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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

CAROLINE MESSIH-ZEMAITIS, Plaintiff and Appellant, v. CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION, Defendant and Respondent. AIR CANADA, Real Party in Interest and Respondent.	B266197 (Los Angeles County Super. Ct. No. BS141614)

APPEAL from an order of the Superior Court of Los Angeles County, Joanne B. O'Donnell, Judge. Reversed with directions.

Chad Biggins for Plaintiffs and Appellants.

Lewis Brisbois Bisgaard & Smith, Roy G. Weatherup, Caroline E. Chan, Rachel L. Romanello; Biedermann Hoenig Semprevivo, Elaine Chou, and Philip C. Semprevivo, for Real Party in Interest and Respondent.

No appearance for Defendant and Respondent.

In an administrative mandamus proceeding, Caroline Messih-Zemaitis filed a motion to recover attorney fees after she successfully challenged a decision by the Fair Employment and Housing Commission (the Commission). The trial court ruled that Messih-Zemaitis did not have a right to recover attorney fees because the administrative mandamus proceeding was not an "action brought under" Government Code section 12965.[1] The court nevertheless addressed the merits of the motion and determined that if Messih-Zemaitis had the right to recover her fees, she would be entitled to an award of $20,335. Messih-Zemaitis appealed. We hold that Messih-Zemaitis has the right to recover her attorney fees and therefore reverse the court's order.

FACTUAL AND PROCEDURAL SUMMARY

Messih-Zemaitis was a customer service agent for real party in interest Air Canada from December 1993 until 2007, when Air Canada terminated her employment. On July 17, 2008, she filed a complaint with the California Department of Fair Employment and Housing (the Department), alleging, among other unlawful acts, that Air Canada discriminated against her based on a physical disability and her gender in violation of the Fair Employment and Housing Act (FEHA). (§ 12940 et seq.) Messih-Zemaitis did not request, and the Department did not issue, a right-to-sue notice concerning her allegations.

On July 16, 2009, the Department issued a written accusation against Air Canada alleging, among other unlawful acts, that Air Canada discriminated against Messih-Zemaitis on the basis of actual or perceived physical disabilities in violation of FEHA. The Department sought an order that Air Canada pay Messih-Zemaitis back pay, benefits, front pay (if she was not reinstated), and damages.

In July 2011, the Commission found that Air Canada violated Messih-Zemaitis's rights under FEHA, and ordered Air Canada to pay $102,737.60 in back pay, $19,720 as compensation for lost benefits, and $125,000 for her emotional distress, as well as a $25,000 administrative fine payable to the State. In addition, the Commission ordered Air Canada to

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[1] Unless otherwise specified, statutory references are to the Government Code.

reinstate Messih-Zemaitis or to pay her "front pay" damages in an amount to be agreed upon or, if no agreement was reached, an amount to be determined by the Commission at a further hearing.

The parties were unable to reach an agreement on front pay. In December 2012, after a hearing, the Commission ordered Air Canada to pay to Messih-Zemaitis an additional $114,237.70, and convey to her 95 shares of Air Canada stock to resolve front pay and other compensation issues.

On November 27, 2013, Messih-Zemaitis filed in the superior court an amended petition for writ of administrative mandate under Code of Civil Procedure section 1094.5. Initially, she appeared in propria persona. She named the Commission as the respondent and Air Canada as the real party in interest.

Messih-Zemaitis alleged that the Commission's December 2012 decision was "invalid" for a variety of reasons. She requested additional compensation and attorney fees incurred in the writ proceedings pursuant to Code of Civil Procedure section 1021.5. Air Canada opposed the petition. The Commission did not appear in the proceeding.

On May 14, 2014, the court granted the petition in part, and directed the Commission to award additional sums to Messih-Zemaitis.

On November 12, 2014, Messih-Zemaitis, then represented by attorney Anne Singer, filed in the superior court a motion for an award of attorney fees in the amount of $101,780 pursuant to section 12965, subdivision (b). Although Messih-Zemaitis had up until that point represented herself in the writ proceedings, she explained that she had previously engaged attorney Mary Mock to act as a "ghostwriter" to prepare documents and provide guidance and advice. Mock billed Messih-Zemaitis $13,730 for her services. Singer billed Messih-Zemaitis $1,980 for her work on the motion for attorney fees.

Air Canada opposed the motion, arguing that Messih-Zemaitis had no statutory right to recover her fees and, if fees were recoverable, the amount she sought was excessive.

The court denied the motion. It explained that section 12965, subdivision (b) does not "confer a right to fees in connection with a writ of mandamus challenging the result of an administrative adjudication." "[I]n the interest of completeness," however, the court determined the amount

of fees Messih-Zemaitis would be entitled to recover if she had that right. That amount, the court concluded, was $20,335.

DISCUSSION

We review de novo the question whether statutory language authorizes an award of attorney fees. (*In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1213-1214.)

Generally, litigants must bear their own attorney fees unless a statute or contract provides otherwise. (*Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 504.) Messih-Zemaitis bases her right to recover her attorney fees on a statute—section 12965, subdivision (b). This and other FEHA statutes underwent a substantial change in 2012, during the course of the underlying proceedings. Air Canada asserts that the former version of the statute applies, but that the order should be affirmed under either version. Messih-Zemaitis does not squarely address the question of which version applies, although she quotes and relies on language from the current version.

We begin by providing an overview of the statutory scheme in place prior to the 2012 statutory revisions. Under section 12960, an employee asserting a violation of FEHA could file a complaint with the Department. (§ 12960, subd. (b).) Prior to 2013, the Department could have responded to the complaint in at least the following two ways: (1) Under subdivision (a) of section 12965, the Department could have issued a written accusation against the employer, which the Commission would have heard and decided; or (2) Under subdivision (b), the Department could have provided the employee with a right-to-sue letter, which allowed the employee to pursue a "civil action" in court against the employer. (Former §§ 12965, subds. (a) & (b), 12967; see *State Personnel Bd. v. Fair Employment & Housing Com.* (1985) 39 Cal.3d 422, 428 (plur. opn. of Broussard, J.) (*State Personnel Bd.*).) The last sentence in section 12965, subdivision (b) provided: "In actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney fees and costs, including expert witness fees, except where the action is filed by a public agency or a public official, acting in an official capacity." (Former § 12965, subd. (b).)

Judicial review of Commission decisions was authorized by former section 12972, subdivision (b)(2), which provided that "the rules for judicial review set forth in Section 11523, shall apply to the [C]ommission." (Former

§ 12972, subd. (b)(2).) Section 11523, which is part of the Administrative Procedure Act, provides that "[j]udicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure." More specifically, the appropriate procedural vehicle is a petition for administrative mandate under Code of Civil Procedure section 1094.5. (*State Personnel Bd.*, *supra*, 39 Cal.3d at p. 429; see, e.g., *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306.)

As stated above, the Legislature revised FEHA, including section 12965, in 2012. (Stats. 2012, ch. 46.) The amendments were effective January 1, 2013—after the Commission's decision on the Department's accusation and before Messih-Zemaitis's filing of her petition for writ of administrative mandate. As is relevant here, the amendments eliminated the Commission and replaced the Department's power to issue a written accusation with the power to "bring a civil action in the name of the department on behalf of the person claiming to be aggrieved." (§ 12965, subd. (a).) If the Department does not bring a civil action, it may issue a right-to-sue notice to the aggrieved employee, who may then bring a "civil action." (§ 12965, subd. (b).) The attorney fees provision in the last sentence of subdivision (b) was amended to read: "In [civil] actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney fees and costs, including expert witness fees." In accordance with the elimination of the Commission, the Legislature repealed the statute that provided for review of the Commission's decisions by administrative mandamus pursuant to the Administrative Procedure Act. (Stats. 2012, ch. 46, § 51 [repealing former section 12972].)

Statutes presumably apply prospectively only. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207; Civ. Code, § 3.) A law is deemed retrospective—and presumptively *not* applied—when it would affect " ' "rights, obligations, acts, transactions and conditions which are performed or exist prior to the adoption of the statute." ' " (*Evangelatos v. Superior Court*, *supra*, at p. 1206.) Here, the 2012 law revised the statutory language concerning the recovery of attorney fees to correspond with the elimination of the Commission and the creation of the Department's right to file a "civil action" instead of an accusation. Under the revised law, there is no more

Commission, no more administrative proceedings before the Commission, and, consequently, no procedure for challenging the Commission's ruling by a petition for writ of mandate. If the revised law were applied to Messih-Zemaitis, therefore, she would have had no procedural mechanism for challenging the Commission's decision. The elimination of that mechanism would plainly affect her preexisting rights. Therefore, the 2012 revisions to FEHA do not apply to Messih-Zemaitis.

Under the law applicable to Messih-Zemaitis, she could challenge the Commission's decision by petition for writ of mandate under Code of Civil Procedure section 1094.5. That section allows the prevailing party to recover the expense of preparing the administrative record for the writ proceeding, but does not provide for the recovery of attorney fees. (Code Civ. Proc., § 1094.5, subd. (a); see generally 2 Cal. Administrative Mandamus (Cont.Ed.Bar 3d ed. 2016) §§ 1532-15.33, pp. 15-28-15-35.) Courts have, however, awarded attorney fees to a successful petitioner in administrative mandamus cases under either of two statutes: Section 800 and Code of Civil Procedure section 1021.5. (See, e.g., *Verdugo Hills Hospital, Inc. v. Department of Health* (1979) 88 Cal.App.3d 957, 964 [fees awarded under section 800]; *Environmental Protection Information Center v. Department of Forestry & Fire Protection* (2010) 190 Cal.App.4th 217, 250 [fees recoverable under Code of Civil Procedure section 1021.5 in administrative mandamus action].)

Section 800 provides for the recovery of attorney fees from a "public entity" when an administrative decision "was the result of arbitrary or capricious action or conduct by a public entity or an officer thereof in his or her official capacity." (§ 800, subd. (a).) The recovery of fees under this statute is limited to a maximum of $7,500. (*Ibid.*) Messih-Zemaitis did not request fees based on this statute and, in her reply brief, clarified that she is *not* claiming a right to fees under this statute.

Code of Civil Procedure section 1021.5 codified the so-called private attorney general theory for recovering attorney fees. (See *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 933.) Although Messih-Zemaitis cited to this statute as the basis for her right to attorney fees in her amended petition, she did not rely on it in her motion and does not rely on it on appeal.

Instead of relying on section 800 or Code of Civil Procedure section 1021.5, Messih-Zemaitis based her motion on section 12965, subdivision (b). The last sentence of that subdivision as it read before 2013 provided for an award of attorney fees to a prevailing party "[i]n actions brought under this section." (Former § 12965, subd. (b).) Messih-Zemaitis and Air Canada disagree as to whether the underlying proceedings constitute an "action brought under" section 12965.

"In interpreting a statutory provision, 'our task is to select the construction that comports most closely with the Legislature's apparent intent, with a view to promoting rather than defeating the statutes' general purpose, and to avoid a construction that would lead to unreasonable, impractical, or arbitrary results.' " (*Poole v. Orange County Fire Authority* (2015) 61 Cal.4th 1378, 1385.)

The general purpose of FEHA is "to protect and safeguard the right and opportunity of all persons to seek, obtain, and hold employment without discrimination or abridgment on account of" various characteristics, including physical disability. (§ 12920.) By enacting FEHA, the Legislature intended "to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons." (§ 12920.5.) Its provisions are to "be construed liberally for the accomplishment of [its] purposes." (§ 12993.)

By providing for the recovery of attorney fees in section 12965, the Legislature "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.' " (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 584.) The provision furthers the goal of preventing and deterring discrimination by compelling employers who engage in unlawful practices "to internalize to some degree the significant social costs of its discrimination, thereby promoting the FEHA's goal of deterring such discrimination." (*Harris v. City of Santa Monica* (2013) 56 Cal.4th 203, 235.) The recovery of fees also "make it easier for plaintiffs of limited means to pursue meritorious claims." (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 984.)

Air Canada argues that Messih-Zemaitis's administrative mandamus proceeding is not an "action" within the meaning of section 12965 because it

is a "special proceeding." Indeed, as Air Canada points out, Code of Civil Procedure section 1094.5 is located in Part 3 of the Code of Civil Procedure, which is titled, "Of Special Proceedings Of A Civil Nature," and courts have referred to mandamus proceedings as such. (See, e.g., *Mata v. City of Los Angeles* (1993) 20 Cal.App.4th 141, 149; *Wenzler v. Municipal Court* (1965) 235 Cal.App.2d 128, 131-132.) The question, however, is not how mandamus proceedings are labeled or characterized, but whether the Legislature, by providing for the recovery of attorney fees for employees who prevail in an "action" brought under FEHA, intended to preclude an award of attorney fees for employees who must pursue an administrative mandamus proceeding to vindicate their rights under FEHA. (See *In re Head* (1986) 42 Cal.3d 223, 226.)

Neither side has referred us to authority directly on point. Our Supreme Court has stated that in determining whether to award fees under section 12965, subdivision (b), courts will look to cases interpreting Code of Civil Procedure section 1021.5. (*Chavez v. City of Los Angeles*, *supra*, 47 Cal.4th at p. 985.) That statute permits a successful party to recover attorney fees incurred "in any action" where the requirements of the statute are satisfied.[2] Notwithstanding the statute's textual limitation to "action[s]," courts have awarded fees under the statute to successful litigants in cases otherwise characterized as "special proceedings." (See, e.g., *In re Head*, *supra*, 42 Cal.3d at p. 226 [fees recoverable in habeas corpus proceeding]; *Olney v. Municipal Court* (1982) 133 Cal.App.3d 455, 463 [ordinary mandamus]; *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 752-754 [administrative mandamus].) In *In re Head*, *supra*, 42 Cal.3d 223, the Court of Appeal had held that the successful habeas corpus petitioners could not recover their

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[2] Code of Civil Procedure section 1021.5 provides in part: A "court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, (b) the necessity and financial burden of private enforcement, or of enforcement by one public entity against another public entity, are such as to make the award appropriate, and (c) such fees should not in the interest of justice be paid out of the recovery, if any."

attorney fees under Code of Civil Procedure section 1021.5 because "habeas corpus is a special proceeding of a criminal nature and not a civil action." (*Id.* at p. 226.) The Supreme Court reversed, and explained that "the nature of the relief sought, not the label or procedural device by which the action is brought, is determinative of the right to seek fees under section 1021.5." (*Ibid.*) The habeas corpus "petitioners' claim," the court added, "is of such a nature that it might have been presented in a purely civil proceeding—by petition for writ of mandate or action for declaratory relief—in which case no question would be raised as to the propriety of the award." (*Ibid.*)

In *Edna Valley Watch v. County of San Luis Obispo* (2011) 197 Cal.App.4th 1312, Division Six of this court extended the meaning of an "action" under Code of Civil Procedure section 1021.5 to include not only an administrative mandamus proceeding, but also the administrative proceeding that preceded the party's petition for writ of administrative mandate. (*Id.* at p. 1315.) The word "action" in Code of Civil Procedure section 1021.5, the court stated, "is not limited to the common definition of 'action' found in the Code of Civil Procedure," and must be construed in light of the purpose of Code of Civil Procedure section 1021.5. (*Id.* at p. 1319.) "Its purpose is to encourage suits effectuating a strong public policy by awarding fees to persons who through lawsuits successfully bring about the benefits of such policies to a broad class of citizens." (*Id.* at p. 1320.) To "say that administrative proceedings are not part of the 'action,' as that term is used in [Code of Civil Procedure] section 1021.5, would defeat the purpose of the statute and could discourage many lawsuits in the public interest." (*Ibid.*; see also *Best v. California Apprenticeship Council* (1987) 193 Cal.App.3d 1448, 1460 [whether the private enforcement of public policies is achieved through an administrative and/or a judicial proceeding is irrelevant to the need to award attorney fees to encourage the enforcement].) Moreover, a plurality of our Supreme Court has construed the attorney fees provision in section 12965 to provide for the recovery of fees incurred in a proceeding before the Commission by an employee "who demonstrates a need for independent counsel." (*State Personnel Bd.*, *supra*, 39 Cal.3d at p. 434, citing *DFEH v. American Airlines* (1983) FEHC Dec. No. 83–15.)

The purpose of FEHA's attorney fees provision, like the purpose of section 1021.5, is to encourage meritorious suits effecting strong public policies by rewarding those who bring them. (See *Weeks v. Baker & McKenzie* (1998) 63 Cal.App.4th 1128, 1172; see also *Tipton-Whittingham v. City of Los Angeles* (2004) 34 Cal.4th 604, 610 [the language and purpose of Code of Civil Procedure section 1021.5 and section 12965, subdivision (b) are similar].) Construing "action" as it appears in section 12965, subdivision (b), to include administrative mandamus proceedings would further this purpose for the same reasons courts have expansively construed the same word in section 1021.5.

In light of the purposes of FEHA, the liberal construction of FEHA's provisions, and cases construing the analogous language in Code of Civil Procedure section 1021.5, we hold that an "action," within the meaning of former section 12965, subdivision (b), includes an administrative mandamus proceeding brought to vindicate an employee's rights under FEHA.

For the foregoing reasons, we reverse the trial court's order denying Messih-Zemaitis the right to recover her reasonable attorney fees in her mandamus proceeding.

Although the court determined that Messih-Zemaitis had no right to recover her attorney fees, it proceeded to determine the amount of attorney fees Messih-Zemaitis would have been entitled to recover if she had that right. On appeal, Messih-Zemaitis argues that the trial court's determination was "dicta," and should be disregarded. She requests that we vacate the trial court's order and remand for "a new hearing as to the amount of the attorney's fees [to] be ordered."

We decline to order a new hearing. The court heard Messih-Zemaitis's motion for attorney fees and Messih-Zemaitis offers no compelling reason for a further hearing. We also decline to adopt Air Canada's suggestion that we modify the court's order to reflect the amount of fees the court had conditionally determined. Although the court determined an amount of fees

that would be reasonable if Messih-Zemaitis was entitled to recover attorney fees, it did not order that amount and we will thus remand the matter to the trial court to enter a formal order on the motion. Air Canada, not the Commission, shall be obligated to pay the amount of attorney fees awarded to Messih-Zemaitis. (Former § 12973, subd. (e).)[3]

DISPOSITION

The order denying appellant's motion for attorney fees is reversed. The court shall rule on Messih-Zemaitis's motion for attorney fees in accordance with the views expressed in this opinion and enter an order accordingly.

We award Messih-Zemaitis her costs on appeal.

NOT TO BE PUBLISHED.

ROTHSCHILD, P. J.

We concur:

CHANEY, J.

JOHNSON, J.

[3] Subdivision (e) of former section 12973 provided: "Notwithstanding any other provision of law, the commission is not liable for attorney's fees of parties to the administrative adjudication of cases brought before the commission, including proceedings brought pursuant to Section 11523 of this code and Section 1094.5 of the Code of Civil Procedure."