No. S213100

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LORING WINN WILLIAMS,
Plaintiff and Appellant,

vs.

CHINO VALLEY INDEPENDENT FIRE DISTRICT,
Defendant and Respondent.

Court of Appeal, Fourth Appellate District, Case No. E055755
San Bernadino County Superior Court Case No. CIVRS801732

OPENING BRIEF ON THE MERITS

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INTRODUCTION

When statutory construction *and* public policy considerations both point to the same conclusion, it is fair to say that the conclusion is probably the correct one. That is our case. As we detail below, all roads lead to the conclusion that an unsuccessful plaintiff in a FEHA action should not be required to pay costs to the defendant except in those rare cases in which the defendant has shown an entitlement to recover its attorney's fees, *i.e.*, proof that the plaintiff's action was frivolous.

This case goes to the heart of the effective enforcement of California's most important civil rights employment statute: the Fair Employment and Housing Act (FEHA). The FEHA declares that the right to work free from discrimination is a "civil right." (*Gov. Code* §12921(a).) The FEHA was enacted because the Legislature fully recognized that "employment discrimination 'foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.'" (*Gov. Code* §12920.)

To ensure that discrimination in the workplace is eradicated, the FEHA's "forward-looking goal of preventing and deterring unlawful discrimination goes beyond the tort-like objective of compensating an

aggrieved person for the effects of wrongs done in any individual case." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 225.)

To further these important policies, the Legislature crafted a statutory scheme (including provisions for damages and attorney fees recovery) intended to provide incentive to individual victims of unlawful employment practices to file private actions. In doing so the Legislature recognized the limits of government resources to police the millions of employers in California.

But unless employees are willing to stand-up for their rights and pursue claims under the FEHA, the "forward-looking goal" of the FEHA will never be accomplished. If the potential price to enforce one's workplace anti-discrimination rights may be too steep, victims of discrimination will be chilled and deterred from standing-up for their rights. And if victims of discrimination are deterred from standing-up for their rights, the FEHA's purpose of providing "effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons" will be undermined. (Gov. Code §12920.5.)

Thirty-five years ago, the United States Supreme Court upheld these principles in *Christiansburg Garment Co. v. Equal Employment*

Opportunity Commission (1978) 434 U.S. 412. There, even though the anti-discrimination statute in question gave "prevailing party" attorney fee recovery rights to either side, the Court held that the statute must be construed in a manner that would not "substantially undercut the efforts of Congress to promote the vigorous enforcement of the provisions of" anti-discrimination law. (*Id.* at 422.) To ensure that monetary awards against an unsuccessful plaintiff employee did not undermine the purpose of the statute, the Court held that statutory attorney's fees in anti-discrimination cases may only be awarded to a prevailing defendant "upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." (*Id.* at 421.)

The *Christiansburg* standard has become a settled principle of FEHA law regarding the award of attorney's fees to a prevailing defendant. (*See e.g., Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 985.) Moreover, the initial decision concerning whether *Christiansburg* applies to an award of costs to a prevailing FEHA defendant – unsurprisingly – found that it does. (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387-1388.) Below, we establish that this holding was correct, and that the appellate court in our case erred in saying otherwise.

- First, the FEHA's text gives parallel – indeed, identical – treatment to prevailing party fees and costs. In fact, the statutory authority for the award of attorney's *fees and costs* is found in the *same sentence* of the same statute. There is nothing in the statute remotely suggesting any legislative intent that the standard for the award of attorney's fees to a prevailing defendant should be any different than an award of costs to that defendant. Rather, given the symmetrical treatment of both fees and costs within the same sentence of a single statute, it is only logical that they be governed by the same standard.

- Second, as a matter of statutory construction, the FEHA creates a limited exception to the Code of Civil Procedure's general cost recovery provisions (Code of Civil Procedure §1032). This Court has recognized that when a statute "require[s] that additional conditions be satisfied before one side of the litigation may recover costs ... the[] statute may constitute [an] express exception[] to section 1032(b)." (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 999.) In *Murillo*, this Court acknowledged that one example of a type of statute that constitutes an exception to the recovery of ordinary costs "as a matter of right" (under Code of Civil Procedure section 1032) involves those statutes that require a

finding that the action is frivolous for the prevailing defendant to obtain costs. (*Ibid.*) That rule should apply here.

- Third, and finally, the decisions that have disagreed with *Cummings* and instead held that the ordinary cost provisions of the Code of Civil Procedure control in a FEHA action are wrongly-decided. They fail to consider the parallel treatment of both fees and costs within the same statute, overlook the rationale of *Murillo* relating to exceptions to the ordinary Code of Civil Procedure cost provisions, and are premised on a fundamentally incorrect assumption view that cost awards are not substantial enough to chill or deter a FEHA plaintiff from filing suit.

For each of these reasons, this Court should hold that a successful defendant in a FEHA action should only be able to recover costs if it satisfies the same requirement needed to recover attorney's fees – proof that the action was "frivolous, unreasonable, or without justification." (*Christiansburg*, 434 U.S. at 421.)

ISSUES PRESENTED

1. Whether the standard of *Christiansburg Garment Co. v. Equal Employment Opportunity Commission* (1978) 434 U.S. 412 for an award of

attorney's fees to a prevailing defendant applies to an award of both attorney's fees and costs against an unsuccessful FEHA plaintiff where:

a. The FEHA gives parallel – indeed, identical – treatment to both fee and cost recovery rights;

b. Code of Civil Procedure section 1032(b), the general cost recovery statute, expressly recognizes that other specific cost statutes may trump it; and

c. The polices that underlie the *Christiansburg* standard fully apply to an award of costs, as well as fees, against an unsuccessful FEHA plaintiff in a non-frivolous action?

SUMMARY OF FACTS AND PROCEDURAL HISTORY

In February 2008, Plaintiff Loring "Winn" Williams – a firefighter who was the youngest person ever to achieve the rank of Captain in the history of the Chino Fire Department – filed a verified complaint alleging disability-based discrimination against the Chino Valley Independent Fire District (the District). (Clerk's Transcript [CT], 29-34.) Thereafter, Williams filed a series of amended complaints. (CT, 36-75.) Each of Williams' complaints alleged discrimination claims under California's Fair Employment and Housing Act (FEHA). (CT, 29-75.)

The District obtained summary judgment in its favor (CT, 93-94) and then filed a memorandum of costs against Williams. (CT, 76-92.) Williams moved to tax. (CT, 95-98.)

Thereafter, the case was appealed and, following a decision, by the appellate court, the District filed a second memorandum of costs seeking costs in the sum of nearly ten thousand dollars ($10,000) against Williams. (CT, 99-144 & 226.)

Williams moved to tax costs arguing, *inter alia*, that an award of costs to a prevailing FEHA defendant requires a finding that the action was frivolous, groundless or unreasonable. (CT, 145-152.) Williams then filed an amendment to the motion to tax. (CT, 184-191.) The City opposed the motion. (CT, 220-320.) Williams filed reply papers. (CT, 321-333.) The trial court held that ordinary costs under the Code of Civil Procedure can be awarded to a prevailing defendant in a FEHA action even if the case is not deemed frivolous, unreasonable or groundless, and awarded the District costs in the sum of $5,368.88. (CT, 350-351.) Judgment was then entered against Williams. (CT, 360-368.) Williams appealed. (CT, 369-370.)

In a published opinion, Division Two of the Fourth District appellate court affirmed the trial court's award of costs against Williams. (*Williams v. Chino Valley Independent Fire Dist.* (2013) 218 Cal.App.4th 73 [159

Cal.Rptr.3d 566].) The appellate court acknowledged that the *Christiansburg* standard applied to an award of fees against an unsuccessful FEHA plaintiff, but held that Code of Civil Procedure section 1032(b) applied to the award of ordinary costs to a prevailing FEHA defendant. (*Ibid.*)

ARGUMENT

I. THE PERTINENT STATUTES MAKES CLEAR THAT THE GENERAL RULES GOVERNING FEES AND COSTS GIVE WAY IN THE FACE OF SPECIFIC STATUTORY EXCEPTIONS.

The Code of Civil Procedure provides the *general rule* for cost recovery in civil litigation.[1] (*Code of Civ. Proc.* §1032, et seq.) For our purposes, there are two key statutes. First, Code of Civil Procedure section 1032(b) provides: "*Except as otherwise expressly provided* by statute, a prevailing party is entitled as a matter of right to recover costs in any action or proceeding." (*Code of Civ. Proc.* §1032(b) [italics added].) Second, Code of Civil Procedure section 1033.5 defines those costs that are allowable under Code of Civil Procedure section 1032. (*Code of Civ. Proc.* §1033.5.)

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[1] "The right to recover costs exists solely by virtue of statute." (*Estate of Johnson* (1926) 198 Cal. 469, 471.)

The FEHA provides one of the "except as otherwise expressly provided" exceptions to the general rules of the Code of Civil Procedure. It sets forth its own specific statutory provision defining the prevailing party attorney's fee and cost recovery rights in the court's discretion. (*Gov. Code* §12965(b).) It provides:

> In civil actions brought under this section, the court, *in its discretion*, may award to the prevailing party, including the department, *reasonable attorney's fees and costs*, including *expert witness fees*.[2] (*Ibid.* [italics added].)

II. THE *CHRISTIANSBURG* STANDARD AND THE LONG-RECOGNIZED NEED FOR ASYMMETRICAL TREATMENT OF ATTORNEY'S FEES FOR CIVIL RIGHTS ACTIONS.

In *Christiansburg Garment Co. v. Equal Employment Opportunity Commission* (1978) 434 U.S. 412, the United States Supreme Court determined what standard should apply to awarding statutory attorney's fees to a prevailing defendant employer in a discrimination action (under Title

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[2] In 1999, the Legislature amended the statute by adding the language "including expert witness fees" in response to *Davis v. KGO-T.V., Inc.* (1998) 17 Cal.4th 436, which held that expert fees were not recoverable as costs under the FEHA. (Stats. 1999, ch. 591, § 12; *see also Olson v. Automobile Club of Southern California* (2008) 42 Cal.4th 1142, 1149 fn. 4; *Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011, 1017.)

VII of the Civil Rights Act of 1964). (*Christiansburg*, 434 U.S. at 417-418.) The applicable statute stated in pertinent part: "In any action or proceeding under this title the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee as part of costs ...." (*Id.* at 413-414, fn. 1, *quoting* 42 U.S.C. §2000e-5(k).) Because the statute itself did not directly answer the question, the Court looked to the policies behind the statutory anti-discrimination law to decide the issue. (*Id.* at 418-419.)

The Court observed that "a moment's reflection reveals that there are at least two strong equitable considerations counseling an attorney's fee award to the prevailing Title VII plaintiff that are wholly absent in the case of a prevailing Title VII defendant." (*Id.* at 418.) First, the purpose of the statute is to enforce anti-discrimination rights and, thus, "the plaintiff is the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.'" (*Ibid.* [citations omitted].) Second, when a court awards fees to the prevailing plaintiff in such a case, "it is awarding them against a violator of federal law." (*Ibid.*) Thus, the policies that support an award of fees to a prevailing plaintiff are quite different in this context than those that support an award to a prevailing defendant. (*Id.* at 419.)

Although stressing that the primary purpose of a statutory fee award was to encourage victims of discrimination to vindicate their statutory rights, the Court did note that Congress "also wanted to protect defendants from burdensome litigation having no legal or factual basis." (*Id.* at 420.) Even so, this policy must be tempered by a key reality – assessing fees against a discrimination plaintiff who presents a non-frivolous action "would substantially undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." (*Id.* at 422.)

To harmonize these competing policies, the Court held that "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith."[3] (*Id.* at 421.)

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[3] The Court also cautioned that "[i]n applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. ... [N]o matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation." (*Id.* at 421-422.)

As this Court recently noted, California courts have uniformly adopted the *Christiansburg* standard in FEHA cases when a defendant prevails. (*See e.g., Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 985.) This Court observed:

> The United States Supreme Court has held that, in a Title VII case, a *prevailing plaintiff* should ordinarily recover attorney fees unless special circumstances would render the award unjust, whereas a *prevailing defendant* may recover attorney fees only when the plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith. California courts have adopted this rule for attorney fee awards under the FEHA. (*Ibid.* [citations omitted].)[4]

In following this asymmetrical standard, California courts have recognized that "[t]he policy behind this disparate treatment with respect to recovery of attorney fees is to 'make it easier for a plaintiff of limited means to bring a meritorious suit[]' while serving 'to deter the bringing of lawsuits without foundation,' 'to discourage frivolous suits,' and 'to diminish the likelihood of unjustified suits being brought.'" (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 420.)

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[4] Numerous other decisions are in accord. (*Holman v. Altana Pharma US, Inc.* (2010) 186 Cal.App.4th 262, 279 ["It is now settled that the *Christiansburg* standard must be satisfied before a defendant prevailing in a FEHA action may recover attorney fees."]; *Young v. Exxon Mobil Corp.* (2008) 168 Cal.App.4th 1467, 1474; *Mangano v. Verity, Inc.* (2008) 167 Cal.App.4th 944, 948-949; *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 865.)

Similarly, some California decisions have applied the *Christiansburg* standard to a prevailing defendant's *cost recovery attempts* in FEHA actions. (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387-1388 [applying *Christiansburg* standard to reverse award of fees and costs to prevailing FEHA defendant]; *Baker v. Mulholland Sec. & Patrol, Inc.* (2012) 204 Cal.App.4th 776, 783 [applying *Christiansburg* standard to expert witness fee award to prevailing defendant in FEHA action]; *but see e.g., Perez v. County of Santa Clara* (2003) 111 Cal.App.4th 671, 681 [ordinary costs are recoverable by prevailing FEHA defendant in non-frivolous action].)

III. SETTLED RULES OF STATUTORY CONSTRUCTION AND THE PUBLIC POLICIES THAT DRIVE THE *CHRISTIANSBURG* STANDARD BOTH DICTATE THAT THE SAME STANDARD GOVERNING FEE AWARDS LIKEWISE APPLY TO COST AWARDS

A. General rules of statutory construction demand that the same standard govern FEHA fee and cost awards to prevailing defendants

"The words of the statute must be construed in context, keeping in mind the statutory purposes, and statutes or statutory sections relating to the *same subject must be harmonized*, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing*

Comm. (1987) 43 Cal.3d 1379, 1387 [italics added].) When an issue involves the intersection of two competing or potentially overlapping statutes, courts will "read the two statutes together and construe them so as to give effect, when possible, to all the provisions thereof." (*De Anza Santa Cruz Mobile Estates Homeowners Assn. v. De Anza Santa Cruz Mobile Estates* (2001) 94 Cal.App.4th 890, 909.) To do so, courts "must examine the statutes in their context and with other legislation on the same subject" striving "to harmonize them so as to give effect to each" to the extent they appear to conflict. (*Santa Clara Valley Transp. Autho. v. Public Utilities Comm. State of Calif.* (2004) 124 Cal.App.4th 346, 360.)

As we show below, these principles dictate that fees and costs in FEHA actions be treated the same.

In trying to reconcile potentially competing statutes, "[i]f the meaning of the statutory language is unclear, we turn to the Legislative history to determine intent, and we apply other traditional aids in statutory construction." (*De Anza*, 94 Cal.App.4th at 909.) "In such circumstances, we 'select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to

absurd consequences." (*Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.)

As we likewise demonstrate below, any such analysis decidedly points in favor of treating fees and costs the same in a FEHA case.

B. Because the FEHA's text gives parallel – indeed, identical – treatment to fees and costs, settled rules of statutory construction dictate that both items be governed by the same (*Christiansburg*) standard.

The FEHA's text relating to the award of fees and costs states: "[T]he court, *in its discretion*, may award to the prevailing party ... reasonable *attorney's fees and costs*...." (*Gov. Code* §12965(b) [italics added.].) In granting the court discretion to award the prevailing party "attorney's fees and costs," the statute makes *no distinction* between how the two are treated. Rather, under the FEHA, the prevailing defendant's right to "fees and costs" derives from a single sentence in the same statute that treats entitlement to fees and costs as parallel – indeed, identical.

The fact that the FEHA's text treats a prevailing employer defendant's entitlement to fees and costs identically should be dispositive of the costs issue herein. (*Cummings*, 11 Cal.App.4th at 1387-1390 [construing prevailing FEHA defendant's entitlement to costs and fees under identical rules].) As noted, it is settled that an award of statutory

attorney's fees to a prevailing FEHA defendant employer is governed (*i.e.*, limited) by the *Christianburg* standard. (*See e.g.*, *Chavez*, 47 Cal.4th at 985; *Young*, 168 Cal.App.4th at 1474; *Rosenman*, 91 Cal.App.4th at 865.) Because the FEHA's text treats entitlement to fees and costs identically – the same result is required for costs under basic principles of statutory construction.

Courts construing analogous federal anti-discrimination statutes have reached this same result when construing statutes (like the FEHA) that give parallel treatment to both statutory fees and costs. (*See e.g.*, *Martin v. California Dept. of Veterans Affairs* (9th Cir. 2009) 560 F.3d 1042, 1051-1053; *Brown v. Lucky Stores, Inc.* (9th Cir. 2001) 246 F.3d 1182, 1189-1190.)[5]

Brown illustrates the point. There, in a discrimination action brought under the Americans with Disabilities Act (ADA), the prevailing defendant sought recovery of ordinary litigation costs under the default rule applicable to such costs in federal court.[6] (*Brown*, 246 F.3d at 1189-1190.) The Ninth

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[5] To the extent that the statutory language is similar to the FEHA's, California courts will look to federal anti-discrimination authority as persuasive authority for interpreting the FEHA. (*Chavez*, 47 Cal.4th at 984.) But, "federal interpretations of Title VII are helpful in construing the FEHA only when the relevant language of the two laws is similar." (*Ibid.*)

[6] Like Code of Civil Procedure section 1032(b), Rule 54(d)(1) of the (continued...)

Circuit understandably held that the ADA's fee and cost provision trumped the general rule regarding recovery of ordinary litigation costs so that the prevailing defendant in an ADA action must meet the *Christiansburg* standard to recover ordinary litigation costs. (*Ibid.*) The Ninth Circuit reasoned that the ADA "has an express provision governing costs" which "provision controls over the [general] federal rules":

> The attorney's fee provision of the ADA allows the court to award a prevailing private party "a reasonable attorney's fee, including litigation expenses, and *costs*." 42 U.S.C. § 12205 (original italics). Attorney's fees under § 12205 should be awarded to a prevailing defendant only if "the plaintiff's action was frivolous, unreasonable, or without foundation." *Summers v. A. Teichert & Sons, Inc.*, 127 F.3d 1150, 1154 (9th Cir. 1997) (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 ... (1978). Because § 12205 makes fees and costs parallel, we hold that the *Christiansburg* test also applies to an award of costs to a prevailing defendant under the ADA. *See Fite v. Digital Equip. Corp.*, 66 F.Supp.2d 232, 233-234 (D. Mass. 1999) (so holding); *Red Cloud-Owen v. Albany Steel, Inc.*, 958 F.Supp. 94, 97 (N.D. N.Y. 1997) (same). (*Id.* at 1190.)

Martin similarly illustrates the point. There, a plaintiff brought claims under both the ADA and the federal Rehabilitation Act of 1973, and the employer prevailed on all claims. (*Martin*, 560 F.3d at 1044-1046.) The Ninth Circuit affirmed the trial court's decision that the prevailing

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(...continued)
Federal Rules of Civil Procedure provides that costs "should be allowed to the prevailing party" as a matter of right "[u]nless a federal statute, these rules, or a court order provides otherwise...." (Fed. R. Civ. Proc. 54(d)(1).)

defendant could *not obtain ordinary litigation costs under the ADA* because the action was not frivolous. (*Id.* at 1052.) The only reason the court nonetheless allowed ordinary litigation costs to the defendant was because it also prevailed under the Rehabilitation Act and the Rehabilitation Act (unlike the FEHA) does not give parallel or identical treatment to fees and costs:

> The district court awarded costs under the Rehabilitation Act, however. Although there was no direct authority to guide it, the district court observed that the costs provision of the Rehabilitation Act is more similar to the costs provision in Title VII than to the costs provision in the ADA. ... [¶] ... That *parallel structure* in the ADA between costs and attorney fees *is critically absent* from the relevant texts of both the Rehabilitation Act and Title VII. *Compare* 29 U.S.C. § 794a(b) [Rehabilitation Act] (permitting the prevailing party to recover "a reasonable attorney's fee *as part of the costs*") (emphasis added)), *and* 42 U.S.C. § 2000e-5(k) [Title VII] (allowing "a reasonable attorney's fee, *including* litigation expenses, and *costs*" (emphasis added)). Thus, our rationale in *Brown* for applying *Christiansburg* to the award of costs under the ADA does not carry over to costs under the Rehabilitation Act. (*Id.* at 1052-1053 [first two italics added; all others in original.)

The appellate court then concluded "[c]onsidering the similarity between the costs provisions in Title VII and the Rehabilitation Act, it is appropriate to use our Title VII precedent, as the district court did, to establish a standard for the award of costs under the substantively identical text in the Rehabilitation Act." (*Ibid.*) Relying on *National Organization*

for Women v. Bank of California, N.A. (9th Cir. 1982) 680 F.2d 1291, the appellate court upheld the trial court's award of ordinary litigation costs to the prevailing defendant on the Rehabilitation Act claim under the general cost recovery statute and without a finding that the action was frivolous. (*Martin*, 560 F.3d at 1053.)

The reasoning of *Martin* and *Brown* is compelling, and this Court should adopt it. Where a statute's text treats costs and fees interchangeably (giving both items parallel treatment), it is illogical to apply the *Christiansburg* standard to one but not the other. Otherwise, the symmetrical treatment of costs and fees which the Legislature declared would be thwarted.

The FEHA is precisely such a parallel-treatment statute. That is why *Cummings* analyzed both fees and costs together. By reading the FEHA's fee and costs provisions together for this purpose, the approach of the *Cummings* court:

- Internally harmonized the FEHA's fee and cost provisions (found in the same sentence of the statute) ensuring that the standard used to determine entitlement to each of them be the same when sought against an unsuccessful plaintiff. (*Dyna-Med*, 43 Cal.3d at 1387 ["statutory sections

relating to the same subject matter must be harmonized, both internally and with each other, to the extent possible"].)

- Promoted the overall purpose of the FEHA by ensuring that FEHA plaintiffs freely stand-up to vindicate their civil rights and enforce the important public policies that underlie FEHA rights without fear of serious economic consequences if they should fail to prevail on unsuccessful – but not frivolous – claims. (*Day*, 25 Cal.4th at 272; *see also Gov. Code* §12993(a) ["The provision of [the FEHA] shall be construed liberally for the accomplishment of [its] purposes."]; §12920 [FEHA establishes fundamental public policy of the state declaring "that it is necessary to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgement on account of" any legally protected trait]; §12921(a) [right to seek and hold employment without discrimination on basis of enumerated traits "is hereby recognized as and is declared to be a civil right"].)

- Gives effect to (*i.e.*, harmonizes) both the general cost provision found in Code of Civil Procedure section 1032 (which still applies to a prevailing plaintiff for "ordinary" costs) while also giving effect to the cost provisions in Government Code section 12965(b) by ensuring (through the *Christianburg* standard) that the discretion expressly provided by section

12965(b) is exercised with respect to a prevailing defendant's attempt to seek costs. (*De Anza*, 94 Cal.App.4th at 909.)

C. Government Code section 12965(b) provides a limited exception to Code of Civil Procedure section 1032(b). Thus, a prevailing FEHA defendant cannot obtain costs "as a matter of right" absent a showing of frivolousness.

Given the analysis above, Government Code section 12965(b) is properly viewed as a limited exception to the general cost recovery statute (Code of Civil Procedure section 1032(b)). When a statute "require[s] that additional conditions be satisfied before one side of the litigation may recover costs ... the[] statute may constitute [an] express exception[] to section 1032(b)." (*Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985, 999.) In *Murillo*, this Court acknowledged that one example of a type of statute that constitutes an exception to the recovery of ordinary costs "as a matter of right" (under Code of Civil Procedure section 1032) involves those statutes that require a finding that the action is frivolous for the prevailing defendant to obtain costs. (*Ibid.*) In contrast, *Murillo* held that a statute providing a one-way right to fees and costs (only to the prevailing plaintiff) did *not* create an exception to Code of Civil Procedure section 1032's rule of entitlement to ordinary costs "as a matter of right"; rather, a

one-sided provision states nothing about the other party's entitlement to costs. (*Id.* at 991.)

Murillo thus recognized the following dichotomy:

- If the statute merely provides that one party (such as a prevailing plaintiff) has a statutory right to recover fees and costs, then the statute does not create an exception to Code of Civil Procedure section 1032's ordinary costs "as a matter of right" rule. (*Murillo*, 17 Cal.4th at 990-996.)

- But, if the statute addresses fee and cost recovery rights of both parties *and* creates a different set of rules applicable to each party, then the statute creates an exception to ordinary cost recovery rules of Code of Civil Procedure section 1032(b). (*Murillo*, 17 Cal.4th at 996-999.)

Under this dichotomy, the FEHA's cost statute creates a limited exception to section 1032(b)'s recovery of ordinary costs "as a matter of right."

Three key points establish this.

- First, Government Code section 12965(b) provides cost recovery rights to *both* prevailing plaintiffs *and* prevailing defendants. It is not like the purely one-sided enhanced cost recovery statute that *Murillo* found did not create an exception to Code of Civil Procedure section 1032. (*Compare Gov. Code* §12965(b) *with Murillo*, 17 Cal.4th at 990-996 ["lemon law"

statute provides right to attorney's fees and enhanced costs solely for prevailing "buyer"].)

- Second, Government Code section 12965(b) requires a finding that the action was frivolous within the meaning of *Christiansburg* for a defendant employer to obtain an award of attorney's fees. .(*Chavez*, 47 Cal.4th at 985; *Young*, 168 Cal.App.4th at 1474; *Rosenman*, 91 Cal.App.4th at 865.) This rule requiring a showing of frivolousness for a prevailing employer to obtain a fee award flows from the courts' construction of the statute as a whole in light of the policies that underlie it. (*Leek*, 194 Cal.App.4th at 419 ["Despite the statutory authorization allowing attorney fees to either party that prevails, California courts have interpreted the statute in accordance with the principles developed by federal courts in employment discrimination claims, to the effect that a prevailing defendant in an employment discrimination action cannot recover attorney fees unless the action was unreasonable, frivolous, meritless or vexatious."].)

- Third, given the fact that the FEHA's statutory language creating attorney fee rights is identical to its language creating discretionary cost recovery rights, the parallel statutory language demands construing the standards for a prevailing defendant obtaining fees and costs identically –

i.e., both being subject to the *Christiansburg* standard. (*Martin*, 560 F.3d at 1051-1053; *Brown*, 246 F.3d at 1189-1190.)

D. Decisions that have reached the opposite result are wrongly-decided.

Considering the analysis above, it is not surprising that certain California appellate courts have applied the *Christiansburg* standard to prevailing defendant cost awards under the FEHA. (*Cummings*, 11 Cal.App.4th at 1387-1388 [fees and ordinary costs subject to *Christiansburg* standard]; *Baker*, 204 Cal.App.4th at 783 [expert fees subject to *Christiansburg* standard].)

Nonetheless, other decisions have reached the opposite conclusion, holding instead that ordinary costs are available to prevailing defendants in FEHA actions under Code of Civil Procedure section 1032(b). (*Perez*, 111 Cal.App.4th at 681; *Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 135-136; *Hatai v. Dept. of Transp.* (2013) 214 Cal.App.4th 1287, 1299.) Because these decisions are easily exposed as wrongly-decided, this Court should not follow them.

Perez is the (weak) foundation upon which this line of cases is built. Citing *Murillo*, *Perez* rejected the assertion that "section 12965(b) states an exception to the general rule of Code of Civil Procedure section 1032(b), as

it does not expressly *disallow* recovery of costs by prevailing defendants." (*Perez*, 111 Cal.App.4th at 679 [original italics].) But, in this respect, *Perez*'s analysis was incomplete – it ignored the *Murillo* dichotomy discussed in section III(C) above. As noted, *Murillo* had held that statutes which used two different standards for fees and costs depending on which party seeks them were exceptions to the ordinary cost recovery rules of the Code of Civil Procedure. (*Murillo*, 17 Cal.4th at 999.) *Perez* thus failed to consider half of *Murillo*'s true import.

In any event, *Perez* curiously continued by stating its conclusion that the FEHA does not provide an exception to the ordinary cost statute "is of no moment, however, as it is clear that section 12965(b) governs the costs at issue here." (*Ibid.*) It then proceeded to independently analyze the prevailing defendant's right to costs directly under section 12965(b), but concluded (contrary to *Cummings*) that the *Christiansburg* standard did not govern the cost recovery rights of a prevailing FEHA defendant.[7] (*Perez*, 111 Cal.App.4th at 680-681.)

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[7] In considering that the cost award was granted pursuant to Government Code section 12965(b) (rather than Code of Civil Procedure section 1032), *Perez* seems to implicitly hold that the FEHA did create an exception to the general cost recovery statutes. If this is the case, *Perez*'s decision to treat the standards for imposing fees and costs against an unsuccessful FEHA plaintiff makes even less sense.

Perez's rationale for this conclusion is fatally flawed.

• First, *Perez* disagreed with *Cummings*' conclusion that FEHA costs and fees should be treated the same under the *Christiansburg* standard because, *Perez* reasoned, "the issue in *Christiansburg* was limited to the recovery of *attorney fees*. Costs outside of those fees were not at issue." (*Perez*, 111 Cal.App.4th at 680 [original italics].) According to *Perez*, *Cummings* erred because it "did not segregate the two parts of the award [fees and costs] in applying *Christiansburg*, but overturned them together." (*Ibid.*)

This makes no sense. Given the fact that the FEHA's statutory text treats fees and costs identically – indeed, it provides for *both* in the same clause of the same sentence – *Cummings* correctly construed them symmetrically as requiring the same standard. (*Martin*, 560 F.3d at 1051-1053; *Brown*, 246 F.3d at 1189-1190.)

• Second, *Perez* relied on the fact that "[s]everal federal courts themselves have refused to apply the *Christiansburg* test for recovery of defense attorney fees to ordinary litigation expenses." (*Perez*, 111 Cal.App.4th at 680-681.) But in looking to federal law, *Perez* failed to appreciate – or apply – the distinction between the different treatment of fees and costs found within the various federal anti-discrimination statutes.

Perez cited solely federal Title VII decisions: *Byers v. Dallas Morning News, Inc.* (5th Cir. 2000) 209 F.3d 419, 430; *Cosgrove v. Sears, Roebuck & Co.* (2nd Cir. 1999) 191 F.3d 98, 101-102; *Delta Air Lines, Inc. v. Colbert* (7th Cir. 1982) 692 F.2d 489, 490; *National Organization for Women v. Bank of California, N.A.* (9th Cir. 1982) 680 F.2d 1291. (*Perez*, 111 Cal.App.4th at 681.) But, as discussed in section III(B) above, and made clear by *Brown*, the text of Title VII treats entitlement to fees as an element of costs. In other words, unlike the FEHA or the ADA (but like the Rehabilitation Act), Title VII does not give parallel treatment to fees and costs within the text of the statute. Thus, the *Christiansburg* standard does not necessarily apply to recovery of ordinary costs in Title VII litigation. In stark contrast, however, federal decisions recognize that when the statute (like the FEHA or the federal ADA) does treat costs and fees in the same provision in a like manner, *both* are subject to the *Christiansburg* standard. (*Martin*, 560 F.3d at 1051-1053; *Brown*, 246 F.3d at 1189-1190.)[8]

- Finally, *Perez* relied on a misplaced – indeed, fundamentally incorrect – policy rationale: "Whereas the magnitude and unpredictability of

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[8] *Perez* failed to cite or consider *Brown* despite the fact that *Brown*: (1) was decided two years before *Perez*; and (2) was more recent Ninth Circuit authority than *National Organization for Women v. Bank of California, N.A.* (9th Cir. 1982) 680 F.2d 1291, a Ninth Circuit case which *Perez* did cite on this point.

attorney's fees would deter parties with meritorious claims from litigation, the costs of suit in the traditional sense are predictable, and, compared to the costs of attorneys' fees, small." (*Perez*, 111 Cal.App.4th at 681.) This misguided conclusion is based on mistaken factual assumptions. The core policy behind the *Christiansburg* rule is the desire "to encourage the vigorous enforcement of rights protected under [anti-discrimination law] in part by 'mak[ing] it easier for a plaintiff of limited means to bring a meritorious suit.'" (*Marquart v. Lodge 837, Intern. Ass'n. of Machinists and Aerospace Workers* (8th Cir. 1994) 26 F.3d 842, 848.) But cost awards in FEHA litigation are frequently quite substantial – indeed, enormous – and far more than a plaintiff of "limited means" would risk incurring. (*See e.g.*, *Hatai v. Dept. of Transportation* (2013) 214 Cal.App.4th 1287, 1299 [cost award of nearly $31,000 assessed against FEHA plaintiff]; *Ogunsanya v. Abbott Vascular, Inc.* (2013) 2013 WL 6498495, at *14 [affirming costs of $26,311.21 against unsuccessful FEHA plaintiff in non-frivolous action].)[9]

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[9] *Hatai* and *Ogunsanya* do not even represent anywhere near the outer limits of the size of cost award in FEHA cases. (*See also* cases cited within Williams' Request for Judicial Notice: (1) *Booker, et al. v. City of Richmond*, Contra Costa County Superior Court Case No. MSC07-00408 [cost award *against* unsuccessful FEHA plaintiffs totaling $776,727.31]; (2) *Ismen v. Beverly Hospital, et al.*, Los Angeles Superior Court Case No. BC 366198 [cost award in FEHA case of over $166,000]; and (3) *Hussein v.*

(continued...)

Given the potential size of these cost awards, to the employee of "limited means," there is likely little practical difference between the economic chilling effect of a potential fee award versus the chilling effect of a potentially-large cost award. Either could logically and naturally dissuade a plaintiff from taking the risk of filing a non-frivolous, but far from guaranteed-to-win, FEHA civil rights case. Thus, application of the *Christiansburg* standard to fees but not costs would defeat the core policies behind that standard.

Simply consider that in 2013, California median family pre-tax income for a single income family was $48,415 and $63,030 for a dual income family.[10] Given the size of the cost awards in FEHA cases discussed above, such awards would likely cause significant economic disruption (if not economic ruin) if the plaintiff did not prevail. This would discourage FEHA victims from vindicating their rights, thereby defeating the core policy behind the *Christiansburg* rule.

(...continued)
Farmers Group, Inc., et al., Alameda County Superior Court Case No. RG10-541948 [cost award in FEHA case of $155,762.23].) While some of the above examples were cost awards to prevailing Plaintiffs, they nonetheless illustrate that costs in FEHA cases can be quite substantial.

[10] These figures are from United States Census Bureau median family income data obtained from the following site: http://www.justice.gov/ust/eo/bapcpa/20130401/bci_data/median_income_table.htm

For all these reasons, *Perez* was wrongly-decided.

Nor do the other cases that have followed it provide any better support for its result. *Hatai* simply parroted *Perez* without any independent analysis. (*Hatai*, 214 Cal.App.4th at 1299.) Likewise, *Knight* added precious little to the analysis. *Knight* merely followed *Perez* and concluded, *ipse dixit*, that "[u]nlike the court in *Cummings*, which did not focus on costs, and simply assumed they should be treated in the same manner as attorneys fees, the *Perez* court explained that the policies justifying the *Christiansburg* standard for awarding attorney fees to a prevailing defendant do not persuasively apply to the award to such a party of costs. For that reason, and because we believe its reasoning is persuasive, we agree with *Perez*." (*Knight*, 132 Cal.App.4th at 135.) Thus, *Knight* reflexively followed *Perez* without considering that the FEHA's text treats entitlement to fees and cost identically, and without considering that, when considered in full, the federal authority *Perez* cited actually leads to the opposite conclusion.

In short, *Cummings* was correct in analyzing the standards for a prevailing FEHA defendant to obtain costs and fees identically given that the two are given identical treatment under the controlling FEHA statute. Both the text of the statute, and the FEHA's policies of broad construction

to effectuate is remedial purpose, demand that a prevailing FEHA defendant establish that the action is frivolous in order to obtain costs or fees from a FEHA plaintiff.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeal should be reversed. Because there was no finding that this action was frivolous within the meaning of *Christiansburg*, costs should not have been assessed against Mr. Williams.

DATED: January 14, 2014 Respectfully submitted,

The deRubertis Law Firm, APC

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By_____

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.520

Pursuant to California Rules of Court, Rule 8.520(c)(1), and in reliance on the word count feature of the Word Perfect software used to prepare this document, I certify that this Petition for Review contains 6,601 words, excluding those items identified in Rule 8.520(c)(3).

DATED: January 14, 2014

David M. deRubertis

PROOF OF SERVICE

Case Name: Loring Winn Williams v. Chino Valley Independent Fire District
Supreme Court Case Number: S213100
San Bernardino County Superior Court Case Number: CIVRS801732
Court of Appeals Case Number: E055755

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 4219 Coldwater Canyon Avenue, Studio City, CA 91604. On the below executed date, I served upon the interested parties in this action the following described document(s): **OPENING BRIEF ON THE MERITS**

/_____/ MAIL: by placing a true copy thereof enclosed in a sealed envelope with First Class prepaid postage thereon in the United States mail at Studio City, California address(es) as set forth below, pursuant to Code of Civil Procedure Section 1013a(1):

/**XXX**/ OVERNIGHT DELIVERY: by causing it to be mailed by a method of overnight delivery with instructions for delivery the next business day with delivery fees paid or provided for in the United States mail at Studio City, California address(es) as set forth below, pursuant to Code of Civil Procedure Section 1013(c):

/_____/ PERSONAL SERVICE: by delivering a true copy thereof by hand to the person or office, indicated, at the address(es) set forth below:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on January 14, 2014 at Studio City, California.

Mary Kupelian

PROOF OF SERVICE (CONT.)

Case Name: Loring Winn Williams v. Chino Valley Independent Fire District
Supreme Court Case Number: S213100
San Bernardino County Superior Court Case Number: CIVRS801732
Court of Appeals Case Number: E055755

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