

CLIENT NEWS BRIEF

California Supreme Court Case Affects The Standard Of Proof And Attorney's Fees Awards In FEHA "Mixed Motive" Discrimination Actions

For decades, employees have had a right to bring discrimination claims under California's Fair Employment and Housing Act (FEHA) based on claims that an employer's adverse employment action (such as termination) was due to the employee's protected class (e.g., race, sex, religion). One of an employer's available defenses has been that that, despite some evidence of a discriminatory motive, the employer would have taken the same adverse action for legitimate reasons if the discriminatory motive was absent. These types of discrimination claims are commonly known as "mixed motive" cases. In a recent case, *Harris v. City of Santa Monica* (February 7, 2013) __ Cal. __ (2013 WL 452959), the California Supreme Court clarified an employee's burden of proof in a mixed motive discrimination case in a way that favors employers, but also held that an employer might not completely avoid liability under FEHA even if it successfully prevails on the "same decision" defense.

The facts in *Harris* involve a convergence of poor performance and protected activities or protected status which employers commonly encounter in today's workplace. In 2004, the City of Santa Monica hired Wynona Harris as a bus driver, which is a position that requires the performance of safe driving and prompt attendance to allow for timely transportation services. Ms. Harris had a record of inconsistent job performance, where she had two "preventable" driving accidents and two "miss-outs," which were failures to give at least one hour's warning of an absence. Based on the City's performance guidelines, "preventable" accidents were indications of unsafe driving and could result in termination of a probationary driver. The guidelines also stated that more than two "miss-outs" indicated a "reliability problem."

Ms. Harris had her second "miss-out" during her fifth month into the job, and shortly after she had completed the probationary period. This caused the City management to examine Ms. Harris's personnel file for possible disciplinary action. Shortly after the City began this disciplinary evaluation, Ms. Harris had a chance encounter with her supervisor when she was starting her shift. The supervisor told Ms. Harris to tuck in her uniform, which was hanging loosely, and Ms. Harris replied that she was pregnant. According to Ms. Harris, the supervisor appeared displeased with the news, asked her for a doctor's note with any work restrictions, and said, "Wow. Well, what are you going to do? How far along are you?" A few days later on the same day when Ms. Harris provided the doctor's note, the supervisor was given a list of probationary drivers who were not meeting performance standards. Ms. Harris was on the list, and she was dismissed.

Ms. Harris brought a lawsuit against the City claiming that she was terminated because of her pregnancy and sex discrimination. The City argued that no discrimination occurred, and that Ms. Harris was terminated for legitimate, non-discriminatory reasons as an at-will, probationary

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employee. The trial court rejected the City's proposed jury instruction on its "mixed motive" defense, which would have absolved the City from liability if a preponderance of evidence showed that the City's legitimate reason, standing alone, would have induced it to make the same decision.

Instead, the court instructed the jury that the City should be liable if a preponderance of the evidence showed that Ms. Harris's pregnancy was a "motivating factor/reason for the discharge." "Motivating factor" was defined as "something that moves the will and induces action even though other matters may have contributed to the taking of the action." The City appealed, challenging the trial court's subject jury instruction, and the Court of Appeal held that the City's "mixed motive" jury instruction should have been used instead of the "motivating factor" instruction. Ms. Harris then sought review by the California Supreme Court.

In a unanimous decision, the Supreme Court affirmed the Court of Appeal's decision in part, and clarified the standards of proof in a "mixed motive" case alleging sex discrimination under FEHA. According to the Court, a plaintiff must prove that the unlawful discrimination was a "substantial motivating factor" for the adverse action to establish liability, and an employer may limit its liability by establishing that it would have made the same decision for a legitimate, non-discriminatory reason. The Court held that a successful "same decision" defense will not completely absolve an employer from liability. Therefore, an employer may still be subject to declaratory and injunctive relief, and may be liable for a plaintiff's reasonable attorneys' fees. The Court reasoned that these remedies would prevent and deter discrimination and provide appropriate redress. Finally, the Court stated that reinstatement, back pay, and damages would be inappropriate when an employer successfully proves the "same decision" defense, because it would constitute a windfall for the employee.

Employers should be mindful that in a mixed motive case they may still be responsible for a plaintiff's attorneys' fees if the plaintiff can prove that the employer was motivated, at least in part, by a discriminatory reason. If you have any questions regarding this case or need assistance with issues related to employee discipline, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#), or download our [Client News Brief App](#).