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Kenneth M.
Jones, Esq.

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California Supreme Court Issues Landmark Decision Clarifying the Mixed-Motive Defense

By Kenneth M. Jones

Just over a week ago, the California Supreme Court issued a landmark opinion in [Harris v. City of Santa Monica](#), 2013 WL 452959 (Feb. 7, 2013), clarifying the proper legal standard for an employer's "mixed-motive" defense under the California Fair Employment and Housing Act ("FEHA"). The court held that where the evidence supports that the employer's alleged adverse employment decision was based in part on discriminatory motives and in other part on legitimate, non-discriminatory reasons, and the employer can prove that its non-discriminatory reasons -- standing alone -- would have resulted in the same action, the remedies available to an aggrieved employee are limited to injunctive and declaratory relief, and discretionary attorneys' fees. This is a significant favorable development for California employers.

According to previous California case law and court-approved jury instructions, a plaintiff only had to show that discrimination was "a motivating factor" for the adverse employment action. The California Supreme Court, however, held that the standard in a mixed-motive action requires the employee to prove that the discrimination was "a **substantial** motivating factor/reason" for the action, to ensure that liability will not be imposed under circumstances where there is only evidence of mere discriminatory thoughts or passing remarks unrelated to the employment action at issue. If an employer can establish its mixed-motive defense, according to the court, then an employee is not entitled to reinstatement or compensatory and noneconomic damages.

In *Harris*, the plaintiff employee (Harris) worked as a bus driver for the

City of Santa Monica. During her training and probationary periods, she had two accidents that the City deemed "preventable." She was also late to work twice. In her first performance evaluation, issued during probation, she was told she needed "further development." These actions were sufficient to terminate Harris' employment according to the City's policies. Before the City notified Harris of her termination, during a chance encounter with her supervisor, Harris told him she was pregnant. Her supervisor responded, "Wow," and asked her what she was "going to do" and how far along she was. He directed Harris to get a doctor's note clearing her for continued work. Four days later Harris gave her supervisor the doctor's note, which contained limited work restrictions. On the same day, her supervisor received a list of probationary drivers who were not meeting standards for continued employment. Harris was on the list, and she was terminated from work two days later.

Harris sued, alleging the City fired her because she was pregnant, which is a form of sex discrimination. The City asserted as an affirmative defense that it had a legitimate, nondiscriminatory reason to fire her as an at-will, probationary employee.

At trial, the City asked that the jury be instructed that if it found the City's termination decision was motivated by **both** discriminatory and non-discriminatory reasons at the time it was made, the City was not liable to Harris if it could establish that its legitimate reason, standing alone, would have induced it to make the same decision. The trial court refused the request. Instead, it gave a standard jury instruction that stated Harris merely had to prove that her pregnancy was "a motivating factor/reason for the discharge." "Motivating factor" was then defined as "something that moves the will and induces action even though other matters may have contributed to the taking of the action." The jury returned a verdict in favor of Harris, awarding her monetary and mental suffering damages.

On appeal, the Court of Appeal concluded that the trial court erred and that the City's requested jury instruction was an accurate statement of California law. The Court of Appeal ordered a new trial using the City's proposed mixed-motive jury instruction, but before that could occur, the California Supreme Court granted Harris' petition for review.

In an unanimous decision, the California Supreme Court found that the standard jury instruction used at the trial, CACI No. 2500, did not accurately state the law. In reaching its decision, the court determined that the FEHA's prohibition of making an adverse employment decision against a person "because of" the person's race, sex, disability, sexual orientation, or other protected characteristic requires a causal connection between the employer's consideration of a protected characteristic and the action taken by the employer. In light of this, as the court explained, the jury should determine whether discrimination was "a substantial motivating factor/reason" for the employment decision.

The California Supreme Court declined to provide specific guidance

concerning when the evidence might be sufficient to show that discrimination was a substantial motivating factor for an employment decision. Rather, the court stated this is a determination to be made by the jury or trier of fact. However, the court noted that proof by an employer that it would have made the same decision even without the alleged discriminatory intent is not a complete defense to liability given the history and purpose of the FEHA. Even if an employer can prove by a preponderance of the evidence that its legitimate non-discriminatory reason for an adverse employment action, standing alone, would have resulted in the same action, an aggrieved employee may still recover declaratory and injunctive relief, along with discretionary attorneys' fees. However, an employee is not entitled to reinstatement or economic or noneconomic damages.

This is good news for employers, because many trial courts in California have refused to give the mixed-motive jury instruction. Now the employer may assert the mixed-motive defense in addition to the legitimate business reasons defense. Whereas in the past a jury may have determined that an employer was liable because a discriminatory motive was a factor in the employer's decision, a jury may now find that although discrimination was a factor, it was not a **substantial** factor. Thus, the employer may be able to avoid an award of damages, although the employer may still be held liable for attorneys' fees in the court's discretion. Of course proof of the employer's legitimate, non-discriminatory reasons for the action taken is the key. Therefore, it is vitally important that employers document the reasons for their employment decisions and that such decisions be made consistent with application of clear company policies.

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