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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

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CHRISTINE EARL,
Plaintiff,

NO. CIV. S-08-0050 FCD KJM

v.

MEMORANDUM AND ORDER

VNU USA, INC., NIELSEN
MEDIA RESEARCH, INC.,
Defendants.

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This matter is before the court on defendants Nielsen Media Research, Inc.'s and the Nielsen Company (U.S.), Inc.'s (collectively "defendants"), motion for attorneys' fees pursuant to Rule 54(d) of the Federal Rules of Civil Procedure and California Government Code § 12965(b). Plaintiff Christine Earl ("plaintiff" or "Earl") opposes the motion, arguing that fees are not appropriate because her claims were not frivolous,

1 unreasonable, or groundless. For the reasons set forth below,¹
2 defendants' motion for fees is DENIED.

3 On October 11, 2007, plaintiff Earl filed a complaint in the
4 Superior Court of the State of California in and for the County
5 of Solano, alleging claims for (1) Age Discrimination in
6 Violation of the Fair Employment and Housing Act ("FEHA"); (2)
7 Disability Discrimination in Violation of the FEHA; and (3)
8 wrongful termination in violation of public policy. On January
9 8, 2008, defendant removed the case to this court on the basis of
10 diversity jurisdiction.²

11 After numerous discovery motions, defendants filed motions
12 for summary judgment. Plaintiff did not oppose defendant Nielsen
13 Company (U.S.) Inc.'s motion for summary judgment, but opposed
14 the motion by defendant Nielsen Media Research, Inc.. Based upon
15 the submissions of the parties and the arguments made at hearing,
16 the court concluded that although plaintiff had set forth a prima
17 facie case of age discrimination in violation of FEHA, she failed
18 to submit either specific or substantial evidence that
19 defendant's reasons for termination were pretextual. (Mem. &
20 Order [Docket #120], filed Sept. 29, 2009, at 9-20.) The court
21 also concluded that plaintiff had failed to present any evidence
22 demonstrating discriminatory intent based upon a disability.
23 (Id. at 20.) Accordingly, plaintiff's claim for wrongful
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25 ¹ Because oral argument will not be of material
26 assistance, the court orders the matter submitted on the briefs.
E.D. Cal. L. R. 230(g).

27 ² The factual background is set forth fully in the
28 court's Memorandum and Order [Docket #120], filed September 29,
2009.

1 termination in violation of public policy, which was based upon
2 the asserted FEHA violations, similarly failed. Therefore, the
3 court granted defendants' motions for summary judgment.

4 Federal Rule of Civil Procedure 54(d) provides that
5 attorneys' fees may be awarded to a prevailing party in
6 accordance with applicable statutes. California Government Code
7 § 12965(b) provides that a court, in its discretion, may award
8 reasonable attorneys' fees and costs to the prevailing party on a
9 FEHA claim. "The language, purpose and intent of California and
10 federal antidiscrimination acts are virtually identical," and
11 therefore, California courts have adopted the principles and
12 methods developed by federal courts in employment discrimination
13 claims under Title VII to state law claims brought under FEHA.
14 Cummings v. Benco Bldg. Servs., 11 Cal. App. 4th 1383, 1386 (2d
15 Dist. 1992).

16 The Supreme Court has held that "a district court may in its
17 discretion award attorney's fees to a prevailing defendant in [an
18 employment discrimination] case upon a finding that the
19 plaintiff's action was frivolous, unreasonable, or without
20 foundation, even though not brought in subjective bad faith."
21 Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 421 (1978).
22 However, in making this determination, the Court has instructed
23 that a "district court should resist the understandable
24 temptation to engage in *post hoc* reasoning by concluding that,
25 because a plaintiff did not ultimately prevail, his action must
26 have been unreasonable or without foundation." Id. at 421-22.
27 Indeed, "[e]ven when the law or facts appear questionable or
28 /////

1 unfavorable at the outset, a party may have an entirely
2 reasonable ground for bringing suit." Id. at 422.

3 California courts have expressly adopted the standards set
4 forth by the Supreme Court in Christiansburg to determine whether
5 a prevailing defendant employer is entitled to attorneys' fees
6 under FEHA. Cummings, 11 Cal. App. 4th at 1387-88; see Jersey v.
7 John Muir Medical Ctr., 97 Cal. App. 4th 814, 830-31 (1st Dist.
8 2002); Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser,
9 Weil, & Shapiro, 91 Cal. App. 4th 859, 865-66 (2d Dist. 2001).

10 In Cummings, the court denied the defendants' motion for
11 attorneys fees despite granting summary judgement in their favor.
12 11 Cal. App. 4th at 1383. In opposition to the motion for
13 summary judgment, the plaintiff had offered "some evidence of age
14 discrimination," including her employer's: (1) comments about her
15 age; (2) opinion that she was physically unable to perform her
16 tasks; and (3) deposition testimony that no other similarly
17 situated employee was as old as plaintiff. Id. at 1388-89.
18 Ultimately, the court concluded that this evidence "was not
19 substantial enough to create a triable issue of fact" under the
20 McDonnell Douglas burden shifting analysis. Id. However, the
21 court held that because the plaintiff's conduct was not
22 "egregious," the plaintiff's case was not "patently baseless,"
23 and "reasonable minds [could] differ as to the strength of the
24 case," attorneys fees were not warranted under FEHA. Id. at
25 1389.

26 Indeed, California courts rarely grant fees, except in the
27 most extreme cases. Rosenman, 91 Cal. App. 4th at 872 ("A
28 relatively small number of California cases have awarded attorney

1 fees to the prevailing defendant under the Christianburg
2 standard."). Fees have been awarded where the plaintiff's claim
3 was clearly foreclosed or factually groundless. Linsley v.
4 Twentieth Century Fox Film Corp., 75 Cal. App. 4th 762 (1991)
5 (awarding defendants attorney fees where plaintiff brought an
6 unlawful discrimination claim six months after signing a release
7 which explicitly released defendants of all liability for such
8 causes of action); Saret-Cook v. Gilbert, Kelly, Crowley &
9 Jennet, 74 Cal. App. 4th 1211 (1999) (granting attorneys' fees
10 where plaintiff's entire FEHA pregnancy discrimination claim was
11 based on plaintiff's outright and admitted lies). Fees have also
12 been awarded where the plaintiff continued to pursue "litigation
13 after discovery affirmatively disclosed the factual basis for the
14 alleged discrimination was patently nonexistent." Cummings, 11
15 Cal. App. 4th at 1390 (citing E.E.O.C. v. Jordan Graphics, Inc.,
16 769 F. Supp. 1357 (W.D.N.C. 1991)). Further, while not
17 conclusive, a plaintiff's ability to establish a prima facie case
18 militates strongly in favor of not granting attorneys fees. Cf.
19 Gonzales v. Metpath, Inc. 214 Cal.App.3d 422 (1989) (granting
20 attorneys' fees where plaintiff failed to establish a prima facie
21 case and finding plaintiff lacked any legitimate justification
22 for bringing her action forward); Guthrey v. State of California,
23 63 Cal.App.4th 1108 (1998) (granting attorneys' fees where the
24 court held "there is absolutely no evidence on the record which
25 supports a finding that [plaintiff] has established a prima facie
26 case for any of his claims").

27 In this case, defendants have failed to demonstrate that
28 plaintiff's claim meets the Christianburg standard for attorneys

1 fees. Plaintiff presented sufficient evidence to establish a
2 prima facie case of age discrimination. Specifically, plaintiff
3 proffered evidence that (1) she was competently performing in her
4 position, (2) she was replaced by a substantially younger
5 employee, (3) she was treated differently than other employees,
6 and (4) defendants failed to engage in a complete progressive
7 discipline policy. Further, plaintiff offered expert analysis of
8 statistical evidence supporting her contention that defendant had
9 a pattern or practice of discriminating on the basis of age. Id.
10 Ultimately, this evidence was insufficient to create a triable
11 issue of fact as to pretext because (1) plaintiff was replaced by
12 an employee within the protected class, (2) she was unable to
13 point to similarly situated employees that she was treated
14 different from, and (3) plaintiff's statistical expert did not
15 utilize the relevant proxy pool for comparison. However, as in
16 Cummings, plaintiff's claim was supported by "some evidence of
17 age discrimination." 11 Cal. App. 4th at 1389. Moreover,
18 defendants fail to point to any conduct by plaintiff that rises
19 to that required by courts to grant fees.

20 Defendants contend that plaintiff and her counsel knew or
21 should have known that her claims were "baseless" by the
22 conclusion of plaintiff's deposition. However, contrary to
23 defendants' assertions, the court did not conclude that
24 plaintiff's claims were without legal or factual foundation.
25 Rather, the court concluded that plaintiff had failed to present
26 specific and substantial evidence of pretext sufficient to attack
27 the legitimacy of defendants' proffered non-discriminatory
28 justifications for termination.

1 Defendants have wholly failed to demonstrate that
2 plaintiff's claim was completely meritless, unreasonable, or
3 frivolous. Accordingly, defendants motion for attorneys fees is
4 DENIED.

5 IT IS SO ORDERED.

6 DATED: February 16, 2010

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9 FRANK C. DAMRELL, JR.
10 UNITED STATES DISTRICT JUDGE
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