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# Calif. Legal Costs Battle Leaves Employment Deals In Limbo

By Erin Coe

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Law360, San Diego (January 16, 2015, 5:30 PM ET) -- The California Supreme Court will hear oral arguments next month in a case that raises the question of whether a prevailing employer must prove a state employment suit was frivolous before it can recoup litigation costs, and management-side lawyers say such a heightened burden would jeopardize settlement talks and drag out court fights.

The state high court issued a notice Wednesday that it plans to hold oral arguments on Feb. 4 in a Chino Valley, California, fire captain's case claiming employers that prevail in litigation brought under the state's Fair Employment and Housing Act can only recover ordinary litigation costs — such as motion, filing and witness subpoena fees — if they show the case was frivolous, unreasonable or groundless.

"This could be an earth-shattering case and would impact all public and private employers," said Lonny Zilberman, a partner at Wilson Turner Kosmo LLP. "The California Supreme Court is going to decide whether the law as written and enacted in 1986 is still the law. Or is there now a double standard that when a defendant wins a discrimination case, it no longer automatically wins these costs and has an affirmative duty to prove that the case was frivolous, unreasonable or groundless?"

The California Court of Appeal for the Fourth District in July 2013 rejected the plaintiff's claim that the standard for receiving an award of defense attorneys' fees should apply to an ordinary costs award because ordinary costs are recoverable as a matter of right under Code of Civil Procedure Section 1032. It affirmed that retired fire Capt. Loring Winn Williams, who lost his FEHA discrimination case, should pay the Chino Valley Independent Fire District nearly $5,400 in costs.

Williams petitioned the state high court to review the case, and the court agreed in October 2013. Williams has argued that the standard articulated in Christiansburg Garment Co. v.Equal Employment Opportunity Commission — a U.S. Supreme Court case that found a prevailing defendant in a discrimination fight can only recover attorneys' fees if it shows the suit was frivolous, unreasonable or groundless — also applies to litigation costs awards.

If the California Supreme Court sides with Williams, employers would have a much harder time trying to collect litigation costs when they successfully defend against a FEHA suit, according to management-side lawyers.

"If the state Supreme Court rules that this heightened standard is now going to apply to recovery of routine costs as articulated in 1032, that would be a huge change," Zilberman said. "It basically would mean that employers will not be able to recover these costs anymore. They will have to jump through a whole bunch of hoops to prove the case was frivolous, unreasonable or groundless, and that's just so hard to prove."

A ruling shifting the burden of proof on prevailing employers to recover costs would make plaintiffs less willing to settle suits accusing employers of discrimination or harassment under FEHA and prolong court disputes, according to Mark Spring, a partner at Carothers DiSante & Freudenberger LLP.

"If the California Supreme Court reverses the decision of the court of appeal, it is likely to affect plaintiffs' motivations to settle in many cases," he said. "The threat of a cost judgment is one of the weapons employers use in settlement negotiations. If there is a reversal, that weapon will be taken away, and this will make settlement more difficult, and a higher percentage of cases are likely to be litigated further and end up being resolved at summary judgment or trial instead."

Sometimes in settlement negotiations, employers offer to waive their litigation costs in exchange for a plaintiff's agreement

to dismiss a FEHA suit, but a ruling for Williams would eliminate that bargaining chip for employers, according to Zilberman.

“The employer won’t have that card to play and there will be zero downside to a plaintiff who has a horrible case that he can never win,” he said.

Worker advocates also are watching the case closely and say a decision upholding the court of appeal ruling could discourage workers from bringing employment claims.

While the current case involves only about $5,400 in costs, some major discrimination or sexual harassment cases brought under FEHA can involve litigation costs that run into the tens of thousands of dollars or even more than $100,000, according to David A. Lowe, a Rudy Exelrod Zieff & Lowe LLP litigator who represents employees.

“If employees have to be concerned that if they lose a discrimination case, they could be on the hook for tens of thousands of dollars or over $100,000 in litigation costs — even if it’s a meritorious case — that’s going to deter a whole lot of people from bringing discrimination, retaliation and sexual harassment cases to vindicate what the courts and the Legislature have acknowledged are fundamental statutory rights,” he said.

Zilberman said it’s important that plaintiffs bringing FEHA suits have a little bit of skin in the game.

“If plaintiffs feel they have no case or don’t have a chance to win, then they have to understand that if they lose, it’s not just a walk away — that they may be on the hook for certain costs,” he said.

He added that if the court finds for Williams, taxpayers could end up being on the hook for litigation costs when public employers, such as police departments, fire districts or sheriff’s departments, successfully defend FEHA litigation yet fail to meet the high burden necessary to recover ordinary costs from plaintiffs.

“I think it would fly in the face of basic fairness,” Zilberman said.

Loring Winn Williams is represented by Ben-Thomas Hamilton of Hamilton & McInnis LLP, David deRubertis of deRubertis Law Firm and Norman Pine of Pine & Pine.

The fire district is represented by Peter Brown of Liebert Cassidy Whitmore.

The case is Williams v. Chino Valley Independent Fire District, case number S213100, in the California Supreme Court.

--Editing by John Quinn and Patricia K. Cole.