LIU, J.

CRC 8.25(b)

SUPREME COURT
FILED

OCT -1 2013

Frank A. McGuire Clerk

Deputy

No. S213100

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

LORING WINN WILLIAMS,

Plaintiff and Appellant,

v.

CHINO VALLEY INDEPENDENT FIRE DISTRICT,

Defendant and Respondent.

After A Decision By The California Court of Appeal,
Fourth District, Division Two, No. E055755

San Bernardino Superior Court, No. CIVRS801732
The Honorable Janet M. Frangie

REPLY TO ANSWER TO PETITION FOR REVIEW

Donald E. McInnis (SBN 59720)
Ben-Thomas Hamilton (SBN 222601)
HAMILTON & McINNIS, L.L.P.
3110 Camino del Rio South, Suite 203
San Diego, California 92108
Telephone: (619) 299-4877
Facsimile: (619) 299-4787

Attorneys for Plaintiff/Appellant
Loring Winn Williams

No. S213100

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

LORING WINN WILLIAMS,

Plaintiff and Appellant,

v.

CHINO VALLEY INDEPENDENT FIRE DISTRICT,

Defendant and Respondent.

After A Decision By The California Court of Appeal,
Fourth District, Division Two, No. E055755

San Bernardino Superior Court, No. CIVRS801732
The Honorable Janet M. Frangie

REPLY TO ANSWER TO PETITION FOR REVIEW

Donald E. McInnis (SBN 59720)
Ben-Thomas Hamilton (SBN 222601)
HAMILTON & McINNIS, L.L.P.
3110 Camino del Rio South, Suite 203
San Diego, California 92108
Telephone: (619) 299-4877
Facsimile: (619) 299-4787

Attorneys for Plaintiff/Appellant
Loring Winn Williams

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

Federal Statutes

Rules

INTRODUCTION

In his petition for review, Loring Winn Williams demonstrated that review by this Court was necessary to resolve a split in published appellate authority concerning an important question of law. The issue is whether a prevailing defendant in an FEHA action is required to show that a claim was frivolous, unreasonable, or groundless in order to recover ordinary litigation costs.

The answer filed by Respondent Chino Valley Independent Fire District ("Chino Fire") does not refute that review is necessary to resolve this unsettled issue. Chino Fire attempts to argue there is no conflict requiring this Court's review, but fails. The Courts of Appeal have expressly recognized a split of authority on the exact issue presented in the petition. Moreover, Chino Fire's argument that there can be no split between federal and California authority is simply wrong. Ultimately, rather than show a lack of conflict, Chino Fire's answer actually highlights the split in authority and the essential need for Supreme Court review to resolve this unsettled issue.

DISCUSSION

I. The Conflict In Published California Appellate Authority On the Issue Presented Is Real—It Has Been Expressly Recognized By the Courts of Appeal

Chino Fire contends there is no split of authority presented in the petition for this Court to resolve. This contention is, quite frankly, absurd.

The issue here is whether the *Christiansburg* standard[1] —which requires a showing of frivolousness by a prevailing defendant—applies to awards of ordinary litigation costs. (*See* Petition 1; Opn. 2.) The Courts of Appeal have reached conflicting conclusions on the answer to this question.

Cummings v. Benco Building Services (1992) 11 Cal.App.4th 1383 ("*Cummings*") holds that "[t]he standard a trial court must use in exercising its discretion in awarding fees ***and costs*** to a prevailing defendant was set forth in the Supreme Court's decision in *Christiansburg*." (*Id.* at 1386-1388, *emphasis added.*) In *Cummings,* the Court of Appeal implicitly found that Government Code section 12965(b) controls over Code of Civil Procedure section 1032(b) for the purposes of awarding costs in an FEHA action. (*Ibid.*). This is evidenced by the Court of Appeal's ultimate holding in the case applying the *Christiansburg* standard and its finding that the trial court "abused its discretion in awarding costs...." (*Id.* at 1387). Under section 1032(b), there is no discretion in awarding costs as set forth in section 12965(b). (*Compare* Cal. Code Civ. Proc. § 1032(b), *with* Cal. Gov. Code § 12965(b).) The Court of Appeal's decision to apply section 12965(b) in *Cummings* demonstrates the propriety of applying section 12965(b) in FEHA discrimination cases over section 1032(b) for the purposes of awarding costs. This is the exact "interplay" argued by Chino

[1] This standard was set forth by the U.S. Supreme Court in *Christiansburg Garment Co. v. E.E.O.C.* (1978) 434 U.S. 412, 417-421.

Fire in its opposition and the exact reason why this issue needs resolution before this Court.

The published Opinion here as well as *Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671, 680-681 ("*Perez*") hold that costs "are not subject to *Christiansburg*." (Opn. 16-17; *see also Knight v. Hayward Unified School District* (2005) 132 Cal.App.4th 121, 135-136 ("*Knight*") [following *Perez* in concluding costs are not subject to *Christiansburg*].)

The split between *Cummings* and the holdings in *Perez* and *Knight* has been ***expressly*** recognized by the Courts of Appeal. (*Baker v. Mulholland Security & Patrol, Inc.* (2012) 204 Cal.App.4th 776, 783 ["The Courts of Appeal are split about whether [the *Christiansburg*] standard applies to an award of *ordinary litigation costs* to a prevailing FEHA defendant."], *emphasis in original*; *Holman v. Altana Pharma US, Inc.* (2010) 186 Cal.App.4th 262, 279 ["[T]here is a split of authority about whether the *Christiansburg* standard applies to 'costs.'"].)

Despite this irrefutable split on the very issue presented for review, Chino Fire, inexplicably, still insists there is no split in authority. (Answer 5-6.) Instead, Chino Fire makes the puzzling argument that no split exists because *Cummings* and the conflicting cases applied differing analyses in arriving at their divergent conclusions with respect to whether *Christiansburg* applied to an award of costs. (*Id.* at 5.) This is nonsense. Rather than show no conflict as Chino Fire suggests, the differing analyses

and contradictory conclusions in these cases form the very basis of the split and the resultant need for review. The ultimate question here is whether the *Christiansburg* standard applies to an award of costs to a prevailing defendant in an FEHA case. On this question, which is the one presented for review, the courts are undeniably split.

Chino Fire itself highlights the sharp split in published appellate authority by detailing the criticisms of *Cummings* by the courts in *Perez* and *Knight*. (*Id.* at 6.) Far from supporting Chino Fire's argument that there is no split, this shows precisely why review is "necessary to secure uniformity of decision." (*See* Cal. Rules of Court, rule 8.500(b)(1).)

By ignoring this obvious conflict and opposing Supreme Court review, Chino Fire is doing a disservice to this Court. The petition shows trial courts and litigants need guidance and finality as to whether the *Christiansburg* standard applies to costs. Without guidance from this Court, the law will remain unsettled and parties will be uncertain as to which authority a trial court will ultimately follow. (Petition 4.) Yet, Chino Fire's answer does not even address the ground, under Rule 8.500(b)(1), that review by this Court is urgent and needed to "settle an important question of law" so parties can be certain of the standard that will be applied to costs awards to prevailing FEHA defendants. (*See* Petition 4 & 12 (discussing "important question of law" ground for review).)

Indeed, even after *Perez* split with *Cummings*, some courts have relied on *Perez* and declined to apply the *Christiansburg* standard to costs, while other courts applied the *Christiansburg* standard to costs, relying on *Cummings*.

For example, in the instant case, the Court of Appeal relied on *Perez* in holding the *Christiansburg* standard does not apply to costs. (Opn. 16-17.) Conversely, other courts have relied on *Cummings* in holding the *Christiansburg* standard "governs a prevailing defendant's claim for attorney's fees and costs under FEHA." (*Dow v. Lowe's Home Improvement, Inc.* (N.D. Cal. Jan. 23, 2007) 2007 U.S. Dist. LEXIS 101223 at p. 2.)[2]

Such inconsistent application of the law will continue without review, which is why this Court needs to step in and resolve this issue once and for all. This case presents the ideal instrument to do exactly that.

II. Review Is Necessary To Reconcile California Cases With Federal Cases Construing The Similarly Worded Federal Statute

Next, Chino Fire's answer attempts to brush aside directly relevant federal cases interpreting similarly worded antidiscrimination statutes under federal law. (Answer 12.) It makes the cursory argument that "federal cases are not binding, they cannot create a 'split.'" (*Ibid.*) This is wrong.

---

[2] The Opinion discusses *Dow v. Lowe's Home Improvement, Inc.*, noting the court in that case "cited *Cummings* to support this assertion but did not discuss either *Perez* or *Knight*." (Opn. 14.)

The applicable federal cases discussed in the petition are binding, and federal authority can create a split.

If California courts simply disregard directly applicable federal cases interpreting similarly worded federal antidiscrimination provisions, as Chino Fire insists they should, it turns on its ear the well-established principle that California courts look to federal decisions in interpreting the FEHA. (*See, e.g., Reno v. Baird* (1998) 18 Cal.4th 640, 647 ["Because the antidiscrimination objectives and relevant wording...are similar to those of the FEHA, California courts often look to federal decisions interpreting these statutes for assistance in interpreting the FEHA."].) In fact, cases interpreting similarly worded federal antidiscrimination law are binding on California courts.

The Legislature has mandated that the FEHA be "construed liberally." (Cal. Gov. Code § 12993.) It has also declared that the ADA "provides a floor of protection" and that California law has always "afforded additional protections." (Cal. Gov. Code § 12926.1.) If California courts were permitted to apply a more restrictive view of the FEHA than federal courts use when applying the analogous ADA provisions, it would render these legislative mandates meaningless. This cannot be. Thus, if a federal court construes an antidiscrimination statute more liberally than California courts interpret a similarly worded state law, then the federal court view of the law becomes binding on California

courts. (*See Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, 664-665 ("*Munson*") [disapproving California cases applying state antidiscrimination law in a manner that conflicted with the ADA].) *Munson* also shows that that this Court recognizes splits in authority between California and federal cases, and regularly grants review to ensure uniformity of decision between the two. (*Ibid.*) This defeats Chino Fire's argument that federal cases are not binding, cannot create a split in authority, and cannot create a basis for review before this Court.

As shown in the petition, there is a clear split between the Opinion below, interpreting Government Code section 12965(b), and the decisions of the Ninth Circuit in *Estate of Martin v. California Dept. of Veterans Affairs* (9th Cir. 2009) 560 F.3d 1042, 1052 and *Brown v. Lucky Stores* (9th Cir. 2001) 246 F.3d 1182, 1190, interpreting the similarly worded ADA provision, 42 U.S.C. § 12205. (Petition 13-17.) Even though these cases are discussed at length in the petition, Chino Fire does not mention them in its answer at all. Ignoring them does not make review any less essential to ensure uniformity of decision between these conflicting state and federal opinions.

III. The Proper Statutory Interpretation of the FEHA Costs Provision Remains Unsettled

The petition argues that the Legislature implicitly endorsed *Cummings'* application of the *Christiansburg* standard to both costs and

fees when, following *Cummings*, the Legislature amended Government Code section 12965(b) and left the language relating to costs unchanged. (Petition 17-19.) Nevertheless, there remains the unsettled question of whether the *Christiansburg* standard applies to a cost award to a prevailing FEHA defendant. Thus, this Court's guidance is needed to settle this important question of law as set forth in the petition. (*Ibid.*)

Chino Fire's answer includes a heading indicating it has a rebuttal to this argument, but fails to provide any. Instead, Chino Fire's answer merely rehashes its discredited argument that there is no conflict.

There is a split in published authority, and this case presents an important question of law that this Court should settle. This case is ideal to bring resolution to this pressing issue.

CONCLUSION

Based on the foregoing, Petitioner Loring Winn Williams respectfully requests that the Supreme Court grant review to resolve the conflict in published authority and settle this important issue of law.

Dated: September 30, 2013

HAMILTON & McINNIS, L.L.P.

By: _____

Ben-Thomas Hamilton, Attorneys for
Plaintiff and Appellant
Loring Winn Williams

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.504(d)(1), and in reliance on the word count feature of the software program used to prepare this document, I certify that this Reply to Answer to Petition for Review contains 1,833 words, which is less than the total words permitted by the rules of court.

Dated: September 30, 2013

HAMILTON & McINNIS, L.L.P.

By: 

Ben-Thomas Hamilton, Attorneys for Plaintiff and Appellant Loring Winn Williams

No. S 213100

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

LORING WINN WILLIAMS,

Plaintiff and Appellant,

v.

CHINO VALLEY INDEPENDENT FIRE DISTRICT

Defendant and Respondent.

After a Decision By The California Court of Appeal,
Fourth District, Division Two, No. E055755

San Bernardino Superior Court, No. CIVRSS801732
The Honorable Janet M. Frangie

PROOF OF SERVICE

Donald E. McInnis (SBN 59720)
Ben-Thomas Hamilton (SBN 222601)
HAMILTON & McINNIS, L.L.P.
3110 Camino del Rio South, Suite 203
San Diego, California 92108
Telephone: (619) 299-4877
Facsimile: (619) 299-4787

Attorneys for Plaintiff/Appellant
Loring Winn Williams

The Honorable Janet M. Frangie
c/o Clerk of Court, Dept. R9
SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN BERNARDINO
8303 N. Haven Avenue
Rancho Cucamonga, California 91730

Clerk of Court
COURT OF APPEAL, FOURTH DISTRICT, DIVISION TWO
3389 Twelfth Street
Riverside, CA 92501

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 30, 2013.

Michelle L. Musgrove