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SUPREME COURT
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IN THE

SUPREME COURT OF CALIFORNIA

ROBERT CHAVEZ
Plaintiff, Appellant, ~~and Respondent~~
vs.
CITY OF LOS ANGELES, ***et al.***
Defendants, Respondents, ~~and Petitioners~~

AFTER A DECISION BY THE COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION EIGHT, CASE NO. B192375
APPEAL FROM THE SUPERIOR COURT FOR THE COUNTY OF LOS ANGELES, CASE NO. BC324514, THE HONORABLE ROLF M. TREU, JUDGE PRESIDING

PETITION FOR REVIEW

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I. ISSUES PRESENTED

1. Are the cost-shifting provisions found in California Code of Civil Procedure §1033(a) ("§1033")[1] and California Government Code §12965(b) ("§12965(b)")[2] so irreconcilable that the public policy of deterring a plaintiff from exaggerating the value of his case should never apply to a case brought under the Fair Employment and Housing Act?

2. Should a party's failure to settle a case serve as a predominant factor for awarding attorney's fees against it under §12965(b)?

II. WHY REVIEW SHOULD BE GRANTED

The Court of Appeal's decision in this matter attempts to judicially expand the award of attorney's fees under §12965(b) in two ways. First, by eliminating the application of §1033 to FEHA actions, such that §1033 cannot serve as a basis for denying an award of attorney's fees. And, by awarding attorney's fees against a party because of it's failure to settle a case. Such judicial expansion of §12965(b), however, is unsupported by the law and comes at the cost of creating conflicting legal authority among the courts of appeal, ignoring rules of statutory construction and relevant legal authority, and disregarding public policy considerations.

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[1] Section 1033 provides a court with discretion to deny attorney's fees and costs when a plaintiff recovers a judgment that could have been rendered in a limited jurisdiction court. (Civ. P. Code §1033(a)).

[2] Section 12965(b) provides courts with discretion to award attorney's fees to a prevailing party in a FEHA action. (Gov. Code §12965(b)).

In the instant matter, Plaintiff sought nearly $880,000 in attorney's fees after having recovered only $11,500 on a single claim under FEHA. For over five years, Plaintiff brought one unsuccessful claim after another before the Los Angeles Superior Courts, the District Court and the Ninth Circuit, until he finally prevailed in the instant lawsuit on only one cause of action. Nevertheless, Plaintiff sought attorney's fees on virtually everything that had transpired over the past several years and then added a 2.0 multiplier simply because he might get it. The trial court issued an order denying Plaintiff's request for attorney's fees relying on §1033 and Steele v. Jensen Instrument Co., 59 Cal. App. 4th 326 (1997).

Over the last ten years, the Courts of Appeal have grappled with the issue of whether §12965(b) is subject to §1033.[3] And, until now, the only published decision on the issue, Steele, resolved that §12965(b) can be applied in harmony with §1033. Disregarding this published decision as unpersuasive, the Court of Appeal in this case relied extensively upon an analysis set forth in an un-published decision, Galanter v. Oak Park Unified School District, 2003 Cal. App. Unpub. LEXIS 8750 (2003), and reversed

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[3] See, e.g., Steele v. Jensen Instrument Co., 59 Cal.App.4th 326 (1997); Steele v. NIBCO, Inc., 2002 Cal. App. Unpub. LEXIS 5410 (2002); Silva v. Stockton Further Processing, Inc., 2003 Cal. App. Unpub. LEXIS 1875 (2003); Galanter v. Oak Park Unif. Sch. Dist., 2003 Cal. App. Unpub LEXIS 8750 (2003); Flemens v. Looney, 2005 Cal. App. Unpub. LEXIS 35 (2005); Ditsch v. Peppertree Café, 2006 Cal. App. Unpub. LEXIS 6587 (2006).

the trial court's denial of attorney's fees. In reversing the trial court, the Court of Appeal found that §1033 and §12965(b) serve conflicting public policies and, as such, §1033 must yield to §12965(b). By confining its analysis to whether the public policies supporting these cost-shifting provisions were in conflict with each other, the Court of Appeal disregarded established cannons of statutory construction. Indeed, starting statutory analysis at the public policy point puts the proverbial "cart before the horse." The Court of Appeal's analysis also ignores the fact that §12965(b) is part of the cost-shifting framework found in Code of Civil Procedure §1032 *et seq.* and, as such, should be interpreted within the context of that framework. This Court should grant review to resolve this conflict among the courts of appeal and interpret §1033 and §12965(b) in harmony with each other.

In reversing the trial court's order, the Court of Appeal also found that it was unjust to deny attorney's fees to Plaintiff in light of the City's settlement posture, which the Court of Appeal described as "recalcitrant." Once again, the Court of Appeal's analysis followed the un-published decision of Galanter. And, once again, the Court of Appeal disregarded relevant legal authority that prohibits courts from considering a party's settlement posture in determining whether to award attorney's fees.

Indeed, by allowing a party's failure to settle to serve as a predominant factor in awarding attorney's fees, the Court of Appeal has introduced a factor into the prevailing party analysis that converts an attorney's fee motion from a relatively uncomplicated evaluation of the parties' comparative litigation success into a limitless attack on the ethics and character of the involved parties. Such an analysis also raises significant public policy concerns, including the invasion of the attorney-client privilege for the sole purpose of justifying a party's settlement posture in order to avoid an award of attorney's fees. Accordingly, this Court should grant review and put an end to this expansion of §12965(b).

In summary, the conflicts in the law, the Court of Appeal's disregard of precedent and relevant legal authorities, as well as public policy considerations all warrant this Court granting review, reversing the Court of Appeal's decision and answering in the negative each of the issues presented.

III. BACKGROUND

For five years, Plaintiff unsuccessfully litigated claims against the City and various individual defendants in the Los Angeles Superior Court, the Central District of the United States District Court and the Ninth

Circuit. (AA:[4] Vol. III at 748-749; Vol. I at 34-39, 156:2-158:21, 162:9-15). Such claims included intentional infliction of emotional distress, trespass, loss of consortium, nuisance, inverse condemnation, and violations of due process and the Fourth Amendment under 42 U.S.C. §1983. (AA: Vol. I at 34-40, 156:3-158:2, 165:8-181:22; Vol. II at 381, 406, 453, 510). Then, on November 15, 2004, Plaintiff filed the instant lawsuit against the City, Lt. Glenn Krejci, Lt. Paul Von Lutzow and Captain Harlan Ward (collectively "Defendants") asserting claims for discrimination and retaliation under FEHA. (RA[5] at 1, 19:6-13, 22:9-11, 26).

The parties unsuccessfully attempted to settle the matter and no Code of Civil Procedure §998 ("§998") offer was made by either party. (RA at 29; RT[6] at 27:24-28:27, 34:16-36:5). The matter proceeded to a jury trial, which lasted roughly 7 days, including jury deliberations and the verdict. Two narrow issues were submitted to the jury for decision, approximately 12 witnesses were called, Plaintiff's only economic loss was for loss of overtime, which the jury found to be $1,500, only two out of four Defendants were found liable on one out of two causes of action, and one Defendant (Von Lutzow) was granted a nonsuit during the trial. (AA:

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[4] A citation to "AA" refers to Appellant's Appendix in Lieu of Clerk's Transcript.

[5] A citation to "RA" refers to Respondents' Appendix.

[6] A citation to "RT" refers to the Reporter's Transcripts on Appeal.

Vol. I at 33-41, 102-107; Vol. III at 746-747, 865). The jury ultimately returned a verdict in favor of Plaintiff and against the City and Ward solely on the retaliation claim awarding economic damages of $1,500 and non-economic damages of $10,000. (AA: Vol. I at 102-107).

Plaintiff, thereafter, moved for attorney's fees under §12965(b). (AA: Vol. I at 51, 127, 154). After amending his motion twice, Plaintiff finally requested a lodestar of $435,467.75 and a multiplier of 2.0. (AA: Vol. I at 154-185; Vol. III at 746, 748). The request for a multiplier came after Defendants received an extension of time to oppose Plaintiff's motion and brought Plaintiff's total fee request to $870,935.50. (AA: Vol. III at 746, 748). Plaintiff's fee request also included such things as time spent towards his unsuccessful pursuit of liability in the preceding five years, which accounted for approximately 60% for the total fee request. (AA: Vol. III at 748-749).

Defendants opposed Plaintiff's motion and argued that Plaintiff's request was unreasonably inflated by including such things as: billing in quarter-hour and half-hour increments; billing at an attorney's rate for secretarial and clerical tasks; claiming time for work that was grossly inflated and including an unsupported request for a 2.0 multiplier. (AA: Vol. I at 184:25-185:1; Vol. III at 733-750). Accordingly, Defendants requested the trial court to exercise its discretion and deny a fee award

altogether, or, at a minimum, reduce the fee to a reasonable amount. (AA: Vol. III at 736:27-737:27).

Prior to the hearing on Plaintiff's fee motion, the trial court raised the issue of whether it had discretion under §1033 to deny fees and requested both sides to be prepared to address the issue at the hearing. (RT at 29:4-8). At the hearing, the trial court questioned Plaintiff's counsel and confirmed that she was requesting over $800,000 in fees for a case where a judgment of only $11,500 was received. (RT at 31:26-28). The trial court also questioned Plaintiff's counsel regarding the reasonableness of requesting fees for all activity during the five-year history of the litigation. (RT at 41:4-42:19; 44:11-45:3). And, questioned Plaintiff's counsel regarding the basis for the 2.0 multiplier as no grounds were ever provided by Plaintiff to support the request. (RT at 39:10-17; AA: Vol. I at 51-100, 127-151, 154-185, RT at 39:18-41:3). Plaintiff's counsel stated that she simply asked for what she thought she could get. (RT at 39:18-41:3).

After taking the matter under submission, the trial court issued an order denying Plaintiff's request for attorney's fees relying on §1033 and the decision in Steele. (AA: Vol. III at 864, 865-869). In explaining its decision, the trial court cited Plaintiff's lack of success at trial on all his claims against all of the Defendants, that the time period at issue was approximately a 7-month period, that the Plaintiff's evidence was

overwhelming devoted to liability, Plaintiff's sparse presentation of evidence regarding his damages, and the low jury award. (AA: Vol. III at 865-869). Plaintiff appealed the decision. (AA: Vol. IV at 881-886).

On February 22, 2008, the Court of Appeal reversed the trial court's denial of attorney's fees and remanded the matter for re-determination of the amount of reasonable fees. (Opinion at 1, 12).[7] In reversing the trial court, the Court of Appeal found that §1033 and §12965(b) serve conflicting public policies and, as such, §1033 must yield to §12965(b). (Opinion at 7, 9). The Court of Appeal also found that it was unjust to deny attorney's fees to Plaintiff in light of the City's settlement posture, which the Court of Appeal described as "recalcitrant." (Opinion at 10).

A petition for re-hearing was not filed by either side.

IV. DISCUSSION

A. Section 12965(b) Should Not Be Judicially Expanded to Exclude the Application of §1033 to FEHA Actions

In the instant matter, the trial court denied Plaintiff's request for attorney's fees relying on §1033 and Steele. In Steele, the Court considered the complex relationship between §1033 and §12965(b). Finding that both §1033 and §12965(b) provide for a discretionary award of attorney's fees, the Court upheld the denial of plaintiff's motion for attorney's fees in light

[7] The page references to the Court of Appeal's Opinion refer to the page numbers of the Opinion as they appear in the Appendix to this brief.

of plaintiff's low recovery and lack of success in the litigation. (Steele, 59 Cal.Ap.4th at 331).

Here, the Court of Appeal disregarded Steele as unpersuasive claiming that the court and parties merely assumed that §1033 applied to §12965(b). (Opinion at 7). The Court of Appeal then analyzed §1033 and §12965(b) solely in terms of the public policies they seek to enforce and finding that while not all FEHA actions involve large sums of money, all FEHA actions seek to vindicate significant public policy. As such, a FEHA plaintiff should not be denied attorney's fees simply for recovering a modest verdict. Consequently, §1033 does not apply to §12965(b). (Opinion at 7-8).

By holding that §1033 does not apply to FEHA actions, the Court of Appeal has effectively expanded the scope of §12965(b) by precluding courts from denying attorney's fees where a plaintiff has exaggerated the value of his claims. In reaching this conclusion, the Court of Appeal directly contradicted the holding in Steele and failed to acknowledge that §12965(b) is part of a cost-shifting statutory scheme that should be interpreted within the context of that scheme. By granting review this Court can provide much needed guidance to the courts regarding the proper scope and application of §1033 and §12965(b), demonstrating that these cost-shifting provisions can operate in harmony with each other.

1. Under California Rules of Statutory Construction, §1033 and §12965(b) Can Be Read in Harmony With Each Other

The most fundamental rule of statutory construction is that "the court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (Select Base Materials v. Bd. Of Equal., 51 Cal.2d 640, 645 (1959); California Teachers Ass'n. v. San Diego Comm. College Dist., 28 Cal.3d 692, 698 (1981); Moyer v. Workmen's Comp. Appeals Bd., 10 Cal.3d 222, 230 (1973)).

The court first looks to the language of the statute, attempting to give effect to the usual, ordinary import of that language and seeking to avoid making any language mere surplusage. (Id.). Further, a statute must be construed in the context of the entire statutory system of which it is a part, in order to achieve harmony among the parts. (People v. Woodhead, 43 Cal.3d 1002, 1009 (1987)). If the statutes conflict on a central element, the court is to strive to harmonize them so as to give effect to each statute. If conflicting statutes cannot be reconciled, later enactments supersede earlier once and more specific provisions take precedence over more general ones. (Collection Bureau of San Jose v. Rumsey, 24 Cal.4th 301, 310 (2000)).

Statutory provisions must be given a reasonable and common sense interpretation consistent with the apparent purpose and intention of the

lawmakers, practical rather than technical in nature, and which, when applied will result in wise policy rather than mischief or absurdity. (United Business Com. V. City of San Diego, 91 Cal. App.3d 156, 170 (1979); City of Costa Mesa v. McKenzie, 30 Cal.App.3d 763, 770 (1973)). The court should also take into account matters such as context and the evils to be remedied. (Cossack v. City of Los Angeles, 11 Cal.3d 726, 733 (1974); United Business Com., 91 Cal.App.3d at 170).

Here, Plaintiff sought attorney's fees pursuant to §12965(b), which provides a court with discretion to award reasonable attorney's fees to a prevailing party. (Gov. Code §12965(b)). Statutory attorney's fees, however, are an item of costs and are, therefore, subject to the cost-shifting framework found in Code of Civil Procedure §1032 *et seq*.

a. Section 12965(b) is Part of the Cost-Shifting Framework Found in California Code of Civil Procedure §1032 *et seq*

California adheres to the "American Rule," which generally requires parties to bear their own costs, including attorney's fees. (Civ. P. Code §1021). Indeed, the right to recover costs exists solely by virtue of statute. (Civ. P. Code §§ 1021, 1032; Murillo v. Fleetwood Enterprises, Inc., 17 Cal.4th 985, 989 (1998)).

Code of Civil Procedure §1032 is the fundamental authority for awarding costs in civil actions; "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." (Civ. P. Code §1032(b)). A court has discretion, however, in awarding costs where the prevailing party recovers a judgment that could have been rendered in a limited civil case. (Civ. P. Code §1033(a)).

Code of Civil Procedure §1033.5 specifies the items allowable as costs, including attorney's fees when authorized by statute. (Civ. P. Code §1033.5(a)(10)(B)). Section 1033.5 further provides, in relevant part, "When any statute of this state refers to the award of 'costs and attorney's fees,' attorney's fees are an item and component of the costs to be awarded and are allowable as costs pursuant to subparagraph (B) of paragraph (10) of subdivision (a)." (Civ. P. Code §1033.5(c)(5)).

Thus, when attorney's fees are to be awarded pursuant to a statute, including under §12965(b), they are an item of costs. (Davis v. KGO-T.V., Inc., 17 Cal.4th 436, 443-445 (1998); Bond v. Pulsar Video Prod., 50 Cal.App.4th 918, 921 (1996); Santisas v. Goodin, 17 Cal.4th 599, 606 (1998); Heritage Engineering Const., Inc. v. City of Industry, 65 Cal.App.4th 1435, 1441-1442 (1998)).

As set forth above, the right to recover costs, including statutory attorney's fees, exists solely by statute. Indeed, §1033.5 was amended in 1990 to bring statutory attorney's fees into the cost-shifting framework. (See Civ. P. Code §1033.5, Annotated, Legislative History Notes). Consequently, the Legislature intended statutory attorney's fees to be regulated by the cost-shifting framework of §1032 *et seq*.

Additionally, the plain language of §1033, as well as the cost-shifting framework found in §1032 *et seq.*, states that it applies to all civil actions. (See Civ. P. Code §§1032 and 1033 including the titles and chapters thereto). There is also no exception in either the plain language of §1033 or the cost-shifting framework of §1032 *et seq*. for FEHA actions.[8,9] By holding that §1033 does not apply to §12965(b), the Court of Appeal rendered the language appearing in §1032(b) -- "in any action or proceeding," and the language appearing in §1033 – "in a case other than a limited civil case," as mere surplusage, which, under rules of statutory construction, is to be avoided.

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[8] Indeed, there is nothing in FEHA that prohibits the prosecution of an action in a limited jurisdiction court. (See Gov. Code §12965(b)).

[9] In fact, §1033 is a specifically delineated exception to the general rule of §1032 to award costs. And, where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed. (Mutual Life Ins. Co. v. City of Los Angeles, 50 Cal.3d 402, 410 (1990)). Neither the plain language of FEHA, nor §1033, states that either section should not apply to the other. As such, the Court of Appeals presumed exception of §1033 to FEHA should not stand.

Further, when the Legislature amended §1033 in 1998 to account for the unification of the Courts, the Legislature did not disapprove of Steele, which had been decided in 1997. (See Civ. P. Code §1033, Annotated, Legislative History Notes). And, the same is true when the Legislature amended §12965(b) in 1999, to add a provision regarding expert witness fees, and again in 2007, when the Legislature amended the language of §12965(b) to also account for the unification of the courts. (See Gov. Code §12965(b), Annotated, Legislative History Notes).

Finally, the Legislature designed these statutes to advance various public policies. Section 1033 encourages the filing of actions in the appropriate forum and works to deter plaintiffs from unduly puffing the value of their cases. (2 Witkin, Cal. Procedure (4th Ed. 1996) Jurisdiction, §30). The award of attorney's fees to plaintiffs who prevail in FEHA actions is designed to promote the important public policies favoring the elimination of workplace discrimination. (Flannery v. Prentice, 26 Cal.4th 572, 582-583 (2001)).

While FEHA unquestionable promotes a significant public policy, §12965(b) does not have primacy over the cost-shifting framework found at §1032, *et seq*. Not all FEHA cases are created equal, some have only small amounts at stake. Had the Legislature deemed it crucial to award attorney's fees to prevailing FEHA parties – even when the recovery is small enough

to fall below the jurisdictional limits of limited civil cases, then it could have said so. Instead, FEHA actions can be filed in either limited or unlimited courts. (Gov. Code §12965(b)).

Moreover, these statutes read together work to encourage parties to rationally and realistically evaluate the merits and value of their cases as litigation progresses by providing a disincentive to unduly inflating the value of cases. To be sure, it's hard to imagine that there would never be such an occasion where §1033 should be applied to deny a plaintiff attorney's fees under §12965(b). As such, these statutes do not conflict and they can be harmonized without one taking precedence over the other.[10]

2. Public Policy Considerations Weigh in Favor of Applying §1033 to §12965(b)

FEHA provides a court with discretion to award reasonable attorney's fees to a prevailing party. (Gov. Code §12965(b)). The award of

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[10] Indeed, harmonizing the statutory language mandating an award of fees or costs to the prevailing party with the policies underlying §1033, courts have concluded §1033 properly applies to other statutory attorney's fees provisions. (See, e.g., Dorman v. DWLC Corp., 35 Cal.App.4th 1808, 1814-1815 (1995)(discretion over mandatory award of contract-based fees under Cal. Civ. Code §1717); see also Korech v. Roberta Hornwood, 58 Cal.App.4th 1412 (1997)(§1717 created to prevent oppressive, one-sided use of contractual fee provisions); Haworth v. Lira, 232 Cal.App.3d 1362, 1371 (1991)(discretion over mandatory award of fees and costs under Cal. Civ. P. Code §1021.9); see also Elton v. Anheuser-Busch Beverage Group, Inc., 50 Cal.App.4th 1301 (1996)(reading §1022 and 1021.9 together); Dickens v. Lee, 230 Cal.App.3d 985, 988 (1991)(discretion over mandatory award of fees and costs under Cal. Civ. Code §1942.4)).

attorney's fees to plaintiffs who prevail in FEHA actions is designed to promote the important public policies favoring the elimination of workplace discrimination. (Flannery v. Prentice, 26 Cal.4th 572, 582-583 (2001)). Attorney's fees under §12965(b), however, are also available to a prevailing defendant. (Hon v. Marshall, 53 Cal.App.4th 470 (1997)). And, even if a plaintiff prevails on a FEHA claim, if the plaintiff recovers a verdict less than a defendant's §998 offer, the plaintiff is liable for the defendant's attorney's fees and costs. (Steele, 59 Cal.App.4th at 332).[11]

It is apparent from the plain language of §12965(b) that by allowing for awards of attorney's fees to a prevailing defendant that the Legislature intended for a balance to be placed on the award of attorney's fees. In other words, the Legislature did not intend a one-sided application of §12965(b) that inure only to the benefit of plaintiffs and their attorneys. Such a balance is also apparent from the Legislature's application of §998 to FEHA actions.

The application of §1033 to §12965(b) furthers this balance and gives effect to §12965(b)'s presence within the Code of Civil Procedure's

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[11] The basic premise of §998 is that plaintiffs who reject reasonable settlement offers and then obtain less than the offer should be penalized for continuing the litigation. The harsh result of §998 is that the plaintiff not only loses the right to recover his costs, but must also pay the defendant's post-offer costs. (Meister v. Regents of Univ. of Calif., 67 Cal.App.4th 437, 450 (1998)).

cost-shifting framework. As indicated above, §1033 is designed to encourage a plaintiff to pursue litigation in the appropriate forum and to deter a plaintiff from exaggerating the value of a case. (2 Witkin, Cal. Procedure, Jurisdiction §30). "When litigants bring cases in [unlimited jurisdiction courts] which properly belong in [limited jurisdiction courts] it wastes judicial resources and drain clients' wallets. By doing so, they invoke the more extensive and expensive procedures the judicial system reserves for higher stakes cases." (Valentino v. Elliott Sav-On Gas, Inc., 201 Cal.App.3d 692, 701 (1988)).

Section 1033 also does not run afoul of the public policies supporting FEHA action as it only provides a court with discretion to deny costs, including attorney's fees, if the plaintiff recovers a judgment that could have been rendered in a limited jurisdiction court. (Civ. P. Code §1033(a)). A denial of fees and costs is not mandatory. Furthermore, §1033 does not apply to a party who reasonably and in good faith files an action as an unlimited civil case, but is surprised by an unexpectedly low verdict. (Valentino, 201 Cal.App.3d at 701-702).[12]

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[12] Additional factors to the considered in the exercise of its discretion under §1033 are the plaintiffs' assessment of their chances of recovery beyond the jurisdiction of the courts of lesser jurisdiction, their reasonable and good faith assessment of the recovery, and the amount of costs incurred. (Greenberg v. Pacific Tel. & Tel. Co., 97 Cal.App.3d 102, 108 (1979); Dorman v. DWLC Corp., 35 Cal.App.4th 1808, 1816 (1995)).

Judicially expanding §12965(b) such that §1033 cannot serve as a basis for denying attorney's fees removes a legislatively imposed check placed on plaintiff's attorneys in pursuing civil actions. In support of this expansion, the Court of Appeal reasoned that applying §1033 to deny attorney's fees to a prevailing FEHA plaintiff simply because the recovery is modest would thwart the purposes underlying FEHA and discourage attorneys from taking meritorious FEHA cases unless the damages would be large.

Such encouragement, however, should not come at the cost of providing an opportunity for abuse of the availability of fees. Here, Defendants contend that Plaintiff repeatedly lost at every turn for over five years until he finally prevailed on one claim in the instant action, yet he seeks attorney's fees for his unsuccessful pursuits. While the Court of Appeal characterized this unsuccessful period of litigation as a battle waged for five years against a recalcitrant Defendant, perhaps Plaintiff's claims were merely over-stated. And, perhaps Defendants' success over these five years was a more accurate reflection of the value and validity of Plaintiff's claims, then the nearly $880,000 Plaintiff seeks in attorney's fees.

And, if overall success is an important factor in determining reasonable fees,[13] and if a party can be denied fees for unreasonably

[13] PLCM Group, Inc. v. Drexler, 22 Cal.4th 1084, 1095 (2000).

inflating a fee request,[14] then why shouldn't a court have the discretion to deny attorney's fees where a plaintiff has unreasonably inflated his lawsuit in the first instance?

This Court should grant review and weigh these public policy concerns in favor of applying §1033 to FEHA actions and prevent the improper judicial expansion of §12965(b).

B. Section 12965(b) Should Not Be Judicially Expanded to Allow for Attorney's Fee Awards Because of a Party's Settlement Posture

After expanding §12965(b) such that §1033 cannot serve as a basis for denying attorney's fees, the Court of Appeal, without citing any supporting legal authority, further expanded the availability of attorney's fees under §12965(b) by concluding that a party's failure to settle a case can serve as a basis for awarding attorney's fees against it. (Opinion at 10). Such a holding, however, is it odds with case law that establishes that it is improper to consider a party's settlement posture in determining whether to award attorney's fees. This Court should grant review to resolve this newly created conflict in the law and eliminate this factor from a court's consideration in awarding attorney's fees.

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[14] See Serrano v. Unruh, 32 Cal.3d 621, 635 (1982); Ketchum v. Moses, 24 Cal.4th 1122, 1137 (2001).

1. A Party's Settlement Posture Is Not an Appropriate Factor to Consider in Determining Whether to Award Attorney's Fees

There is no legal authority that provides for an award of attorney's fees, or for even setting the amount of attorney's fees, in light of a party's settlement posture. Relevant legal authority does, however, establish that a party's settlement posture is not an appropriate factor to consider in determining whether to award attorney's fees. (See, e.g., Hsu v. Abbara, 9 Cal.4th 863 (1995); Greene v. Dillingham Const. N.A., Inc., 101 Cal.App.4th 418, 426 (2002); Neptune Society Corp. v. Longanecker, 194 Cal.App.3d 1233, 1251 (1987)).

In Greene, the Court held that it was not proper for a court to rely on informal settlement negotiations and hindsight to determine whether attorney's fees should be awarded. (Greene, 101 Cal.App.4th at 426). Otherwise, plaintiffs with meritorious FEHA claims and defendants disputing unmeritorious FEHA claims may be improperly dissuaded from pursuing their right to a jury trial. (See id.). Thus, a defendant's decision to not make a pre-trial settlement offer is not a valid factor for the trial court's consideration in determining whether to award attorney's fees to a prevailing FEHA plaintiff. (Id.).

Similarly instructive is this Court's decision in Hsu v. Abbara. In determining prevailing party status for an award of attorney's fees under Civil Code §1717, this Court held that a court may not invoke equitable considerations unrelated to litigation success, such as the parties' behavior during settlement negotiations. "To admit such factors into the 'prevailing party' equation would convert the attorney fees motion from a relatively uncomplicated evaluation of the parties' comparative litigation success into a formless, limitless attack on the ethics and character of every party who seeks attorney's fees...." (Hsu, 9 Cal.4th at 877; see also Neptune Society Corp. v. Longanecker, 194 Cal.App.3d 1233, 1251 (1987)(a purported settlement offer does not supply a legal basis to award attorney's fees under Civil Code §1717)).

The foregoing rules and policies should have been applied in this case, but were not. Instead, the Court of Appeal's opinion created an opposite and conflicting rule. [15] Furthermore, this unprecedented expansion of §12965(b) also erodes this Court's prior holdings regarding the availability of attorney's fees under §12965(b). Specifically, this Court has held that attorney's fees can be denied where special circumstances would render an award unjust. (Serrano v. Unruh, 32 Cal.3d 621, 635

[15] The Court of Appeal's holding also conflicts with the preclusion of such information for purposes of establishing liability as set forth in Evidence Code §§1152 and 1154, as well as Evidence Code §1115 *et seq.*

(1982)("Serrano IV"); Ketchum v. Moses, 24 Cal.4th 1121, 1137 (2001)). One such special circumstance is where the prevailing party has requested an unreasonably inflated fee. (Serrano IV, 32 Cal.3d at 635; Ketchum, 24 Cal.4th at 1137).

Here, after amending his motion twice, Plaintiff finally requested a lodestar of $435,467.75 and a multiplier of 2.0 for a total fee request of $870,935.50. Plaintiff's fee request included such things as time spent towards his unsuccessful pursuit of liability in the preceding five years, which accounted for approximately 60% for the total fee request; billing in quarter-hour and half-hour increments; billing at an attorney's rate for secretarial and clerical tasks; claiming time for work that was grossly inflated and by including the last minute, unsupported request for a 2.0 multiplier simply because he might receive it.

Defendants' opposed Plaintiff's motion identifying these, as well as other, problematic billing practices, and requested the trial court to exercise its discretion and deny a fee award altogether, or, at a minimum, reduce the fee to a reasonable amount. Ignoring these arguments and potential basis for denying attorney's fees, the Court of Appeal focused exclusively on the fact that Defendants failed to reach a settlement with Plaintiff and held that it would be unjust to deny Plaintiff any fees where the City flatly resisted

all settlement discussion and never made a substantive settlement offer. (Opinion at 10).

The effect of such a holding is that whenever a defendant has failed to reach a settlement, a plaintiff will not be discouraged from making an unreasonable attorney's fees demand as the only consequences from such misconduct would either be a windfall if the court awards the full request or a reduction of the fee request to what should have been asked for in the first instance. (Serrano IV, 32 Cal.3d at 635). Consequently, the Court of Appeal has diminished this Court's prior interpretations of the scope of §12965(b) and placed a party's settlement posture as a paramount factor in determining whether to award attorney's fees.

This Court should grant review and disapprove of the Court of Appeal's unsupported holding.

2. Public Policy Considerations Also Weigh Against The Expansion of §12965(b) to Include a Party's Settlement Posture as a Predominant Factor in Awarding Attorney's Fees

The primary concern against the expansion of §12965(b) to include a party's settlement posture as a predominant factor in awarding attorney's fees is the invasion into the attorney-client privilege that such an analysis would entail. The true reasons behind a party's settlement posture are

oftentimes cloaked by the attorney-client privilege. Parties should not be forced to disclose such privileged communications in response to a party's motion for attorney's fees. There is simply no sound public policy reason to support such an invasion.

Furthermore, as indicated above, to admit such a factor into the prevailing party analysis would convert the attorney fees motion from a relatively uncomplicated evaluation of the parties' comparative litigation success into a limitless attack on the ethics and character of the involved parties. Indeed, while a court may view a party's settlement position as "recalcitrant," the posture may actually be a response to a number of influencing factors, particularly for public entities, that lead to the failure of reaching a settlement. For example, a settlement might not be reached because of any one or more of the following factors: the necessary support to approve a settlement by various public committees is lacking; the public is outraged by a settlement recommendation to a public committee; the party's settlement request is unreasonably high and out-of-line with similar cases, the timing of the settlement discussions coincide with low budget reserves. And, unlike private corporations, public entities are also bound by a legal obligation to not waste tax-payer dollars.

Finally, the practical effects of introducing such a factor into the attorney's fees analysis would simply be un-workable as is proven by the

instant case. Specifically, whose settlement offer is to be analyzed for reasonableness? In the instant case, the Court of Appeal held that attorney's fees must be awarded after only considering the City's settlement offer, which the Court of Appeal characterized as lacking in substance. There is absolutely no discussion by the Court of Appeal regarding the Plaintiff's settlement demand and it's implied reasonableness. Additionally, from whose perspective should a settlement offer be analyzed for reasonableness? Here, its Defendants' contention that Plaintiff repeatedly lost at every turn, back and forth between the California and federal courts for over five years, until he finally prevailed on one claim in the instant action. The Court of Appeal, on the other hand, viewed this same scenario as a battle waged by Plaintiff for five years against a recalcitrant Defendant. Is the Defendants' offer to waive fees and costs a more accurate assessment of the validity and value of Plaintiff's claims since Plaintiff only recovered $11,500? Or, is Plaintiff's five-year war to recover $11,500 at a cost of $880,000 more accurate? This Court should grant review and put an end to this kind of formless, limitless analysis as to whether attorney's fees should be awarded.

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V. CONCLUSION

For all the foregoing reasons, this Court should grant review and answer in the negative each of the issues presented.

DATED: April 2, 2008

RESPECTFULLY SUBMITTED:

ROCKARD J. DELGADILLO, City Attorney
PAUL L. WINNEMORE, Deputy City Attorney
BETH D. ORELLANA, Deputy City Attorney

BY: _____
BETH D. ORELLANA, Deputy City Attorney

Attorneys for Petitioners CITY OF LOS ANGELES, GLENN KREJCI, PAUL VON LUTZOW and HARLAN WARD

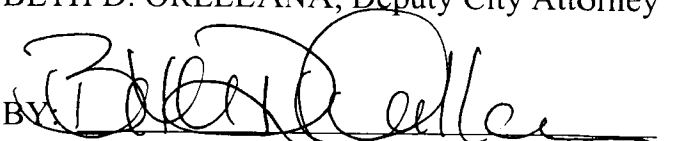
CERTIFICATE OF WORD COUNT

Petitioners' counsel of record hereby certifies, pursuant to Rule 8.504(d)(1) of the California Rules of Court, that the text of the foregoing Petition for Review was produced using 13-point Times New Roman font (including footnotes) and contains 5,721 words, as counted by the Microsoft Word word-processing system used to generate the brief.

DATED: April 2, 2008

RESPECTFULLY SUBMITTED:

ROCKARD J. DELGADILLO, City Attorney
PAUL L. WINNEMORE, Deputy City Attorney
BETH D. ORELLANA, Deputy City Attorney

BY 
BETH D. ORELLANA, Deputy City Attorney

Attorneys for Petitioners CITY OF LOS ANGELES, GLENN KREJCI, PAUL VON LUTZOW and HARLAN WARD

APPENDIX

Filed 2/22/08

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ROBERT CHAVEZ, Plaintiff and Appellant, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B192375 (Los Angeles County Super. Ct. No. BC324514)

APPEAL from a post-judgment order of the Los Angeles County Superior Court. Rolf M. Treu, Judge. Reversed and remanded.

Law Office of Rochelle Evans Jackson and Rochelle Evans Jackson for Appellant.

Rockard J. Delgadillo, City Attorney, and Paul L. Winnemore, Deputy City Attorney, for Respondents.

SUMMARY

After five years of litigation in the superior court, district court, and Ninth Circuit Court of Appeals, a jury awarded appellant Robert Chavez $11,500 in a statutory retaliation action brought against his employer and a supervisor. Chavez then filed a motion seeking approximately $871,000 in attorney fees under the fee provisions of the Fair Employment and Housing Act (FEHA), Government Code section 12965, subdivision (b). Ignoring that statute, and instead exercising its discretion under Code of Civil Procedure section 1033, subdivision (a)[1] to deny costs because Chavez's recovery was below its jurisdictional minimum, the trial court denied the motion. Chavez appeals from the denial of the motion, contending the court applied the wrong statutory standard and abused its discretion by denying him fees. We agree and reverse the order.

FACTUAL AND PROCEDURAL BACKGROUND

Chavez, a Los Angeles Police Department officer, sued his employer, the City of Los Angeles (City), and three supervisors for violation of FEHA. Chavez alleged he was subjected to discrimination based on a perceived disability and in retaliation for complaining about harassment and discrimination. Chavez sought recovery for five days' lost pay and benefits, emotional distress, and punitive damages. Before trial, the parties participated in five mediation sessions. According to Chavez, the City made no offer to settle except to waive its costs in full satisfaction of Chavez's claims. Neither side made a statutory offer to compromise. (§ 998.)

At the conclusion of trial, the jury returned a verdict in favor of Chavez on his claim of retaliation. The jury awarded him economic damages of $1,500 for lost overtime and cash detail, and noneconomic damages of $10,000 for mental suffering

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[1] Undesignated statutory references are to the Code of Civil Procedure.

and emotional distress against the City and one individual defendant.[2] No punitive damages were awarded.

Following trial, Chavez moved for $870,935.50 in attorney fees as the prevailing plaintiff under FEHA. The fees consisted of $435,467.75 in hourly fees, enhanced with a multiplier of 2.0. (Gov. Code, § 12965, subd. (b).) Chavez's motion was supported by an expert witness's declaration attesting to the reasonableness of his fee request. The City opposed the motion. It argued Chavez had (1) failed to establish a reasonable hourly rate for sole practitioners with experience comparable to that of his attorney, Rochelle Evans Jackson, (2) submitted inflated bills based on questionable billing practices, (3) unreasonably sought a positive multiplier, and (4) sought recovery of fees for time spent litigating claims on which he had not prevailed. The City urged the trial court to exercise its discretion to deny or at least substantially reduce Chavez's fee request.[3] Based on Chavez's modest recovery, the court exercised its discretion under section 1033, subdivision (a) to deny fees as costs under section 1033.5, subdivision (a)(10)(B), and denied the motion. This appeal followed.

DISCUSSION

The issues before us are whether the trial court erred in failing to consider the motion in light of Chavez's status as the prevailing plaintiff under FEHA and in applying section 1033 to deny him fees.

1. Standard of review.

Under FEHA, a prevailing plaintiff is entitled to recover attorney fees and costs absent circumstances rendering the award unjust. (Gov. Code, § 12965, subd. (b); *Stephens v. Coldwell Banker Commercial Group, Inc.* (1988) 199 Cal.App.3d 1394,

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[2] A motion for nonsuit was granted in favor of one supervisor during trial. The jury found in favor of the City and the third individual defendant on the discrimination claim.

[3] The City's expert recommended Chavez be awarded fees of no more than $158,783.44. The City itself urged the trial court to reduce the fee award to at least $44,459.37.

1406 (*Stephens*), disapproved on other grounds in *White v. Ultramar, Inc.* (1999) 21 Cal.4th 563, 574, fn. 4.) We review an order denying attorney fees to a prevailing plaintiff under FEHA for abuse of discretion. (*Steele v. Jensen Instrument Co.* (1997) 59 Cal.App.4th 326, 330 (*Steele*); *Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 445.) But the determination whether the criteria for a fee award are met is a factual question subject to de novo review on appeal. (*Akins v. Enterprise Rent-A-Car Co.* (2000) 79 Cal.App.4th 1127, 1132-1133.) While the court is vested with discretion to deny attorney fees to a prevailing plaintiff, its discretion "is narrow." (*Stephens, supra*, 199 Cal.App.3d at p. 1405.) Two cost-shifting and attorney fees statutes--each advancing different public policies--are involved: FEHA's fee provision (Gov. Code, § 12965, subd. (b)), and section 1033, subdivision (a). In its ruling, the trial court made no reference to FEHA's fee provision. Instead, it focused on Chavez's modest recovery to justify its exercise of discretion under section 1033, subdivision (a), to deny attorney fees outright as costs under section 1033.5, subdivision (a)(10).

2. Section 1033, subdivision (a).

Section 1033, subdivision (a) is a cost-shifting statute designed to encourage a plaintiff to pursue litigation in the appropriate forum, and to deter the plaintiff from exaggerating the value of a case. (2 Witkin, Cal. Procedure (4th ed. 1996) Jurisdiction, § 30, p. 576.) To encourage the filing of minor grievances as "limited civil cases," section 1033 vests trial courts with the discretion to deny costs to a plaintiff who files an action as an unlimited action, but recovers a judgment in an amount which could have been rendered in a court of limited jurisdiction.[4] (*Steele, supra*, 59 Cal.App.4th at p. 330.) Under section 1033, "costs" include attorney fees if authorized by a statute, such as FEHA. (§ 1033.5, subd. (a)(10)(B).)

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[4] After trial court unification in 1998, civil cases formerly within the jurisdiction of the municipal court--where the amount in controversy is less than $25,000--are classified as "limited civil cases." (§§ 85, subd. (a), 86.) All others are "unlimited civil cases." (§ 88.)

Classification of a case as a limited civil case turns largely on whether the amount in controversy exceeds $25,000. (§ 85, subd. (a).) That classification has significant consequences in terms of the quantity of discovery the parties may conduct. In a limited civil action, discovery is typically limited to one deposition and a combined maximum of 35 interrogatories, document requests or requests for admission. (§ 94; but see § 95, subds. (a) & (b) [permitting additional discovery by stipulation or on showing of need].) Neither statutory nor contractual attorney fees are part of the equation when the trial court determines whether a judgment is one that could have been rendered in a court of limited jurisdiction. (*Dorman v. DWLC Corp.* (1995) 35 Cal.App.4th 1808, 1815.)

3. Attorney fees under FEHA.

FEHA authorizes an award of attorney fees to the prevailing party. (Gov. Code, § 12965, subd. (b).) According to that statute, "[T]he court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs, . . . except where the action is filed by a public agency . . . ." (*Ibid.*) A key objective of FEHA is to preserve the civil rights of Californians to seek and maintain employment without discrimination. (Gov. Code, §§ 12920, 12921.) Notwithstanding FEHA's neutral language, courts award attorney fees to a prevailing plaintiff as a matter of course unless special circumstances render an award unjust; but a prevailing defendant recovers fees only if an action is found to be "'unreasonable, frivolous, meritless or vexatious.'" (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387, quoting *Christianburg Garment Co. v. EEOC* (1978) 434 U.S. 412, 421; *Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 830-832.)

A plaintiff who brings a discrimination suit acts as a private attorney general, vindicating a vital legislative policy. (*Cummings v. Benco Building Services*, *supra*, 11 Cal.App.4th at p. 1387.) The statutory fee provisions are meant to ease the burden on plaintiffs of limited means so they can bring meritorious suits to vindicate key public policies. An award of fees to a prevailing plaintiff under FEHA provides "'fair compensation to the attorneys involved in the litigation at hand and encourage[s]

litigation of claims that in the public interest merit litigation.'" (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 584, quoting *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1172.)

4. The interplay of the cost-shifting statutes in this action.

The trial court's three-page ruling denying Chavez's motion for attorney fees ignored FEHA. The court made no express finding of any "special circumstance" to justify its denial of fees under that statute. Instead, it relied on Chavez's modest recovery and the "sparse" evidence he presented at trial regarding damages to justify its denial of fees under section 1033. The court noted its decision was "guided" by the holding in *Steele, supra*, 59 Cal.App.4th 326, where the court's "discretion to deny fees was upheld in a case where the verdict was twice the amount of the instant one." *Steele* is not persuasive.

In *Steele*, the plaintiff sued her employer and two individuals in superior court for pregnancy discrimination under FEHA. Defendants made an offer to compromise under section 998 of $40,000, which the plaintiff rejected. Plaintiff was awarded just over $21,000 by a jury. The trial court denied plaintiff's request for attorney fees and costs. Plaintiff appealed, arguing the court erred in denying her fees under section 1033; she was entitled to fees under FEHA; and, under section 998, when her fees and costs were added to the jury's award, the judgment exceeded defendant's statutory offer. (*Steele, supra*, 59 Cal.App.4th at p. 329.) The court of appeal disagreed. It determined that the trial court had discretion to deny fees and costs because nonsuit was granted in favor of the individual defendants, and because the amount of the judgment against the employer was less than the jurisdictional limit of the municipal court and only about half the amount of the section 998 offer. (*Id.* at p. 330.)

Factually, this action differs from *Steele* in that Chavez ultimately prevailed on one cause of action against his employer and an individual defendant. Moreover, notwithstanding Chavez's efforts to resolve the matter during five years of litigation and at least as many formal endeavors at settlement, the City never made a section 998 offer--or any offer--to settle the case.

Most importantly, while noting in passing that "[t]he interplay of these statutes is complex," like the trial court in this action, the court in *Steele* failed to address whether special circumstances existed rendering an award of attorney fees under FEHA unjust.[5] The court just assumed section 1033 applied, never questioning its applicability in a civil rights action, allowing it to trump a prevailing plaintiff's right to recover fees under FEHA.

In our view, section 1033 does not apply in actions brought under FEHA. Section 1033, subdivision (a) is designed to encourage pursuit of minor grievances in courts of limited jurisdiction where simple disputes may be expeditiously and less expensively resolved. That rationale is inapposite in statutory discrimination or civil rights actions. FEHA actions do not always involve large sums of money. However, that factor alone cannot convert a bona fide civil rights claim into an insignificant grievance. Even a modest financial recovery can serve to vindicate a substantial legal right. Moreover, by its nature and the fact that circumstantial evidence is almost always required to prove a discrimination or other claim under FEHA, such litigation is invariably expensive and time consuming in terms of the quantity of discovery conducted and the inevitability of summary judgment or other extensive pretrial motions. FEHA's attorney fee provision is designed to ease the financial burden on a plaintiff of limited means to enable the plaintiff to find representation to sue to vindicate a significant public policy. It provides assurance to an attorney whose client prevails that the attorney will be paid a reasonable fee, unless special circumstances make a fee award unjust. (*Stephens*, *supra*, 199 Cal.App.3d at p. 1405.) That assurance is not predicated on the size of the jury's award. In FEHA actions, it is not uncommon for fee awards to greatly exceed the amount of the verdict. (See, e.g., *Vo v. Las Virgenes Municipal Water District*, *supra*, 79 Cal.App.4th at pp. 442-445 [affirming attorney fees award of $470,000 on a $37,500 verdict]; *Riverside v. Rivera*

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[5] The facts of *Steele* are not included in the published portion of that opinion.

(1986) 477 U.S. 561 [award of attorney fees of over $245,000 upheld where damages awarded just exceeded $33,000].)

Denying attorney fees to a plaintiff who prevails under FEHA solely because the plaintiff's damages are modest would be inimical to the intent of FEHA's fee provisions and would discourage attorneys from taking meritorious cases. Unless a victory is merely technical or "de minimis" and does not serve a public purpose, federal and state courts almost uniformly refuse to link the size of a fee award to the amount of damages a plaintiff recovers.[6] (See, e.g., *Quesada v. Thomason* (9th Cir. 1988) 850 F.2d 537, 540 [reducing fee award below lodestar simply because a damage award is small impermissibly creates an incentive for attorneys to file only those civil rights actions likely to produce large awards]; *Riverside v. Rivera*, *supra*, 477 U.S. at p. 581 [rejecting argument that plaintiff's fee award in action under 42 U.S.C. § 1983 should be limited to percentage of monetary recovery]; *Wilcox v. City of Reno* (9th Cir. 1994) 42 F.3d 550 [fee award of over $66,500 affirmed where damages awarded were $1.00]; *Wallace v. Mulholland* (7th Cir. 1992) 957 F.2d 333, 339 [refusing to adopt a rule of proportionality between degree of plaintiff's financial recovery and amount of attorney fee award]; *Corder v. Gates* (9th Cir. 1991) 947 F.2d 374 [affirming attorney fees of over $90,000 on damages award of $24,000]; *County of Los Angeles v. Superior Court* (1999) 21 Cal.4th 292, 304, fn. 2 ["a small award of compensatory damages in a federal civil rights lawsuit can justify a substantial amount of attorney fees"]; *Nightingale v. Hyundai Motor America* (1994) 31 Cal.App.4th 99 [judgment for just over $6,000, attorney fees of almost $76,000]; *Stokus v. Marsh* (1990) 217 Cal.App.3d 647 [limiting fees by amount of damages permits recalcitrant defendants to deprive prevailing plaintiff of reasonable attorney fees]; but see *Farrar v. Hobby* (1992) 506 U.S. 103, 116-122 (conc. opn. of O'Connor, J.) [court may award low or

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[6] Because the language and objectives of FEHA closely parallel or are identical to equivalent federal civil rights statutes, we refer to federal court decisions where appropriate. (See *Stephens*, *supra*, 199 Cal.App.3d at p. 1405.)

no fees on nominal damage award if victory is technical or "de minimis" and does not advance a significant issue or public purpose].)

FEHA and section 1033, subdivision (a), each serve laudable but conflicting public policies, particularly so in light of the rule that attorney fees must be awarded to a prevailing plaintiff under FEHA unless special circumstances make an award unjust under that statute. The trial court should have analyzed Chavez's fee motion under Government Code section 12965, the applicable statute under which the motion was brought, not section 1033. We conclude the trial court abused its discretion when it denied fees because the damages award was modest and, in hindsight, could have been made in a court of limited jurisdiction. Until the court raised the specter of section 1033 on its own after the issue of attorney fees under FEHA was fully briefed, no one raised the subject of the amount in controversy not exceededing $25,000. Indeed, according to Chavez, the fact that each side believed significant sums were at stake is evidenced by the parties' stipulation to consolidate this action with his federal action. According to his attorney, that stipulation occurred only because the City threatened to remove the case on the ground the amount in controversy exceeded $75,000, the jurisdictional minimum for a federal diversity action. (28 U.S.C. § 1332(a).)

The court also failed to consider whether an attorney could have competently filed this civil rights action as a limited jurisdiction case, and the parties' efforts to settle the action short of litigation. As Chavez's attorney noted at the hearing on the motion, as a practical matter, she could not have filed this case as a limited civil action. Even in its final, more streamlined form, this statutory retaliation action involved two complex causes of action against four defendants, one a large public entity. At one point, Chavez intended to call 28 witnesses at a trial projected to last two weeks. Chavez conducted written discovery and took at least 13 depositions. Had this lawsuit been filed as a limited civil action, Chavez could not have deposed all the named defendants, let alone other essential witnesses. That Chavez eventually prevailed on only one theory and against two defendants is not dispositive. "'Attorneys generally must pursue all available legal avenues and theories in pursuit of

their clients' objectives; it is impossible, as a practical matter, for an attorney to know in advance whether or not his or her work on a potentially meritorious legal theory will ultimately prevail.' [Citation.]" (*Greene v. Dillingham Construction N.A., Inc.* (2002) 101 Cal.App.4th 418, 424.)

Moreover, according to Chavez, the parties participated in five mediation sessions, and he made numerous attempts to settle the case. The City flatly resisted all settlement discussions and never made a substantive offer. The City's litigation posture forced Chavez to engage in extensive discovery and litigate the action for five years through the state and federal trial and appellate courts, incurring substantial attorney fees. Under these circumstances, in which Chavez prevailed against some defendants on his FEHA retaliation claim, and in the face of a recalcitrant City, it was unjust to deny him any fees. Nothing in this record evidences special circumstances sufficient to render an award of fees unjust, apart from the modest verdict, which itself provides an insufficient basis to deny a prevailing plaintiff attorney fees under FEHA. (See *Riverside v. Rivera*, *supra*, 477 U.S. at pp. 575-577; *Quesada v. Thomason*, *supra*, 850 F.2d at p. 540; *Beaty v. BET Holdings, Inc.* (9th Cir. 2000) 222 F.3d 607, 612 [applying FEHA].) We also reject the City's invitation to imply a finding of special circumstances because the trial court issued a three-page minute order discussing the basis for its decision. The order enumerates the reasons for the court's ruling and clearly states its reliance on Chavez's minimal recovery to justify its application of section 1033, subdivision (a). The order contains no analysis of special circumstances sufficient to justify a denial of attorney fees under FEHA.

We conclude the order denying Chavez's motion must be reversed and the case remanded for proper application of Government Code section 12965, subdivision (b) and consideration of the City's objections to Chavez's fee request. We express no opinion regarding the amount of fees due Chavez. On remand, Chavez must establish that the fees he seeks were reasonably incurred. The trial court should consider the FEHA motion and objections to the motion, and then determine the lodestar figure by multiplying the hours reasonably worked by a reasonable hourly rate. (*Press v. Lucky*

Stores, Inc. (1983) 34 Cal.3d 311, 322; *Serrano v. Unruh* (1982) 32 Cal.3d 621, 639.) The court may augment or reduce the lodestar figure in light of applicable factors to make an appropriate fee award. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1134; *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1095; *Serrano v. Unruh*, *supra*, 32 Cal.3d at p. 643; *Serrano v. Priest* (1977) 20 Cal.3d 25, 48.) Those factors include the novelty and difficulty of the issues and the skill displayed in presenting them, other employment precluded by the litigation, the contingent nature of the fee award, the quality of the representation (*Serrano v. Priest*, *supra*, 20 Cal.3d at p. 49), and damages and other relief obtained by the litigation and any delay in receipt of payment (*Downey Cares v. Downey Community Development Com.* (1987) 196 Cal.App.3d 983, 995, fn. 11). The court is not, as a matter of law, required to apply a multiplier, and a multiplier may be inappropriate if the action lacks significant public value or is one in which the plaintiff's injuries are slight. (*Weeks v. Baker & McKenzie*, *supra*, 63 Cal.App.4th at p. 1175; *State of California v. Meyer* (1985) 174 Cal.App.3d 1061, 1073-1074.) It is not inappropriate for a trial court to reduce a fee award if a plaintiff obtains only limited success, so long as the claims on which the plaintiff prevails are distinct from and unrelated to the unsuccessful claims.[7] (*Harman v. City and County of San Francisco* (2006) 136 Cal.App.4th 1279, 1307; *Greene v. Dillingham Construction N.A., Inc.*, *supra*, 101 Cal.App.4th at p. 423.) The court has broad authority to determine the amount of reasonable fees. (*PLCM Group, Inc. v. Drexler*, *supra*, 22 Cal.4th at p. 1095.) Nevertheless, because determination of the lodestar figure is fundamental to the determination of an objectively reasonable amount, the exercise of that discretion must begin with and be based upon the lodestar adjustment method. (*Ketchum v. Moses*, *supra*, 24 Cal.4th at p. 1134.)

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[7] It is worth noting that even the City's damages expert opined that Chavez was due attorney fees of up to $158,783.44.

DISPOSITION

The order denying Chavez's motion for attorney fees is reversed. The matter is remanded to the trial court for a redetermination of the amount of attorney fees to be awarded Chavez, including an amount for fees incurred prosecuting this appeal. Costs on appeal are awarded to Chavez.

CERTIFIED FOR PUBLICATION

FLIER, J.

We concur:

COOPER, P.J.

RUBIN, J.

PROOF OF SERVICE

I, GLORIA YOSHINAGA, declare as follows:

I am over the age of 18 years and am not a party to this action. My business address is 200 North Main Street, 700 City Hall East, Los Angeles, California, 90012, which is located in the county where the service described below took place.

On April 2, 2008, I served the foregoing document, described as **PETITION FOR REVIEW**, on all interested persons as follows:

[XX] BY MAIL - I served the foregoing document by placing a true copy thereof in sealed envelopes and caused such envelopes to be deposited in the mail at Los Angeles, California, with first class postage thereon fully prepaid, to the addressees listed below. I am readily familiar with this Office's business practice for collection and processing of correspondence for mailing. Under that practice, mailing is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postage cancellation or postage meter date is more than one (1) day after the date of deposit for mailing affidavit. The addressees so served are as follows:

[Attorneys for Plaintiff/Appellant/Respondent]

Rochelle Evans Jackson, Esq.
Law Office of Rochelle Evans Jackson
333 City Boulevard West, 17th Floor
Orange, CA 92868

[XX] BY PERSONAL SERVICE - ( ) I delivered by hand or (**XX**) I caused to be delivered said document, via messenger service with delivery time prior to 5:00 p.m. on the date specified above, to the office of the following addressee:

Clerk of the Court of Appeal
Second Appellate District
Ronald Reagan Bldg., 2nd Floor
300 South Spring Street
Los Angeles, CA 90013

Clerk of the Superior Court
(re: the Honorable Rolf M. Treu,
Judge Presiding, Department 58)
111 North Hill Street
Los Angeles, CA 90012

I am employed in the office of a member of the bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 2, 2008, at Los Angeles, California.

GLORIA YOSHINAGA