



Equal Rights Advocates

Since 1974, Fighting for Women's Equality

September 17, 2010

Governor Arnold Schwarzenegger
California State Capitol
State Capitol Building
Sacramento, CA 95814

Re: AB 2773 (Swanson) - SUPPORT

Dear Governor Schwarzenegger:

Equal Rights Advocates (ERA) offers its strong support of AB 2773 (Swanson), which was passed by the Legislature on August 30th and now awaits your signature. This bill will help protect workers' rights in California Fair Employment and Housing Act (FEHA) cases. Equal Rights Advocates is a non-profit law firm based in San Francisco, California that was founded in 1974 to advocate on behalf of women and girls seeking equality in education and employment. We have played a crucial role in the enforcement of civil rights laws by engaging in impact litigation on behalf of women and girls, particularly those most marginalized, who have been denied opportunities in the employment and education spheres. As a non-profit, we have been able to engage in this important work under the FEHA because we are funded by statutory fees we obtain through our successful efforts.

AB 2773 will help ensure that California workers have fair and equitable access to pursue FEHA claims within the civil justice system. This bill prohibits the application of Civil Procedure Code 1033(a) as a penalty for bringing a FEHA claim as an unlimited jurisdiction case when the recovery is less than the jurisdictional limit, thus removing a significant barrier to securing private counsel for lower wage workers.

On January 14, 2010, the California Supreme Court held in *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970, that a trial court has discretion in a FEHA case to deny a *successful* plaintiff his attorney's fees when the plaintiff chooses to proceed in an unlimited civil jurisdiction but recovers less than the \$25,000 jurisdictional minimum. This decision reversed the Court of Appeal's ruling, which reasoned that the rationale for denying attorney fees under section 1033(a) of the California Code of Civil Procedure, which was designed to encourage pursuit of minor grievances in courts of limited jurisdiction, is inapposite to statutory discrimination or civil rights actions because "even a modest financial recovery can serve to vindicate a substantial legal right." The Court of Appeal also opined that denying attorney fees under section 1033(a) would discourage attorneys from taking meritorious cases.

The reality is that limited jurisdiction case procedure has significant consequences in terms of the quantity of discovery the parties may conduct and is often inappropriate for FEHA claims given the complexity of the claim and the importance of the civil rights afforded under the FEHA. Furthermore, damages amounts in FEHA claims, which often involve non-pecuniary damages, are difficult to quantify and hard to predict.

The legislature must step in to help ensure that plaintiffs' attorneys are not discouraged from taking FEHA cases, as these cases are integral to protect and vindicate important civil rights. As the California Supreme Court noted in the *Chavez* decision, attorney fee awards in FEHA actions make it easier for plaintiffs of limited means to pursue meritorious claims (*Cummings v. Benco Building Services* (1992) 11 Cal.App.4th 1383, 1387), are

intended to provide fair compensation to the attorneys involved in the litigation at hand, and encourage litigation of claims that are of public interest (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 584.).

The need for plaintiffs of limited means, in particular, to access private counsel to pursue their FEHA claims was highlighted in a recent UCLA-RAND study on the FEHA and its enforcement procedures, which found that lower wage workers have a harder time securing private counsel and consequently recover considerably lower damage awards through the FEHA's administrative enforcement procedures. According to this study, employees who take their case to trial win about half the time with jury awards averaging \$205,000. Those who stay in the state's administrative system reach settlements, typically less than \$4,000, in 1 case out of 7.

The study noted that the barrier to private counsel is even higher after *Chavez* because now "any attorney who considers accepting a case that may result in a verdict under the jurisdictional amount risks being paid nothing at all, even if he or she prevails at trial, based on his or her inability to predict a jury verdict" (G. Blasi & J. Doherty, *California Employment and Discrimination Law and Its Enforcement: The Fair Employment and Housing Act* at 50, 2009).

AB 2773 will clarify that Civil Procedure Code section 1033(a) does not apply to actions brought under the California Fair Employment and Housing Act. Such a statutory amendment will ensure that plaintiffs are not penalized for being unable to predict damage awards and are allowed more extensive discovery procedures to address the complex nature of claims brought under the FEHA.

This measure would still leave the trial court with its long-standing authority under Government Code Section 12965 to determine the amount of reasonable attorney fees, and the court may, if appropriate, reduce a fee award if a plaintiff obtains only limited success. (*Harman v. City and County of San Francisco* (2006) 136 Cal. App.4th 1279, 1307, 39 Cal.Rptr.3d 589; *Greene v. Dillingham Construction N.A., Inc.*, supra, 101 Cal.App.4th at p. 423, 124 Cal.Rptr.2d 250.)

For these reasons, we urge you to sign this important measure into law. Thank you for your attention to this matter.

Sincerely,



Arcelia Hurtado
Executive Director



Noreen Farrell
Managing Attorney

cc: Michael Pro시오, Legislative Secretary and Deputy Chief of Staff
Aaron Maguire, Deputy Legislative Secretary