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IN BRIEF

In affirmance, the Second District held that even assuming trial court erred by awarding attorney fees to plaintiff as the prevailing party prior to trial, such error was harmless since the parties subsequently settled their case in a manner that made plaintiff the prevailing party

Pollock v. Kelso (2025) 107 Cal.App.5th 1190, 328 Cal.Rptr.3d 846, 2025 FA 2170. In 2018, Pamela Pollock sued Michael Kelso, who was her supervisor at the time, for sexual harassment and refusing to promote her on the grounds of race. More specifically, Pollock alleged that Kelso asked her to have sex with him in 2016 and, after she rejected his request, he promoted five less qualified people of other races to positions she sought. Ultimately, the trial court ruled Pollock's lawsuit was time-barred, and the Second District affirmed.

In 2021, the California Supreme Court reversed and rendered the following three holdings: (1) the statute of limitations in this type of case begins to run when Pollock knew or should have known of the adverse promotion decision; (2) Kelso bears the burden on this issue; and (3) under the Fair Employment and Housing Act, an appellate court may not award costs or fees on appeal to a prevailing defendant without first determining that plaintiff's action was frivolous, unreasonable, or groundless when brought, or that plaintiff continued to litigate it after it clearly became so.

Following the California Supreme Court's directions, the Second District remanded and ordered costs for Pollock. Back in the trial court, Pollock moved for \$526,475.63 in attorney fees under [Govt C § 12965\(c\)\(6\)](#). In March 2022, the trial court (Los Angeles County's Martin) awarded \$493,577.10 in attorney fees. Kelso appealed, but the Second District affirmed.

After awarding attorney fees to Pollock, the trial court set a trial date of May 1, 2023. However, before the trial date, in February 2023, the parties settled the bulk of their case. Pollock moved to dismiss her underlying case with prejudice, except for the attorney fees award that Kelso was appealing. The trial court retained jurisdiction regarding the fee award and the settlement terms were confidential. On April 20, 2023, the trial court dismissed the action with prejudice but retained jurisdiction regarding the fee award.

On appeal, Pollock offered to provide the Second District with a copy of the confidential settlement agreement in camera in order to demonstrate she was the prevailing party. Kelso objected, arguing this would be an improper augmentation of the record pursuant to [Cal Rules of Court, rule 8.155\(a\)\(1\)\(A\)](#). At oral argument on appeal, Pollock's counsel brought a copy of the settlement agreement to counsel table, but Kelso's appellate attorney claimed she had never seen the document and refused to view it.

At the outset of their analysis, the justices denied Pollock's motion to dismiss Kelso's appeal. The justices disagreed with Pollock's claim the appeal arose from an interlocutory order. Instead, the justices noted the order in question was a final collateral order. The justices also concluded Pollock preserved his right to appeal, notwithstanding "an insubstantial defect in Kelso's notice of appeal."

The justices next noted that appellate courts give considerable deference to trial court decision making regarding attorney fee awards. First, trial judges routinely rule on fee applications and, as a result, "develop a sense of what is customary and reasonable." Second, trial judges are "uniquely positioned to observe telltale ephemera, such as the parties' reflective reactions when the verdict is announced." The justices noted that two methods for determining whether an attorney fee is reasonable are the lodestar formula and the percentage-of-recovery formula.

Turning to the central issue on appeal, the justices held that even assuming the trial court erred by concluding before trial that Pollock was the prevailing party, such error was harmless since Pollock became the prevailing party once the parties settled their case. That Pollock was the prevailing party was demonstrated by the parties' conduct in the trial court as well as in the Court of Appeal. For example, Kelso declined to lodge the settlement agreement with the appellate court in camera. Moreover, at oral argument, when Pollock's attorney brought the settlement agreement to counsel table, Kelso's attorney declined to view the document. According to the justices, this behavior "reveal[ed] Pollock won something tangible."

Next, the justices concluded that Kelso forfeited his argument that the trial court erred by failing to apportion the fee award among other defendants in the appeal when rendering the amount of the award, since Kelso failed to elaborate this argument in meaningful detail in his opening brief. For example, Kelso failed to identify the other defendants, how their issues might have been different from his, and in what degree.

Finally, the justices concluded the trial court acted within its discretion in accepting evidence of Pollock's lawyers' hourly rates as well as by employing an attorney fee multiplier of 1.8. In the former instance, Pollock's lawyers' declarations regarding their hourly rates was substantial evidence supporting the trial court's order. Moreover, the trial court did in fact adjust Pollock's fee request downward by \$32,898.53. In the latter instance, the justices noted that trial courts have

“vast discretion in deciding whether to employ a multiplier and at what level to set it.” The justices added that a multiplier of 1.8 was within the acceptable range of trial court discretion.

For these reasons, the Second District affirmed the trial court’s judgment. CFLP § § A.0 et seq.

Library References

5 Witkin, Summary of Cal. Law (11th ed. 2024) Torts § 289

Hogoboom & King, Cal. Practice Guide: Family Law (The Rutter Group), ¶ 14:276a

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