



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.



The federal lay of the land: Less favorable and more varied

Federal Rule of Civil Procedure 54(d), which is the equivalent of California Code of Civil Procedure section 1332, states that costs “should be allowed to the prevailing party” unless “a federal statute, these rules, or a court order provides otherwise.” The types of costs subject to this rule are enumerated in 28 U.S.C. § 1920, and include court fees, transcription and printing fees, and court-appointed expert fees. Federal circuits have provided varied interpretations of Rule 54(d) in the employment context.

The Ninth Circuit provides district courts with a measure of discretion to deny costs to prevailing Title VII defendants. The Court has explained that such discretion is necessary to guard against “the regrettable effect of discouraging potential plaintiffs from bringing” “important, close, but ultimately unsuccessful civil rights cases.” (See *Assoc. of Mexican-American Educators v. State of Cal.* (9th Cir. 2000) 231 F.3d 572.) Although the presumption is that costs should be awarded to prevailing defendants in Title VII cases, a number of factors may support a discretionary denial of costs, including the following: the importance of the case, the closeness of the issues, the amount of the costs, whether the plaintiff’s resources are limited, and the chilling effect on future civil rights litigants. (*Id.* at 592-93.)

As noted above, the Ninth Circuit has held that costs in ADA cases, unlike Title VII cases, may not be awarded to a prevailing defendant unless the case was frivolous under the *Christianburg Garment* standard. (See *Brown*, 246 F.3d 1182.) On the other hand, the Court has held that prevailing defendants under the Rehabilitation Act are generally entitled to costs without any showing of frivolousness, because the statute’s language suggests a degree of discretion with respect to attorneys’ fees that does not extend to costs. (See *Martin v. Cal. Dept. of Veteran Affairs* (9th Cir. 2009) 560 F.3d 1042.)

In wage-and-hour cases under the Fair Labor Standards Act, district courts in the Ninth Circuit have applied the same principles as in Title VII cases, holding that losing plaintiffs presumptively bear the defendant’s costs, but that a showing of resulting inequity may serve as grounds for a discretionary denial of costs. (See, e.g., *In re Farmers Ins. Exch. Claims Representatives Overtime Pay Litig.* (D. Or. Nov. 13, 2009) 2009 WL 3834034 (holding that no special grounds for departing from the default rule existed); *Taylor v. AutoZone Inc.* (D. Ariz. June 20, 2012) 2012 WL 2357379 (same).) This is troubling because the costs of a large class or collective action can be considerable, and the risk of being held liable for such costs could well deter employees from serving as named plaintiffs in meritorious wage violation suits. (See, e.g., *In re Farmers Ins.*, 2009 WL 3834034 (awarding costs of \$320,000 to defendants in multi-district wage & hour litigation).) Numerous courts in the circuit have noted, however, that the deterrent effect is absent when the client’s fee agreement states that the attorney will bear such costs. (See, e.g., *Taylor*, 2012 WL 2357379, at *2); *Jardin v. DATAlegro, Inc.* (S.D. Cal. Oct. 12, 2011) 2011 WL 4835742, at *4 (rejecting request to deny costs in part because plaintiff “has not argued that he – as opposed to his counsel, pursuant to a fee agreement – will have to pay the cost award himself”); *Tibble v. Edison Int’l.*, 2011 WL 3759927, at *3 (C.D. Cal. Aug. 22, 2011) (noting that chilling effect would be minimal because fee arrangement required attorneys to pay costs).) Ethical issues surrounding plaintiffs’ attorneys agreeing to bear costs of prevailing defendants are explored further in the following section.”

Some circuits provide district courts with a measure of flexibility similar to that of the Ninth Circuit. (See, e.g., *Moore v. Cnty. of Delaware* (2d Cir. 2009) 586 F.3d 219, 221 (appropriate reasons to deny costs include, but are not limited to, misconduct by prevailing party, public

importance of the case, difficulty of issues presented, and losing party’s financial resources).) Others interpret Rule 54(d) in a much less plaintiff-friendly manner. For example, the Seventh Circuit applies a rigid rule, forbidding district courts from denying costs to prevailing defendants in Title VII cases unless (i) there has been misconduct by the defendant or (ii) the plaintiff can make a detailed, documented showing of “indigence,” such that he or she is “incapable of paying the court-imposed costs at this time or in the future.” (See *Rivera v. City of Chicago* (7th Cir. 2006) 469 F.3d 631, 635-36.) Even under the ADA, courts in the Seventh Circuit award costs to prevailing defendants, without limiting such cost awards to frivolous cases. (See, e.g., *Sanglap v. LaSalle Bank, FSB* (N.D. Ill. 2002) 194 F. Supp. 2d 798, 803.

An attorney filing a case in a new jurisdiction or under an unfamiliar statute would be well-advised to determine whether the applicable cost-shifting rules differ from those with which the attorney is familiar.

Can a plaintiff’s attorney pay the defendant’s costs?

If a potential plaintiff is deterred by the risk of being held liable for the defendant’s costs, can the attorney promise to indemnify the client for such costs? If the issue was not discussed at the retention phase, can the attorney, out of sympathy for an unsuccessful client, voluntarily offer to cover the cost award? As noted above, several decisions in FLSA cases have alluded to plaintiffs’ attorneys doing just that in their fee agreements. However, the question implicates the ethical rules, and does not necessarily have a straightforward answer.

California Rule of Professional Conduct 4-210 states:

A) A member shall not directly or indirectly pay or agree to pay, guarantee, represent, or sanction a representation that the member or member’s law firm will pay the personal or business



expenses of a prospective or existing client, except that this rule shall not prohibit a member: ...

(3) From advancing the costs of prosecuting or defending a claim or action or otherwise protecting or promoting the client's interests, the repayment of which may be contingent on the outcome of the matter. Such costs within the meaning of this subparagraph (3) shall be limited to all reasonable expenses of litigation or reasonable expenses in preparation for litigation or in providing any legal services to the client.

A Bar Association of San Francisco advisory ethics opinion interpreting an earlier version of the rule stated: "[I]t does not strain the meaning of 'advance' in the context of litigation to read it as requiring repayment out of a recovery and only to the extent that there is a recovery." (See S.F. Bar Op. 1985-2.) Indeed, in 1989 the Rule was revised to embody that principle (adding the phrase "repayment of which may be contingent on the outcome of the matter"). However, the opinion also noted that "for purposes of this opinion, 'costs' do not include costs assessed against the client in the event of an unsuccessful outcome, nor do they include attorneys' fees assessed against the client pursuant to any statutory or common law fee-shifting provision." The opinion went on to state that the client's retainer agreement "should make clear that costs or attorneys' fees awarded to one's adversary are not included in the attorney's undertaking." The opinion was not called upon to decide whether an attorney could agree to bear the opponent's

costs for a losing client, but its comments suggest that it would not necessarily have analyzed such costs the same as it did the client's own costs.

When the question was put squarely to the Los Angeles County Bar Association, that Bar concluded that "at either the inception of the representation or during the course of litigation, an attorney may agree to indemnify the client for court ordered costs if the client is not the prevailing party." (See L.A. County Bar Ass'n Ethics Op. 517 (2006).) The opinion reasoned that this result "is not materially different from advancing costs repayment of which is contingent on the outcome."

The issue is similar under the ABA Model Rules. Rule 1.8(e) states:

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that ... a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.

Comment 10 to the Model Rule states:

Lawyers may not subsidize lawsuits or administrative proceedings brought on behalf of their clients, including making or guaranteeing loans to their clients for living expenses, because to do so would encourage clients to pursue lawsuits that might not otherwise be brought and because such assistance gives lawyers too great a financial stake in the litigation. These dangers do not warrant a prohibition on a lawyer lending a client court costs and litigation expenses, including the expenses of

medical examination and the costs of obtaining and presenting evidence, because these advances are virtually indistinguishable from contingent fees and help ensure access to the courts.

...

This article cannot provide an answer or legal advice, but any attorney considering whether to agree to pay the defendant's costs if the case is unsuccessful should be fully aware of the applicable ethical rules and guidance before making a decision.

Fortunately, at least in the context of FEHA cases, the Supreme Court's recent *Williams* decision should give comfort to California employees thinking of asserting their employment rights.

Endnote

¹ In the *Pao* case, \$865,000 of the pending costs motion is attributed to expert witness fees, and the costs issue is complicated by the fact that the defendant made a pre-trial offer of judgment under California Code of Civil Procedure § 998, which is an additional consideration for plaintiffs but is outside the scope of this article.

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