Filed 12/20/19 Leggins v. Rite Aid Corp. etc. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ROBERT LEGGINS, Plaintiff and Appellant, v. RITE AID CORPORATION and THRIFTY PAYLESS, INC., Defendant and Respondent.	B290700 (Los Angeles County Super. Ct. No. BC511139)

APPEAL from an order of the Superior Court of Los Angeles County, Michael L. Stern, Judge. Affirmed.

Shegerian & Associates, Carney R. Shegerian for Plaintiff and Appellant.

Morgan, Lewis & Bockius, Thomas M. Peterson, Barbara A. Fitzgerald, Jason S. Mills and Kathryn T. McGuigan for Defendant and Respondent.

A jury found that Rite Aid Corporation harassed, discriminated against, and wrongfully discharged Robert Leggins, a store manager, based on his disability, retaliated against him for his complaints about the harassment, and failed to prevent discrimination. It awarded him $3,769,128 in compensatory damages and $5 million in punitive damages, and the trial court awarded him $1,037,286 in attorney fees. Rite Aid appealed, and we reversed the punitive damages award and the judgment as to one cause of action, but otherwise affirmed. On remand, the trial court denied Leggins's motion for additional attorney fees, including fees expended in responding to Rite Aid's appeal. We conclude the court acted within its discretion, and thus affirm.

BACKGROUND

Rite Aid operates retail stores, each of which comprises a pharmacy and a "front end" store selling general merchandise. Leggins was a store manager from 1988 to 2013, and from 1985 to 2010 received only positive job performance reviews. Approximately half of his work involved physical labor.

On August 28, 2006, Leggins sustained serious injuries to his neck and left shoulder when he was beaten during a robbery at a Rite Aid store in Hollywood. He returned to work seven months later but suffered severe pain that sometimes made it difficult for him to walk and use his left arm and leg. Leggins nevertheless worked full time for the next six years, sometimes 15 to 16 hours a day, and often came to work on his days off. He received cortisone shots, took "very heavy" pain medication, and underwent acupuncture treatments.

Leggins informed Rite Aid's district and regional managers about the pain and his medications, and in August 2010 took a

leave of absence to undergo surgery, where his third, fifth and seventh vertebrae were surgically fused.

Leggins began receiving poor performance reviews in April 2011, and was given extra work. In May of 2011 he complained to his supervisor and human resources that he was still recovering from surgery and was unable to clear pallets and do heavy lifting, but was told, a "big Black guy like you? I mean, I thought you guys were tough. You know, stop being a sissy. . . . [S]top whining and crying." Leggins asked for additional help, but was told the work had to be done despite his physical limitations.

On several occasions, Leggins informed a Rite Aid investigator that the extra physical work caused pain that he treated by taking strong medications during lunch breaks. He stated his supervisor had ignored his complaints, other than to assign him more physical work, called him a "sissy," and commented that Black men should be tougher. The investigator did nothing in response, other than to tell Leggins that a "big Black guy like [him was] very intimidating," a comment she repeated several times in later meetings.

After Leggins's complaint to the investigator, his supervisor escalated the harassment campaign. He visited Leggins's store more often, frequently when Leggins was absent, and spread rumors among the employees that Leggins was going to be fired. When Leggins inquired about the rumors, the supervisor told him that for "a big Black guy" he "complain[ed too] much."

Leggins's further complaints up the chain of command yielded no result.

Instead, Leggins was given impossible tasks and forced to come in early, stay late, and work on his days off. When he asked for assistance, none came.

In June and July 2012, Rite Aid initiated disciplinary proceedings against Leggins, ostensibly for poor performance, and in February 2013 fired him on a pretext.

Leggins sued for discrimination, retaliation and wrongful termination based on age, disability, and race in violation of the Fair Employment and Housing Act. (Gov. Code, § 12900 et seq.; FEHA.)[1] He sought compensatory and punitive damages, arguing his supervisors were corporate managers such that their actions were the actions of Rite Aid itself. A jury found Rite Aid was not liable for race-based harassment, discrimination or termination; failure to prevent harassment; or retaliation or wrongful termination based on Leggins's medical leaves. However, the jury found Rite Aid was liable for disability-based discrimination, retaliation and wrongful termination; retaliation and wrongful termination for complaints concerning race- and disability-based harassment; and failure to prevent discrimination.

The jury awarded Leggins $1,269,128 in economic damages, $1.5 million for past noneconomic loss, and $1 million for future economic loss. The jury also awarded $5 million in punitive damages on a finding that Rite Aid acted with malice, fraud, or oppression, and the trial court awarded Leggins $1,037,286 in attorney fees.

[1] Undesignated statutory references will be to the Government Code.

Rite Aid appealed. We reversed the judgment as to Leggins's cause of action for harassment and vacated the punitive damages award, but affirmed the judgment in all other respects and ordered that each side bear its own costs on appeal. (*Leggins v. Rite Aid Corp*., Nov. 15, 2017, B267434 [nonpub. opn.].)

On remand, Rite Aid paid the $1 million in attorney fees and costs originally ordered by the trial court, and Leggins moved for additional attorney fees.

After a hearing that was not transcribed, the court denied the motion, stating in a minute order only the following: "Motion is denied pursuant to Code of Civil Procedure section 1033.5(a)(10) and *Nielsen v. Stumbos*, 226 Cal.App.3d 301, 305 (1990)."

Leggins appeals the denial of his motion for additional fees.

DISCUSSION

Leggins contends the court abused its discretion in denying his motion for additional attorney fees.

In a civil action brought under the California FEHA by a person aggrieved by an unlawful business practice, "the court, in its discretion, may award to the prevailing party . . . reasonable attorney's fees and costs." (§ 12965, subd. (b).) "In enacting the FEHA, the Legislature sought to safeguard the rights of all persons to seek, obtain, and hold employment without discrimination on account of various characteristics, which now include race, religion, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, and sexual orientation. [Citations.] . . . 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." ' " (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 984 (*Chavez*).) "[A] trial court should ordinarily award attorney fees to a prevailing plaintiff [in a FEHA action] unless special circumstances would render a fee award unjust." (*Id.* at p. 976.)

" 'It is well established that the determination of what constitutes reasonable attorney fees is committed to the discretion of the trial court . . . . [Citations.] The value of legal services performed in a case is a matter in which the trial court has its own expertise. . . . The trial court makes its determination after consideration of a number of factors, including the nature of the litigation, its difficulty, the amount involved, the skill required in its handling, the skill employed, the attention given, the success or failure, and other circumstances in the case.' " (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1096.) We review a trial court's attorney fee determination for abuse of discretion, examining "whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court." (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1339.)

As our Supreme Court explained in *Serrano v. Priest* (1977) 20 Cal.3d 25, 49: "The 'experienced trial judge is the best judge of the value of professional services rendered in his court, and while his judgment is of course subject to review, it will not be disturbed unless the appellate court is convinced that it is clearly wrong.' "

Here, the court's determination that Leggins was entitled to no further attorney fees was within the bounds of reason. Leggins's primary objective was to vindicate his claim that Rite Aid subjected him to unlawful business practices. He prevailed, and ultimately, after appeal, obtained a judgment in the amount of about $3.8 million.

For their efforts, Leggins's attorneys were compensated in the amount of $1,037,286, about 27 percent of the ultimate judgment. Although this award is somewhat less than an attorney generally accepts on a contingency basis—around 33 to 45 percent or higher—it seems to be in the ballpark. Nothing about the nature or difficulty of the litigation or the skill employed or attention given suggests the court's decision to award 27 percent of a $3 million judgment rather than 33 percent or more was arbitrary or capricious.

The parties disagree about which side prevailed specifically on appeal, Rite Aid likening Leggins to plaintiffs in the caselaw who obtained no or little recovery and were awarded no or nominal fees, and Leggins arguing the analogy and cases are inapposite. Such a discussion is of limited cogency generally, because section 12965, subdivision (b), which states only that attorney fees may be awarded to the "prevailing party," says nothing about the timing of that party's success. The discussion is especially unhelpful here, where each side prevailed on appeal about equally, Rite Aid whittling down the judgment—and Leggins preserving it—by approximately half.

In any event, given that under FEHA attorney fees are awarded in relation to the litigation as a whole, without parsing them into pre- and post-appeal fees, it is reasonable to reevaluate the propriety of a fee award after any appeal. Here, the trial

court could and presumably did conclude that Leggins's attorneys should not be compensated for time spent litigating the punitive damages award, which was reversed on appeal.

"Although fees are not reduced when a plaintiff prevails on only one of several factually related and closely intertwined claims [citation], '. . . a reduced fee award is appropriate when a claimant achieves only limited success.' " (*Chavez*, *supra*, 47 Cal.4th at p. 989.) Here, Leggins's claim for punitive damages was unrelated to and distinct from his employment claims. He argued that mid-level managers overseeing 10 to 15 Rite Aid stores (out of approximately 4,000 nationwide) and about 300 employees were corporate managers determining corporate policy. We concluded that his only evidence for the claim—the testimony of two lower-level managers—failed to establish that Rite Aid had so empowered the mid-level managers with independent decisionmaking over corporate policy that their actions were those of the corporation. We therefore reversed the punitive damages award, which reduced the judgment by more than half. The trial court could reasonably consider the pre-appeal fee award to have been overly generous in light of the reduced judgment.

Leggins argues abuse of discretion is demonstrated by the court's citation in its minute order to Code of Civil Procedure section 1033.5 and *Nielsen v. Stumbos*, *supra*, 226 Cal.App.3d at page 305, both of which stand for the unremarkable proposition that attorney fees may be awarded as costs of suit.

Although neither authority is particularly pertinent to a FEHA claim, neither are they incorrect or misleading. Nothing about these citations indicates the court misunderstood its

discretion under section 12965 or considered improper criteria in choosing to deny additional attorney fees post-appeal.

Leggins argues that the court's failure to mention section 12965 indicates it failed to apply that section, and thus demonstrates an abuse of discretion. The argument is meritless. " ' " 'Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless a clear case of abuse is shown and unless there has been a miscarriage of justice[,] a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power.' " ' " (*Steele v. Jensen Instrument Co.* (1997) 59 Cal.App.4th 326, 330.) Citation to tangential but innocuous authority neither affirmatively nor clearly establishes deliberation outside the bounds of reason. On the contrary, in accordance with the standard of review, as to matters on which the record is silent we presume the trial court knew and followed the law. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 ["All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown"].)

Leggins argues the court was required to craft an attorney fee award "so as to fully compensate counsel for the prevailing party for services reasonably provided to his or her client." (*Horsford v. Board of Trustees of California State University* (2005) 132 Cal.App.4th 359, 395.) We agree, but that simply begs the question: What amount would be necessary to fully compensate Leggins's counsel? In light of the factors noted above, one of which is degree of success, we conclude the trial

court acted within its discretion in denying Leggins additional attorney fees post-appeal.

DISPOSITION

The order is affirmed. Rite Aid is to recover its costs on appeal.

NOT TO BE PUBLISHED

CHANEY, J.

We concur:

ROTHSCHILD, P. J.

BENDIX, J.