

One Minute Memo[®]



California Supreme Court Upholds “Mixed-Motive” Defense Under The FEHA

On February 7, 2013, in *Harris v. City of Santa Monica*, the California Supreme Court unanimously held that a “mixed-motive” defense applies to employment discrimination claims under the California Fair Employment and Housing Act (“FEHA”).

This mixed-motive defense limits an employer’s liability for a decision motivated by both discriminatory and non-discriminatory reasons if the non-discriminatory reason, standing alone, would have caused the employer to make the same decision. If the defense succeeds, then a court may not award the plaintiff damages, back pay, or reinstatement, but may order declaratory or injunctive relief and also award reasonable attorney fees and costs.

Factual Background

In October 2005, Wynona Harris sued her former employer, the City of Santa Monica, alleging that Santa Monica violated the FEHA by discharging her because of her pregnancy. Santa Monica had hired Harris as a bus driver trainee for its city-owned bus service, Big Blue Bus, in October 2004. During her initial 40-day training period, Harris had a “preventable” accident. In mid-November 2004, Santa Monica promoted her to probationary part-time bus driver, but then she had a second preventable accident.

In February 2005, Harris was assessed a “miss-out” for failing to notify her supervisor that she would not report for her assigned shift. In her March 2005 performance evaluation, Harris’s supervisor indicated she needed “further development.” Then, in April 2005, Harris was assessed a second miss-out.

It was not until May 12, 2005 that Harris reported that she was pregnant. Four days later, her supervisors discussed at a meeting that Harris was not meeting standards for continued employment and would be terminated. Her last day was May 18, 2005.

The Trial Court and Court of Appeal Decisions

At trial, Santa Monica asked the court to give the jury a mixed-motive instruction, arguing that its decision to terminate Harris was motivated by her accidents, miss-outs, and mediocre performance. The trial court refused to give this instruction. Instead, the trial court judge gave a “motivating factor” instruction, under which Santa Monica would be liable if Harris’s pregnancy was a “motivating factor” in the decision to terminate her employment. The jury returned a verdict for Harris, awarding her \$178,000 in damages, and the trial court awarded \$400,000 in attorney fees.

The Court of Appeal reversed and remanded for a new trial. The Court of Appeal looked to the U.S. Supreme Court’s 2009 decision in *Gross v. FBI Financial Services, Inc.* (interpreting the federal statute on age discrimination) to conclude that the employer is not liable, even in the presence of a discriminatory motive, if the employer’s decision would have been the same in the absence of that motive. Because courts applying California law look to interpretations of analogous federal statutes, the Court of Appeal reasoned that a mixed-motive defense was available under the FEHA, and that Santa Monica was therefore prejudiced by the trial court’s erroneous refusal to give a jury instruction recognizing that defense. Harris then obtained the Supreme Court’s review of the Court of Appeal’s decision.

The Supreme Court Decision

The California Supreme Court began its analysis of whether the FEHA recognizes a mixed-motive defense by looking at the statute’s language: the FEHA prohibits employment actions “because of” specific protected characteristics, such as race and pregnancy. But the Supreme Court concluded that this phrase “is susceptible to many possible meanings.”

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Because of this perceived ambiguity in the statutory text, the Supreme Court turned to an analysis of the legislative purposes behind the FEHA. The Supreme Court discerned two relevant purposes: (1) to restore aggrieved persons to the position they would have occupied had the unlawful discrimination not occurred, and (2) to prevent unlawful discrimination.

The Supreme Court drew several lessons from these purposes. First, in a victory for employers, a plaintiff must show that discrimination was a substantial motivating factor, rather than simply a motivating factor. Thus, the jury instruction given by the trial court was legally insufficient, and the jury, in a new trial, must find whether Harris's pregnancy was a substantial motivating factor in the decision to terminate her employment.

Second, where the employer can show it would have made the same decision, even absent the "substantial" discriminatory "motivating factor," damages, back pay, and reinstatement would give the plaintiff an unjustified windfall—putting the plaintiff in a better financial position than she would hold had the discrimination never occurred—and therefore are not available.

Finally, however, the Supreme Court rejected the employer's argument that an employer should escape all liability whenever it would have made the same decision. Referring once more to the legislative purposes, the Supreme Court held that where a discriminatory reason was a "substantial factor" in the employment decision, the trial court can order declaratory or injunctive relief, to "prevent and deter" discrimination, and has discretion to award reasonable attorney's fees and costs. The Supreme Court reasoned that such an award would advance the FEHA's goals of preventing and deterring employment discrimination by requiring employers to incur the costs of litigation when a "substantial motivating factor" was unlawful.

What *Harris* Means for Employers

This decision is, in large part, a victory for employers, because the decision rejects the noxious standard jury instruction that would make an employer liable for damages simply where a protected status was a motivating factor in an adverse employment decision. It is now clear that where the employer can show that its decision was made for non-discriminatory reasons—such as unacceptable performance—the employer can avoid damages and reinstatement, even if a motivating factor was unlawful. Employers might have hoped that the California Supreme Court would follow closely the analogous federal law (as stated in the *Gross* decision), but that victory would have been short-lived, as the Legislature would have quickly overturned it at the urging of the plaintiffs' bar. The Supreme Court's somewhat balanced approach is much more likely to resist legislative change.

Unfortunately, the decision may encourage some plaintiffs' lawyers to bring baseless cases even while knowing that they could result in no award for their clients, because now the trial court can still find a "substantial motivating factor" and award them attorney's fees.

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