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Forging a Joint Effort

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The United States inherited much of its legal system from England. But one feature of the British legal system that never quite made it across the pond is the requirement that a losing party pays the winner's legal fees. Indeed, in most other countries around the world, the loser must pay the winner's reasonable attorney fees and costs. As the costs of litigation continue to spiral out of control, a loser-pays rule seems like a common sense way to keep individuals from filing frivolous lawsuits. But critics argue that such a rule would bar the courthouse doors to all but the super rich, because most individuals can't afford to risk their life's savings on litigation.

Through California's Fair Employment and Housing Act, the courts have long had the ability to apply the "loser pays" rule. The fees statute in the act state that the court, "in its discretion, may award to the prevailing party reasonable attorney's fees and costs." The statute does not impose a differing standard on prevailing plaintiffs or defendants. However, while the courts have been quite willing to apply the rule in favor of the successful plaintiff, they have been less willing to act when it comes to

awarding fees to the prevailing defendant.

In *Christianburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), the U.S. Supreme Court carefully weighed the risk to the civil rights laws posed by the award of attorney fees to prevailing defendants. After much consideration, the court imposed a strict standard for fee awards in favor of a prevailing defendant with the specific purpose of preventing fee awards from "chilling" the exercise of rights under the anti-discrimination laws. It stated that civil rights plaintiffs are "the chosen instrument of Congress" to vindicate a policy of "the highest priority." Accordingly, fees to defendants may only be awarded after a finding that a plaintiff's lawsuit was unreasonable, frivolous, meritless or vexatious. This higher standard was announced as a means of protecting plaintiffs from fee awards except in those cases where the plaintiff was clearly abusing the legal system by bringing his or her claims.

California courts considered and applied the *Christianburg* standard in *Cummings v. Benco Building Services*, 11 Cal.App.4th 1383 (1992). The *Cummings* court explicitly acknowledged that California would follow federal Title VII standards in deciding defendants' attorney fees claims. In a further

effort to protect plaintiffs from fee awards except where there is a clear abuse of the legal system, the *Cummings* court explained that in California, a case would not be considered "frivolous" if the plaintiff had evidence of even *part* of a prima facie case. In other words, a plaintiff would not be required to pay a prevailing defendant's fees unless the plaintiff had virtually no evidence to support the plaintiff's claims.

Despite these strict standards, prevailing defendants were still entitled to get their fees in cases where the plaintiff had no evidence to support his or her claims. However, with the recent decision in *Young v. Exxon Mobil Corp.*, 2008 DJDAR 18177 (Dec. 11, 2008), defendants in a frivolous Fair Employment and Housing Act action are left to wonder, is there any case in which they will be able to recover their fees?

In *Young*, the plaintiff sued her former employer and a manager for disability discrimination and harassment under the Fair Employment and Housing Act, but admitted at deposition that the manager had not harassed her. After the manager prevailed through summary judgment, the trial court concluded the plaintiff's claim was unreasonable, meritless and frivolous, but awarded the manager only a nominal \$1 fee award of the

\$18,750 requested, in part because the plaintiff could not pay.

The California Court of Appeal affirmed, holding that a trial court may decline to award fees to a prevailing defendant, even when the allegations *are* frivolous. The appellate court based this decision on four factors: fee awards under the Fair Employment and Housing Act are always discretionary and should not be made when the award would be unjust; the fee award should actually benefit the prevailing party or an entity that provided the services, who would not have been compensated but for the fee award; there was little evidence that the employer (Exxon) incurred fees on behalf of the individual defendant that it would not have incurred had he not been named as a party; and the plaintiff was a student who had very little money and would have been required to file for bankruptcy if required to pay a \$18,750 attorney fee award.

While this decision may seem to make some sense based on the facts of the case (after all, what court wants to force a disabled student into bankruptcy?), the standard that it announced will wreak havoc on the attorney fees statute and has no basis in the statute itself.

The differing standard as to when prevailing plaintiffs and defendants can recover their fees was created by cases interpreting the law, such as *Christianburg* and *Cummings*. With the decision in *Young*, the test for a prevailing defendant is now so strict, that it is hard to imagine the circumstance under which a defendant could obtain fees, because the vast majority of plaintiffs who lose employment litigation would be judgment-proof.

The long-standing rule has been that a prevailing defendant cannot recover its fees unless the plaintiff loses and the court finds the plaintiff's case to have been frivolous. Under *Young*, there appear to be two "new" additional standards, either one of which could apparently defeat a fee award to a prevailing defendant - the individual defendant must actually have paid his own fees *and* the plaintiff must be able to afford the fees without it creating an economic hardship.

The issue of who paid the fees seemingly applies only to individual defendants - employees like the manager in *Young* who are sued along with their employer for strategic reasons such as avoiding diversity jurisdiction or driving up defense costs. In regard to these folks, the *Young* decision gives California employers a Hobson's choice. If the employer chooses to pay for the defense of the individual defendant up front, the employer can help vindicate the individual employee and avoid vicarious liability for themselves.

But if they do this, the employer will seemingly lose the chance of recouping its fees no matter how frivolous the claims were against the individual.

If, on the other hand, the employer decides not to defend and instead chooses to indemnify on the back end of the case (California employers are generally required to defend or indemnify an employee who is accused of sexual harassment, even if the employee violated the company's own policy, unless the employee loses in court), the individual defendant employee will be forced to hire his own attorney on his own dime (something an individual defendant is unlikely to be able to afford) to vindicate his rights against the frivolous suit. Of course, if the individual defendant cannot hire adequate counsel and loses, the employer would be liable under vicarious liability and would have lost a potentially valuable employee.

From a practical standpoint, there is now no disincentive to filing a completely frivolous case against an innocent individual defendant simply to defeat diversity jurisdiction or run up the costs of defense in hopes of extorting a better settlement. Obviously, the court's award of \$1 will not serve as a deterrent to the unscrupulous plaintiff. Prior to *Young*, the protection to the "insolvent" plaintiff came through the courts imposing a higher standard on a prevailing defendant in order to recover its fees. Now, as long as a plaintiff can show that he or she cannot afford the fee award, it may be that any other standard is out the window.

The hope for prevailing defendants has to be that other courts will view *Young* as bound by its facts, and not apply its standards to every case. Meanwhile, because the *Young* court also indicated that there were problems with Exxon's documentation of fees incurred for the individual versus the corporate defendant, defense counsel would be wise to better document what time is spent on tasks relating to defense of the individual versus defense of the company.

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