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California Supreme Court Issues Key Ruling on Mixed-Motive Defense to Discrimination Claims

By Joseph L. Richardson, Esq.

Under state law, a defendant employer can allege a "mixed motives" defense to a wrongful termination action by an employee. The essence of mixed motive is that both legitimate and illegitimate factors contributed to the employment decision. Once the [employee] establishes the presumption that an illegitimate factor played a substantial role in an employment decision, the burden falls to the [employer] to show that it would have made the same decision even if it had not taken the illegitimate factor into account. Despite the foregoing, under previous cases, the ultimate burden of persuading the trier of fact that the defendant engaged in intentional discrimination remained at all times with the plaintiff, and the defendant's successful "same decision showing" canceled any presumption of an illegitimate factor by plaintiff. See generally *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327.

The California Supreme Court recently took up the case of *Harris v. City of Santa Monica*, 2013 WL 452959 (issued February 7, 2013) on the mixed-motives issue. Wynona Harris, an at-will bus driver, alleged that the city fired her because she was pregnant. She had two accidents during her probationary period where she was at fault. However, a supervisor expressed displeasure with her when she informed him that she was pregnant in response to his comment that her shirt was sloppy and to tuck it in. Soon after this incident, Harris was listed on a list of probationary employees performing



unsatisfactorily, and she ultimately sued, alleging pregnancy discrimination. The City asserted nondiscriminatory reasons as an affirmative defense and presented evidence of poor job performance. However, aside from her supervisor's adverse reaction to Harris's pregnancy, evidence showed that defendant's written guidelines did not clearly support her termination on the "point system" it used to justify the firing. The City requested but did not receive a mixed-motives jury instruction, and the jury returned a significant damages verdict for plaintiff.

The appeals court below, in overturning the damages award by

Borton Petrin, LLP
5060 California Avenue
Suite 700
Bakersfield, CA 93309
(661) 322-3051

Editor

Jonathan P. Geen
Partner
San Diego



jgeen@bortonpetrini.com
(619) 232-2424

Offices & Managing Attorneys

Bakersfield
Diana L. Christian
661-322-3051

Fresno
John R. Waterman
559-268-0117

Los Angeles
Rosemarie S. Lewis
213-624-2869

Modesto
Bradley A. Post
209-576-1701

Orange County
Rosemarie S. Lewis

the trial court, ruled that the trial court was in error because "they permitted the employee to prevail by showing that her pregnancy was considered during the termination process, even if the city would have terminated her for performance reasons." Even though there was substantial evidence to support the lower court's verdict in plaintiff's favor, the jury should have still been able to consider the mixed-motive defense. (See *Harris v. City of Santa Monica* (2010) 181 Cal.App.4th 1094.)

Reviewing the appeals court case, the California Supreme Court sought to rule on what the trier of fact was to do when there is a mix of discriminatory and legitimate reasons for a firing. The operative state law is the Fair Employment and Housing Act codified in Government Code section 12940(a), which prohibits an employer from taking an employment action against a person "because of" the person's race, sex, disability, sexual orientation, or other protected characteristic. The court focused on what standard does the phrase "because of" invoke: a lesser standard of "motivating factor," a middle-of-the-road standard of "substantial factor," or a higher standard of "but for" causation? Harris argued that showing that discrimination was a "motivating factor" was enough for liability. The City wanted the court to be guided by a previous federal case that allowed a legitimate motive to be a complete defense to liability despite the presence of a discriminatory motive. The court stated that the legislative history of Government Code section 12940(a) did not clearly point in one direction, and that the federal case the City relied on was largely overturned by the 1991 Civil Rights Act.

The court stated that "the existence of facts from which a jury could find that improper bias was a substantial factor motivating the employer's decision is sufficient to establish discriminatory conduct" Therefore, the higher standard of "but for" causation did not need to be met. However, the court did not decide what evidence was sufficient to demonstrate that discrimination was a "substantial factor" in an employment decision. More, the court added that section 12920 did not outlaw discriminatory thoughts, beliefs, or stray remarks not connected to employment decision making.

The court upheld the appeals court's reversal of the damage award, but stated that the defendant would not escape liability even if it proves it would have made the same decision absent discrimination (i.e., there was a legitimate motive for the firing). Specifically, the court ruled that in "light of the FEHA's express purpose of not only redressing but also preventing and deterring unlawful discrimination in the workplace, the plaintiff in this circumstance could still be awarded, where appropriate, declaratory relief or injunctive relief to stop discriminatory practices. In addition, the plaintiff may be eligible for reasonable attorney's fees and costs." With that, the court remanded to the trial court for further proceedings to determine in the event of retrial whether the evidence of discrimination warrants a mixed motives instruction.

This decision is a form of "double-edged sword" for employers. On the one hand, it confirms the appeals court's ruling that there should be a jury instruction on mixed motives in such cases, essentially preserving the defense. More, the court confirmed that when an employer proves it would have made the same decision absent the discrimination,

562-596-2300

Sacramento
[Mark S. Newman](#)
916-858-1212

San Bernardino
[Daniel L. Ferguson](#)
909-381-0527

San Diego
[Paul Kissel](#)
619-232-2424

San Francisco
[Samuel L. Phillips](#)
415-677-0730

San Jose
[Samuel L. Phillips](#)
408-535-0870

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Contact

[Renae Tipton](#)
Borton Petrini, LLP
5060 California Avenue
Suite 700
Bakersfield, CA 93309
661-322-3051

Discrimination

the prejudicial treatment or consideration of a person, racial group, minority based on category rather than individual excluding or restricting members on the grounds of race, sex, or a

neither economic nor noneconomic damages may be awarded. On the other hand, a plaintiff need only show that a discriminatory motive was a "substantial factor" in a firing, which is not as low as "motivating factor," but not the "but for" standard that would afford the most employer protection. Therefore, several "substantial factors" (including legitimate ones) can figure into an employment decision, and an employer can still be liable. Also, there is still some uncertainty because the court did not define what evidence constitutes a "substantial factor." Finally, an employer could still be required to pay attorneys' fees and costs, and the court could issue injunctive and/or declaratory relief even though the employer proves a nondiscriminatory motive for a termination.

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