

**JAMS ARBITRATION
CASE REFERENCE NO. 1220071035**

MARTHA HIERRO, M.D.

Claimant,

and

**DIGESTIVE HEALTH ASSOCIATES OF
SOUTHERN CALIFORNIA, ET AL., PROVIDENCE
SAINT JOHN'S MEDICAL FOUNDATION,
PROVIDENCE SAINT JOHN'S HEALTH CENTER,
ENDOSCOPY CENTER OF SOUTHERN CALIFORNIA,
RUDOLF BEDORD, M.D, LENNA MARTYAK, M.D.,
MARC HARWITT, M.D., RICHARD CORLIN, M.D.,
RAHUL DIXIT, M.D.,**

Respondents.

**RULING ON DIGESTIVE HEALTH ASSOCIATES'
MOTION FOR COSTS AND ATTORNEY FEES**

Respondents Digestive Health Associates of Southern California, West Los Angeles Anesthesia Services, LLC, West Los Angeles Anesthesia Services, Rudolph Bedford, M.D., Richard Corlin, M.D., Marc Harwitt, M.D., Lenna Martyak, M.D., Rahul Dixit, M.D. (collectively, the "DHA Respondents" or "DHA") ask the Arbitrator to award attorneys' fees in the amount of \$264,246 and costs in the amount of \$27,287.53, for a total award of \$291,533.53.

Procedural History

On April 5, 2019, Claimant Dr. Hierro’s employment with DHA was terminated. (Complaint at ¶ 60.) On March 4, 2020, Dr. Hierro filed a complaint alleging discrimination and other employment claims in the Los Angeles County Superior Court against defendants including Digestive Health Associates of Southern California. (*See generally* Complaint.) Following service of the Complaint, DHA Respondents moved to compel arbitration, based on the arbitration provision in the Physician Employment Agreement entered into by DHA and Dr. Hierro. (DHA Motion at 12.) The Superior Court granted the petition to compel arbitration on March 17, 2021. (*Id.*) The Arbitrator granted summary judgment in favor of DHA on September 1, 2023, on all causes of action. (Ruling on MSJA – DHA.)

FEHA Claims

Code of Civil Procedure § 1021 states: “Except as attorney’s fees are specifically provided for by statute, the measure and mode of compensation of attorneys and counselors at law is left to the agreement, express or implied, of the parties; but parties to actions or proceedings are entitled to their costs, as hereinafter provided.”

For FEHA claims, attorney’s fees and costs are specifically provided for by statute. Govt. Code § 12965(c)(6) provides: “In civil actions brought under this section, the court, in its discretion, may award to the prevailing party . . . reasonable attorney’s fees and costs . . . except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.” As the Supreme Court of California has said, “an unsuccessful FEHA plaintiff should not be ordered to

pay the defendant's fees or costs unless the plaintiff brought or continued litigating the action without an objective basis for believing it had potential merit." (*Williams v. Chino Valley Indep. Fire Dist.* (2015) 61 Cal. 4th 97, 99–100.)

Consistent with this law, the Superior Court's ruling on DHA's Motion to Compel Arbitration stated: "[A]s to the FEHA causes of action, attorneys' fees shall only be awarded by the Arbitrator if the Arbitrator deems any/all of these causes of action to be unreasonable, frivolous, meritless, or vexatious. As to the remaining causes of action, attorneys' fees may be awarded to the prevailing party as per contract or statute." (Minute Order dated March 17, 2021.)

DHA argues that the attorney fee provision in the Employment Contract between it and Claimant, as well as the attorney fee provisions in the other contracts governing Claimant's employment with DHA, should dictate the question of attorney fees and costs here. (DHA Motion at 13.) However, the law on FEHA fees and the Superior Court ruling make clear that, as to the FEHA causes of action, DHA may only seek fees based upon a finding by the Arbitrator that the causes of action were unreasonable, frivolous, meritless, or vexatious. (*Id.* at 7.)

The U.S. Supreme Court has observed, "It is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims." (*Christiansburg Garment Co. v. Equal Emp. Opportunity Comm'n*, 434 U.S. 412, 422 (1978).) Here, Claimant's argument was that she was wrongfully terminated based on her alcohol use disorder in violation of FEHA and that DHA used the Medical Board Order restricting her license as a pretext. (DHA Motion at 10.) The Arbitrator found Claimant's three FEHA causes of action to be without merit, agreeing with DHA that Claimant was terminated because the Medical Board had suspended her

from treating Providence patients, and that the discipline imposed by the medical board was not a disability under FEHA. (Ruling on MSJA – DHA.) However, Claimant’s theory of the case had potential merit, and the action was not frivolous. Accordingly, the Arbitrator will *not* require Claimant to pay DHA’s attorney’s fees and costs incurred in defending against Claimant’s FEHA causes of action, pursuant to Govt. Code § 12965(c)(6).

Non-FEHA Claims

Claimant relies on *Roman v. BRE Properties* (2015) 237 Cal.App.4th 1040, to argue that, where a defendant prevails against a plaintiff’s FEHA claims, and it is determined that the plaintiff’s pursuit of those claims, although unsuccessful, was not frivolous, then fees and costs for “intertwined and inseparable” non-FEHA claims should also be disallowed. (*Roman* at 1059-62.) *Roman*, which solely concerned costs and not fees, held that it would weaken enforcement of vital antidiscrimination statutes to compel an award of costs under CCP § 1032 (the provision generally allowing an award of costs to a prevailing party) simply because the plaintiff, based on the same alleged misconduct, had pleaded other theories in addition to his or her FEHA causes of action attempting to vindicate the same rights. (*Id.* at 1059-60.)

Roman is distinguishable from this case because it concerned only costs, not fees. *Roman* resolved a conflict between Government Code § 12965(b) and CCP § 1032 regarding costs. (*Roman* at 1062.) In doing so, the court confronted two conflicting policy concerns—(1) the concern that compelling a plaintiff to pay litigation costs when he or she unsuccessfully attempts to enforce FEHA statutes simply because he or she had also brought non-FEHA claims would weaken those statutes by tending to discourage private suits, an outcome in tension with § 12965(b)’s legislative goal of encouraging potentially meritorious FEHA suits, and (2) the

concern that a party whose position was vindicated in court should be relieved of the basic costs of litigation, when those costs have not been increased by the inclusion of additional theories of liability. (*Id.*) The second policy concern regarding costs is not at play with respect to attorney fees for the non-FEHA causes of action here. Unlike *Roman*, which was confined to costs, which “by definition . . . have not added to the burden of the litigation on the party defending against FEHA claims,” *Roman* at 554, here, Claimant’s non-FEHA claims required DHA to incur fees for its counsel’s efforts to defend against each claim. Additionally, with respect to the first concern, plaintiffs with claims like Claimant’s could elect not to pursue relief other than that provided by FEHA if they wanted to control the risk of bearing attorney fees, and thus, allowing the parties’ contractual agreement on fees to stand does not weaken FEHA. (*Roman* at 554.)

Roman—which concerned costs—does not stand for the proposition that, if fees for the FEHA claims are disallowed, all of the fees should be disallowed. The Employment Agreement provides for an award of reasonable attorney’s fees and costs to the prevailing party. DHA is the prevailing party. Accordingly, with respect to Claimant’s non-FEHA claims, DHA is entitled to its reasonable attorney’s fees and costs.

Apportionment

Where fees are authorized for some causes of action in a complaint but not for others, allocation is a matter within the trial court’s discretion. (*Thompson Pac. Constr., Inc. v. City of Sunnyvale* (2007) 155 Cal. App. 4th 525, 555.)

Claimant alleged nine causes of action for: (1) discrimination on the basis of disability; (2) failure to engage in the interactive process; (3) failure to accommodate; (4) breach of fiduciary duty; (5) intentional interference with prospective economic advantage; (6) wrongful

termination under labor code section 1102.5; (7) accounting; (8) intentional infliction of emotional distress; and (9) conspiracy.

DHA's request for costs and attorney's fees totals \$291,533.53. The Arbitrator determines that 60% of that amount was incurred to defeat the non FEHA claims and awards \$174,920.19.

Excessive Fees

“[I]n challenging attorney fees as excessive because too many hours of work are claimed, it is the burden of the challenging party to point to the specific items challenged, with a sufficient argument and citations to the evidence. General arguments that fees claimed are excessive, duplicative, or unrelated do not suffice.” (*Vines v. O'Reilly Auto Enterprises, LLC* (2022) 74 Cal.App.5th 174, 184 (internal citation omitted).)

Claimant states that “the total hours claimed are vague, non-specific, potentially duplicative, and otherwise unnecessary.” (Claimant's Opposition at 15.) However, Claimant does not challenge any particular entries. (*Id.*) Accordingly, Claimant has failed to satisfy the legal standard for challenging a fees award as excessive.

Financial Hardship Argument

The Arbitrator may in her discretion deny or reduce an award to a prevailing FEHA defendant when a large award would impose hardship on the plaintiff. (*See Roman v. BRE Properties, Inc.* (2015) 237 Cal. App. 4th 1040, 1062 (citing cases).)

Claimant argues that a large award would impose hardship on her. She states that her income from her new practice is \$2,000 per month. (Hierro Declaration at ¶ 2.) Additionally, since 2019, she has been receiving partial disability payments of \$10,000 (presumably per

month, although she does not specify), which will terminate in October 2024. (*Id.* at ¶ 6.) She also notes that she currently spends significant sums for malpractice policies and to comply with the requirements of her probation. (*Id.* at ¶ 8-9.) She is 64 and plans to retire next year, presumably losing both the income and the expenses associated with her practice. (*Id.* at ¶ 7.)

DHA responds that Claimant's assertions, unsupported by documentation, about her current income and expenses are insufficient to support her financial hardship argument. (Reply at 10.) DHA also notes that there is over \$600,000 being held on Dr. Hierro's behalf, which is more than enough to cover the award of attorney's fees and costs sought. (*Id.* at 11.)

Claimant's assertions about her current income and expenses are insufficient to support her financial hardship argument, especially considering possible gaps in the financial picture she has painted, such as the funds cited by DHA. Claimant may introduce additional evidence regarding financial hardship at the hearing.

Conclusion

Claimant is ordered to pay DHA the portion of its fees attributable to Claimant's non-FEHA causes of action. DHA's request for costs and attorney's fees totals \$291,533.53. The Arbitrator determines that 60% of that amount was incurred to defeat the non FEHA claims and awards \$174,920.19.

Dated: December 21, 2023



Hon. Elizabeth A. White (Ret.)
Arbitrator