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## California Supreme Court Strips Prevailing Employers of Automatic Right to Recoup Costs in FEHA Suits

The California Supreme Court has held that in actions governed by the Fair Employment and Housing Act (FEHA), a prevailing defendant may recover ordinary litigation costs only if the trial court determines that the action was objectively baseless. [\*Williams v. Chino Valley Indep. Fire Dist.\*](#) No. S213100 (May 4, 2015). This new decision is certain to alter the dynamics of FEHA litigation.

The Court's analysis involved the relationship between two statutes: (i) Code of Civil Procedure section 1032(b), which authorizes a prevailing party to recover costs as a matter of right; and (ii) Government Code section 12965(b), the FEHA provision stating that "the court, *in its discretion*, may award to the prevailing party ... reasonable attorney's fees and costs, including expert witness fees" (italics added). The Court concluded, with little analysis, that FEHA's costs provision operates as an express exception to Code of Civil Procedure section 1032(b)'s general costs-recovery mandate.

The Court held that in order to recover costs, a prevailing defendant must meet the standard announced in *Christianburg Garment Co. v. EEOC*, 434 U.S. 412, 420 (1978): the plaintiff's "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Through an examination of legislative history of the FEHA costs provision, the Court found that the Legislature intended that the *Christianburg* standard, "or something very close to it," would dictate whether a prevailing defendant may recover costs, even though the statutory language itself did not compel this conclusion.

As part of its analysis, the Court considered the rules that apply to cases brought under federal employment discrimination statutes, including Title VII. The federal courts of appeal have consistently concluded that although, as *Christianburg* held, Title VII contains language that gives courts discretion regarding attorney's fee awards, there is no similar language regarding costs awards. However, cases under the Americans with Disabilities Act (ADA) have applied the *Christianburg* standard to recovery of costs because the ADA makes awards of fees and costs discretionary. Given the similarity between the relevant

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language in FEHA and the ADA, the Court believed the ADA decisions supported the same outcome in FEHA actions.

For employers, *Williams* is, by any reckoning, an unwelcome development. The cases analyzing when a prevailing defendant can recover attorney's fees teach that it is very difficult to meet the *Christianburg* standard. As a result, recovery of costs by a prevailing defendant in a FEHA action can no longer be assumed. More important, the situation in which a defendant agrees to waive costs in exchange for the plaintiff's agreement to forgo an appeal will now seldom arise. And, only time will tell the effect of *Williams* on other aspects of FEHA litigation, including whether the decision influences the types of cases that are filed and whether it impacts the costs-shifting, offer of compromise procedure authorized by Code of Civil Procedure section 998.

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