

FILED

NOT FOR PUBLICATION

APR 17 2008

UNITED STATES COURT OF APPEALS

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

FOR THE NINTH CIRCUIT

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff - Appellee,

v.

HARRIS FARMS INC.,

Defendant - Appellant,

v.

OLIVIA TAMAYO,

Plaintiff-intervenor - Appellee.

No. 05-16945

D.C. No. CV-02-06199-AWI/LJO

MEMORANDUM*

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff - Appellee,

v.

HARRIS FARMS INC.,

Defendant - Appellant,

No. 06-16317

D.C. No. CV-02-06199-AWI

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

v.

OLIVIA TAMAYO,

Plaintiff-intervenor - Appellee.

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

v.

HARRIS FARMS INC.,

Defendant - Appellee,

v.

OLIVIA TAMAYO,

Plaintiff-intervenor - Appellant.

No. 06-16437

D.C. No. CV-02-06199-AWI

Appeal from the United States District Court
for the Eastern District of California
Anthony W. Ishii, District Judge, Presiding

Argued and Submitted March 11, 2008
San Francisco, California

Before: HUG, RYMER, and RAWLINSON, Circuit Judges.

Harris Farms appeals the district court's denial of its motion to dismiss Olivia Tamayo's claims under the California Fair Employment and Housing Act (FEHA) as untimely, and further appeals the district court's denial of its motions for judgment as a matter of law and for a new trial. Tamayo appeals the amount of attorney's fees awarded to her counsel. We affirm.

I

The district court did not err in refusing to dismiss Tamayo's request to intervene. *See EEOC v. Farmer Brothers Co.*, 31 F.3d 891, 902-03 (9th Cir. 1994). It does not appear that Tamayo ever received a notice from the Equal Employment Opportunity Commission ("EEOC") informing her of her right to sue within ninety days. Accordingly, the ninety-day clock for Tamayo's lawsuit never began to run. *See Missirlian v. Huntington Mem'l Hosp.*, 662 F.2d 546, 549-550 (9th Cir. 1981) (holding that a Title VII plaintiff is entitled to a clear indication of when the ninety-day period commences); *see also Payan v. Aramark Mgmt. Servs. Ltd.*, 495 F.3d 1119, 1121 (9th Cir. 2007); *Scholar v. Pac. Bell*, 963 F.2d 264, 266 (9th Cir. 1992); *Lynn v. Western Gillette, Inc.*, 564 F.2d 1282, 1286 (9th Cir. 1977) ("[T]he ninety-day period does not begin until the charging party receives a letter specifically informing him of his right to sue."). As Harris Farms acknowledges,

there is no basis upon which to conclude that Tamayo knew about the EEOC's action, or when (if ever) she may have become aware of the lawsuit or of its significance (if any) for the timeliness of her FEHA claims. Accordingly, we need not address its constructive notice theory for, even if the theory had legs (for which Harris Farms offers no authority), it would lack support in the record. Harris Farms urges us to remand for further factual development, but we decline to do so as it had the chance to do that in district court.

II

The district court also did not err in denying motions for judgment as a matter of law and for a new trial. Harris Farms waived its right to object by stating before trial that it did not contest the admissibility of the Maria Martinez evidence, and by failing to make specific objections at trial to the Hermila Barrera evidence. *United States v. Rivera*, 43 F.3d 1291, 1295 (9th Cir. 1996). Even so, the Martinez evidence was neither irrelevant nor unduly prejudicial because Tamayo learned about the incident during an interview at Harris Farms, and Rodriguez himself used the Barrera incident to threaten Tamayo.

With respect to the punitive damages award, there was sufficient evidence from which the jury could find that managers acted with reckless indifference to

Tamayo's federal right to be free from retaliation for her complaints about sexual harassment. *See Kolstad v. American Dental Ass'n*, 527 U.S. 526, 538-39 (1999). Managerial agents criticized Tamayo for raising the issue of past harassment in a new complaint, indicated that complaints like hers cost Harris Farms time and money, suggested to Tamayo that continuing with her complaint would be difficult, and recommended to the Human Resources Department that Tamayo be suspended in the wake of a complaint.

III

The district court acted within its discretion in setting hourly rates for Smith and Pearl. The court did not err in declining to accept new evidence that Tamayo could have offered earlier. *See Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003). The Jones declaration, which Tamayo offered in support of Smith's request for a higher rate, provided insufficient detail about past cases in Fresno to require the court to adopt that rate. *See Mendenhall v. NTSB*, 213 F.3d 464, 470-72 (9th Cir. 2000). Nor did the district court abuse its discretion by declining to pay Pearl at San Francisco rates because Tamayo did not demonstrate that local fee counsel was unavailable. *See Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 907 (9th Cir. 1995).

AFFIRMED.

United States Court of Appeals for the Ninth Circuit
Office of the Clerk
95 Seventh Street; San Francisco, California 94103

General Information
Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the file stamp date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1, 2)

- The mandate will issue seven (7) calendar days after the expiration of the time for filing a petition for rehearing or seven (7) calendar days from the denial of a petition for rehearing, unless the court directs otherwise. If a stay of mandate is sought, an original and four (4) copies of the motion must be filed. The mandate is sent only to the district court or agency, we do not provide a copy to the parties.

Publication of Unpublished Disposition (9th Cir. R. 40-2)

- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency, or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-2.

Petition for Panel Rehearing (Fed. R. App. P. 40; 9th Cir. R. 40-1)

Petition for Rehearing En Banc (Fed. R. App. P. 35; 9th Cir. R. 35-1 to 4)

(1) A. Purpose (Panel Rehearing):

- A petition for panel rehearing should only be made to direct the Court's attention to one or more of the following situations:
 - ▶ A material point of fact or law overlooked in the decision;
 - ▶ A change in the law which occurred after the case was submitted and which appears to have been overlooked by the panel;
 - ▶ An apparent conflict with another decision of the court which was not addressed in the opinion.
- Petitions which merely reargue the case should not be filed.

B. Purpose (Rehearing En Banc)

- Parties should seek en banc rehearing only if one or more of the following grounds exist:
 - ▶ Consideration by the full court is necessary to secure or maintain uniformity of its decisions; or
 - ▶ The proceeding involves a question of exceptional importance; or
 - ▶ The opinion directly conflicts with an existing opinion by another court of appeals and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- ▶ A petition for rehearing may be filed within fourteen (14) days from entry of judgment. Fed. R. App. P. 40 (1)
- ▶ If the United States or an agency or officer thereof is a party in a civil appeal, the time for filing a petition for rehearing is 45 days from entry of judgment. Fed. R. App. P. 40 (1)
- ▶ If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- ▶ *See* Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- ▶ *See 9th Cir. R. 40-2* (motion to publish unpublished disposition)

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies

- The format is governed by 9th Cir. R. 40-1 and Fed. R. App. P. 32(c)(2).
- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If an unrepresented litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.
- The petition or answer must be accompanied by a certificate of compliance found at Form 11.

- If a petition for panel rehearing does not include a petition for rehearing en banc, the movant shall file an original and 3 copies.
- If the petition for panel rehearing includes a petition for rehearing en banc, the movant shall file an original and 50 copies.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The bill of costs must be filed within 14 days after entry of judgment.
- See attached form for additional information.

Attorney's Fees

- Circuit Rule 39-1 describes the content and due dates for attorney fee applications.
- Any relevant forms are available on our website www.ca9.uscourts.gov or by telephoning 415 355-7806.

Petition for Writ of Certiorari

- Please refer to the Rules of the United States Supreme Court at www.supremecourtus.gov

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please notify **in writing within 10 days**:
 - ▶ West Publishing Company; 610 Opperman Drive; PO Box 64526; St. Paul, MN 55164-0526 (Attn: Kathy Blesener, Senior Editor), and
 - ▶ Clerk, U.S. Court of Appeals; PO Box 193939; San Francisco, CA 94119-3939 (Attn: Opinions Clerk).

Form 10. Bill of Costs (Rev. 1-1-05)

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and Circuit Rule 39-1 when preparing your bill of costs.

_____ v. _____

CA No. _____

The Clerk is requested to tax the following costs against: _____

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, Circuit Rule 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk				
	No. of Docs.*	Pages per Doc.	Cost per Page **	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page	TOTAL COST	
Excerpt of Record									
Appellant's Brief									
Appellee's Brief									
Appellant's Reply Brief									
Other									
TOTAL				\$	TOTAL				\$

Form 10. Bill of Costs - Continued

Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys fees **cannot** be requested on this form.

* If more than 7 excerpts or 20 briefs are requested, a statement explaining the excess number must be submitted.

** Costs per page may not exceed .10 or actual cost, whichever is less. Circuit Rule 39-1.

I, _____, swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed.

Signature: _____

Date: _____

Name of Counsel (printed or typed): _____

Attorney for: _____

Date: _____ Costs are taxed in the amount of \$ _____

Clerk of Court

By: _____, Deputy Clerk