



Will your client be liable for the defendant's costs if your employment case is unsuccessful?

Recent California Supreme Court decision provides comfort for FEHA plaintiffs

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Plaintiffs alleging employment law violations are usually ordinary people with limited means. Although contingency representation and one-way fee-shifting statutes provide workers with access to the courts, the risk of being held liable for the employer's costs if the case is unsuccessful can deter employees from bringing suit. Court-reporter fees, transcription costs, and court-ordered expert fees may run in the tens of thousands of dollars. In extreme cases, such as the recent high-profile sex-discrimination case brought by Ellen Pao against venture capital firm Kleiner Perkins, the defense seeks costs approaching \$1 million.¹

Recently, the California Supreme Court provided clarity regarding the risk that plaintiffs face of bearing defendants' costs in unsuccessful FEHA cases. In *Williams v. Chino Valley Independent Fire District* (May 4, 2015) __ Cal.4th __, 2015 WL 1964947, the Court held that a losing FEHA plaintiff will be liable for the employer's costs only upon a finding that the action was objectively without foundation. This article summarizes the *Williams* decision, discusses the primary differences between state and federal law regarding cost-shifting, and explores whether plaintiffs' attorneys may assume liability for costs if their clients do not prevail on their claims.

The *Williams* decision limits exposure to costs under FEHA

The *Williams* Court was called upon to reconcile Code of Civil Procedure section 1032, which entitles a prevailing party to recover ordinary court costs "as a matter of right" "except as otherwise expressly provided by statute," and Government Code section 12965(b) (FEHA's fee-and cost-shifting provision), which states that "the court, in its discretion, may award to the prevailing party ... reasonable attorney's fees and costs, including expert witness fees."

The Court concluded that FEHA's fee-and cost-shifting provision is an express exception to the general rule contained in the Code of Civil Procedure. The Court went on to hold that a prevailing FEHA defendant's costs, like its attorneys' fees, should be shifted to the plaintiff only if the case was "objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so." In so holding, the Court resolved a Court of Appeal split on this issue, which had placed unsuccessful FEHA plaintiffs at greater risk of being held liable for costs. Compare *Cummings v. Benco Bldg. Servs.* (1992) 11 Cal.App.4th 1383 with *Perez v. Cnty. of Santa Clara* (2003) 111 Cal.App.4th 671 and *Knight v. Hayward Unified Sch. Dist.* (2005) 132 Cal.App.4th 121.

The "objectively without foundation" standard originates in the U.S. Supreme

Court's landmark decision establishing one-way attorneys' fee-shifting under Title VII. (See *Christianburg Garment Co. v. E.E.O.C.* (1978) 434 U.S. 412 (holding that under Title VII, prevailing plaintiffs are entitled to reasonable attorneys' fees, but prevailing defendants are not unless the case was frivolous).) The *Williams* Court observed that although federal courts have not applied the asymmetrical *Christianburg Garment* rule to costs under Title VII, the language of Title VII and FEHA is materially different with respect to costs: FEHA discusses a court's discretion to award fees and costs in parallel (as quoted *supra*), while Title VII contains no comparable provision addressing costs. Accordingly, cases applying other federal civil rights statutes – those with language similar to FEHA's – such as the Americans with Disabilities Act, have applied the *Christianburg Garment* rule to costs as well as fees. (See *Williams*, 2015 WL 1964947, at *3, 8 (citing *Brown v. Lucky Stores, Inc.* (9th Cir. 2001) 246 F.3d 1182, 1190).) As a matter of statutory interpretation, the California Supreme Court held that costs and fees should be treated identically under FEHA – an outcome that the Court viewed as consistent with the Legislature's desire to ensure that employees are not discouraged from vindicating their civil rights under FEHA. The case provides an important protection for California workers.

