

California Supreme Court Issues Employer-Friendly Decision on Mixed-Motive Defense

By Ellen Connelly Cohen and Paula M. Weber

On February 7, 2013, the California Supreme Court issued a unanimous opinion in Harris v. City of Santa Monica. The California high court upheld the “mixed-motive” defense in cases brought under California’s Fair Employment and Housing Act (“FEHA”). The court’s decision is viewed by many as a compromise decision, but it does raise the bar for what a plaintiff employee must prove in order to prevail, and also limits the relief available even when the employee meets the new higher burden.

Harris Facts and Background

Wynona Harris was hired as a bus driver for the City of Santa Monica in October 2004. Shortly into her 40-day training period, she had an accident, which her employer deemed “preventable.” Harris ultimately passed her training period and entered into a three-month probationary period, during which she was involved in a second “preventable” accident. Shortly thereafter, Harris incurred a “miss-out” for failure to timely notify her supervisor that she would not report for an assigned shift. When Harris received a written performance evaluation covering her first three months of employment, her overall performance rating was “further development needed.” The very next month, Harris incurred her second “miss-out.” Two weeks later, Harris informed her supervisor that she was pregnant. The supervisor asked Harris to obtain a doctor’s note clearing her to continue working. On the same morning Harris gave her supervisor the doctor’s note, the supervisor received a list of probationary drivers who were not meeting standards for continued employment. Harris’s name was on the list. Her last day on the job was two days later.

Harris sued the City. She claimed that she was fired because she was pregnant, a form of sex discrimination under FEHA. The City denied Harris’s allegations and claimed that it had legitimate, non-discriminatory reasons to fire her: two preventable accidents and two “miss-outs” during her short period of employment.

At trial, the City asked the court to instruct the jury in the “mixed-motive” affirmative defense. Essentially, this defense states that if the employer had both discriminatory and non-discriminatory reasons for firing an

employee, the employer should not be found liable as long as the non-discriminatory reasons standing alone were sufficient to warrant dismissal. The trial court rejected the City's mixed-motive instruction, and instead instructed the jury that Harris need only prove that discrimination was a "motivating factor/reason for the discharge." The jury found that Harris's pregnancy was indeed a motivating reason for the City's decision to terminate her, and awarded Harris \$177,905 in damages, including \$150,000 in emotional distress damages. The City appealed, and ultimately the California Supreme Court granted review of the case to determine whether the challenged "motivating factor" jury instruction was correct.

The California Supreme Court's Decision

While the California Supreme Court did not adopt the legal standard urged by the employer at trial, the decision in *Harris* contains several employer-friendly aspects. First, the court rejected the "motivating factor" instruction, which had been used in the standard CACI jury instructions, and held that the employee must instead prove that discrimination was a "substantial factor" – a higher standard – in the employer's adverse employment decision. Next, the court held that even if the employee is successful in proving discrimination was a "substantial factor" in the employer's decision, the employer's liability is limited. If the employer is able to prove that it would have made the same decision even absent the discrimination, the employee's remedies are limited to declaratory relief, injunctive relief, and attorney's fees. The employee cannot obtain monetary damages, back pay, or reinstatement. The court explained that limiting the employer's liability in this way would serve FEHA's purpose of redressing, preventing, and deterring unlawful discrimination in the workplace while simultaneously denying employees an "unjustified windfall."

The court also declined to impose a higher burden of proof on an employer asserting the "same decision" or "mixed-motive" defense. The employer need only show that it would have made the same decision even absent the discrimination under the traditional "preponderance of the evidence" standard. Additionally, the court observed that an employer who intends to assert the "same decision" or "mixed-motive" defense should raise the issue in its initial response to a lawsuit, although general language that the employer had non-discriminatory motives is sufficient. The court also noted that there would be no inconsistency for an employer to deny that it had a discriminatory motive altogether while also arguing, contingently, that if the trier of fact finds a mixture of lawful and unlawful motives, then the employer's lawful motive alone would have led to its decision.

Mixed-Motive Defense Also Before U.S. Supreme Court

The mixed-motive defense is currently before the U.S. Supreme Court in *Univ. Texas Southwestern Med. Ctr. v. Nassar*. Certain federal anti-discrimination laws, such as Title VII's retaliation provisions, do not specifically authorize mixed-motive claims. In *Nassar*, the U.S. Supreme Court will decide whether an employee claiming discrimination under these types of laws must prove that the employer would not have taken an adverse action but for an improper motive. This is called a "but-for" causation standard. Currently, there is a split among federal circuits as to whether employees must prove "but-for" causation or whether a less stringent standard applies, in which employees need only show that a discriminatory motive was one of several reasons behind an employer's action.

In 2009, the U.S. Supreme Court determined that the "but-for" causation standard applies in cases brought under the federal Age Discrimination in Employment Act ("ADEA"). This means that an employer is not liable under the ADEA unless age discrimination was the "but-for" cause of an adverse employment decision. The California Supreme Court declined to apply the "but-for" causation standard in *Harris*, as many employers had hoped.

The Upshot of *Harris* for Employers

Although the *Harris* decision was not a complete victory for employers, it raises the burden on employees to show that unlawful discrimination was a “substantial factor” motivating an adverse employment decision. And even if the employee meets this higher burden, *Harris* eliminates the risk that an employee will be awarded monetary damages, back pay, and reinstatement. The decision may deter the filing of lawsuits in mixed-motive cases, and reduce plaintiffs’ expectations when it comes to valuing a case for settlement purposes.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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