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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SILVANA FOTHERINGHAM, Plaintiff and Appellant, v. AVERY DENNISON CORPORATION, Defendant and Respondent.	B238282 (Los Angeles County Super. Ct. No. BC219801)

APPEAL from a judgment of the Superior Court of Los Angeles County. Michael C. Solner, Judge. Affirmed.

John Elson for Plaintiff and Appellant.

Miller Law Group, Karen A. Rooney and Joseph P. Mascovich for Defendant and Respondent.

Silvana Fotheringham sued her former employer, Avery Dennison Corporation. After lengthy litigation involving two trials and multiple appeals, the trial court entered a judgment including a determination of costs and attorney fees pertaining to an earlier phase of the litigation. Fotheringham appeals this award. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The litigation between Fotheringham and Avery Dennison has consumed more than a decade. In what the parties label Phase 1 of the litigation, Fotheringham sued Avery Dennison for wrongful termination based upon her disability in violation of the Fair Housing and Employment Act (FEHA), Government Code section 12940; wrongful termination in violation of fundamental public policy; discriminatory failure to make reasonable accommodations for a disability, under FEHA; hostile work environment based on disability, under FEHA; intentional infliction of emotional distress; breach of contract not to terminate without good cause; and breach of the implied covenant of good faith and fair dealing. Avery Dennison moved to compel arbitration, and the trial court granted the motion. The parties conducted arbitration in 2002. On appeal, we reversed the order compelling arbitration and remanded the matter to the trial court. (*Fotheringham v. Avery Dennison Corp.* (June 7, 2004, B162762) [nonpub. opn.].)

In proceedings after remand, the trial court summarily adjudicated most of Fotheringham's causes of action as well as her request for punitive damages. She proceeded to trial on her remaining one cause of action, the claim that Avery Dennison failed to make reasonable accommodations for her disability. (*Fotheringham v. Avery Dennison, Inc.* (Mar. 19, 2008, B187949) [nonpub. opn.], at p. 4.) Fotheringham's appeal from the resulting judgment is referred to by the parties as Phase 2. In Phase 2, this court reversed the summary adjudication of two causes of action and the punitive damages demand, vacated the attorney fee award, and remanded the matter for further proceedings. (*Fotheringham v. Avery Dennison, Inc*. (Mar. 19, 2008, B187949) [nonpub. opn.], at p. 35.)

Phase 3 of the litigation was the second trial, in which the jury found that Fotheringham's request for accommodations was a motivating reason for Avery Dennison's decision to terminate her employment and that the discharge caused her harm. (*Fotheringham v. Avery Dennison, Inc*. (Mar. 2, 2011, B217757) [nonpub. opn.], at p. 4.) Fotheringham also presented evidence to support her claim for punitive damages on her FEHA claims, but the jury did not award punitive damages. (*Ibid*.) The court concluded that the damages awarded by the jury in Phase 3 were duplicative of the damages that had been previously awarded, and it awarded attorney fees as to the first two phases of the litigation but declined to award attorney fees for Phase 3. (*Id*. at pp. 4, 16-20.)

In Phase 4 of the litigation, the appeal from that judgment, we ruled that the trial court had erred in failing to include the damages awarded by the jury in Phase 3 in the judgment and in its determination of attorney fees and costs. (*Fotheringham v. Avery Dennison, Inc*. (Mar. 2, 2011, B217757) [nonpub. opn.], at p. 2.) We remanded the matter with instructions to the court to determine the appropriate award of attorney fees and expert witness costs for Fotheringham's FEHA claim in Phase 3. (*Id*. at p. 23.)

The parties litigated the fees and costs issues before a judge who had not presided over the trials. The trial court awarded Fotheringham $165,781 in attorney fees and $7,047.05 in costs. Fotheringham moved for clarification of the court's attorney fees order and a new trial on that issue. The court clarified its order at a hearing and in writing. Fotheringham appeals the attorney fees and costs awards.

DISCUSSION

I. Attorney Fees Award

In conjunction with Fotheringham's motion for attorney fees, her counsel John Elson declared that during Phase 3 of the litigation he had worked 627.6 hours on the matter. Of those 627.6 hours, Elson estimated that "over 99% of the time was related to the FEHA claim upon which the plaintiff had prevailed in the 2005 trial, and her request

for punitive damages that was being tried in 2009." Elson asserted that the non-FEHA retaliation claim "required less than an hour of the nearly three week trial." Elson also declared that during the subsequent Phase 4 of the litigation, consisting of legal work after the commencement of the prior appeal, he had spent 368.3 hours on the case, of which "at least 75% of the time for the appellate work was related to the FEHA claim."

Based on these hours, Fotheringham requested a lodestar figure of $597,540, representing 995.9 hours of attorney time at a rate of $600[1] per hour. Fotheringham claimed that the fee award for Phase 3 of the litigation should be multiplied by 4, and that the fee award for Phase 4 of the litigation should be multiplied by 3. Accordingly, she sought a total fee award of $2,169,180, of which $1,506,240 was attributable to Phase 3 and $662,940 to Phase 4.

In opposition to the motion for attorney fees, Avery Dennison challenged Fotheringham's contention that only one percent of the Phase 3 trial was devoted to the trial of her common law retaliation claim. Avery Dennison's counsel declared that Avery Dennison, "disagrees with plaintiff's claim that 99% of the Phase 3 trial was devoted to her punitive damages claim, especially when one considers that plaintiff's common law retaliation claim based on her retention of an attorney was tried for the first time in Phase 3. There were also witnesses who were called specifically to testify about plaintiff's retaliation claim such as her former attorney and defendant's in house counsel. A much fairer estimate would be 50%." Avery Dennison also contended that Fotheringham was seeking fees not attributable to her FEHA claim; her limited success in the litigation warranted a smaller attorney fees award; the fees were inadequately documented; unintelligible descriptions of Elson's services precluded meaningful review of the claimed hours; Fotheringham had run up unnecessary fees; clerical tasks and travel fees were included in the services provided; Elson's claimed $600 rate was unreasonable; and

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1 Elson declared that his retainer agreement with Fotheringham specified an hourly rate of $350, but that his rate was now $650 for all new matters.

Fotheringham had presented no reasonable basis for employing a multiplier. Avery Dennison argued a more reasonable award was $150,710.

At the hearing on the fee and costs issues, the trial court expressed skepticism over Elson's claimed $600 hourly rate: "I know an attorney['s] hourly rates have gone up, but I don't think they've gone up this much." The court found both an increase in hourly rate of $250 over a span of two years and Fotheringham's proposed multipliers unreasonable. The court announced a tentative award of $139,384. After Elson pointed out that this tentative award was lower than the award proposed by Avery Dennison, the court reconsidered its tentative and arrived at an award of $165,781. The court explained, "And I've arrived at that by taking the defense figure and multiplying that with an additional 10 percent on there."

At the hearing on Fotheringham's motion for clarification of the court's attorney fees order and a new trial on attorney fees, the court advised the parties, "Just so everybody knows, on the attorney's fees issue, I know there is some passion on the part of plaintiff's counsel who spent—claims to have spent a significant amount of time on this case. I evaluated it the last go around and came up with a figure that I thought was reasonable in terms of the amount of time that was reasonable to achieve the result that was achieved and the hourly rate and I multiplied them which is, essentially, a [lode]star approach to it. I did not use a multiplier because I did not think that that was warranted. So, in analyzing the amount of time that I thought was reasonable, I came up to you [*sic*] a figure. I took into account the amounts claimed by the plaintiff, the amount acknowledged by the—I guess it's acknowledged by the defense. And, while I didn't go along with either one, I awarded a figure that I thought was appropriate based on reasonableness of hours spent and the fee. The fee, the hourly rate had, according to the plaintiff, had jumped from $350 an hour, which was true in 2006. And up through 2009 it had gone up to $600, which is not quite double but it represents a $250-an-hour increase in the period of less than two years or about two years. And I didn't think that was appropriate. [Three hundred and fifty dollars] seemed, to me, to be the appropriate

hourly rate. And the number of hours that I took into account in looking through the billing I thought was also appropriate. So I thought I had made that clear last time. But I guess I didn't because you're here on a motion for clarification of that."

The court clarified that its attorney fees award was based on 473.66 hours of compensable services at a $350 hourly rate. It considered that hourly rate reasonable based on its experience with attorney fees and fee requests. Elson asked the court to state how it arrived at 473.66 hours, and the court responded, "It's reasonably necessary. I was a partner in a law firm and I was a solo practitioner for 10 years before I was appointed. I have experience in billing. And it's oftentimes easy to—I'll use the word 'pad.' I'm not accusing you of . . . doing that. You have to look at what's reasonable, what's reasonable to the client, what's reasonable to the attorney. And [$]350 an hour and the 473 hours plus that I came up with, I think is totally reasonable for the work done on—for the value gained in this case."

Elson asked if the court's minute order would include "anything . . . [on] how you got to the 473 [hours] other than just cutting the 995 in half, essentially?" the court responded, "It's a figure. You look through it, you get a sense of the work that should have been done, what it should have taken to do that work, unnecessary work being done, and you come to a figure. And it's not real magic. It's just reason. Trying to apply reason. So that's what it is. And I'm not going to go through 200 line items and reduce this one by one-tenth of an hour and this one by two-tenths of an hour. That's what you come to."

We find no abuse of discretion here. The trial court set forth on the record that it had evaluated Fotheringham's showing of the hours worked on the case, the hours attributable to the FEHA claim, and the work that was performed. It concluded that Elson's claimed hourly rate was excessive and that the hours documented were well above what was reasonable for the demands of the case. The court concluded that the rate previously used and set forth in the retainer agreement was a reasonable hourly rate, found that slightly less than half the number of hours claimed by Elson were appropriate

here, and concluded that no multiplier was warranted. The court's comments demonstrate that it considered the appropriate factors in arriving at the attorney fees award and its conclusions are supported by the record.

Fotheringham, however, argues that the court abused its discretion with this award for seven reasons. We address each contention in turn.

A. Evidentiary Objection

Fotheringham objected to the paragraph of Avery Dennison's counsel's declaration in which counsel described the Phase 3 trial and estimated that approximately 50 percent of the trial was dedicated to plaintiff's FEHA claim, and she argues on appeal that the implied overruling of her objection was error. The entirety of Fotheringham's argument on this point is her conclusory statement that "There was nothing in respondent's counsel's declaration from which the court could conclude that the suggested allocation of 50% to the retaliation claim was an appropriate figure." However, the paragraph to which she objected laid out the factual basis for counsel's estimate: Fotheringham's entire common law retaliation claim was tried in Phase 3 for the first time, and included multiple witnesses, including Fotheringham's former attorney and Avery Dennison's in-house counsel, offering testimony specific to the retaliation claim. Avery Dennison's counsel had represented Avery Dennison during the prior trial and therefore drew on personal knowledge to make her estimate of the proper allocation of time between the FEHA and non-FEHA claims. Fotheringham has not demonstrated any error in the failure to sustain this objection.

B. FEHA Policy

Fotheringham claims that the court violated the FEHA policy for full recovery with its award, specifically the policy that "[o]nly in the unusual case in which there are 'special circumstances [which] render such an award'—that is, an award for the full lodestar 'for all hours reasonably spent'—'unjust' does California FEHA law permit a

lodestar reduction for results obtained." (*Beaty v. BET Holdings* (9th Cir. 2000) 222 F.3d 607, 612.) Here, however, the court did not calculate the lodestar and then reduce it based on results obtained. Instead, the court calculated a lower lodestar amount than Fotheringham sought based on its evaluation of the hours reasonably spent on the matter and a reasonable hourly rate. (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1095 [lodestar is "the number of hours reasonably expended multiplied by the reasonable hourly rate"].) The court awarded full payment of the lodestar amount, and Fotheringham has therefore failed to show a violation of the FEHA policy of full recovery of the lodestar absent special circumstances.

C. Avery Dennison's Opposition

Fotheringham argues that because Avery Dennison failed to challenge particular tasks or the time required to perform them as "unnecessary or unreasonable, the court had little, if any discretion to reduce the lodestar being sought as it was not free to disregard the uncontradicted evidence supporting the motion." We do not find Avery Dennison's opposition to be inadequate because, inter alia, it challenged Fotheringham's contention that 99 percent of Phase 3 work was attributable to FEHA claims rather than disputing individual line item entries. Avery Dennison appropriately disputed Fotheringham's contention that she was entitled to recover fees for the entirety of her counsel's Phase 3 work and her assessment that nearly every moment of work for the Phase 3 trial concerned the FEHA request for punitive damages rather than the cause of action that was fully tried in the Phase 3 trial. Even if Avery Dennison's opposition were insufficient, moreover, Fotheringham still bore the burden of establishing her entitlement to attorney fees, and the trial court was nonetheless required to evaluate her evidentiary showing to determine "reasonable attorney's fees" (§ 12965, subd. (b)) under the circumstances of this case. Purported deficiencies in Avery Dennison's evidentiary showing do not establish any abuse of discretion in the attorney fee award.

D. Allocation of Fees

Fotheringham's argument entitled, "There was no basis for an allocation between the FEHA and non-FEHA claims," consists entirely of the presentation of a series of authorities, with no application of the legal principles she cites to the facts of this case and no argument as to how these authorities demonstrate that the trial court erred. An appellant must offer argument as to how the court erred rather than citing general principles of law without applying them to the circumstances before the court. (*Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699 (*Landry*).) Fotheringham has failed to present meaningful legal analysis and has therefore failed to demonstrate error here. (*Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd*. (2002) 100 Cal.App.4th 1066, 1078 (*Beverage Control*) ["Mere suggestions of error without supporting argument or authority other than general abstract principles do not properly present grounds for appellate review"].)

E. Consideration of Damages

Fotheringham contends that the court erred in considering the damages awarded here. Her argument consists of a quotation from the trial court that the hourly rate and number of hours it selected were "totally reasonable for the work done on—for the value gained in this case"; the holdings of three decisions; and a description of the amount of compensatory damages she was awarded and the factual bases of her claims. At no point does Fotheringham present any legal argument applying her authorities to the facts of this case or demonstrating any error by the trial court. She has therefore failed to establish error here. (*Landry*, *supra*, 39 Cal.App.4th at pp. 699-700; *Beverage Control*, *supra*, 100 Cal.App.4th at p. 1078.)

F. Hourly Rate

Next, Fotheringham complains that the hourly rate selected by the court was an abuse of discretion because $600 was an appropriate rate for the years 2008 through 2011

in light of counsel's legal experience and prevailing market rates. She supports this assertion with a citation to one case, *Nichols v. Taft* (2007) 155 Cal.App.4th 1233, in which the court described three Los Angeles attorneys' stated hourly rates in 2005 ($550 and $475 per hour for two partners, and $415 per hour for an associate). Without analysis, Fotheringham concludes, "Accordingly, an hourly rate of $600 per hour for work done by plaintiff's counsel in 2008-2011 is fully consistent with the rates approved by courts in other cases, such as *Nichols*." The fact that in one case a court approved particular rates for three local attorneys does not demonstrate that the trial court abused its discretion in setting a reasonable hourly rate here.

Here, the trial court drew upon its experience as a judge to assess what hourly rate was reasonable within the legal community and for the work counsel performed. It observed that its usual experience was to see rates between "about $225 to a high of maybe [$]400." It further found that $350 per hour was reasonable for the work done by Elson. Fotheringham did not prove that comparable counsel handling similar cases typically earned $600 per hour, and she did not show that such a large fee increase over a span of two years was reasonable. She has not shown any abuse of discretion here.

G. Multiplier

Finally, Fotheringham asserts that the trial court was required to use a multiplier because counsel worked on a contingency basis, relying on *Horsford v. Board of Trustees* (2005) 132 Cal.App.4th 359, 394-395 (*Horsford*) ["It has long been recognized, however, that the contingent and deferred nature of the fee award in a civil rights or other case with statutory attorney fees requires that the fee be adjusted in some manner to reflect the fact that the fair market value of legal services provided on that basis is greater than the equivalent noncontingent hourly rate"]. Fotheringham contends that a multiplier should have been used here because Phases 3 and 4 of the case required an "extraordinary amount of time"; counsel had already spent ten years and nearly 1600 hours working on the case without payment before Phases 3 and 4 occurred; the legal and factual issues

here were difficult and required "a Herculean effort" to prepare and present to the jury; and Avery Dennison aggressively litigated the case, resulting in unnecessary battles and unreasonable consumption of time.

We are familiar with this case over its years of litigation and appeals and are not persuaded that the trial court abused its discretion by failing to apply a multiplier. Phases 3 and 4 did not require an extraordinary amount of time: while Elson claimed to have spent 995 hours on the litigation this portion of the matter records, the trial court reasonably determined that 473.66 hours were required to perform the legal work necessary at the relevant stages of the litigation, and this determination is supported by the record. Based on a 40-billed-hour per week schedule, that means that just less than 12 weeks were required over the three years of Phases 3 and 4 of the litigation. This does not demonstrate that this case was one in which the "demands of the . . . case substantially precluded other work during that extended period" of time. (*Horsford*, *supra*, 132 Cal.App.4th at p. 399.) The history of the case prior to Phases 3 and 4 is not relevant to the use of a multiplier here, as attorney fees for the prior portion of the case have already been litigated and appealed. Although she characterizes the legal and factual issues presented by the case as difficult, we identify no issues of fact or law here as complicated or unusual. As for Fotheringham's assignment of blame to Avery Dennison for the protracted nature of the litigation, our review of the record persuades us that over the course of this matter, all parties employed aggressive litigation techniques resulting in what appear to have been unnecessary legal proceedings.

II. Printing Costs

Fotheringham filed a memorandum of costs on appeal in which she sought a total of $12,047.16. Of that amount, $5,848.81 was attributed to the printing of briefs. The invoices submitted by Fotheringham to support the her stated expenditure for printing and copying of briefs included charges for such items as "Hour(s) Paralegal Time," "Preparation of" briefs, motions, applications, and petitions, and "Page(s) Table of

Contents/Cites." Avery Dennison contended that a more reasonable charge for printing was $475.70.

Avery Dennison moved to strike or tax a portion of the costs pertaining to the printing of the briefs on the basis that the amount requested was unreasonable in light of the fact that only approximately 4800 pages were involved and document preparation charges and paralegal time were included in the requested amount. Fotheringham accused Avery Dennison of displaying "contentiousness for the sake of contentiousness alone," asserted that Avery Dennison's law firm certainly must charge clients more than $.10 per page for copying, and reiterated that it had been charged the amount it sought to recover. Fotheringham did not respond to Avery Dennison's observation that the invoices supporting the printing and copying costs included charges for services other than printing and copying.

The court granted $875.70 in costs for printing and reproducing briefs rather than the $5,848.81 Fotheringham had requested. The court explained, "[T]he statute that we talk about doesn't say that you can recover the costs charged by a professional company to print and reproduce the briefs. And paralegal fees which they've attacked."

Fotheringham contends on appeal that the court erred in reducing the printing costs award from the requested $5848.81 to $875.70. She begins with California Rules of Court, rule 8.278(d)(1)(E), which specifies as recoverable the cost to "print and reproduce any brief." Fotheringham then cites the Supreme Court's interpretation of the rule's predecessor and the guiding principle: "'The fact that the brief could have been printed by some other printer, or produced by some other process, at a lesser cost is not controlling. The only requirements in this respect are that the cost be actually incurred and that it be reasonable.' [Citation.]" (*Johnson v. Workers' Comp. Appeals Bd.* (1984) 37 Cal.3d 235, 243 (*Johnson*).)

Fotheringham claims that the court did not adequately attend to the portion of the rule that speaks of "printing" rather than copying and asserts that because she "inarguably incurred the charges" she was entitled to recover the full amount of the charges set forth

in those invoices. Her briefing on appeal focuses exclusively on the fact that these charges were actually incurred, but disregards the requirements that the printing cost must be (1) for printing and copying and (2) reasonable. (Cal. Rules of Court, rule 8.278(d)(1)(E); *Johnson*, *supra*, 37 Cal.3d at p. 243.)

The record abundantly demonstrates that the court did not abuse its discretion in awarding a substantially lower figure for printing and reproducing the briefs than was requested by Fotheringham. Even the most cursory examination of the invoices she submitted for printing and reproduction charges demonstrates that they included paralegal time and work preparing the documents, not merely the costs to print and copy the briefs. At no time did Fotheringham separate the recoverable costs for printing and copying from the other, nonrecoverable charges for services provided by the document production service she elected to use. Accordingly her evidentiary showing was useful only to demonstrate the amount of printing and copying that was performed: approximately 4800 pages.

While under California Rules of Court, rule 8.278(d)(1)(E) Fotheringham was entitled to the cost of printing and reproducing the briefs, the trial court was well within its discretion in concluding that $5,848.81 was not a reasonable cost to print and reproduce approximately 4800 pages of documents; that the request was excessive; and that it included charges for nonrecoverable services. In the absence of any evidence from Fotheringham of the costs actually attributable to printing and reproducing the briefs, the court relied upon Avery Dennison's showing that two copying services charged $.10 per page to determine that was a reasonable price per page. The court did not abuse its discretion in making this reasonable determination of recoverable printing and copying costs based on the evidence before it.

DISPOSITION

The judgment is affirmed. Each party shall bear its costs on appeal.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.