

LOS ANGELES

# Daily Journal

FRIDAY,  
JANUARY 11, 2008

— SINCE 1888 —

OFFICIAL NEWSPAPER OF THE LOS ANGELES SUPERIOR COURT AND UNITED STATES SOUTHERN DISTRICT COURT

## Employment

# SUIT RETALIATION

By Jeffrey C. Freedman

Can an employer sue its employee after winning a trial in which the employee sued for sexual harassment? In a Dec. 12, 2007, decision, the Ohio Supreme Court answered this question affirmatively in *Greer-Burger v. Temesi*, 2007-Ohio-6442. By a 4-3 vote, the court permitted the employer to proceed on claims for abuse of process, malicious prosecution and intentional infliction of emotional distress. The employer sued for the attorney fees it had incurred in defending the suit and sought compensatory and punitive damages.

The matter began when Tammy Greer-Burger filed her suit against Lazlow Temesi. The jury trial resulted in a judgment for Temesi, who thereafter filed an action against Greer-Burger. Greer-Burger then filed a complaint with the Ohio Civil Rights Commission, saying that Temesi's suit constituted retaliatory action. A state administrative law judge heard Greer-Burger's retaliation complaint and recommended that Temesi be ordered to cease and desist, finding the suit a retaliatory violation of state law. The administrative judge recommended that Temesi be ordered to pay Greer-Burger \$16,000, the amount she claimed as her incurred legal expenses. Temesi challenged the commission's decision in the trial court, which affirmed the commission's order. The intermediate appellate court affirmed, holding that the Ohio statute "essentially creates an absolute privilege for the filing of a discrimination suit or charge." Temesi petitioned the Ohio Supreme Court, which held that the employer had not engaged in retaliation, explaining "that an employer is not barred from filing a well-grounded,

objectively based action against an employee who has engaged in a protected activity."

The court agreed that Temesi's suit should be allowed to proceed as long as it was prosecuted objectively and in good faith. But the majority and the dissenters disagreed on the employer's standard of proof and the scope of recoverable damages.

The majority stated that it "cannot countenance the OCRC's conclusion that Temesi's act of filing suit is per se retaliatory. ... Temesi must be afforded an opportunity to show that there is an objective basis for his lawsuit."

The majority ordered that the administrative judge first should have permitted "the employer the opportunity to demonstrate that its suit was not going to be objectively baseless." In determining

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whether the employer's action has an objective basis, the administrative judge should review the employer's suit under the standard for rendering summary judgment. If the employer satisfies this standard, the suit does not fall under the definition of sham litigation.

The Supreme Court held that construing all lawsuits brought by prevailing employers as retaliatory would provide an open invitation to employees to file frivolous claims without any fear of consequence. Thus, Temesi's suit could proceed.

The court disagreed on the standard for determining whether the employer's suit should be allowed. The dissent criticized the majority for using a "not objectively baseless" test and argued that it "sets a very low threshold."

The dissenters advocated a standard whereby the employer's filing of a suit after winning the underlying trial would raise a rebuttable presumption of retaliation: "The employer may respond by showing how the

employee's previous discrimination claim was totally without merit. But such a showing should involve more than a judgment in the employer's favor, and certainly more than the 'material issues of fact' required to be present to survive under a summary judgment standard."

The second point of contention involved punitive damages. The dissent said "that an employer engages in retaliatory conduct by seeking such a remedy against an employee who has exercised the right to bring a discrimination lawsuit but has ultimately failed in that endeavor." But the dissent agreed that, if "an employee has filed a totally baseless claim, the employer should be allowed to be made whole for defending the unfounded accusations by filing a claim for defamation, abuse of process, or intentional infliction of emotional distress. ... The right to redress allows for full compensation, and any 'punishment' of the employee for filing a false claim comes in the form of compensatory damages and attorneys' fees rather than punitive damages."

*Greer-Burger v. Temesi* was a case of first impression in Ohio. No California appellate court has dealt with this issue. But a California court likely would apply the same standard used by federal courts in determining whether a prevailing defendant in a discrimination suit is entitled to attorney fees - a standard much closer to the dissenting position in the Ohio decision.

The seminal federal law prohibiting employment discrimination is Title VII of the Civil Rights Act of 1964. The analogous California law is the Fair Employment and Housing Act. Both permit an award of attorney fees to the party prevailing. But although attorney fees are awarded as a matter of course to a prevailing plaintiff, prevailing employers receive attorney fees only in limited circumstances. In *Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412 (1978), the U.S. Supreme Court held that a prevailing employer may receive

attorney fees only if the court finds that the plaintiff's action was frivolous, even if the case was not brought in subjective bad faith.

The California courts first applied the *Christiansburg Garment* standard to FEHA in *Cummings v. Benco Building Services*, 11 Cal.App.4th 1383 (1992). In *Cummings*, the trial court granted summary judgment for the defendant in an age-discrimination case and awarded the defendant its attorney fees. The appellate court reversed, applying *Christiansburg Garment*, stating that Cummings had brought "a routine case in which the plaintiff merely failed to achieve success on her claim. ... [T]his fact should not automatically entitle a prevailing party to fees and costs."

The Court of Appeal applied *Christiansburg Garment* two more times, first in *Bond v. Pulsar Video Productions*, 50 Cal.App.4th 918 (1996). There, an employer was sued for race discrimination. After the jury returned a verdict for the defendant, the trial court awarded attorney fees and found that the plaintiff's case was "frivolous, vexatious, and without merit." The appellate court affirmed.

Most recently, the Court of Appeal decided

*Jersey v. John Muir Medical Center*, 97 Cal. App.4th 814 (2002). In *Jersey*, an employee sued for sex discrimination. The trial court granted the employer's motion for summary judgment and awarded the employer its attorney fees on the statutory claim. The Court of Appeal affirmed but found that the trial court abused its discretion in awarding fees. The appellate court held that simple lack of merit was not the proper measurement. Rather, the court should have applied the *Christiansburg Garment* standard.

The California courts thus have made it clear that attorney fees in a FEHA case will be awarded to a prevailing employer only when the plaintiff's case was frivolous or unreasonable. This standard places a heavy burden on an employer seeking attorney fees. However, this criterion has existed in federal law for 30 years and in California law since the 1992 *Cummings* decision. The California courts seem unlikely to allow a lesser standard for the award of compensatory damages (let alone punitives) than is required for an award of attorney fees.

California courts also might hold that an

award of attorney fees is the exclusive remedy available to a prevailing defendant in a FEHA case. California courts may disagree with the Ohio holding on whether the filing of the employer's suit is an act of retaliation. FEHA prohibits retaliation against individuals for asserting their rights under the statute.

One reason California courts may never have considered a situation similar to that in Ohio is that the two states anti-discrimination laws have a major difference. Whereas FEHA provides that the prevailing party can be awarded attorney fees, Ohio law contains no such provision. Thus, in Ohio, neither Greer-Burger nor Temesi could have been awarded attorney fees in the initial harassment case, simply because the statute does not authorize such an award. Attorney fees are allowed to prevailing claimants in Ohio only in cases in which age discrimination in employment is alleged and proved.

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