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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

JODI YOUNG,

Plaintiff and Appellant,

v.

BURLINGAME SCHOOL DISTRICT,

Defendant and Respondent.

A147012

(San Mateo County
Super. Ct. No. CIV528513)

A public school physical education teacher was brought up on charges by her school district for multiple allegations of sexual misconduct with female students and for isolated separate instances of unprofessional conduct. After a seven-day evidentiary hearing, the teacher was cleared of all charges related to sexual misconduct, found to have engaged in a few acts of unrelated “unprofessional conduct,” and was reinstated to her position. The teacher then filed suit against the school district for violations of the Fair Employment and Housing Act (FEHA) on multiple grounds, including that the school district had a discriminatory animus against her because of her sexual orientation, and had wanted to end her employment with the school district on that basis. After a year of litigation, a superior court judge granted summary judgment in favor of the school district. Then the school district went on the offensive against the teacher, and filed a motion to recover its attorney fees and costs under Government Code section 12965, subdivision (b), which permits a court, in its discretion, to award attorney fees against an unsuccessful FEHA plaintiff who brings or continues litigating a lawsuit without an objective basis for believing it had potential merit. A different superior court judge heard

the motion for attorney fees and costs, and ordered the teacher to pay \$16,175.50 to the school district. The teacher's sole contention on appeal is that the superior court abused its discretion in ordering her to pay attorney fees and costs. We agree and reverse.

BACKGROUND

Plaintiff Jodi Young was hired by the Burlingame School District (District) in 1993. In the 2012-2013 school year, she was a physical education teacher and chair of the physical education department at Burlingame Intermediate School.

Young Is Brought Up on Disciplinary Charges

In February 2013, the District Superintendent, Maggie MacIsaac, filed written charges against Young with the Burlingame Board of Education, seeking Young's immediate suspension or dismissal, or in the alternative suspension for 60 days without pay. This set in motion an administrative process, which included a 12-page formal written accusation against Young (Accusation), prehearing discovery, an evidentiary hearing lasting 7 days in September 2013 conducted by a Commission on Teacher Competence (Commission) comprised of a state administrative law judge and representatives chosen by Young and by the school district, and ultimately a 6-page written decision with findings of fact and conclusions of law (Decision).

The Accusation alleged that Young engaged in "immoral conduct," and that she "inappropriately touched, harassed, bullied and intimidated students." The charges involving sexual misconduct concerned only girls, not boys. At the end of the administrative process, the Decision concluded unambiguously that Young had not engaged in "immoral conduct." Young "did not engage in sexual harassment or discrimination." Young did not "touch[] female students' buttocks while they are performing push-ups." She did not "stare[] at students in P.E. when they are changing." The child who testified regarding these matters (referred to as Child #1) was, in the Commission's judgment, "not credible or persuasive."¹ The allegation that Young had

¹ This child, referred to as Child #1 in the written findings, had been in Young's P.E. class in the 2012-2013 school year. The administrative panel went on at some length about the child's utter lack of credibility: "Her allegations started out as reasonable. She

grabbed Child #1's buttock was unfounded. The allegation that Young brushed her hand up against a student's breast and smiled at her was not established by a preponderance of the evidence, and if a similar incident had occurred, it was accidental. In sum, Young was cleared of all charges involving sexual misconduct.

Young was also cleared of all but a few of the charges which were unrelated to sexual misconduct. One of the charges was that Young had made her students remain outside in the rain, a count that was thoroughly debunked: it was not established that it was "pouring rain," or that the children were "at risk" or that "any student became ill" as a result of having P.E. outdoors that day. The P.E. in the rain incident was not "unprofessional conduct." Nor was it established that Young "yelled at" or "threatened" Child #1 in connection with this incident. To the contrary, "it was established" through the testimony of at least two other students who observed Child #1 that day and after class that Child #1 was "disrespectful and rude" to Young, and wanted to change P.E. classes because Young "took away points when the child was not participating in P.E." Further, the Commission found that "[n]o other students testified that [Young's] conduct made them upset, afraid, or that they believed that [Young] was going to hit the student."

The Commission did find that Young had engaged in "unprofessional conduct" in a few incidents where she disciplined or questioned students inappropriately. In one incident, she told a child who returned to school after he had been expelled or suspended that he was a "cheater, a liar, and a crook," for which Young later apologized to the

alleged that [Young] touched her on the hips to help position her to do push-ups and that she did not like to be touched and asked [Young] to stop once or twice in the previous school year. It may have happened that [Young] did it again in the 2012-2013 school year and she was not sure if she had asked her to stop. After repeated questioning by District personnel, including the counselor, vice principal, and principal, the District's attorney, the police, and a deposition, Child #1's story grew to outrageous proportions. For example, she claimed that [Young] grabbed her buttocks in front of the entire P.E. class. None of the other students, including Child #1's friends, corroborated this allegation. In fact, at least two students testified that Child #1 fabricated this ever increasing allegation to get a transfer from [Young's] P.E. class into another teacher's class, who she perceived as an easier teacher."

student and his father. In another incident, Young asked two students, who had completed their suspension for fighting in the locker room and had returned to school, to write a statement about what had occurred. According to the Commission, Young wanted to “resolve any dispute between the girls that may have still existed for the safety of the students in the locker room.” But the Commission concluded that having the girls “write out statements was going too far after the matter had already been investigated and the students disciplined.” In another incident, Young was on duty in front of the school when one child (Child #10) yelled at another and threatened to go after another student. Young stopped Child #10 by grabbing her arm. Child #10’s father later complained; Young spoke to him and “the matter appeared to be resolved.” But the Commission found that sometime thereafter, Young walked up to Child #10 in the school yard, said she wanted to talk to the child, and “lifted up the child’s sleeve to check her arm for bruise marks. [Young] did not see any bruise marks and commented that she ‘thought so’ and walked away.” The Commission concluded that “confronting the child and looking for a bruise was unprofessional conduct.”²

Except for these incidents of unprofessional conduct, the Commission found that “[a]ll other allegations, not specifically dealt with in this decision that are in the accusation in this matter have been considered and found to be without merit.” As we have noted, the Accusation ran to 12 detailed single-spaced pages.

The Commission concluded that none of the acts that constituted unprofessional misconduct were individually or in combination serious enough to support terminating Young from her position with the district; a 10-day suspension without pay would be adequate. By the time the Commission issued its Decision in October 2013, Young had

² It was also noted in the Decision that Young admitted that she changed from her street pants to her gym shorts in the P.E. office “where students could see her.” She also admitted that she “discussed breast development with female students during class. This conduct is unprofessional.” After making this finding, the Commission observed mildly that Young “should take care not to be too familiar with her students. An educational opportunity involving appropriate boundaries for P.E. teachers and students would be helpful.”

been suspended without pay from her teaching position for approximately 10 months, so the District was ordered to pay back pay, and Young was reinstated to a different school in the District.

Young Sues the District for FEHA Violations

After the Commission cleared Young of all of the sexual misconduct charges, on May 9, 2014, Young filed a lawsuit against the District, its superintendent, and the principal at Young's former school for violation of FEHA and other charges. She believed that she had been "singled out for discipline, including the filing of the false charges against me, based on my sexual orientation as a lesbian, even though that fact was known to the District."

Summary Judgment Is Granted to Defendants

The trial court (Judge Elizabeth K. Lee) granted summary judgment to the District in June, 2015, after the lawsuit had been underway for about 13 months. Young was unsuccessful both in opposing the motion for summary judgment and in making her own motion to reconsider.

On August 11, 2015, the District made a motion for attorney fees and costs under Government Code section 12965, subdivision (b),³ on the ground that Young's claims were "objectively without basis" at the time the action was filed or during the pendency of the action.

Young opposed the motion for attorney fees with supporting declarations from herself and her attorney. As Young summed up in her declaration, "[m]y belief that I was being discriminated against was reinforced when the District Supervisor [sic: superintendent] told me in February 2013 that the District wanted to fire me because of 'rumors.' My belief was further supported by testimony at my hearing that the District refused to consider evidence in my favor during its investigation before it filed the false charges against me and by the findings of the Commission that evidence against me regarding my alleged sexual misconduct had been fabricated. It is hard to put into words

³ All further undesignated statutory references are to the Government Code.

how devastating that was. [¶] I filed my complaint after consulting with my attorneys and, based on their analysis, I believed that I had sufficient evidence of discrimination and could prove my case against the District.”

The motion for attorney fees and costs was decided by Judge Susan Irene Etezadi, who had not heard the motion for summary judgment. Judge Etezadi issued a tentative ruling in advance of the hearing, the substance of which was as follows:

“While at the outset of this litigation, Plaintiff may have asserted her causes of action under a good faith belief that they were viable, certainly by the time of Plaintiff’s deposition on March 4, 2015, it should have become clear to plaintiff and her attorneys that there was no basis for the FEHA claims. As considered in the Motion for Summary Judgment, Plaintiff testified at her deposition that she had no evidence of a discriminatory animus on the part of the District in taking adverse personnel action against her. Since a FEHA claim can be (and was in this case) successfully defended, if the District can show that it had a legitimate reason for the adverse personnel action, the lack of merit in Plaintiff’s claims should have been obvious by the time of her deposition. Plaintiff and her attorneys nonetheless continued litigating this case, forcing the District to prepare and bring a Summary Judgment Motion, which was ultimately granted.”

At the hearing on the motion for attorney fees, Young’s attorney took issue with the premise of the tentative ruling that Young herself had testified that she had no evidence. Young’s counsel read from passages in Young’s deposition to make the point that the deposition questions asked only “[d]id any district office employee ever *tell* you or suggest to you through their *words*” that she had been discriminated against based on her “sexual identity.” (Emphasis added.) Young answered “[n]o.” Young’s counsel explained the significance of the questions and answer for purposes of the motion for attorney fees:

“That question basically should be paraphrased as: Do you have any *direct evidence*, Ms. Young, that you were discriminated [sic] on the basis of your age, sexual orientation, et cetera? Direct evidence? [¶] In other words: Were you told in words? The answer is no, because it wasn’t what was said to her that forms the basis of her claim

of discrimination; and therefore, her reasonable good faith belief that she had a claim. It was what happened. What should have happened. So she answered the question truthfully. It wasn't said in words. The follow-up question should have been something like this: All right. If it wasn't said in those words—in words, what causes you to believe that you were discriminated against or what evidence do you have that you were discriminated against? [¶] To which she would have answered—well, then the whole litany of all that happened.” (Emphasis added.)

That “litany” was described in Young’s opposition to the motion for summary judgment. According to Young’s declaration, around March 22, 2011, Young told Pamela Scott, the principal of Burlingame Intermediate School where Young was then teaching, that Young needed a personal day off to go to the funeral of “my girlfriend’s grandmother. Scott was obviously displeased by this request, but reluctantly granted it. [¶] It was only after Scott learned that I had a girlfriend that Pamela Scott and [Superintendent] Margaret MacIsaac began to target me for disciplinary actions for various purported incidents of unprofessional conduct. [¶] For example, I was written up in late March 2011 for how I handled a fight between two students. Scott claimed that I had been warned the previous year about another incident, but she had not done so.⁴ [¶] When my disciplinary hearing was held in September, 2013, I was cleared of any misconduct regarding that incident. [¶] In November 2011, the District Superintendent, Margaret MacIsaac, suspended me for a day without pay based on how I stopped a student from attacking another student. At the September hearing, I was cleared of wrongdoing for that incident as well.”

Then Young described how the Burlingame police were called in: “On January 22, 2013, I was questioned at my house by two members of the Burlingame Police

⁴ This comports with what the Commission found: “The District claims that they gave an oral warning to [Young] about this matter, but there was no evidence presented to corroborate this claim. The principal’s memory was poor and she could not recall anything with specifics.” The Accusation had alleged specifically that “Principal Scott gave [Young] a verbal warning for her unprofessional conduct at that meeting” with regard to the incident in question.

Department, including Sergeant Boll, regarding the claims being made against me by the students. Sergeant Boll asked me if how [sic] I adjusted students' positions during push-ups and whether or not I had touched a student's breast in the hallway. I told him I might have done so accidentally while opening the classroom door for the students, but that I had heard nothing from a student saying I had touched her. Sergeant Boll told me that he seriously doubted that anything further would be done regarding this incident. [¶] On February 7th, 2013, I told MacIsaac that the girls making the charges against me were lying and asked her why [sic] was trying to dismiss me. Her response was that it was because of 'too many rumors' regarding my conduct. [¶] At the September disciplinary hearing, MacIsaac testified to the Commission that she did not consider any exculpatory evidence, because they had already concluded their investigation of me. [¶] As a result of the false charges made against me and the subsequent investigation and hearing, which cleared me of any charges of sexual misconduct or harassment of my students, I suffered months of financial and emotional stress, and still suffer from the stress related to how I was treated, the damage to my reputation as a teacher, the lingering innuendos and suspicion in the community regarding my personal life and character and the fear that I would possibly have my teaching credentials revoked."

In opposition to the motion for summary judgment, Young also submitted a declaration from her attorney, which attached excerpts of the depositions of Pamela Scott and a student named Yasaman Samsami, both taken in connection with the administrative proceeding. On appeal, Young describes this evidence, together with her own declaration, as evidence of discriminatory animus. "Young testified that Scott, her school principal, knew that she was a lesbian because she had asked for time off to attend her girlfriend's grandmother's funeral. Scott, on the other hand, testified that she knew Young had a female partner, but didn't know that it meant Young was a lesbian, or even what the term 'lesbian' meant—she asked counsel to 'clarify lesbian.' An intermediate school principal who, in 2015, feigns not to understand what it means to be a lesbian cannot be believed. Young presented evidence that Scott denied knowing that Young

was a lesbian, yet had told a student [Samsami] she did not want to work with ‘somebody like Jodi Young.’ When it comes to discrimination, people lie as to their motivations.”

Young’s counsel argued at the hearing in opposition to the motion for attorney fees that once Scott found out that Young was a lesbian, Young “began being written up for things that she feels that a straight teacher would not have been written up about or if those problems had occurred, they would have been addressed in an entirely different manner.” Instead, it escalated to a notice of termination, and a full blown evidentiary hearing after which it was not established that Young engaged in any immoral conduct. Explaining Young’s reasoning in filing the lawsuit, counsel stated that once the administrative proceeding was over, and Young was exonerated of all of the immoral conduct charges, “what could be the rationale for the school district pursuing these charges—very, very serious charges against Ms. Young. [¶] . . . [I]t is so serious that the police were called in, as they should have been, if the charges had been true because it is an allegation of a molestation of a child. It even found its way into the newspapers—not by my client—and yet she is vindicated on all these charges of serious misconduct.”

As to Judge Etezadi’s tentative conclusion that the asserted lack of merit in plaintiff’s claim should have been “obvious” by the time of her deposition, Young’s counsel again countered that “direct evidence” of discrimination is not a requirement in a FEHA case, and Young continued litigating because she believed there was merit in her case.

District counsel did not refute the substance of anything Young’s counsel stated, except to state that “we are not here to reargue the summary judgment motion. All the arguments that counsel just made discussing evidence in summary judgment motion were listened to, heard, evaluated and ruled upon by a judge who handled that motion and found not to create a trier [sic] issue of fact.”

At the conclusion of the hearing, Judge Etezadi adopted her tentative ruling, and ordered Young to pay \$16,175.50 to the District, representing \$13,795.50 in attorney fees from the date of Young’s deposition plus \$2,380 in costs.

DISCUSSION

I. *Standard of Review and Section 12965, subdivision (b)*

We review an order awarding attorney fees and costs under section 12965, subdivision (b) for abuse of discretion. (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387.)

When a plaintiff prevails in an FEHA lawsuit, she is ordinarily entitled to attorney fees and costs under section 12965(b), unless “special circumstances would render such an award unjust.”⁵ (*Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 115 (*Williams*)). But the same is not true where the defendant prevails. Then, it is the exception, not the rule, that a prevailing defendant is awarded its attorney fees and costs. The standard and rationale for this rule is set forth in *Christiansburg Garment Co. v. EEOC* (1978) 434 U.S. 412 (*Christiansburg*), in the context of an action under title VII of the 1964 Civil Rights Act, and has been adopted by the California Supreme Court for awards of attorney fees and costs under FEHA. (*Williams, supra*, 61 Cal.4th at p. 115.) Attorney fees should be awarded to a prevailing defendant “ ‘not routinely, not simply because he succeeds, but only where the action brought is found to be unreasonable, frivolous, meritless or vexatious.’ ” (*Christiansburg, supra*, 434 U.S. at p. 421.)

As the Supreme Court in *Christiansburg* explained, “the term ‘meritless’ is to be understood as meaning groundless or without foundation, rather than simply that the plaintiff has ultimately lost his case, and . . . the term ‘vexatious’ in no way implies that the plaintiff’s subjective bad faith is a necessary prerequisite to a fee award against him. In sum, a district court may in its discretion award attorney’s fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff’s action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

“In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a

⁵ Section 12965, subdivision (b) provides in part, “In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney’s fees and costs, including expert witness fees.”

plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." (*Christiansburg, supra*, 434 U.S. at pp. 421-422.)

Christiansburg also explained the rationale underlying the distinction for fee awards to prevailing plaintiffs as compared to prevailing defendants in civil rights cases. Fee awards for prevailing plaintiff are designed to " "make it easier for a plaintiff of limited means to bring a meritorious suit." " (*Christiansburg, supra*, 434 U.S. at p. 420.) But to require an unsuccessful plaintiff to pay attorney fees and costs "simply because they do not finally prevail would substantially add to the risks inhering in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." (*Id.* at p. 422.)

II. *Scope of Review*

We first address the scope of our review. The District contends that we must not consider any of the evidence proffered by Young in opposing the motion for summary judgment that was ruled inadmissible by Judge Lee. The District relies on language from *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, 1196, but that case stands only for the proposition that if a party appeals from a summary judgment and does not challenge the trial court's evidentiary rulings, any issues as to the correctness of the rulings are waived.

We reject the District's contention. First, we are aware of no authority that requires a court to consider only previously ruled admissible evidence in determining whether to award attorney fees against an unsuccessful FEHA plaintiff. Such a rule would penalize an unsuccessful FEHA plaintiff and risk awarding prevailing defendants

attorney fees simply because the plaintiff lost. Moreover, we are not persuaded by the District's argument that because Young did not appeal the adverse summary judgment ruling, she cannot refer to inadmissible evidence in opposing attorney fees. This would give a plaintiff who wanted to accept the trial court's summary judgment ruling the perverse incentive to pursue the case on appeal, including all of the evidentiary rulings, simply to stave off an award of possible section 12965, subdivision (b) attorney fees and costs.

The risk that the blanket exclusion of inadmissible evidence from consideration would result in attorney fees being awarded simply because the FEHA plaintiff lost is underscored here, where the bulk of the evidentiary objections which Judge Lee sustained did not go to the merits. Several of the objections to Young's declaration in opposition to the motion for summary judgment were sustained because although Young accurately described the outcome of the Commission's Decision, defendants objected that the document "speaks for itself." Defendants made a similar objection, also sustained, in objecting to Young's description of MacIsaac's testimony at the Commission hearing, rather than attaching the hearing transcript. Critically, two of the sustained objections to Young's declaration were based on Young's lack of personal knowledge under Evidence Code section 702 to the reactions of principal Scott and superintendent MacIsaac after Scott "learned that [she] had a girlfriend." Although these objections were sustained in connection with the opposition to motion for summary judgment and we do not consider the merits of those evidentiary rulings, Young's statements *must* be considered in determining whether her lawsuit was so without merit and any foundation at all that she should be required to pay the District's attorney fees. It is certainly evidence in considering "how honest one's belief [was] that [s]he has been the victim of discrimination." (*Christiansburg, supra*, 434 U.S. at p. 422.)⁶

⁶ To complete the picture, the last sustained objection to Young's declaration was that her testimony about what a Burlingame Police Department sergeant said to her about the meritlessness of the claims against her was hearsay. The sergeant's asserted views as

Nor will we take the District's suggestion that we disregard the other objected-to evidence that Young proffered in opposition to the motion for summary judgment, namely excerpts from the depositions of Pamela Scott and Yasaman Samsami, objected to on multiple technical grounds that these transcripts of recorded testimony from the administrative proceeding had not been produced to the District, despite its request, and were hearsay and not properly authenticated. Judge Lee sustained the objections to this evidence, without stating the basis for her ruling. For the reasons we describe above, we will consider all of the evidence proffered by Young in opposition to the motion for summary judgment and in opposition to the motion for fees in considering whether her lawsuit warranted the payment of her employer's attorney fees and costs.

III. *The Award of Attorney Fees and Costs Was an Abuse of Discretion*

Judge Etezadi's order stated the correct legal standard for the award of attorney fees and costs against an unsuccessful FEHA plaintiff. As we have discussed, Judge Etezadi then concluded that although at the outset of the lawsuit, Young "may have asserted her causes of action under a good faith belief that they were viable," by the time of Young's deposition in March 2015, it should have become "clear" that there was no basis for the FEHA claims, in that Young had testified in her deposition that she had "no evidence" of discriminatory animus on the part of the District, and because a FEHA claim "can be (and was in this case) successfully defended, if the District can show that it had a legitimate reason for the adverse personnel action." Judge Etezadi's award of attorney fees and costs on this basis was an abuse of discretion, appearing to us to be based on the conclusion that Young lost the summary judgment motion, and not on supportable findings that the action was unreasonable, frivolous, meritless or vexatious.

As we have described the excerpts of Young's deposition testimony that are in the record before us, there is no basis to conclude that Young testified at her deposition that she had no evidence of a discriminatory animus on the part of the District. She may have

to the meritlessness of the sexual misconduct charges were ultimately borne out in the Commission's findings.

testified that she had no direct evidence, but that is not the end of the story. Our Supreme Court has recognized that “direct evidence of intentional discrimination is rare, and that such claims must usually be proved circumstantially.” (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355.) As a leading practice treatise has noted, “[p]retext may also be shown by circumstantial evidence that casts doubt on whether the employer’s stated reason was the true reason for its action, creating an inference that the employer acted for some other, discriminatory reason. (Chin, et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2015) ¶ 7:460, p. 7-103.) And as this court noted in *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243, 283, “[p]roof of discriminatory intent often depends on inferences rather than direct evidence.”

Here, Young told her school principal that she had a girlfriend, and after that, in Young’s view, the District attempted to terminate her by alleging multiple charges of sexual misconduct involving girls which were unequivocally found to be entirely without merit and based on incredible witness testimony that Young believed the District had accepted at face value. Young told MacIsaac in advance of the administrative proceeding that the charges were not true, but to no avail. As Young states in her reply brief on appeal, “Why were false charges of sexual misconduct involving young girls added to the unrelated charges that were found to have some merit? Because, Young believes, once her supervisors knew she was a lesbian, they wanted her fired. They could not do that just for minor infractions. Young’s belief proved justified: her discipline was a ten-day suspension, not sixty days or termination—which is what the district’s superintendent sought.” As we have discussed, Young’s testimony was that in February, 2013, she told MacIsaac that the girls making the charges against her were lying, and asked MacIsaac why she was trying to dismiss her. MacIsaac’s alleged response was that there were “too many rumors” about Young’s conduct. Later, at the Commission hearing, MacIsaac testified that she had not considered exculpatory evidence, because the investigation had already concluded.

The District argues on appeal in support of the attorney fee award that “the single key issue in our case was whether the School District had good cause to take adverse

personnel action against the Plaintiff. A ‘yes’ answer to that question resolved every FEHA cause of action in our case against the Plaintiff. The outcome of Plaintiff’s administrative trial was a Hearing Officer Decision finding good cause for the adverse personnel action of a ten-day suspension without pay. Plaintiff never appealed or challenged the decision, instead allowing it to become final and binding upon her.” The District contends that Young’s FEHA claims were “barred by collateral estoppel due to the finding of good cause for discipline,” and thus that her claims were without merit from the beginning.

This argument misses the point. As we understand it, Young’s FEHA complaint was not an attempt to relitigate the claims decided against her in the Decision. Assuming for these purposes that collateral estoppel applied to the Decision’s findings, the District itself would also be estopped from arguing that the sexual misconduct charges had any merit. Young’s point was that she believed that she was charged with sexual misconduct because she is a lesbian, and that the District intended to fire her because of rumors. Young contended that the District could not fire her just for minor infractions, and that this was proven correct, since her discipline was a 10-day suspension, not the 60 days or termination sought by the District. Further, she argues that even if the district “may have been justified” in suspending her for a few days because of the “minor infractions involving her mishandling the discipline of several students, it did not stop there. Instead, in an attempt to fire Young, it piled on false accusations of serious sexual misconduct and harassment that led to months of suspension, withholding of pay, a police investigation, public scrutiny of Young’s personal life, disruption of her career, and the emotional distress caused by [the District’s] false accusations.”

The cases that the District cites where attorney fees have been awarded against unsuccessful plaintiffs are not even close to the facts in this case, and bolster our conclusion that fees were inappropriate here. For example, in *Linsley v. Twentieth Century Fox* (1999) 75 Cal.App.4th 762, 770, attorney fees were awarded where an employee had signed a release of claims, including FEHA claims, but then filed suit against his former employer and continued to litigate even after his counsel was advised

of the existence of the release. In *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 Cal.App.4th 1211 (*Saret-Cook*), which the Court of Appeal characterized as a “real-life tragedy similar to the movie *Fatal Attraction*” with a “relentless campaign of harassment” by the plaintiff against the individual defendant, “tenaciously pursued with brutal effect” (*id.* at 1216), the trial court found that the plaintiff had “ ‘simply lied about what occurred to her.’ ” (*Id.* at p. 1229.)⁷ Finally, in *Villanueva v. City of Colton, supra*, 160 Cal.App.4th at p. 1200, the trial court found the FEHA action was “ ‘unreasonable, frivolous and meritless’ ” from the outset; plaintiff was a “ ‘disgruntled employee,’ ” and “ ‘no racial overtones appear, even remotely.’ ”

That Young’s case was ultimately unable to survive a summary judgment motion is undisputed. The trial court found no triable issues of fact; otherwise the District would not have prevailed on summary judgment. But that is the beginning and not the end of the inquiry as to whether Young should be required to pay the District’s attorney fees and costs. On the record before us, we believe the answer is plainly no, and the trial court abused its discretion in concluding otherwise.⁸

DISPOSITION

The trial court’s order awarding \$16,175.50 in attorney fees and costs is reversed. Young is awarded her costs on this appeal.

⁷ The trial court went on, “ ‘She was aware of her lies during the course of this lawsuit and persisted in weaving a more and more incredible story to explain lies with more lies. She prosecuted this lawsuit to the point of harassing Defendants and their party witnesses. Her bad faith is evidenced by, among other things, her actual knowledge of the falsity of her allegations and testimony.’ ” (*Saret-Cook, supra*, 74 Cal.App.4th at p. 1129.) In upholding fees, the Court of Appeal characterized the trial court’s findings as supporting the conclusion that the lawsuit was also unreasonable, frivolous, and vexatious. (*Id.* at p. 1230.)

⁸ Because we reverse the order awarding fees, we do not need to consider Young’s remaining argument that the trial court erred in failing to consider her ability to pay before ordering her to pay the District’s attorney fees. (See *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 868.)

Miller, J.

We concur:

Kline, P.J.

Richman, J.

A147012, *Young v. Burlingame School District*