NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CHERE AMOUR, Plaintiff and Appellant, v. MAGDI ALEXANDER, Defendant and Respondent.	B235897 (Los Angeles County Super. Ct. No. BC370384)

APPEAL from an order of the Superior Court of Los Angeles County. Rita Miller, Judge. Affirmed in part, reversed in part.

Eisenberg & Associates, Michael B. Eisenberg, Joseph Socher, and Michael Kopple, for Plaintiff and Appellant.

Ballard Rosenberg Golper & Savitt, Linda Miller Savitt, Christine T. Hoeffner, for Defendant and Respondent.

Plaintiff Chere Amour was the prevailing party in a bench trial on claims for sexual harassment under the Fair Employment and Housing Act (Gov. Code, § 12900 et seq.; FEHA), and sexual battery. The trial court awarded Amour $15,000 in economic and non-economic damages. She sought over $270,000 in attorney fees. The trial court awarded $45,000 in attorney fees and rejected Amour's request for expert fees as costs. We affirm the attorney fee award, but reverse as to the denial of expert fees as costs.

FACTUAL AND PROCEDURAL BACKGROUND

The parties do not challenge the judgment on the merits. Thus we only briefly summarize the factual background based on the trial court's findings. On May 5, 2006, Amour began work as a receptionist/medical assistant trainee in Dr. Magdi Alexander's medical office. On the evening of May 16, Amour and Alexander were the only people left in the medical suite. Alexander used a ruse to stand behind Amour, then he put his arms around her waist and pulled her to him so that the front of his body was pressed against her back, and his erect penis was pressed against her buttocks. When Amour turned to face Alexander he took her wrists in his hands. Alexander attempted to apologize; Amour was unable to respond. The following morning, Amour called in sick and filed a police complaint against Alexander. Alexander fired Amour on the pretext that she had not followed a non-existent office policy requiring employees to speak with a live person when calling in sick, rather than leaving a message. Amour was unemployed for six months until she found higher-paying employment.

In May 2007, Amour filed a complaint against Alexander alleging claims for sexual harassment and retaliation under FEHA, and sexual battery. The complaint sought lost wages, non-economic damages, and punitive damages. A six-day jury trial in late January and early February 2009 ended in a mistrial. In June 2009, Alexander filed a motion for summary judgment which the court denied in September 2009. In October 2010, the trial court conducted a three-day bench trial. The trial court found Alexander was not credible in his denial of the incident with Amour. The court awarded Amour all of her lost wages, totaling $10,000. However, the court found Amour's emotional distress was disproportionate to the nature and duration of the sexual battery, and was not

all attributable to the harassment. The court also concluded charges Amour incurred for psychiatric treatment were not recoverable because they were not reasonable or necessary. The court awarded Amour $5,000 in non-economic damages and denied punitive damages.

The judge who had handled the case from its inception retired. The case was reassigned. Amour filed a motion for costs and a motion for attorney fees. Amour requested $14,441 in costs and $274,230 in attorney fees. The attorney fee motion also included a request for $4,974 in expert fees as costs. The requested attorney fees were the result of hours worked by several attorneys: Michael Eisenberg (304 hours at $495 per hour), Michael Kopple (212 hours at $450 per hour), and three associates (81 hours at $350 per hour). In support of the request, counsel provided information regarding the attorneys' respective qualifications, information about billing rates for attorneys in the Los Angeles area, and a brief summary of the work the case required. Counsel provided justifications for the depositions taken and argued all of Amour's claims were inextricably factually intertwined, including a retaliation claim the court dismissed. Counsel also included detailed billing records for each attorney from May 2006 through December 2010. With one exception, the billing records listed a description of each task performed and the amount of attorney time expended, in increments of not less than six minutes.[1]

Alexander opposed the motion. He argued the court should deny fees because the case should have been filed as a limited jurisdiction case; Amour was not entitled to fees because the trial court did not find she prevailed on her FEHA claims; and if the trial court awarded attorney fees at all, the award should be reduced because Amour did not prevail on all of her claims. Alexander also asserted Amour's requested hourly rates

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[1] On the page providing billing details for the associates who worked on the case, one associate's time was listed in one block for August 2009, denoting multiple tasks all related to Amour's opposition to Alexander's motion for summary judgment, and a total of 42.2 hours billed.

were unreasonable, and the attorney fee motion improperly compared Amour's counsel's rates to those "charged by a few, highly experienced attorneys in large firms with heavy overhead on complex cases." Alexander offered competing evidence that billing rates in Los Angeles County for smaller firms were significantly lower than Amour's counsel's rates. Alexander submitted a "matrix" from 2007 purporting to show that average rates awarded by courts in Los Angeles County ranged from $209 for the least experienced attorneys to $443 for the most experienced. Alexander additionally contended the number of hours Amour's attorneys billed was unreasonable.

Alexander reported he had offered Amour $25,000 to settle the case in April 2009, and he asserted Amour's failure to win more than that amount in damages established her pursuit of the case was unreasonable.[2] Alexander further argued any fee award should be proportional to the damages award. Although Alexander had filed a separate motion to tax costs in response to Amour's costs memorandum, he did not object to the expert fees identified as costs in the attorney fee motion.

The trial court rejected the argument that Amour did not prevail on her FEHA claim. The court also rejected Alexander's assertion that Amour should be denied fees because the case could have been prosecuted in a limited jurisdiction court.[3] However, the court found Amour's fee request unreasonable. The court explained in a written ruling:

> " 'A fee request which is unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny it altogether.' [Citations.] [¶] The court finds that the request for $247,230 [*sic*] is unreasonable, as was the 55 months it took to litigate this action. At the core of this case is a 10-second incident with an employee who had been on the job eight days. The facts

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[2] The $25,000 offer was apparently inclusive of attorney fees. Amour subsequently served a settlement offer under Code of Civil Procedure section 998, offering to settle the case for $25,001 plus attorney fees and costs. Alexander did not accept the offer.

[3] The court explained: "Considering the underlying policies of FEHA, and considering the entire case in light of the facts known to plaintiff's counsel at the relevant time . . . the court finds that it was reasonable for plaintiff to file this action as an unlimited case, although just barely."

> are relatively simple. The entire bench trial took only three days. Although the judgment could have reasonably exceeded $25,000, the amount by which it exceeded the jurisdictional limit would not have been large, viewing all plaintiff's evidence in the light most favorable to her. [¶] It appears likely that this case could have settled early, even prior to the first trial, if plaintiff's settlement demands had not been grossly inflated so that the lowest one was more than ten times the eventual recovery. [¶] Considering the relatively simple nature of this case, the short duration of the incident and plaintiff's employment, the amount of damages plaintiff could reasonably have expected to recover, the total amount of costs she should have expected to incur, the policies underlying FEHA and all of the circumstances, the court finds a reasonable fee award is $45,000."

As to costs, the trial court indicated costs are properly recovered by being itemized in the memorandum of costs and it would not consider costs not itemized in the memorandum. The court granted all itemized costs, with the exception of one item Amour conceded was not proper.

This appeal timely followed.

DISCUSSION

I. Amour Has Not Established the Trial Court Abused its Discretion in Awarding Less Than Her Requested Amount of Attorney Fees

In *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970 (*Chavez*), the California Supreme Court recently summarized the principles applicable to awards of attorney fees in FEHA cases: "In any action brought under the California Fair Employment and Housing Act . . . Government Code section 12965's subdivision (b) grants the trial court discretion to award attorney fees to a prevailing party. This statute has been interpreted to mean that in a FEHA action a trial court should ordinarily award attorney fees to a prevailing plaintiff unless special circumstances would render a fee award unjust. . . ." (*Id*. at p. 976.) "In FEHA actions, attorney fee awards, which make it easier for plaintiffs of limited means to pursue meritorious claims [citation], 'are intended to provide "fair compensation to the attorneys involved in the litigation at hand and encourage [ ] litigation of claims that in the public interest merit litigation." ' [Citation.]." (*Id*. at p. 984.)

"[I]f a court determines that attorney fees should be awarded, computation of those fees is based on the lodestar adjustment method as set forth in *Serrano v. Priest* (1977) 20 Cal.3d 25, 141 . . . . [Citation.] Using that method, the trial court first determines a touchstone or lodestar figure based on a careful compilation of the time spent by, and the reasonable hourly compensation for, each attorney, and the resulting dollar amount is then adjusted upward or downward by taking various relevant factors into account. [Citations.] When using the lodestar method to calculate attorney fees under the FEHA, the ultimate goal is 'to determine a "reasonable" attorney fee, and not to encourage unnecessary litigation of claims that serve no public purpose either because they have no broad public impact or because they are factually or legally weak.' [Citation.]" (*Chavez, supra*, at p. 985.) Thus, while the lodestar calculation is indisputably the starting point for the calculation of an attorney fee award in a FEHA case, the court may either reduce the total fees by awarding fewer hours or a lower hourly rate, or by reducing the lodestar amount. (*Ibid.* [court computes lodestar, then may adjust "the resulting dollar amount" upward or downward]; *Gorman v. Tassajara Development Corp.* (2009) 178 Cal.App.4th 44, 101 (*Gorman*).)

As we recently explained in *Rogel v. Lynwood Redevelopment Agency* (2011) 194 Cal.App.4th 1319, 1321, "It is well settled that a trial court is vested with wide discretion in fixing the amount to be awarded to a prevailing party for attorneys' fees, and that a court's award will not be disturbed on appeal unless the record discloses an abuse of discretion. [Citation.]" It is the appellant's burden to establish an abuse of discretion, including by providing an adequate record for appellate review. "We cannot presume the trial court has erred. . . . ' "A judgment or order of the lower court is *presumed correct.* All intendments and presumptions are indulged to support it on matters as to which the record is silent. . . ." [Citation.]' [Citations.]" (*Vo v. Las Virgenes Municipal Water Dist.* (2000) 79 Cal.App.4th 440, 447 (*Vo*).)

Here, Amour provided the trial court with a lodestar calculation, and detailed billing records. Although the trial court did not specifically reference the lodestar components, it expressly found the fee request unreasonably inflated. Our high court has explained that " '[a] fee request that appears unreasonably inflated is a special circumstance permitting the trial court to reduce the award or deny one altogether.' [Citation.]" (*Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1137 (*Ketchum*), citing *Serrano v. Unruh* (1982) 32 Cal.3d 621, 635.) "To the extent a trial court is concerned that a particular award is excessive, it has broad discretion to adjust the fee downward or deny an unreasonable fee altogether." (*Ketchum,* at p. 1138, fn. omitted.) In addition, "trial courts are not obliged in every case to expressly acknowledge the lodestar amount or to specifically itemize those fee claims they find to be unnecessary or unreasonable." (*Gorman, supra,* 178 Cal.App.4th at p. 91.) The trial court could properly reduce the requested award in this case based on the finding that the lodestar amount was unreasonably inflated.

Moreover, while the trial court severely reduced the lodestar amount, it also justified the reduction at least in part on factors courts have found are appropriately considered. (*Ketchum, supra,* 24 Cal.4th at pp. 1132, 1139.) For example, in *Flannery v. Prentice* (2001) 26 Cal.4th 572, the California Supreme court noted that when calculating a FEHA attorney fee award, "[d]epending on the circumstances, consideration may also be given to the attorneys' experience, the difficulty of the issues presented, the risk incurred by the attorneys in litigating the case, the quality of work performed by the attorneys, and the result the attorneys achieved" (*id*. at p. 584), in addition to the number of hours reasonably worked and the reasonable hourly rate. (See also *Press v. Lucky Stores, Inc.* (1983) 34 Cal.3d 311, 322-323.) Our high court has also expressly noted the lodestar may be increased *or* decreased using such factors. (*Ketchum, supra,* 24 Cal.4th at p. 1134; *Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1294–1295; see also *EnPalm, LLC v. Teitler* (2008) 162 Cal.App.4th 770, 774, fn. 4; *Graciano v. Robinson Ford Sales, Inc.* (2006) 144 Cal.App.4th 140, 160-161.) Here, the court referenced the simplicity of the

case, the limited potential damages, and other factors indicating the case did not require significant legal experience or expenditures of time to reach a successful result.

We acknowledge that " '[a]bsent circumstances rendering the award unjust, an attorney fee award should ordinarily include compensation for *all* the hours *reasonably spent'* in litigating the action to a successful conclusion. [Citation.]" (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 394, citing *Ketchum, supra,* 21 Cal.4th at p. 1132, italics in original.) But " '[r]easonably spent' means that time spent 'in the form of inefficient or duplicative efforts is not subject to compensation.' [Citation.]" (*Ibid.*) "A plaintiff is not automatically entitled to all hours claimed in the fee request. Rather, the plaintiff must prove the hours sought were reasonable and necessary." (*Rey v. Madera Unified School Dist.* (2012) 203 Cal.App.4th 1223, 1243-1244.) And, on appeal, the party challenging an attorney fee award "has an affirmative obligation to provide an adequate record so that we may assess whether the trial court abused its discretion." (*Vo, supra,* 79 Cal.App.4th at p. 447.)

Amour has not provided such a record. The record on appeal contains only the complaint, the answer, the superior court online docket, the ruling after the bench trial, the attorney fee motion and costs-related papers, and the ruling on fees and costs. There is no trial transcript. (*Vo, supra,* 79 Cal.App.4th at pp. 447-448.) In the attorney fee motion and on appeal, Amour provides only a cursory summary of the work required to litigate the case. For example, Amour provided the court with a laundry list of tasks that were necessary, and billing records showing such tasks and the amount spent on each. Yet, Amour provided no further details, either by declaration or by attaching documents. Thus, we know Amour conducted discovery, but the record does not explain what forms of written discovery she found it necessary to serve, to what extent she was required to respond to written discovery, or details regarding any disputes over written discovery. Similarly, the attorney fee motion noted Amour was forced to respond to Alexander's summary judgment motion, filed after the first trial. But the record offers no details to illustrate the level of complexity of the motion, or what may have been reasonably required to effectively oppose it.

Although the judge deciding the attorney fee motion did not preside over the case throughout the litigation, we presume, as we must, that the court had the benefit of reviewing the entire superior court file and was therefore able to come to informed conclusions about the complexity of the case and the reasonableness of Amour's counsel's hourly rate and the hours expended litigating the case. Our record is far more circumscribed on appeal. The trial court did not indicate whether it concluded both the hourly rates requested and number of hours billed were unreasonable, but it was not required to provide such specificity or a statement of decision. (*Ketchum, supra,* 24 Cal.4th at p. 1140; *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1323.) We have no basis in the record to conclude the trial court did not use the lodestar amount as a starting point, as it was required to do. In light of the record provided on appeal, we cannot determine the trial court abused its discretion in reducing the lodestar amount as it did after concluding the requested award was unreasonably inflated. (*Vo, supra,* 79 Cal.App.4th at p. 447.) Amour has not met her burden to show the trial court abused its discretion.

II. The Trial Court Erred in Refusing to Consider Expert Witness Fees as a Cost Item

In her attorney fee motion, Amour also sought $4,974 in expert witness fees as costs. Alexander did not object to this request in his opposition to the motion. However, the court did not consider these costs, indicating: "Plaintiff requests costs in excess of those requested in the memorandum of costs. Costs are recovered by being itemized in the memorandum of costs. The court is inclined to deny costs not itemized in the memorandum." This was error.

Government Code section 12965, subdivision (b) explicitly provides that the court may, in its discretion, award expert witness fees to the prevailing party. In *Anthony v. City of Los Angeles* (2008) 166 Cal.App.4th 1011 (*Anthony*), this court concluded expert witness fees in a FEHA case need not be included in a memorandum of costs. In *Anthony*, the losing defendant appealed an award of expert witness fees as costs as untimely because, instead of seeking the expert fees as costs in a memorandum of costs,

the plaintiff filed a separate noticed motion, after the deadline for costs set forth in California Rules of Court, rule 3.1700(a)(1). We rejected the defendant's argument, noting "there would be no point in requiring a party to include in its memorandum of costs those cost items which are awarded in the discretion of the court and thus *cannot* be entered by the clerk of the court under rule 3.1700." (*Anthony*, at p. 1016.) We thus determined the plaintiff was not required to claim her expert witness fees within the time constraint imposed by rule 3.1700 for filing a memorandum of costs.

Under the reasoning of *Anthony*, Amour was not required to claim her expert witness fees in the memorandum of costs. Although in *Anthony*, the plaintiff filed a separate noticed motion, we see nothing improper in Amour's inclusion of her expert witness costs in the noticed attorney fee motion. (*Anthony*, at p. 1016.) The trial court abused its discretion in refusing to consider Amour's request for expert witness fees as a cost.

III. Alexander's Arguments

Alexander argues that the trial court erred and the order awarding attorney fees should be reversed. He primarily contends the court should have denied Amour's motion for attorney fees in its entirety because she did not prevail on her FEHA claim. However, Alexander has not filed a cross-appeal. A respondent who does not cross-appeal may not seek affirmative relief in response to the appellant's appeal. (*Townsend v. Townsend* (2009) 171 Cal.App.4th 389, 397-398.) Alexander asserts that despite the lack of a cross-appeal, we must consider his arguments because Amour cannot show prejudice from any trial court error in calculating the amount of attorney fees. (*Press v. Lucky Stores, Inc.*, *supra*, 34 Cal.3d at p. 317, fn. 4, citing Code Civ. Proc., § 906.) But while Alexander nominally expresses this justification, he repeatedly asserts in his briefing that the attorney fee award should be *reversed*—which is indeed seeking affirmative relief (reversal), rather than merely making a harmless error argument in favor of an affirmance. (*California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 382, fn. 7 [purpose of Code. Civ. Proc., § 906 is to allow respondent to assert a legal theory which may result in affirmance; refusing to review respondent's

arguments intended to overthrow the judgment]; *Mayer v. C.W. Driver* (2002) 98 Cal.App.4th 48, 57 [respondent could raise argument without cross-appeal to show trial court reached the *right* result even if on the wrong theory].) We do not consider Alexander's argument that the court's attorney fee award should be reversed in its entirety.

Moreover, to the extent Alexander's argument is relevant to Amour's request for expert attorney fees as costs, we reject the contention. Alexander's primary assertion on this point was that the statement of decision did not make express findings under FEHA and the decision in Amour's favor was therefore only a favorable ruling on the sexual battery claim. But as the trial court noted below, the decision in Amour's favor was explicitly based, in part, on a determination that Alexander's explanations for terminating her were pretextual. It is clear the court was referring to a pretext for unlawful discrimination under FEHA. The decision's discussion of pretext would have been irrelevant to the sexual battery claim standing alone. In addition, the court awarded economic damages resulting specifically from the termination, rather than damages proximately caused by the offensive touching. Indeed, given the court's findings regarding Amour's limited emotional distress damages and the brief and "gentle" nature of the offensive touching, it would have made no sense for the trial court to award Amour all of her lost wages as damages resulting from the touching alone. The only reasonable interpretation of the statement of decision is that the court concluded Amour prevailed on her FEHA claim.

DISPOSITION

The portion of the judgment denying expert witness fees as costs is reversed. On remand the trial court is to consider Amour's request for expert witness fees. In all other respects, the judgment is affirmed. The parties are to bear their own costs on appeal.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.