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EVIDENTIARY REQUIREMENTS TO RECOVER ATTORNEY'S FEES MAY BE CHANGING

Texas courts have long approved recovery of attorney's fees supported only by testimony. On September 15, 2011, the Texas Supreme Court heard oral arguments challenging the recovery of attorney fees based on testimony, in the case of *El Apple I Ltd. v. Myriam Olivas*, 324 S.W.3d 181, on appeal to the Texas Supreme Court, *pet. granted*, Case No. 10-0490. El Apple I Ltd., operator of an Applebee's restaurant, argued to the Court, after being ordered to pay attorney's fees of \$464,000.00, that Olivas' lawyers should be required to produce detailed time records when seeking attorney-fee awards, as is the practice in federal courts.

FACTS OF THE CASE

Myriam Olivas filed suit against the operator of an Applebee's restaurant in El Paso County, Texas, alleging sex discrimination and retaliation after she was reportedly required to work, while pregnant, more than 40 hours per week despite her doctor's orders. When Ms. Olivas was no longer able to work her usual shift of over 50 hours per week, her pay was reduced by one-fifth, despite the fact that no written company policy required restaurant managers to work 50 or more hours to receive a full salary.

At trial, the jury determined that Ms. Olivas was not the target of discrimination based on her sex. However, the jury agreed that Olivas' decision to file employment discrimination complaints against her employer was a major factor in El Apple's creation of a hostile work environment. Based on a retaliation finding, the jury awarded Ms. Olivas total damages of \$104,700.00, as well as attorney's fees of \$464,000.00, with added conditional attorney's fee awards for post-judgment and appellate proceedings.

On appeal, the Court of Appeals for the Eighth District of Texas upheld the trial court's attorney fee award. Accordingly, El Apple I Ltd. appealed to the Texas Supreme Court arguing that one could not determine whether the award of attorney's fees was reasonable without detailed documentation, such as time sheets. It should be noted that Olivas' attorney testified in the trial court, and presented affidavits, asserting that over the course of five years her two attorneys spent over 890 hours working on the case, which included 190 hours preparing for, and trying, the case. Conversely, El Apple argued that its attorney only required 266 hours to prepare and try the case.

ISSUE BEFORE THE SUPREME COURT

The issue considered by the Texas Supreme Court during the September 15, 2011, oral arguments is whether the testimony and affidavits of Myriam Olivas' attorneys, absent detailed documentation, is sufficient proof to justify the award of attorney's fees. It has previously been held in Texas that generally a court does not abuse its discretion simply because the evidence of attorney time is not provided in the form of billing records, or similar documentation. *See West Telemarketing Corp. Outbound v. McClure*, 225 S.W.3d 658, 676 (Tex.App.-El Paso 2006, Pet. Granted, Judgm't Vacated w.r.m). Conversely, El Apple argued that without detailed billing records, there is legally insufficient evidence to support the trial court's determination that the hours claimed to have been spent working on the case by Olivas' attorneys were reasonable.

WHAT DOES THIS MEAN?

The Texas Supreme Court has not ruled on the appeal. However, the fact that the Court agreed to hear the case indicates that it is interested in evaluating the reasonableness of the attorney fee award and soon may be clarifying the proof needed for recovery of attorney's fees.

Although Texas courts have long approved awards of attorney's fees based on testimony, to ensure an award of attorney's fees that are supported by sufficient evidence, we recommend that a party seeking recovery of legal fees should:

1. Be aware that their legal fees should be reasonably related to the potential recovery in the case;
2. Maintain detailed legal fee and expense records on every case for which a recovery of attorney's fees is sought, including contingency fee cases; and
3. Consider supporting a request for attorney's fees with the testimony of a designated expert witness, knowledgeable about the nature of the legal work for which recovery of fees are sought.



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