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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

BEVERLY BERNELL MYRES,

Plaintiff and Appellant,

v.

SAN FRANCISCO HOUSING
AUTHORITY,

Defendant and Appellant.

A141107

(San Francisco County
Super. Ct. No. CGC-12-519978)

Plaintiff Beverly Bernell Myres prevailed on a single cause of action for harassment/hostile work environment in a disability discrimination lawsuit against her former employer, the San Francisco Housing Authority (SFHA), under the Fair Employment and Housing Act (FEHA; Gov. Code, § 12900 et seq.).¹ She appeals from an award of \$78,750 in attorney fees plus costs, arguing the trial court erred in reducing the claimed amount of fees and costs based on her limited success at trial. SFHA filed a cross-appeal. We remand the case for reconsideration of the trial court's order striking \$7,642.46 in costs, but affirm the award of \$78,750 in attorney fees.

I. FACTUAL AND PROCEDURAL BACKGROUND

SFHA hired plaintiff as a claims assistant in its human resources department in 2006 and promoted her to the position of workers' compensation analyst in 2007. In June

¹ Further statutory references are to the Government Code unless otherwise indicated.

2009, she filed a claim for workers' compensation after she tripped on a cord at work and injured her right knee. Plaintiff continued to work without restrictions until she had knee surgery on February 11, 2010, after which she was placed on leave. On May 19, 2010, while still on crutches, plaintiff returned to work with restrictions on standing, walking and lifting. She was placed on a part-time schedule that had been approved by her direct supervisor, Phyllis Moore-Lewis.

Following her return to work, plaintiff started having pain in her left knee. She went to a walk-in clinic complaining of acute pain on Saturday, June 12, 2010, and was taken off work after she advised the doctor that her job required her to do a significant amount of walking despite her physician's work restrictions.

Meanwhile, on the afternoon of June 11, 2010, SFHA had advised the entire human resources department, except Moore-Lewis, that they were being laid off as a result of departmental restructuring. Plaintiff, who had worked only a half day on June 11 and was not in the office when the other employees were given their hand-delivered notices of the layoff, received her notice via fax and mail. She remained out on disability leave until the date of her separation (September 1, 2010).

Plaintiff's doctor concluded her left knee pain had been caused by overcompensation for her work-related right knee injury. She received a total of \$110,000 in workers' compensation benefits and her condition was declared permanent and stationary in September 2011.

On April 12, 2012, plaintiff filed a complaint against SFHA alleging five causes of action: (1) "disability discrimination" based on SFHA's failure to engage in the interactive process (§ 12940, subd. (n)); (2) "disability discrimination" based on SFHA's failure to make reasonable accommodation (§ 12940, subd. (m)); (3) "disability discrimination" based on harassment/hostile work environment (§ 12940, subd. (j)(1)); (4) retaliation against plaintiff after she asserted her right to reasonable accommodation

(§ 12940, subd. (h)); and (5) wrongful discharge in violation of public policy (*Tameny v. Atlantic Richfield Co.* (1980) 27 Cal.3d 167).²

With respect to the claims for failure to engage in the interactive process and failure to accommodate, the complaint alleged Moore-Lewis was too busy to meet with plaintiff and as a result, plaintiff was deprived of options that would have allowed her to work without harming herself. It also alleged SFHA failed to recognize plaintiff's restrictions on walking and lifting, requiring her to lift heavy boxes and walk to the far end of the office to access copy and fax machines that could have easily been relocated closer to her work area. The claims for retaliation and wrongful discharge were premised on allegations plaintiff was laid off because she had taken workers' compensation leave. The claim for harassment/hostile work environment was based on remarks allegedly made by SFHA's executive director, Henry Alvarez: (1) his openly critical comments about people who took workers' compensation leave and his stated belief that most such claims were fraudulent; (2) his comment on plaintiff's leave at a staff meeting to the effect of, "How can the workers' comp person be out on workers' comp?"; (3) his question to plaintiff in front of other employees as to why she was walking on crutches instead of using a cane; and (4) his joking statement to other employees, in earshot of plaintiff, that he was going to look into his budget and see if he could buy an electric scooter for her.

The case proceeded to trial before a jury. According to SFHA, plaintiff and the rest of the department were laid off for a legitimate reason. Alvarez testified that he and Moore-Lewis decided, with the approval of SFHA's board of commissioners, to restructure the department for improved efficiency. In his words, "[SFHA] needed a different skill set to get the work done that we had to get done." Moore-Lewis testified the restructuring was due to reduced federal funding and a budget shortfall.

² Although the first three causes of action were labeled "disability discrimination" and referred to section 12940, subdivision (a), plaintiff did not allege she was subjected to an adverse employment action because of her physical disability, which is the basis of such a claim.

Plaintiff, on the other hand, asserted SFHA had retaliated against her for taking workers' compensation leave. In support of this contention she called Roger Crawford, SFHA's former special assistant to the executive director, who testified "[t]here were a number of people in the department . . . that [Alvarez and Moore-Lewis] were having trouble with. So they decided to deal with the problem by restructuring and laying everybody off." Plaintiff testified that as a result of the layoff, she suffered a loss of her annual salary of approximately \$81,000 for almost three years, as well as fringe and retirement benefits.

The jury returned verdicts in favor of SFHA on four of the five causes of action (failure to engage in interactive process, failure to make reasonable accommodation, retaliation, wrongful termination in violation of public policy). With respect to the harassment/hostile work environment claim, the jury found in plaintiff's favor and awarded her \$35,000 in noneconomic damages based on emotional distress.

On September 13, 2013, after denying SFHA's motion for judgment notwithstanding the verdict, the trial court entered judgment in favor of plaintiff in the amount of \$35,000 plus postjudgment interest. SFHA filed a notice of appeal from the judgment, and plaintiff filed a timely notice of cross-appeal. In an unpublished opinion, this court modified the judgment to reflect postjudgment interest at a rate of 7 percent rather than the 10 percent ordered by the trial court, but otherwise affirmed. (*Myres v. San Francisco Housing Authority* (Mar. 23, 2015, A140332).)

Plaintiff sought prevailing party costs and attorney fees under FEHA (§ 12965, subd. (b)) and Code of Civil Procedure section 1021.5. She filed a motion and costs bill seeking \$15,627.81 in costs and \$221,374 in lodestar attorney fees, and requested that the court apply a multiplier of 1.5 for a total attorney fees award of \$332,061.75. SFHA responded with a motion to strike or tax attorney fees and costs, arguing the amount sought was excessive and unsupported by the verdict, given plaintiff's limited success.

During a hearing on the motion, the court indicated it viewed the facts underlying the harassment claim, on which plaintiff prevailed, as separate and distinct from her unsuccessful employment discrimination claims. It offered plaintiff's counsel the

opportunity to file supplemental papers segregating the time spent on the harassment claim, which counsel declined because in their view it was impossible to allocate the time spent on the individual causes of action.

After taking the matter under submission, the trial court issued a written order awarding plaintiff \$78,750 in attorney fees (250 hours at \$315 an hour) and striking \$7,642.46 of plaintiff's claimed costs. The order states, "The court finds that Count III [hostile work environment harassment] is a separate and distinct cause of action from those alleging failure to accommodate and unlawful termination, and that an appropriate award of attorneys' fees and costs should so reflect this distinction." The order noted that most of the billable hours on the case were accumulated on unsuccessful and unmeritorious theories, that plaintiff's counsel had failed to assist the court in a proper allocation of the hours, that the action did not serve to vindicate an important public right as required for an award of fees under Code of Civil Procedure section 1021.5, and that no multiplier was called for because the case lacked complexity and did not confer a public benefit.

II. DISCUSSION

A. Standard of Review

A plaintiff who prevails in a FEHA case may recover attorney fees under section 12965, subdivision (b), which provides: "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party . . . reasonable attorney's fees and costs, including expert witness fees." A trial court's exercise of discretion concerning an award of attorney fees in a FEHA case "will not be reversed unless there is a manifest abuse of discretion. [Citation.] ' "The 'experienced trial judge is the best judge of the value of professional services rendered in his [or her] court, and while his [or her] judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong[']—meaning [the court] abused its discretion. [Citations.]" [Citations.]" ' Accordingly, there is no question our review must be highly

deferential to the views of the trial court. [Citation.]” (*Nichols v. City of Taft* (2007) 155 Cal.App.4th 1233, 1239.)

In cases where the court’s exercise of discretion is based on disputed factual issues, we affirm the court’s findings so long as they are supported by substantial evidence. (*Soni v. Wellmike Enterprise Co. Ltd.* (2014) 224 Cal.App.4th 1477, 1481.) When the trial court’s determination of the statutory criteria necessary for a fee award presents an issue of law or statutory construction, we apply a de novo standard of review. (*Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th 892, 929.)

B. Attorney Fees Under FEHA—General Principles

The purpose of allowing attorney fees in a FEHA case is to “make it easier for plaintiffs of limited means to pursue meritorious claims” and to “ ‘provide “fair compensation to attorneys involved in the litigation at hand and encourage[] litigation of claims that in the public interest merit litigation.” ’ ” (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 984 (*Chavez*)). An attorney fee award under FEHA “may take into account the scale of the plaintiff’s success, and it must not encourage ‘unnecessary litigation of claims that serve no public purpose either because they have no broad public impact or because they are factually or legally weak.’ ” (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 235.) A party seeking attorney fees has the burden of proving the fees it seeks are reasonable. (*Center for Biological Diversity v. County of San Bernardino* (2010) 188 Cal.App.4th 603, 615 (*Center for Biological Diversity*)).³

In setting an attorney fee award under FEHA, the trial court first determines a “lodestar” figure, defined as the product of the number of hours worked multiplied by a reasonable fee per hour. (*Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, 422 (*Greene*)). The trial court then has the discretion to increase or decrease the lodestar figure by applying a positive or negative “multiplier” based on a

³ Although the *Center for Biological Diversity* decision involves an award of fees under Code of Civil Procedure section 1021.5, courts will look to the rules set forth in cases interpreting section 1021.5 when determining a party’s entitlement to fees in a FEHA case. (*Chavez, supra*, 47 Cal.4th at p. 985.)

variety of factors including the attorneys' experience, the difficulty of the issues presented, the risk incurred by the attorneys in litigating the case, the quality of work performed by the attorneys, and the result the attorneys achieved. (*Taylor v. Nabors Drilling USA, LP* (2014) 222 Cal.App.4th 1228, 1249; *Flannery v. Prentice* (2001) 26 Cal.4th 572, 584.) The initial lodestar calculation should exclude hours that were not "reasonably expended" in pursuit of successful claims. (*Harman v. City and County of San Francisco* (2006) 136 Cal.App.4th 1279, 1310 (*Harman I*), citing *Hensley v. Eckerhart* (1983) 461 U.S. 424 (*Hensley*)⁴; *Harman v. City and County of San Francisco* (2007) 158 Cal.App.4th 407, 417 (*Harman II*).

In cases where the plaintiff has prevailed on some but not all claims, certain principles guide the trial court in setting a reasonable fee award. "Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the amount of a reasonable fee." (*Hensley, supra*, 461 U.S. at p. 440.) "Counsel's work on such unsuccessful and unrelated claims 'cannot be deemed to have been "expended in pursuit of the ultimate result achieved["]' . . . and therefore no fee may be awarded for services [on such claims].' " (*Harman I, supra*, 136 Cal.App.4th at p. 1310.) Conversely, attorney fees need not be apportioned when incurred for representation common to both a cause of action for which fees are proper and one for which fees are not allowed. (*Harman II, supra*, 158 Cal.App.4th at p. 417.) Apportionment is not required where plaintiff's claims " " "involve a common core of facts or are based on related legal theories" " " or when they " 'are so inextricably intertwined that it would be impractical or impossible to separate the attorney's time into compensable and noncompensable units.' " (*Harman II, supra*, 158 Cal.App.4th at p. 417.)

⁴ The analysis in *Hensley*, though involving a federal civil rights statute, is applicable to FEHA cases. (*Harman I, supra*, 136 Cal.App.4th at pp. 1310-1311.)

C. Apportionment of Fees

Plaintiff argues the trial court erred in cutting the amount of attorney hours from the 858.6 that were claimed to 250 based on her limited success at trial. She argues “full compensation” is favored in a FEHA case, and contends the trial court applied the wrong legal standard when it concluded the harassment claim on which she prevailed was “separate and distinct” from her other causes of action for wrongful termination, failure to accommodate and failure to engage in interactive process.

Although plaintiff urges us to apply the de novo standard of review applicable to an error of law or statutory construction, she has not directed us to any legal error made by the trial court in determining her entitlement to fees. Absent any such legal error, we review the trial court’s apportionment of a fee award for abuse of discretion. (See *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1604 [where fees authorized for some causes of action but not others, allocation is matter within court’s discretion].) We find no abuse in this case.

The harassment claim on which plaintiff prevailed was based on comments by Alvarez, SFHA’s executive director, during the 17 days plaintiff returned to work part time after her initial leave period. The trial court, which sat through the trial and heard all the evidence, concluded these remarks were not related to the allegedly discriminatory decision to terminate plaintiff or the alleged failure to offer her reasonable accommodation or to engage in the interactive process after her return. As the trial court noted at the hearing, the harassment claim would have been viable even if plaintiff had not been terminated; conversely, a finding that the remarks by Alvarez did not amount to harassment would not have resolved the discrimination claims. The evidence on the harassment claim was distinct from the evidence on the discrimination claims (testimony about the remarks by Alvarez and the emotional distress they caused plaintiff, versus the details of her leave, the terms of her return to work, her communications with her direct supervisor when she returned to work, and the reasons behind the decision to terminate her). The trial court’s order setting fees did not exceed the bounds of reason and did not

amount to an abuse of discretion. (See *Erickson v. R.E.M. Concepts, Inc.* (2005) 126 Cal.App.4th 1073, 1083.)

D. Defense Counsel's Tactics

Nor did the court abuse its discretion in “failing to fully compensate prevailing counsel for hours expended as a direct result of defense counsel’s aggressive litigation posture,” as plaintiff contends. Though plaintiff complains opposing counsel propounded extensive discovery and engaged three experts, she has not established that counsel’s efforts were excessive when compared to the issues presented in the lawsuit and the damages sought. The trial court “was in the best position to determine the amount of hours reasonably necessary for this case.” (*El Escorial Owners’ Assn. v. DLC Plastering, Inc.* (2007) 154 Cal.App.4th 1337, 1367; see *Perlan Therapeutics, Inc. v. Superior Court* (2009) 178 Cal.App.4th 1333, 1349 [trial court is best situated to determine whether parties engaged in abusive litigation tactics].)

E. Fees Under Code of Civil Procedure Section 1021.5

Plaintiff argues the trial court should have awarded additional fees under Code of Civil Procedure section 1021.5, which provides in relevant part: “Upon motion, a court may award attorneys’ fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any.” We do not agree.

The trial court did not abuse its discretion in concluding plaintiff’s recovery of damages on the harassment claim did not confer a significant benefit to the general public or a large class of persons. (See *Flannery v. California Highway Patrol* (1998) 61 Cal.App.4th 629, 637 [while plaintiff’s lawsuit alleging gender-based discrimination and retaliation “was based on the important right to be free from unlawful discrimination, its

primary effect was the vindication of her own personal right and economic interest”].) Moreover, “the private attorney general doctrine codified in section 1021.5 is based on the premise that without some mechanism authorizing a fee award, private actions that effectuate fundamental public policies may be infeasible. [Citation.] Here, plaintiff’s action alleged a violation of FEHA. As that act itself provides such a mechanism, resort to section 1021.5 is unnecessary.” (*Id.* at pp. 637-638.)

F. Lodestar Calculation and Multiplier

Plaintiff complains the trial court “mysteriously averaged” the respective hourly rates of the two lawyers who acted as her trial counsel (with lead counsel claiming \$300 per hour and associate counsel claiming \$210 per hour), coming up with a reasonable rate of \$315 per hour and allowing only 250 hours of total attorney time. She does not explain how the court’s conclusion that a *higher* hourly rate than that charged by either counsel could have prejudiced her. As for the reduction of hours to 250, we cannot say the court abused its discretion in finding that was the amount of time reasonably needed to litigate the sole claim on which plaintiff prevailed, for which the jury assessed damages of \$35,000, or less than half the amount of the attorney fees awarded. The trial court gave plaintiff’s counsel the opportunity to submit additional papers showing a more detailed breakdown of the hours expended on each cause of action, but counsel declined to do so.

Plaintiff also argues the trial court erred in refusing to apply a multiplier to the lodestar amount based on her limited success at trial, the lack of complexity in the case, and the lack of any public benefit. Again we disagree. “Although the lodestar adjustment method is the prevailing rule for statutory attorneys fee awards and is applicable in the absence of a clear legislative intent to the contrary [citation], the application of a fee multiplier is never mandatory but remains a matter reserved to the trial court’s sound discretion.” (*Galbiso v. Orosi Public Utility Dist.* (2008) 167 Cal.App.4th 1063, 1089.) A party seeking fees “bears the burden of proving that a fee enhancement is warranted.” (*Greene, supra*, 101 Cal.App.4th at p. 429.)

The trial court relied on appropriate criteria when considering and denying plaintiff's request for a positive multiplier. (See *San Diego Police Officers Assn. v. San Diego Police Department* (1999) 76 Cal.App.4th 19, 24 [court did not abuse discretion in reducing fee award by negative .20 multiplier based on plaintiff's limited success and lack of complexity of issue on which it prevailed].) The criteria cited by the court were supported by substantial evidence and the court did not abuse its discretion in awarding fees without a multiplier.

Plaintiff complains the trial court abused its discretion because it did not consider the risk inherent in contingency cases, citing *Greene, supra*, 101 Cal.App.4th at page 428. In *Greene*, the trial court was found to have abused its discretion because it interpreted case law—incorrectly—to preclude it from considering the risks inherent in a contingency fee case when determining whether a multiplier was appropriate. While plaintiff complains the trial court in this case “failed to consider the contingency risk of the case” when determining whether a multiplier should be used, the court's order reflects no misapprehension of the law similar to that of the trial court in *Greene*. (See *Holguin v. DISH Network LLC* (2014) 229 Cal.App.4th 1310, 1333, fn. 11.) Nothing in *Greene* suggests a trial court *must* use a multiplier for counsel retained on a contingency fee basis.⁵

⁵ The “contingency fee” factor, while still an appropriate consideration when setting a multiplier, is less potent in a FEHA case, where statutory attorney fees are available to a prevailing party regardless of whether the criteria for an award under Code of Civil Procedure section 1021.5 have been met, making the contingent nature of the litigation coextensive with the risk the plaintiff will not prevail. (*Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1173-1175.) “Such a risk is inherent in any contingency fee case and is managed by the decision of the attorney to take the case and the steps taken in pursuing it. When the public value of the case is great and the risk of loss results from the complexity of the litigation or the uncertainty of the state of the law, fee enhancement may be proper. Fee enhancement, however, should not be a tool that encourages litigation of claims where the actual injury to the plaintiff was slight.” (*Id.* at p. 1175.)

G. Costs

Plaintiff sought \$15,627.81 in prevailing party costs. She argues the trial court abused its discretion when it struck \$7,642.46 in costs because they were attributable solely to the unsuccessful discrimination claims and were unrelated to the harassment claim on which she prevailed. We conclude a remand is appropriate so the court can reconsider this aspect of its order.

Code of Civil Procedure section 1032, subdivision (a)(4) defines a “prevailing party” to include the party with a “net monetary recovery.” Plaintiff received a net monetary recovery and was the prevailing party. Code of Civil Procedure section 1032, subdivision (b) entitles a prevailing party to recover ordinary litigation costs: “Except as otherwise expressly provided by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding.” In actions to which Code of Civil Procedure section 1032, subdivision (b) applies, a successful plaintiff “is entitled to recover the whole of his or her costs, despite a limited victory, so long as those costs were reasonable and necessary to the litigation.” (*Michell v. Olick* (1996) 49 Cal.App.4th 1194, 1200 [costs allowable even though some pertained to claims on which plaintiff did not prevail].) The defendant is not entitled to an offset, even when it has prevailed to a lesser extent. (*Ibid.*; see *Hyatt v. Sierra Boat Co.* (1978) 79 Cal.App.3d 325, 347-350 [no reduction of prevailing plaintiff’s costs though damages reduced due to comparative negligence].)

Recently, the state Supreme Court held that costs in a FEHA case are governed by section 12965, subdivision (b), which creates an exception to Code of Civil Procedure section 1032, subdivision (b) and renders an award of prevailing party costs discretionary rather than mandatory in all FEHA cases: “In civil actions brought under this section, the court *in its discretion*, may award to the prevailing party . . . reasonable attorney’s fees and costs . . .” (§ 12965, subd. (b), italics added.) “We conclude [] section 12965, subdivision (b), governs cost awards in FEHA actions, allowing trial courts discretion in awards of both attorney fees and costs to prevailing FEHA parties.” (*Williams v. Chino*

Valley Independent Fire District (May 4, 2015, S213100) __ Cal.4th __ [2015 WL 1964947, p. *1] (*Williams*).

Although *Williams* involved a claim for costs by a prevailing *defendant* that unsuccessfully argued it was entitled to costs as a matter of right under Code of Civil Procedure section 1032, subdivision (b), its holding regarding the applicability of section 12965 applies to FEHA plaintiffs as well. (*Williams, supra*, __ Cal.4th __ [2015 WL 1964947, p. *7.]) That said, section 12965, subdivision (b) “does not significantly lessen the availability of costs to a prevailing FEHA *plaintiff*.” (*Ibid.*) A trial court’s exercise of discretion is circumscribed by a standard imported from the federal courts, and is more favorable to prevailing plaintiffs than prevailing defendants: “[W]e conclude the *Christiansburg* [*Garment Co. v. EEOC* (1978) 434 U.S. 412] standard applies to discretionary awards of both attorney fees and costs to prevailing FEHA parties under [] section 12965[, subdivision] (b). . . . [U]nder that standard a prevailing *plaintiff* should ordinarily receive his or her costs and attorney fees unless special circumstances would render such an award unjust. [Citation.] A prevailing *defendant*, however, should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so.” (*Williams*, at p. *13].)

The trial court in this case struck \$7,642.46 of the costs claimed by plaintiff because they “solely related to witnesses on the issues of disability accommodation and employment termination. These witnesses had no information concerning any harassment of Plaintiff when she returned to work.” This is not the equivalent of a finding that an award of those costs would be “unjust.” At oral argument, counsel for SFHA conceded plaintiff would be entitled to the challenged costs if the standard of *Michell, supra*, 49 Cal.App.4th at page 1200 were applied, which requires an award of costs under Code of Civil Procedure section 1032, subdivision (b) unless they were unnecessary or unreasonable. On remand, the trial court should consider whether special circumstances would render the costs at issue unjust; if not, plaintiff is entitled to their recovery.

H. Cross-Appeal

SFHA suggests plaintiff should not have recovered any costs or fees because the sole cause of action on which she prevailed (harassment) was not supported by substantial evidence. Effectively, this amounts to an argument plaintiff is not a prevailing party under section 12965, subdivision (b). We disagree. We rejected the substantial evidence claim in the prior appeal, which is now the law of the case. (See *Yu v. Signet Bank/Virginia* (2002) 103 Cal.App.4th 298, 309.) Plaintiff's status as a prevailing party remains intact.

III. DISPOSITION

The order awarding plaintiff \$78,750 in attorney fees is affirmed. The order striking \$7,642.46 of plaintiff's prevailing party costs is reversed and the matter is remanded for further proceedings consistent with this opinion. The parties shall bear their own costs on appeal. (Cal. Rules of Court, rule 8.278(a)(3).)

NEEDHAM, J.

We concur.

JONES, P.J.

SIMONS, J.