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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

GENNADY DOLZHENKO, Plaintiff and Appellant, v. VALLEY TEMPS, INC., Defendant and Respondent.	B233449 (Los Angeles County Super. Ct. No. LC075992)

APPEAL from an order of the Superior Court of Los Angeles County, Michael Harwin, Judge. Reversed and remanded with directions.

Gennady Dolzhenko, in pro. per., for Plaintiff and Appellant.

Law Offices of Martin J. Trupiano and Martin J. Trupiano for Defendant and Respondent.

Gennady Dolzhenko appeals from an order awarding respondent Valley Temps, Inc. its attorney fees. The fees were awarded after respondent successfully defended two appeals brought by appellant from discovery sanction and attorney fee orders. Appellant argues the trial court erred by not finding he was financially able to pay the fee award, although he raised this ground in his opposition and in his declaration setting out his financial situation. We agree. While we reject most of appellant's arguments that the fee award was inflated, we agree that the evidence in support of the award is inconsistent. We reverse the fee award and remand for consideration of the proper fee award in light of appellant's ability to pay the award of fees.

FACTUAL AND PROCEDURAL SUMMARY

This is the third appeal brought by appellant arising from this action under Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e et seq. (Title VII)). Appellant did not appeal the trial court's award of summary judgment in favor of respondent. In our first unpublished opinion, *Dolzhenko v. Valley Temps, Inc.* (July 26, 2010, B209129) (*Dolzhenko I*), we affirmed an award of attorney fees to respondent for prevailing in the underlying action. In the second unpublished opinion, *Dolzhenko v. Valley Temps, Inc.* (Aug. 24, 2010, B207346) (*Dolzhenko II*), we affirmed three awards of discovery sanctions against appellant. We take some of the procedural history from our prior opinions.

Respondent is an employment services business principally serving manufacturing firms. Appellant applied for a temporary job as a factory assembler with respondent, but scored poorly on screening examinations and a personal interview and was not considered for any job openings. He sued respondent, alleging a single cause of action for national origin discrimination under Title VII. The trial court granted respondent's unopposed motion for summary judgment because appellant failed to exhaust administrative remedies, had not shown he was qualified for the position he sought, and had not produced evidence that he was discriminated against because of his national origin. In addition, appellant had not produced substantial evidence that respondent's

stated legitimate reasons for closing his application were untrue or pretextual, nor had he produced evidence that respondent acted with a discriminatory animus.

The trial court granted respondent's motion for attorney fees as a prevailing party under Title VII and awarded $30,750 in fees. In *Dolzhenko I*, we affirmed that order and granted respondent its costs on appeal. (*Dolzhenko I*, *supra*, [at p. 10] [nonpub. opn.].) As noted, in *Dolzhenko II* we affirmed three trial court orders imposing discovery sanctions on appellant. Remittitur in *Dolzhenko II* was issued by this court on October 26, 2010. Remittitur in *Dolzhenko I* was issued by this court on November 23, 2010. Notably, no issue about appellant's ability to pay attorney fees was raised on those appeals.

On December 3, 2010, respondent filed a memorandum of costs on appeal ($1,277.60). The same day it also filed a motion for attorney fees for defending both *Dolzhenko I* and *II* on appeal, and for the preparation of the fee motion. A total of $29,190 in fees was sought. Appellant opposed the fee motion. The trial court granted fees in the reduced amount of $20,000. This timely appeal followed.

DISCUSSION

I

Appellant argues the fee award must be reversed because we did not award respondent its fees on appeal. The argument is based on language in *Dolzhenko I*. In that opinion, we affirmed the trial court's award of attorney fees to respondent on the ground that appellant's action was frivolous. In the same appeal, respondent also sought the costs of obtaining a copy of the record on appeal and sanctions in the form of fees related to that issue. In that context, we discussed the availability of an award of fees and costs on appeal: "Rule 8.278(a)(5) provides for an award of costs on appeal '[i]n the interests of justice' as the court 'deems proper.' Rule 8.278(d)(2) provides: 'Unless the court orders otherwise, an award of costs neither includes attorney's fees on appeal nor precludes a party from seeking them under rule 3.1702.' Rule 3.1702(c) provides that a motion to claim attorney fees on appeal under a statute requiring the court to determine

entitlement to the fees, the amount of fees, or both, must be served and filed with this court within the time for filing a memorandum of costs under rule 8.278(c). The deadline under that rule is 40 days after notice of the remittitur." (*Dolzhenko I*, *supra*, [at p. 9] [nonpub. opn.].) We concluded that respondent was "entitled to its costs on appeal, *not including attorney fees*, but including the costs of copying the record on appeal at the clerk's office for the Second District." (*Id*. [at p. 10], italics added.)

Appellant argues that the italicized language is a ruling denying respondent *any* attorney fees on appeal. We disagree with this construction of our opinion. It is plain from the context that we were reaching the much narrower conclusion that respondent could not receive attorney fees for its efforts in obtaining the record on appeal. We did not address the availability of fees for prevailing on the appeal itself and thus the opinion in *Dolzhenko I* does not provide a basis for reversal of the fee award now appealed.

II

The Title VII attorney fee provision states: "In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee . . . ." (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, 985, quoting 42 U.S.C. § 2000e-5(k) (*Chavez*).) Fees are awarded for both trial and appellate work. (*Norris v. Hartmarx Specialty Stores, Inc.* (5th Cir. 1990) 913 F.2d 253, 257 [Title VII action].) But in a Title VII case, "a *prevailing defendant* may recover attorney fees only when the plaintiff's action was frivolous, unreasonable, without foundation, or brought in bad faith. [Citation.]" (*Chavez*, *supra*, 47 Cal.4th at p. 985.) In *Dolzhenko I*, we affirmed the trial court order concluding that appellant had failed "'to present any argument showing that the claim had merit and was not "groundless or without foundation." [Citation.]'" (*Dolzhenko I*, *supra*, [at p. 3, see also pp. 6–8].)

Appellant argues the trial court failed to make findings as to his ability to pay any award of attorney fees, nor did it take his financial situation into consideration in determining the amount of fees to be awarded.

In a declaration in opposition to the motion for fees on appeal, appellant stated under penalty of perjury: "2. I am currently unemployed. I do not have any savings, a car, house, etc. [¶] 3. The trial court already awarded defendant attorneys' fees in the amount of $30,750, that subjects me to financial ruin. [¶] 4. When I had a temporary job, I worked for minimum wages." He expanded on this showing in a supplemental memorandum in opposition to the motion for fees on appeal. He declared that his average income over the prior year was $527 per month, he paid rent of $350 a month, and that he spent $177 a month for food, transportation or other necessities. Appellant argued that the trial court was required to make findings as to his ability to pay an award of attorney fees. He also contended the trial court was required to take his financial condition under consideration in determining the size of any fee award. In support, appellant cited two federal cases, *Patton v. County of Kings* (9th Cir. 1988) 857 F.2d 1379 (*Patton*) and *Miller v. Los Angeles County Bd. of Educ.* (9th Cir. 1987) 827 F.2d 617 (*Miller*). Respondent replied that appellant's financial condition is not a basis for denying attorney fees altogether, citing *Miller*, *supra*, 827 F.2d 617.

The trial court minute order states that the court reviewed the moving papers and opposition and heard oral argument.[1] The court ruled: "The Court finds that the Court of Appeal did not say that attorney fees were disallowed. Based on grounds as set forth in the moving papers, and good cause appearing, the motion for [attorney] fees is granted in the amount of $20,000.00." No findings were made as to appellant's ability to pay a fee award.

Both federal and state authority require a finding of the plaintiff's ability to pay a fee award in a civil rights action. *Miller*, *supra*, 827 F.2d 617, was an action for discrimination based on race under Title VII,[2] which resulted in a defense judgment following trial. The defendant moved for attorney fees under Title VII and 42 U.S.C.

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[1] No reporter's transcript was ordered.

[2] Miller also alleged claims under 42 U.S.C. sections 1981 and 1983.

section 1988. At the hearing on the motion, the district court said it did not believe Miller would be able to pay the $48,375 in fees requested, and indicated it would reduce the reward on that ground. The defendant asserted that Miller had a house worth $160,000. The district court granted the full amount of fees sought. The Ninth Circuit held: "[A] district court in cases involving 42 U.S.C. §§ 1981, 1983, or Title VII should consider the financial resources of the plaintiff in awarding fees to a prevailing defendant. See *Munson v. Friske*, 754 F.2d 683, 697–698 (7th Cir. 1985); *Charves v. Western Union Telegraph Co.*, 711 F.2d 462, 465 (1st Cir. 1983); *Durrett v. Jenkins Brickyard, Inc.*, 678 F.2d 911, 917 (11th Cir. 1982)." (*Miller*, at p. 621.) The *Miller* court explained "[w]hile an award of attorney's fees for a frivolous lawsuit may be necessary to fulfill the deterrent purposes of 42 U.S.C. § 1988 and 42 U.S.C. § 2000e-5(k), the award should not subject the plaintiff to financial ruin. [Citation.]" (*Ibid*; see also *Patton, supra*, 857 F.2d 1379, 1382 [applying *Miller*, *supra*, 827 F.2d 617 in civil rights action brought under 42 U.S.C. section 1983].)

The Ninth Circuit in *Miller*, *supra*, 827 F.2d 617, noted that the district court's findings of fact and conclusions of law did not reveal "how, or if, the court concluded that Miller was able to pay the $48,375 fee award." (*Id*. at p. 621.) The court vacated the award of attorney fees. Respondent relies on a footnote in *Miller*: "However, a district court should not *refuse* to award attorney's fees to a prevailing defendant under 42 U.S.C. § 1988 or 42 U.S.C. § 2000e-5(k) solely on the ground of the plaintiff's financial situation." (*Id.* at p. 621, fn 5.)

In interpreting the California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12940 et seq.), California courts often have looked for guidance to decisions construing Title VII. This occurs where the relevant language of the two laws is similar, as it is in the attorney fee provisions. (*Chavez*, *supra*, 47 Cal.4th at pp. 984–985.) The rationale of *Patton, supra*, 857 F.2d 1379 was applied by the court in *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859 (*Rosenman*). *Rosenman* was an employment discrimination case under FEHA. Trial of the action resulted in a defense verdict, and the defendant firm was awarded $150,000 in

fees under FEHA. The principal holding of *Rosenman* was that the record did not support a finding that the action was frivolous, unreasonable, or groundless as required for an award of fees against a plaintiff in an employment discrimination action. (*Id*. at p. 867–868.) In a footnote, the court said: "The trial court should also make findings as to the plaintiff's ability to pay attorney fees and how large the award should be in light of the plaintiff's financial situation. As the Ninth Circuit Court of Appeals held in *Patton*[, *supra,*] 857 F.2d 1379, 1382, the trial court 'should consider the financial resources of the plaintiff in determining the amount of attorney's fees, to award to a prevailing defendant.' We wholeheartedly agree with the Ninth Circuit's holding an award of attorney fees '"should not subject the plaintiff to financial ruin."' (*Ibid.*)" (*Id*. at pp. 868–869, fn. 42.)

The Court of Appeal in *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, agreed with the rationale in *Rosenman*, *supra*, 91 Cal.App.4th 859. *Villanueva* was an employment discrimination action brought under FEHA. The trial court granted the defendant's motion for summary judgment and awarded nearly $40,000 in attorney fees against the plaintiff. On appeal, the plaintiff argued for reversal of the fee award because the trial court did not consider his ability to pay, relying on *Rosenman*, *supra*, 91 Cal.App.4th 859. The *Villanueva* court agreed that a trial court must consider the financial ability of a plaintiff in a FEHA action to pay an award of fees: "We agree with the rationale of *Rosenman*. Because the majority of cases under the FEHA involve litigants who would not have the financial means to prosecute this type of case, the public policy behind FEHA is served by not discouraging them from pursuing the litigation by potentially imposing fees that could easily devastate them financially simply because a few file frivolous claims. Thus, a plaintiff's ability to pay must be considered before awarding attorney fees in favor of the defendant." (*Villanueva*, *supra*, 160 Cal.App.4th at p. 1203.)

While the *Villanueva* court adopted the rule that the financial situation of the unsuccessful FEHA plaintiff must be considered in awarding fees to the defendant, no reversal was required in that case because the plaintiff failed to present evidence of his

inability to pay. (*Villanueva, supra*, 160 Cal.App.4th at pp. 1203–1204.) Assuming that appellant had the burden here of demonstrating his inability to pay a fee award, he satisfied that burden here. He did so by making a prima facie showing of his inability to pay a fee award because of his financial situation. Under penalty of perjury he stated his monthly income, expenses, unemployed status, and history of minimum wage work. He also stated that he lacked financial assets such as savings, a car, or a house.

Respondent recognizes this evidence was before the trial court, but argues that the trial court's reduction of the request for fees by nearly $10,000 was presumably based on appellant's financial condition. Considering the very substantial amount of the fee award that remained ($20,000) and the absence of any stated rationale for the reduction, we infer the trial court exercised its discretion to reduce the amount claimed on the merits. As to the amount remaining, respondent proffered no evidence to the trial court which would demonstrate that appellant had financial assets from which a fee award could be paid. The trial court did not find that appellant had the ability to pay even the reduced fee award, as required by the authority we have cited.

The *Miller* court cited the following passage in *Durrett v. Jenkins Brickyard, Inc.* (11th Cir. 1982) 678 F.2d 911 (*Durrett*) when it indicated that fees should not be refused because of an inability to pay. (*Miller, supra*, 827 F.2d at p. 621, fn. 5.) The *Durrett* court said: "[W]e hold that in no case may the district court refuse altogether to award attorney's fees to a prevailing Title VII defendant because of the plaintiff's financial condition. A fee must be assessed which will serve the deterrent purpose of the statute, and no fee will provide no deterrence. In this case, the district court erred by finding Durrett's apparent indigency justification for assessing no fee. On remand, Durrett's indigency, if established, will limit, but not eliminate, the award. Finally, we note that, particularly at this remove from the filing of Durrett's application to proceed in *forma pauperis*, that application alone will not suffice to establish a limitation on Durrett's

ability to pay; just as the court will conduct a thorough inquiry to evaluate the *Johnson*[3] factors, so must it look beyond the plaintiff's application to proceed in *forma pauperis* to determine his financial condition." (*Durrett,* at p. 917.)

Based on this authority, we reverse the fee award and remand the matter to the trial court. It is directed to consider appellant's financial condition in fashioning a fee award which will serve the deterrent purpose of the fee statute, but not subject appellant to financial ruin. Appellant has thus prevailed in arguing that the trial court must make findings taking into account his financial situation, but has not achieved complete success because the fee award cannot be completely eliminated for the reasons set out in *Durrett, supra,* 678 F.2d at page 917 and *Miller, supra,* 827 F.2d at page 621, fn. 5.

III

Appellant raises a number of challenges to the amount of fees awarded. We review the award of fees under an abuse of discretion standard. (*Carpenter & Zuckerman v. Cohen, LLP* (2011) 195 Cal.App.4th 373, 378.) "'We look at the evidence in support of the trial court's finding, resolve all conflicts in favor of the respondent and indulge in all legitimate and reasonable inferences to uphold a finding.' [Citation.]" (*Ibid.*)

A. Cribbing

Appellant argues that the amount claimed was excessive because a substantial portion of the motion was duplicative of work performed in moving for fees which were affirmed in *Dolzhenko I.* His complaint is that counsel for respondent copied section B. of the points and authorities in the *Dolzhenko I* fee motion regarding the reasonableness of the fees sought at that time. We granted appellant's request to take judicial notice of the fee motion in *Dolzhenko I.* We have compared the two motions. The first portion of the two motions sets out the legal standards for calculating the amount of fees under Title VII. The first two paragraphs are identical in content, although not in format. The next

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[3] *Johnson v. Georgia Highway Express, Inc.* (5th Cir. 1974) 488 F.2d 714, abrogated on another ground in *Blanchard v. Bergeron* (1989) 489 U.S. 87, 93.

paragraphs in each motion concern the billing rates of the attorneys who performed work on the cases, the totals of fees claimed, the reasonableness of the billing rates based on community standards, and references to supporting declarations. These portions of the fee motions are not identical or duplicative.

It is appropriate to include the established standards for awarding attorney fees in a fee motion. The fact that these standards were stated identically in the two fee motions is not a basis for a reduction in fees. Otherwise, the fee motions are not identical. This conclusion disposes of appellant's related arguments that respondents' fee claim should be rejected because the alleged copying from the prior motion constituted a violation of Business and Professions Code section 6128.[4] We find no violation in the statement of standard legal principles that appeared in each motion.

B. Sufficiency of the Evidence

Appellant argues the declaration of counsel for respondent, Martin J. Trupiano, was deficient in numerous respects.

1. Technical Arguments

Appellant bases his challenge in part on the fact that the supporting invoices submitted by respondent are not signed by Trupiano and were sent to an address that was different from the physical address used by respondent. Appellant claims they were sent to a UPS store where respondent rents a mailbox. Appellant also questions the authenticity of the invoices submitted by respondent because some pages are blank or have been redacted or are not sequentially numbered. He also complains that the invoices do not show a total amount.

These arguments were presented to the trial court. The trial court rejected them by making a fee award in favor of respondent. Appellant cites no authority to support reversal of the fee award on these technical grounds, and we have found none. He cites

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[4] Business and Professions Code section 6128 provides in pertinent part: "Every attorney is guilty of a misdemeanor who either: [¶] (a) Is guilty of any deceit or collusion, or consents to any deceit or collusion, with intent to deceive the court or any party."

no authority for the proposition that the invoices must be signed by the attorney for the party seeking fees, be unredacted, and sent to a particular address. We find no basis for reversal on these grounds.

2. Amounts Claimed

Appellant challenges the amounts claimed for various work performed by Trupiano on behalf of respondent. In his declaration in support of the fee motion, Trupiano said that the agreed billing rate was $300 an hour, which he describes as a discounted rate. But in the memorandum of points and authorities, Trupiano argued that respondent's "lodestar figure is calculated as follows: [¶]

Mr. Trupiano's Hourly Rate:	$188.65
Hours worked	127.70
Total Fees	$24,090.00"

In a footnote, Trupiano explains: "Due to discounts provided to VTI, Mr. Trupiano's hourly rate is substantially less than his normal rate of $350 per hour." The supporting invoices, however, reflect various billing rates. For example, on an invoice dated February 4, 2010, an entry for work on an appeal brief on December 11, 2009 is for .75 hours for the amount of $225. But On December 10, 2009 and on two dates in January 2010, 7 hours of work were billed at the total amount of $420. Other work done in January also was billed at a rate far below that described by Mr. Trupiano.

On this record, it is impossible to discern how the trial court determined the fee award. On remand, the trial court must determine the appropriate amount of fee to be awarded, resolving the issues regarding the appropriate billing rate. Next, the trial court is to determine the appropriate fee to impose in light of appellant's financial situation.

Appellant once again raises an issue we considered and rejected in *Dolzhenko I*. He contends that respondent unnecessarily prolonged the underlying litigation because the action could have been dismissed at the outset since he filed no complaint with the Equal Employment Opportunity Commission. In *Dolzhenko I*, we expressly rejected that argument as calling for us to substitute our opinion regarding litigation strategy for that of

counsel for respondent. (*Dolzhenko I, supra*, [at pp. 5–6].) We decline to revisit an issue previously decided against appellant.

Two arguments are raised in appellant's reply brief for the first time. He contends that the motion for attorney fees must be supported by expert testimony. He also claims the fee order under review was rendered by a judge other than the trial judge. The judge who entered the orders granting fees affirmed in *Dolzhenko I* and *II* is not the judge who made the award we now review, and we infer this is the basis for this argument, although appellant presents no supporting authority. Arguments raised for the first time in a reply brief result in forfeiture of the argument and we therefore decline to consider these contentions. (*Martin v. PacifiCare of California* (2011) 198 Cal.App.4th 1390, 1410, fn. 12.) In addition, an argument not supported by citation to authority is forfeited. (*Nickell v Matlock* (2012) 206 Cal.App.4th 934, 947.)

DISPOSITION

The award of attorney fees on appeal to respondent is reversed. The matter is remanded to the trial court for proceedings consistent with the views expressed in this opinion. Each party is to bear its costs on this appeal.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.