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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@portfoliomedia.com

The Weight Of Chavez V. City Of Los Angeles

Law360, New York (February 02, 2010) -- The California Supreme Court has come down with a significant new opinion in Chavez v. City of Los Angeles that could radically alter the balance of power in the never-ending battle between the interests of employers and employees here in the state.

Or maybe not.

Instead, it could amount to nothing more than a whimper if the trial courts in the state don't rally behind the principles underlying the decision. Only time will tell.

But to understand the potential impact of the Chavez decision, it is first important to get a lay of the land here in the State Of Never-Ending Supply Of Employment Lawsuits. The first place to start is with the rules governing the recovery of attorney's fees in employment cases.

FEHA and Fees

In California, most employees with discrimination, harassment, or retaliation claims against their employers bring them under California's Fair Employment and Housing Act (FEHA), rather than the federal Title VII, for a variety of reasons (all of them having to do with the fact that FEHA is apparently the most employee-friendly statutory scheme in America.)

One of FEHA's most significant provisions is a very neutral-sounding fee-shifting rule. Remember the "American Rule" of attorney's fees learned in law school (pay your own way)? Well, throw that out the FEHA window. For claims brought under the statute:

"[T]he court, in its discretion, may award to the prevailing party reasonable attorney's fees and costs ..." (Cal. Government Code section 12965(b))

Sounds fair enough. The "prevailing party," regardless of who it is, employee or employer, plaintiff or defendant, may be awarded his/her/its attorney's fees. Even, reciprocal, fair.

And wrong.

While a plain reading of the statute is that "the prevailing party" — i.e, the party that wins, be that employer or employee — may recover his, her, or its reasonable attorney's fees, the courts apparently don't read plainly. Instead, the courts in California (taking their lead from the U.S. Supreme Court interpreting Title VII) have determined that this statute really says:

"The trial court, in its discretion, should ordinarily award a prevailing plaintiff employee his or her attorney's fees unless special circumstances would render such an award unjust."

(Paraphrasing Christiansburg Garment Co. v. EEOC (1978) 434 U.S. 412 [98 S.Ct. 694, 54 L.Ed.2d 648], as adopted in California in Cummings v. Benco Building Services (1992) 11 Cal.App.4th 1383.)

So under FEHA, the prevailing employee "ordinarily" gets his or her attorney's fees paid for by the losing employer.

And the prevailing employer? (Do you even need to ask?)

The California courts, again in their infinite wisdom, have determined that the neutral-sounding statute instructs trial courts that they may:

"award attorney's fees to a prevailing employer only when the plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith."

(Thanks once again to the Christiansburg Garment and Cummings courts.)

So to summarize the bidding: Prevailing employees "ordinarily" recover their attorney's fees; prevailing employers only recover fees if the action was frivolous or in bad faith. Or stated in the way most employers here understand it: prevailing employees always get fees; prevailing employers never do.

The Policy Behind the One-Sided Fee-Shifting Rule

Without going into the whole law school debate over whether courts should or should not engage in policy-making by the way they construe statutes, California courts (and the U.S Supreme Court, for that matter) did have a reason for tilting the fee-recovery balance in favor of employees.

Employees of limited means — those at the lowest end of the pay and power structure in today's economy — are likely to be subject to civil rights abuses (sexual harassment, racial discrimination, retaliation, etc.).

They are also the least likely to be able to enforce those rights — they can't afford attorneys on an hourly basis; and because their damages are more likely to be relatively low (since they were not making much to begin with), they could have trouble attracting the interest of attorneys willing to handle their cases on a contingency basis.

Nearly guaranteeing the recovery of attorney's fees to prevailing employees, paid for by the losing employer defendant, is a fantastic way of incentivizing attorneys to take on the cases of those most vulnerable. That's a nice upside.

And to make the equation even more attractive, reduce the downside: If the employee loses, don't put him or her at risk of paying the prevailing employer's fees. Plenty of upside, very little downside.

By all appearances, the encouragement has worked.

Unintended Consequences

But as with any medicinal, there do appear to be some unintended side effects.

There are some who say this one-sided fee-shifting rule encourages plaintiff's employment attorneys to excessively work up their cases — to generate unnecessary attorney's fees — solely to increase the settlement value of the case and increase any attorney's fee recovery after trial.

A $10,000 employment case becomes one worth $10,000 plus attorney's fees. So, the more attorney's fees that are generated on this case, the more the case is "worth." When it comes to settlement discussions, the $10,000 case is presented as one "worth" $300,000 (there were a lot of depositions necessary, and all those motions to compel ...).

The incentives are now built in to over-lawyer simple cases solely to drive up the attorney fee portion of the ultimate recovery — a fee award that is, according to the court, to be "ordinarily" granted.

Could these incentives actually turn an $11,500 employee verdict into an attorney's fee application for $870,000? The answer is — or at least was — YES.

Which leads us to Chavez v. City of Los Angeles.

The Chavez Case

In the underlying case, police officer Robert Chavez had some issues with his employer. Without going into all of the details here, they involved false allegations of payroll check theft, claims of helicopter surveillance of the officer's home, psychiatric care, complaints by crime victims, stress leaves, a rescinded transfer to another division, and a whole slew of lawsuits, removals, dismissals and refilings.

Ultimately, after a five-day jury trial, the trial judge threw out some claims on nonsuit, and the jury found for the employer on nearly all the rest. However, the jury returned a verdict for the officer on one FEHA claim, finding (a) that the officer had in fact been denied a transfer to another division; (b) that this denial had been in retaliation for the officer's engaging in protected activity; and (c) that the officer had suffered economic damages.

How much were the damages? $1,500! Add in the $10,000 general damages for the officer's emotional distress and you have a total verdict of $11,500.

The plaintiff's attorney followed up the verdict with a motion for recovery of his attorney's fees in the amount of approximately $436,000, which he then doubled under a "lodestar" calculation (it wasn't easy getting that $11,500) for a total fee application of over $870,000!

The defense, naturally enough, opposed the application. While probably wishing they could say what they really felt, the defense politely argued that the plaintiff had "overreached and outrageously inflated his fee request," and asked that fees be (a) denied altogether or (b) substantially reduced.

The trial court went with defense option (a) and rejected the plaintiff's fee request outright.

The appellate court rejected the trial court's rejection of the fee request, ruling that the trial court had to award the $870,000 in attorney's fees to the prevailing plaintiff under FEHA's fee-shifting statute.

The Supreme Court reversed, and upheld the trial court's discretion to reject the fee application.

The Legal Principles At Work

The Chavez court reviewed FEHA's fee shifting statute, and noted the intentional tipping of the balance in favor of employee fee awards, and against employer fee awards. However, the court also looked at another statutory scheme that was called in to play.

Code of Civil Procedure Section 1033(a) deals with the situation where a plaintiff brings an action as an unlimited civil case (i.e., damages in excess of $25,000), but recovers an amount that could have been recovered in a limited civil case (i.e., less than $25,000).

When a plaintiff brings an unlimited civil case but fails to recover at least $25,000, the trial court has discretion under 1033(a) to deny the plaintiff recovery of his or her costs of suit. The idea is to encourage small cases to be brought in a limited civil case where the procedures are streamlined and less expensive.

Attorney's fees are considered costs of suit. So under 1033(a), a trial court in an unlimited civil action has the discretion to deny an attorney's fee application where the plaintiff recovered damages less than $25,000.

But under FEHA, as we have seen, a prevailing employee is "ordinarily" entitled to his or her fees "unless special circumstances would render such an award unjust."

So who wins when a FEHA plaintiff in an unlimited civil action obtains a verdict in her favor (thereby "ordinarily" entitling her to a recovery of attorney's fees), but the verdict is less than $25,000? Does the trial court have discretion under 1033(a) to deny the fee application? Or must the trial court award the fees under FEHA?

Using simple enough logic, the Supreme Court noted that under FEHA, the prevailing employee "ordinarily" should be awarded his or her fees, "unless special circumstances would render such an award unjust."

What kind of "special circumstances" would render a fee award "unjust?" How about if an employee filed an unlimited civil action, but only recovered a small amount? This, according to the Supreme Court, may in fact "be considered a special circumstance that would render a fee award unjust."

Since just about every employment case is brought as an unlimited civil suit, the Supreme Court is saying that it is perfectly within a trial court's discretion to deny a prevailing employee's fee application when he or she recovers less than $25,000. In the Court's words:

"But if, to the contrary, the trial court is firmly persuaded that the plaintiff's attorney had no reasonable basis to anticipate a FEHA damages award in excess of the amount recoverable in a limited civil case, and also that the action could have been fairly and effectively litigated as a limited civil case, the trial court may deny, in whole or in part, the plaintiff's claim for attorney fees and other litigation costs."

What's the Impact of This Case?

Here's the $870,000 question: Will Chavez have any impact on either (a) the filing of unmeritorious or marginal employment lawsuits; or (b) the over-lawyering of simple employment lawsuits?

One could say that the California Supreme Court is sending a message to the bench and bar that the pendulum has swung far enough in favor of the employees, and it is now time to bring it back, if only a little.

Look at the Roby v. McKesson decision's reining in of punitive damage awards. Look at the Hernandez v. Hillside decision to allow limited workplace surveillance. Look at the court's decision to allow the appellate court's Chau v. Starbuck's decision to stand, denying class certification of a nearly $100 million tip sharing action. And now Chavez — it's OK to deny award attorney's fees to successful employee plaintiffs.

But will anyone listen? Now that the Court That Must Be Obeyed has expressly blessed the trial court's discretion to deny attorney's fee awards to employee plaintiffs who recover less than $25,000 in unlimited civil actions, will the trial courts answer the call?

As the gatekeepers, will the trial courts now start exercising their discretion to deny fee applications to employee plaintiffs who have clearly over-lawyered their cases to run up fees, or whose recoveries pale in comparison to the expense of getting there?

And if the trial courts begin to exercise some discretion, will plaintiff's attorneys be more selective in the cases they take? Will they litigate the smaller cases more in line with their actual value? Will they be sufficiently discouraged to overlitigate the small ones such that the settlement value of the small cases are actually in line with the claimed injury suffered by the employee?

Will there be more balance between the interests of employers and employees in California courts? Is that Pendulum swinging back?

The jury is out ...

--By Michael D. Young, Alston & Bird LLP

Michael Young is a partner with Alston & Bird in the firm's Los Angeles office and head of the firm's California labor and employment practice. He is also the primary editor of Alston & Bird's California labor and employment blog, Who's The Boss? Labor and Employment In Today's California (www.alston.com/laborandemploymentblog).

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