

EMPLOYMENT LAW UPDATE

Juan C. Aranedo
Jennifer A. Becker
David P. Borovsky
Shoshana Y. Chazan
Chip Cox
Edward F. Donohue, III
Kathleen M. Ewins
Kathleen A. Foley
Howard M. Garfield
Jason A. Geller
J. Michael Higginbotham
John B. Hook
William L. Jacobson
Anna Kapetanakis
Joseph P. McMonigle
Douglas J. Melton
Jessica B. Rudin
Richard J. Sciaroni
Steven Sharaftian
Jennifer W. Suzuki
Jeanette Traverso
Karen L. Uno
Seth E. Watkins
Gerald G. Weisbach
Irene K. Yesowitch

September 22, 2003

Issue No. 86

California Law

***Perez v. County of Santa Clara* (CA6 August, 25, 2003)
03 C.D.O.S. 7771**

Defendant Employers In FEHA Actions May Recover Ordinary Costs Of Litigation Even If Plaintiff's Lawsuit Was Not Frivolous, Groundless Or Unreasonable.

By Jason A. Geller and Jessica B. Rudin

Perez sued her employer, the County of Santa Clara, for racial discrimination and retaliation under the California Fair Employment and Housing Act ("FEHA"). She alleged the County failed to promote her based on her race and then retaliated against her when she filed EEOC complaints. At trial, the Court found that Perez proved a prima facie case of racial discrimination; however, the County had established a legitimate non-discriminatory reason for the delay in promotion, which Perez could not rebut. Similarly, the Court found that Perez proved a prima facie case for retaliation; however, the County had established that there was no causal link between Perez's filing of EEO complaints and the acts upon which she premised her claim. The Court entered judgment in favor of the County.

The County requested that the Court require Perez to reimburse it for its litigation costs but not its attorneys' fees. Perez argued that the request was improper on the grounds that Government Code Section 12965(b)

allows an award of attorneys' fees and costs to a prevailing defendant in an employment action only where the plaintiff's action was "frivolous, unreasonable or groundless." The Court agreed with Perez.

The Court of Appeal reversed. It acknowledged another case, ***Cummings v. Benco Building Services***, that held awards of fees and costs to prevailing defendants can be made only where a plaintiff's action was found to be frivolous. The ***Perez*** court questioned whether this stringent test should be applied to ***both*** awards of attorneys' fees and costs.

Under both Federal and California law, prevailing parties are entitled to recover costs (as opposed to attorneys' fees). There is a strong public policy in favor of limiting awards of attorneys' fees to prevailing defendants. Attorneys' fees can be significant and difficult to predict; therefore, awards of fees in all cases in which defendants prevail could deter plaintiffs from filing meritorious

claims. However, there is *no* similar public policy in favor of limiting awards of costs. When compared to fees, ordinary litigation costs are predictable and small.

Based on this reasoning, the *Perez* court held that defendant employers who successfully defeat FEHA claims may now seek ordinary litigation costs without proving the plaintiff's action was frivolous, unreasonable or groundless.

DOCSZ9901-500466575.V1

This publication is intended for general information purposes only and does not constitute nor is it intended to constitute legal advice. The reader must consult with legal counsel to determine how laws or decisions discussed here apply to the reader's specific circumstances including whether the case may have been depublished after the date of this publication.