

## ***Harris v. City of Santa Monica: Damages Exit at the Mixed-Motives Bus Stop***

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The mixed-motives defense has provided an extra layer of protection for employers in discrimination lawsuits brought under federal law by absolving employers of liability or damages where a jury finds discrimination played a role in an adverse action but the same decision would have been made for legitimate reasons, such as poor performance. However, until last month, whether mixed-motives could be raised in defense of an action under California's Fair Employment and Housing Act (FEHA) was unclear.

On February 7, 2013, the California Supreme Court issued an opinion in *Harris v. City of Santa Monica* (2013) Case No. S181004, a pregnancy discrimination case filed by a former Santa Monica bus driver, which established **the mixed-motive defense is applicable to FEHA claims but not as a complete defense to liability.** Although damages and reinstatement are unavailable to a plaintiff who would have suffered the same loss regardless of the discrimination, an employer may still be subject to a judgment of declaratory or injunctive relief and attorneys' fees and costs.

Former bus driver, Wynona Harris, sued the City of Santa Monica in 2006 alleging she was terminated because of her pregnancy. At trial, Ms. Harris presented evidence demonstrating she was terminated within a week of her supervisor learning she was pregnant. The City countered with evidence Ms. Harris was involved in two accidents in less than a year, received two "miss-outs" (i.e. discipline for failing to report to work on time) and was evaluated as needing "further development." Although maintaining that Ms. Harris' termination was non-discriminatory, the City requested the Court instruct the jury on the mixed-motive defense set forth in BAJI<sup>1</sup> No. 12.26. BAJI No. 12.26 instructs: where a mix of legitimate and discriminatory reasons is found to have played a role in an adverse employment decision, an employer is not liable for its discriminatory motivation if it can prove the same decision would have been made based on the legitimate reason alone. The trial court in *Harris* refused to so instruct the jury, opting instead for an instruction indicating Ms. Harris had the burden of proving her pregnancy was a motivating factor for her discharge. The jury found in favor of plaintiff and awarded \$177,905 in damages; the court awarded \$401,187 in attorneys' fees and costs. On appeal, the Second District Court of Appeal reversed, holding the mixed-motive defense jury instruction should have been given.

The California Supreme Court looked to the spirit of FEHA to determine whether the legislature intended the mixed-motive defense to apply in California. FEHA's goal of redress aims to compensate a plaintiff who has suffered discrimination. However, if the same employment decision would have been made for proper reasons, there is essentially nothing to redress. The Court observed, allowing a plaintiff who would have been fired anyway to recoup damages or be reinstated would constitute an "unjustified windfall and unduly limit[] the freedom of employers to make legitimate employment decisions." A successful mixed-motives defense also bars emotional distress damages because, according to the Court, it is unrealistic for a jury to figure out whether a plaintiff's emotional distress was caused by the discrimination or

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<sup>1</sup> California Jury Instructions Civil.

the termination itself. Accordingly, where an employer makes a successful mixed-motives defense, a jury may not award a plaintiff **any** damages or reinstatement.

However, in order to address the broader goal of deterrence, the Court held an employer may **not** escape liability entirely under the mixed-motives defense. Unlike the goal of redress, deterrence of discriminatory practices benefits the public-at-large. Accordingly, where discrimination is found to have played a “substantial”<sup>2</sup> role in an employment decision, a court may award declaratory or injunctive relief, where appropriate, and order a discriminating employer to pay for plaintiff’s reasonable attorneys’ fees and costs.<sup>3</sup> The Court reasoned requiring an employer to “absorb the costs of litigation for which its own wrongdoing is substantially responsible furthers the FEHA’s goals of preventing and deterring unlawful employment practices.”

The Court’s ruling in *Harris* puts California in line with federal case law interpreting the applicability of the mixed-motives defense to cases brought under Title VII thereby extending the extra layer of protection for employers. And although the threat of attorneys’ fees still looms, an employer’s opportunity to potentially eliminate damages completely may be an effective bargaining chip to encourage early settlement where legitimate reasons for an adverse action are strong.

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<sup>2</sup> The opinion did not define “substantial motivating factor” leaving it up for debate as to whether this language requires more than a showing that discrimination was “a motivating factor.”

<sup>3</sup> Declaratory or injunctive relief requires proof of some ongoing activity. We can see these types of relief applying to disparate impact cases, harassment allegations where the plaintiff is still employed, and possibly some employment contract situations. However, it will be difficult for a plaintiff to allege ongoing/broader treatment in disparate treatment cases without running into standing issues. Additionally, although not specified in the opinion, prior case law indicates there would need to be some declaratory or injunctive relief awarded in order for a plaintiff to be considered a “prevailing party” entitled to attorneys’ fees.