PROPOSED TENTATIVE

In a signed order on September 18, 2024, this court entered judgment in favor of defendants City of Guadalupe, Emiko Gerber, and Michael Cash, against plaintiff Ryan Mack. The court had previously granted defendants' summary judgment/adjudication motion, which resolved all issues.[1] The original hearing occurred on November 20, 2024, which was continued to December 3, 2024, to give the parties an opportunity to read the court's ruling. On December 3, 2024, the court adopted the tentative as a final ruling; the court also denied defendant's requests for costs based on a memorandum of costs, as that was the incorrect procedural vehicle to raise a request for costs in a lawsuit initiated by plaintiff under the Fair Employment and Housing Act (Gov. Code, § 12965, et seq.). (*Neeble-Diamond v. Hotel California By the Sea* (2024) 99 Cal.App.5th 551, 556.) The court expressly allowed defendant to file a discretionary motion for costs pursuant to California Rules of Court, rule 3.1702(d) and *Lewow v. Surfside III Condominium Owners' Assn., Inc.* (2012) 203 Cal.App.4th 128, 135.

During the interval between November 20, 2024, and December 3, 2024, it appears defendants had read the tentative and followed its lead, filing a motion for award of attorney's fees and costs, as contemplated by *Neeble-Diamond* and required by Government Code section 12965, subdivision (b), inter alia, which "governs costs awards in FEHA actions, allowing trial courts discretion in awards of both attorney fees and costs to prevailing FEHA parties." (*Neeble Williams, supra*, at p 556, citing *Williams v. Chino Valley Independent Fire Dist.* (2015) 61 Cal.4th 97, 99.) Defendants' claim the court should award fees and costs because the two FEHA causes of action, at the outset and throughout the litigation, were, in terms of the statutory language, "frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so." Defendants ask for fees of $70,475 and costs of $5,378.27. In support of the attorney fee amounts, defendants offer the declaration of attorney Elizabeth Kessel, who identifies the attorneys and paralegals who worked on the matter for defendants, their hours and billing rates, all offered to support the lodestar calculation as follows: 353.9 hours times a blended rate of $199.14 per hour for total of $70,475. As for costs, defendants offer the declaration of attorney Armineh Megrabyan, which details all costs incurred and observing that total costs are for $6,444.30 (even though $5,378.27 are being requested). Plaintiff opposes both requests. Plaintiff does not contest the amounts, but claims that neither fees nor costs are appropriate, as follows: "Although the Plaintiff does not dispute that Defendant has prevailed in this Court, there is absolutely no legal basis which can reasonably be asserted that Plaintiff's claims were frivolous. Plaintiff's claims were unmeritorious but brought in good faith." According to plaintiff, the court should deny the request for fees and costs.

[1] Plaintiff has filed a notice of appeal. (*Mack, et al. v, City of Guadalupe*, et al., B342205.) According to appellate court's docket, on February 3, 2025, the record on appeal was filed. No appellate briefing has yet been submitted.

The motion was originally scheduled to be heard on February 5, 2025. The court continued the matter to February 26, 2025.

The court will first address defendants' judicial notice request. It will then address the legal standards that frame and ultimately govern the issues before the court. The court will then address the merits of defendants' contentions and plaintiff's opposition. The court will conclude with a summary of its conclusions.

A) Defendants' Judicial Notice Request

Defendants ask the court to take judicial notice of the following documents in the present case file: 1) the complaint (Exhibit A); 2) the first amended complaint (Exhibit B); 3) second amended complaint (Exhibit C); 4) the complaint filed with the State of California, Civil Rights Department, as required by FEHA (Exhibit D); 5) the minute order re: motion for summary judgment (Exhibit E); 6) Order re: Entry of Judgment (Exhibit F); and 7) Notice of Entry of Judgment (Exhibit G.)

Plaintiff does not oppose the request. The court grants the request to take judicial notice of Exhibits A to D. As for the remaining exhibits, while documents generally must be attached, and these documents are not, they are in the trial court record; accordingly, the court will grant the request to take judicial notice of them. (See, e.g., Cal. Rules of Court, rule 8.252(a)(3) [if documents to be noticed *are not in the records*, copies must be attached to the request].)

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B) Legal Background

It is undisputed that plaintiff raised only two FEHA causes of action in his operative pleading, per Government Code[2] section 12956, et seq. It is also undisputed that defendants are the prevailing parties, as the court granted their summary judgment/adjudication motion in its entirety. That means, as relevant for our purposes, that defendants fees and costs request is governed exclusively by section 12956, subdivision (c)(6), which provides as follows: "In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees, 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***." (Emphasis added.)

The history of this statutory provision is particularly pertinent for our current purposes. Our high court in *Williams v. Chino Valley Independent Fire Dist., supra*, 61 Cal.5th 97, when

[2] All future statutory references are to the Government Code unless otherwise indicated.

interpreting section 12956, subdivision (b)[3], a predecessor provision, concluded that it was "an express exception to the Code of Civil Procedure section 1032(b) and the former, rather than the latter, therefore governs costs awards in FEHA cases." (*Id.* at p. 105.) *Williams* then went on to limit the trial court's discretion under this provision to the standard enunciated and articulated in *Christiansburg Garment Co. v. Equal Employment Opportunity Commission* (1978) 434 U.S. 412 (*Christiansburg).* (*Williams, supra*, 61 Cal.4th at p. 115; see also *Pollock v. Tri-Modal Distribution Services, Inc*. (2021) 11 Cal.5th 918, 949[4].) "Under [the *Christiansburg*] standard, '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.' " (*Pollock*, at pp. 949–950, quoting *Williams*, at pp. 99–100.) The purpose of limiting fees and cost awards to prevailing FEHA defendants is "to 'reflect[ ] the public policy that society should incentivize enforcement of our civil rights laws.' " (*Pollock, supra*, 11 Cal.5th at p. 949.) Further, the *Christiansburg* court explained that when determining whether a plaintiff's action was frivolous, unreasonable, or without foundation to justify an award of attorney fees, "it is important that a . . . 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, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." (*Christiansburg, supra*, 434 U.S. at pp. 421–422.) The Legislature in 2018 codified the *Williams* holding into section 12956, subdivision (b), which in 2022 was renumbered as section 12956, subdivision (c)(6). (*Travis v. Brand* (2023) 14 Cal.5th 411, 425, fn. 7 [effective January 1, 2022,

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[3] This provision provided as follows: "In civil actions brough under this section, the court, in its discretion, may award to the prevailing party. . . reasonable attorney's fees and costs . . . ."

[4] Our high court in *Pollock* made the following relevant observations when addressing FEHA fees and costs on appeal. When the Legislature added the phrase "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 clear became so" to Government Code section 12956, subdivision (b) in 2018, it made its intentions clear. "The Assembly Judiciary Committee explained that California courts depart from the 'so-called American Rule' where each party is responsible for its own fees and costs in civil rights cases and that 'the provision in this bill limiting the ability of a prevailing defendant to recover fees and costs unless the plaintiff's case is deemed frivolous or without merit appears to codify existing case law.' (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 1300 (2017–2018 Reg. Sess.) as amended May 25, 2018, p. 8.) The Senate Judiciary Committee said that '[u]nder existing law, FEHA provides for an award of attorneys' fees to a prevailing plaintiff, but not to a defendant ***except under narrow circumstances***,' in order to 'reflect[ ] the public policy that society should incentivize enforcement of our civil rights laws.' (Sen. Com. on Judiciary, Analysis of Sen. Bill No. 1300 (2017–2018 Reg. Sess.) as amended Apr. 4, 2018, p. 24.) To allow a prevailing FEHA defendant to collect fees and costs on appeal when the plaintiff brought a potentially meritorious suit that ultimately did not succeed would undercut the Legislature's intent to promote vigorous enforcement of our civil rights laws.' [Citation omitted]." (*Pollock, supra*, at p. 949, bold and italics added.)

the Legislature renumbered former subdivision (b) of section 12965 as current subdivision (c)(6)]; see also *Neeble-Diamond, supra*, 99 Cal.App.5th at p. 557 ["Government Code section 12965, subdivision (c)(6) codifies the *Williams* rule"].)

Our high court has been very clear about the standard: "We perceive no material difference between the standard in *Williams, supra,* 61 Cal.4th at page 115, and the standard in *Christiansburg, supra,* 434 U.S. at p. 411. . . . Although they use slightly different phrasing, they are functionally equivalent and embody a single standard which we apply here." (*Travis, supra,* 14 Cal.5th at p. 428, fn. 8.) Thus, per *Williams* and *Christiansburg,* in enacting the FEHA fee provision, there is a strong policy encouraging persons injured by discrimination to seek judicial relief. (*Id.* at p. 424, citing *Williams, supra*, at p. 112.) "This policy, we went on to observe, would be 'frustrated if attorney fee awards were routinely made to prevailing defendants.' [Citation omitted.] To promote the legislative goal of private enforcement, we found it 'inescapable' that the Legislature intended a trial court's discretion in awarding fees to a prevailing defendant in FEHA cases 'to be bounded by the *Christiansburg* rule, or something very close to it.'" (*Williams*, *supra*, at p. 112.) Although the FEHA statute "did not 'distinguish between awards to FEHA plaintiffs and to FEHA defendants,' we concluded on the basis of legislative history and public policy that 'the Legislature intended trial courts to use the asymmetrical standard of *Christiansburg* . . . as to both fees and costs.' " (*Pollock, supra,*11 Cal.5th at p. 949, quoting *Williams*, at p. 109) Applying the *Christiansburg* standard, and restating it without substantive revision, our high court held that "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*, at pp. 99–100; *id*. at p. 115 ["A prevailing *defendant* ... should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so"]; see also *Travis, supra, at p.* 425.) A prevailing defendant "should not be awarded fees and costs unless the court finds the action was objectively without foundation when brought, or the plaintiff continued to litigate after it clearly became so." (*Id*. at p. 427-428.)

C) Merits

Defendants insist that the record "clearly shows that Plaintiff never had any evidence or even a good faith belief that 1) he was discriminated against on the basis of disability or medical condition; 2) Plaintiff had no disability or medical condition; 3) Plaintiff never made any complaints regarding any FEHA protected matters; and 4) Plaintiff did not file FEHA charges against Defendants Cash or Gerber. In fact, Plaintiff admitted in deposition that his case had nothing to do with disability or medical condition. Simply put, Plaintiff brought this lawsuit in bad faith to attempt to extort money from his former employer." (Motion at p. 5.)

The court, applying the standards enunciated in *Williams* and *Christiansburg,* as detailed above, finds that plaintiff's allegations were not frivolous, were not unreasonable, and were not

groundless, either at its inception or up to the point of summary judgment/adjudication, meaning the statutory predicate for fees and costs for a prevailing defendant per Government Code section 12965, subdivision (c)(6) is absent. At the outset, in making this determination, the court has kept in mind the clear exhortations contained in *Christiansburg* itself - the court will try to resist the 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. Additionally, the court's determination is framed by rules articulated by appellate courts in analogous circumstances. "Allegations that, upon careful examination, prove legally insufficient to require a trial are not, for that reason alone, 'groundless' or 'without foundation' as required by *Christiansburg.*" (*Hughes v. Rowe* (1980) 449 U.S. 5, 15–16; see *Karam v. City of Burbank* (9th Cir. 2003) 352 F.3d 1188, 1196 [plaintiff's "inability to defeat summary judgment does not mean her claims were groundless at the outset"].) Finally, the court has taken into account that a FEHA plaintiff, when the claims are not "*completely* groundless, frivolous, unreasonable or without foundation," should not be ordered to pay the defendant's attorney fees, given the policy determinations that favor enforcement of FEHA claims. (*Leek v. Cooper* (2011) 194 Cal.App.4th 399, 421; see also *Lopez v. Routt* (2017) 17 Cal.App.5th 1000, 1013 [individual defendant who prevailed against plaintiff's harassment claims was not entitled to fees, as the same standard applies to individual defendant under *Christiansburg*].)

Initially, the court rejects defendants claim that plaintiff's failure to name individual defendants Cash and Gerber in the filing with California Department of Civil Rights (CDCR) (and thus amounting to a failure to exhaust) entitle them to attorney fees and costs. True, as noted in the summary judgment/adjudication judgment order prepared and issued by this court, defendants must be named in the caption or body of the CDCR charge in order to exhaust administrative remedies, and they were not, which the court found was a legal basis to support summary judgment/adjudication as to them. The court, however, never addressed the merits of the claim. More significantly, in case law overlooked by the parties, a defendant who is granted summary judgment because of plaintiff's failure to exhaust administrative remedies is not entitled to attorney fees (and thus, by logic, costs) under FEHA because under those circumstances the defendant is not considered a prevailing party. (*Hon v. Marshall* (1997) 53 Cal.App.4th 470, 475.) "Our holding that a trial court may not award a defendant attorney fees under [Government Code] section 12965 where, as here, summary judgment is granted for failure to exhaust administrative remedies, does not mean a plaintiff may prosecute FEHA actions with impunity. If the circumstances surrounding a plaintiff's failure to exhaust his or her administrative remedies are such as to render the decision to file or maintain a FEHA action was frivolous, vexatious, or otherwise an act of bad faith, the trial court may, upon proper notice and hearing, impose sanctions, including reasonable attorney fees, against the plaintiff and/or the plaintiff's attorney pursuant to Code of Civil Procedure sections 128.5 . . . , 128.7. . . , or 128.6 . . . ." (*Id*. at 478 [trial court erred in awarding attorney fees to the defendant where the FEHA claim was dismissed for failure to exhaust administrative remedies].) Defendants have not

sought costs or attorney's fees under these sanction provisions (or any other similarly situated). They cannot seek fees and costs for failure to exhaust otherwise under *Hon* and progeny.

Further, the court is not persuaded that frivolousness, unreasonableness, or groundlessness has been shown as to either cause of action advanced in plaintiff's complaint, either at the initiation of the lawsuit or at the time of summary judgment/adjudication. Put another way, defendants have not shown, in their own words, that plaintiff lacked a good faith belief that he was discriminated against based on a disability or medical condition, had no disability or medical condition, and made no complaints regarding any FEHA, and had no objective basis to believe his claims had potential merit.

The court observes initially that Judge Staffel sustained defendant's demurrer to the first amended complaint, permitting plaintiff to file a second amended complaint. More significantly, a comparison between the two pleadings reveals the same causes of action – the first cause of action for discrimination based on mental disability/condition and age per section 12940, subdivision (a), and the second cause of action for retaliation per section 12940, subdivision (h) – were the same. There is nothing in these documents or procedures that suggest the claims were frivolous – that is, utterly groundless or without foundation. Of course, the mere fact a claim survives pretrial motions (such as a demurrer) alone is not dispositive of the question (See, e.g., *John Russo Industrial Sheetmetal, Inc. v. City of Los Angeles Dept. of Airports* (2018) 29 Cal.App.5th 378, 391 ["the mere fact a claim survives pre-verdict motions[] is not dispositive" of whether the action was frivolous].) Whether a claim is so groundless as to warrant costs and attorney fees against plaintiff must be evaluated with respect to the entire action. (See generally *Jersey v. John Muir Medical Center* (2002) 97 Cal.App.4th 814, 832.) The court must therefore conduct a more thorough examination.

At the point of defendant's summary judgment/adjudication motion, the court was confronted with a number of complex legal arguments. True, the court found dispositive plaintiff's admissions in his deposition that he was not a subject of age discrimination, and determined as a result that this theory should go no further. But the court was required to take the cause of action as it was pleaded (for summary adjudication, the entirety of the cause of action is examined), and in that vein, the alternative ground pleaded by plaintiff with regard to the first cause of action – discrimination based on either a mental condition or a mental disability – required a very close examination of the statutory and legislative scheme. The court, in granting summary adjudication, made the determination that despite the confusing terminology adopted by plaintiff in the operative pleading, he in the end was advancing a discrimination claim based on medical disability and not one based on a medical condition.

With that clarification, the court then went on to note that plaintiff could not establish two prima face elements for discrimination based on medical disability. Critically, the court acknowledged that FEHA offers protections to a person who is not actually disabled, but only perceived to have a medical disability. But even then, plaintiff, to be considered part of the

statutory "protected class," must show that the perceived "mental disability" impacted or infringed upon a major life activity as defined by statute. Not only must plaintiff allege a mental disability (or a perceived mental disability), but plaintiff must also show that the perceived mental disability makes the achievement of work, or some other major life activity, difficult or limited. Plaintiff made it clear in his opposition that he was not suffering a mental disability – but as noted, that was not the real issue, for the FEHA protects those who have a perceived mental disability. The problem was plaintiff's failure to present any evidence in opposition, thus creating a disputed issue of material fact, that the perceived mental disability infringed on a major life activity as part of the prima facie burden, an absence of which meant plaintiff was not a part of the protected class under the statutory scheme. Additionally, plaintiff was unable to show in opposition that the perceived mental disability was a substantial motivating factor with regard to any adverse employment decision, given plaintiff's admissions that any forced testing had nothing to do with any perceived disability, but resulted from defendants' desire to use the testing procedures as a way to punish plaintiff for unrelated speech and union activities. In making this determination, the court was required to engage a very protracted analysis, factually distinguishing the many cases cited by plaintiff in opposition.

Perhaps most telling, at least for the present purpose, are the following observations made in footnote 6 of the final order, which seem relevant. The court observed as follows: "Plaintiff fails to cite to one case supporting the proposition that he can demonstrate he was a member of the 'protected class,' for prima facie case purposes, based exclusively on the fact defendants treated him as potentially disabled, even though defendants knew plaintiff was not disabled concocting the perceived disability to punish plaintiff for unrelated reasons. The court is not claiming such activity is untoward – ***it potentially may be as alleged***; it is simply observing that it does not involve a 'protected class' status to advance a FEHA discrimination cause of action." Plaintiff here was testing the boundaries of the mental disability discrimination statutory scheme; the claims were novel, and in the end, plaintiff should not be liable for making them. In the court's view, while the complaint was unsuccessful, the claims were not frivolous, unreasonable, or groundless.

The same is true when examining the second cause of action based on retaliation. The court granted summary judgment/adjudication because, in the court's view, the statute requires plaintiff to show that the "protected activity" under FEHA must involve FEHA violations itself. FEHA makes it unlawful for the employer to retaliate because the employee opposed any practices "forbidden under this part or because the person has filed a complaint, testified, or assisted in any proceeding under this part." None of the protected activities that involved retaliation as claimed by plaintiff either in the complaint of his evidentiary proffer were predicated on "protected activities" under FEHA. The court acknowledged that plaintiff, with regard to the "No Confidence Vote" detailed words of harassment, retaliation, and hostile work environment; but these terms have no separate talismanic meaning and are defined by the specific incidents identified by plaintiff. They did not involve "protected activity." Although

plaintiff's claims were unsuccessful, they required this court's ***careful*** consideration under the statutory scheme and existing case law. (*Hughes, supra*, 499 U.S. a p. 15 [vacating award of attorney fees where petitioner's amended complaint contained allegations that received the careful consideration of both the District Court and the Court of Appeals before they were dismissed for failure to state a claim].) The theory, while unsuccessful because the claim was not factually supported, was not so devoid of supporting arguments as to be considered completely groundless or frivolous. (See *Leek, supra*, 194 Cal.App.4th at pp. 420-421 [reversing award of defendant's attorney's fees where there was some evidence to support plaintiff's claims].) Under these circumstances, an award of fees and costs in the court's view would punish efforts to craft novel theories of discrimination and retaliation liability, the merits of which, being untested, are difficult to predict. Defendants, even as the prevailing parties, have therefore failed to show plaintiff's claims are frivolous, unreasonable or groundless for these reasons.

Defendants in their motion cite to a number of cases they claim support their request for fees and costs, such as *Huerta v. Kava Holdings, Inc*. (2018) 29 Cal.App.5th 74, 81; *Villanueva v. City of Colton* (2008) 160 Cal.App.4th 1188, *Saret-Cook v. Gilbert, Kelly, Crowley & Jennett* (1999) 74 Cal.App.4th 1211, 1228-1229, *Linsley v. Twentieth Century Fox Film Corp.* (1999) 75 Cal.App.4th 762, 770; *Bond v. Pulsar Video Productions* (1996)) 50 Cal.App.4th 918; and *Moss v. Associated Press* (Cal. C.D. 1996) 956 F.Supp. 891, 895.) The court finds that none of these cases are germane.

In *Huerta*, the trial court granted defendant's motion for nonsuit as to plaintiff's claim for retaliation under FEHA, and allowed the jury to decide plaintiff's FEHA causes of action for harassment. The jury returned a verdict in defendant's favor. (29 Cal.App.5th at p. 76.) The trial court found plaintiff's action was not frivolous, although in light of plaintiff's rejection of defendant's pretrial settlement offer under Code of Civil Procedure section 998, the court granted defendant's request for fees and costs under section 12965, subdivision (b). The appellate court concluded that Code of Civil Procedure section 998 does not apply to nonfrivolous FEHA actions and reversed. As the trial court had determined that plaintiff's FEHA claims were nonfrivolous, it erred in awarding fees and costs. *Huerta* has no impact on the decision here, as the appellate court there did not explore why plaintiff's FEHA causes of action were not frivolous.

In *Villanueva*, the appellate court found the trial court did not abuse its discretion in awarding attorney fees pursuant to section 12965, subdivision (b), for the trial court concluded the action was "unreasonable, frivolous and meritless . . . ." The appellate court concluded that the "record reflects *overwhelming evidence* that the lawsuit was unfounded, unreasonable, and frivolous" (*id*. at p. 1201, italics added), as the trial court found no evidence of discrimination. (*Id.* at p. 1194.) Specifically, the trial court found (and the appellate court concluded) that there was no evidence at all of anything discriminatory done by defendants. The appellant court went on to conclude that defendant's entitlement "to an award of attorney fees under the statute cannot

seriously be questioned." (*Id.* at p. 1201.) That is ***not*** the case here – here, the request can be *seriously* questioned, for the reasons articulated above.

In *Saret-Cook*, the trial court granted the prevailing defendant's request for attorney fees under section 12965, subdivision (b) because plaintiff's actions " 'and tactics in filing and prosecuting this lawsuit were frivolous and totally and completely without merit. Further, Plaintiff's actions and tactics in filing and prosecuting this lawsuit were done with subjective bad faith. This wholly unmeritorious lawsuit should never have been filed or maintained. Indeed, the record demonstrates that Plaintiff's motive in filing and prosecuting this lawsuit was to harass Defendants, individually and collectively. [¶] At no time did his action ever have a factual basis. Plaintiff simply lied about what occurred to her. She was aware of her lies during the course of this lawsuit and persisted in weaving a more and more incredible story to explain lies with more lies. She prosecuted this lawsuit to the point of harassing Defendants and third party witnesses. Her bad faith is evidenced by, among other things, her actual knowledge of the falsity of her allegations and testimony.' " (*Id.* at p. 1229.) The appellate court found these findings "amounted to much more than a finding that the action lacked merit. Fairly read, it also constituted a finding that [plaintiff's] actions was 'unreasonable,' was 'frivolous,' and was 'vexatious.' These findings "are overwhelmingly supported by evidence in the record." (*Id.* at p. 1230.) No such evidence exists here.

In *Linsley*, "the trial court acted within its discretion to award attorney fees to defendant because plaintiff continued to litigate when it was clear that the claim was frivolous, unreasonable, or groundless *due to the executed release* which was directed in part at the unlawful discrimination complained of in his lawsuit. [Citations.] After its filing but before service of the complaint, by letter dated June 1, 1996, defendants advised plaintiff of the prior execution of the 'Settlement Agreement and General Release' on February 13, 1995." "In that agreement, plaintiff agreed to a general release of all claims against defendant arising from the termination of his employment. . . ." (*Id.* at p. 768.) "A release of unlawful discrimination claims under the FEHA under the circumstances present here was fully enforceable." (*Id*. at p. 769.) "Plaintiff continued to litigate the matter after his counsel was advised of a release of all claims against the employer related to his termination, including an unlawful discrimination cause of action prior to service of the complaint. Under such circumstances, there was no legal basis to pursue the unlawful discrimination cause of action because plaintiff, who was represented by an attorney, knew or should have known the claims were unreasonable or without foundation because they were explicitly subject to the release." (*Id*. at p. 770.) "Accordingly, the trial court acted well within its discretion to award attorney fees to the employer for plaintiff's continuing to litigate in the face of the release." (Id. at p. 771.) Nothing remotely similar occurred here.

In *Bond*, the trial court awarded attorney's fees to the prevailing defendant involving plaintiff's FEHA claims because the claims were "frivolous, vexatious, and without merit . . . ." The trial court concluded that the "evidence was clear that there wasn't anything discriminatory

by [defendants]. He was – he was dragged through several days of trial, I think, and attorney's fees needlessly. [¶] People shouldn't have to do that. There was no evidence at all that your client – there was no evidence at all even that he should have believed he was being discriminated against. There is just nothing at all. I sat here and listened and the fact that I made my rulings at the close of your case, I don't even recall when I had a motion for directed verdict. . . . There was no – just no evidence. There was just no evidence there, and [defendants] has been put through I think needless trial expenses over commissions which he offered three times that amount to settle . . . ." Further, there was no good faith, according to the trial court. "This was not a good faith prosecution of a discriminatory action." The appellate affirmed. "We find no error in the trial court's award of attorney fees based on the record before us. The court found [plaintiff's] discrimination claim frivolous, without foundation, and brought in bad faith, the very standards" enunciated in *Christiansburg*. (*Id.* at p. 925.) The record here does not contain the same evidence as was present in *Bond*.

Finally, in *Moss*, plaintiff advanced a claim of age discrimination under FEHA (along with non-FEHA causes of action), and the case was removed to federal court. After the case was dismissed on summary judgment, the trial court granted defendant's request for attorney's fees pursuant to section 12965, subdivision (b), per *Christiansburg*. "The Court does not find, as Defendant urges, that Plaintiff necessarily knew from the beginning of litigation that he could discover no facts to support his age discrimination claim. . . ." (956 F. Supp. at p. 894.) However, the court found that plaintiff continued to litigate after plaintiff "clearly became aware that no facts were available to support the claims against Defendant." In his deposition testimony, plaintiff seemed to acknowledge that his claims were not supported by facts, as plaintiff admitted that no one ever indicated his age was anything other than a positive factor in his employment, and that the only basis for age discrimination was plaintiff's "own personal belief" that he was not selected for the new consulting group because of his age. Further, plaintiff knew or could have easily ascertained that half of the six individuals who replaced him were over the age of 40. Finally, as for defendant's legitimate business justification, plaintiff expressly admitted that his work group had "been disbanded due to poor business earnings." According to the court, at least by February 5, 1996, "Plaintiff was aware of facts that demonstrated the absence of discrimination, thus rendering unreasonable Plaintiff's continued pursuit of the litigation." (*Ibid.*) Finally, the evidence showed that plaintiff failed to pursue facts to support his claims, including business justifications or the similar ages of the replacement employees. "In sum, Plaintiff's deposition testimony and discovery demonstrate that, at least on February 5, 1996, Plaintiff should have clearly been aware that continued litigation was either unreasonable or without foundation. Therefore, under *Christiansburg*, Defendant should be entitled to recover attorneys' fees incurred from the point that Plaintiff unreasonable continued the litigation." (*Id.* at p. 895.)

If the only basis for plaintiff's lawsuit here was based on age discrimination (as alleged in part of the first cause of action), *Moss* might have more impact. In the current case, during

plaintiff's deposition testimony, he expressly admitted that he was not subjected to age discrimination, which is similar in effect as was plaintiff's deposition in *Moss*. But plaintiff's first cause of action in the current case involved more than age discrimination – it involved discrimination based on a mental disability, as well as the second cause of action for retaliation. And because it is settled that a plaintiff does not actually have to have a mental disability – just a *perceived* mental disability – plaintiff's claim became more colorable, as it amounted to an argument for the extension of existing law, a nonfrivolous claim. Again, while plaintiff ultimately was unable to counter defendant's showing made at summary judgment/adjudication, the court is simply not prepared to say that the remaining aspects of plaintiff's action are similarly situated to the age discrimination cause of action at issue in *Moss.*

This case is instead governed by the standards enunciated in *Rosenman v. Christensen, Miller, Fink, Jacobs, Glaser, Weil & Shapiro* (2001) 91 Cal.App.4th 859, 914, which distinguished *Moss* and concluded that where plaintiff presents a colorable claim, even though plaintiff eventually fails to support it with evidence, "an award [of fees and costs] is inappropriate in light of the very strong public antidiscrimination policy embodied in FEHA. Any other standard would have the disastrous effect of closing the courtroom door to plaintiffs who have meritorious claims but who dare not risk the financial ruin caused by an award of attorneys' fees if they ultimately do not succeed." The same is true here.

Summary:

The court denies defendants' request for fees and costs pursuant to Government Code section 12956, subdivision (c)(6), because the court does not find the action was frivolous, unreasonable, or groundless either when brought, or when plaintiff continued to litigate up to the point of summary judgment/adjudication.

Plaintiff's counsel is directed to provide a proposed order and amended judgment for signature.