

One Minute Memo®



Employer Entitled To “Business Judgment” Jury Instruction Wins Reversal of \$1 Million Pregnancy Discrimination Award

On December 10, 2012, in *Veronese v. Lucasfilm Ltd.*, the California Court of Appeal reversed a jury verdict because the trial court gave erroneous jury instructions and refused to give proper instructions. The Court of Appeal thus vacated a judgment of more than \$100,000 as well as a related award of attorneys’ fees and costs exceeding another \$1,000,000. The case is now headed for a new trial.

Factual Background

The plaintiff, Julie Veronese, sought a job with Lucasfilm as an assistant to the manager of George Lucas’s home. This job involved extensive family caretaking. Following successive interviews, Lucasfilm’s estate manager offered Veronese a one-month “tryout,” which would precede any formal offer for the position. Before the tryout, when Veronese learned she was pregnant, the “tryout” was delayed because of early complications with the pregnancy.

As the months went by, the estate manager became concerned that certain aspects of the assistant position might harm Veronese’s pregnancy. Lucasfilm shortened the tryout period to three weeks. During some heated email exchanges, Veronese claimed, and Lucasfilm denied, that the decision to shorten the tryout period was pregnancy-related. Eventually, Lucasfilm rescinded the tryout offer.

Veronese, invoking the Fair Employment and Housing Act (“FEHA”), sued Lucasfilm for pregnancy discrimination, failure to prevent pregnancy discrimination, and wrongful termination in violation of public policy. During the trial, Lucasfilm proposed a “business judgment” jury instruction, advising that the jury was not to second-guess the employer’s business judgment even if it appeared that the employer made a “wrong or unfair decision,” and that the jury could find Lucasfilm liable only if “decisions made were motivated by discrimination or retaliation.” The trial court refused to give the instruction. The jury found in Veronese’s favor. The trial court entered judgment for her. Lucasfilm appealed.

The Court of Appeal’s Holding

The Court of Appeal held that the refusal to give a “business judgment” instruction was reversible error. In doing so, the Court of Appeal relied on cases in a number of different contexts holding that an employer does not violate the FEHA for making wrong, foolish, or erroneous employment decisions, because the FEHA applies only where the employer’s reason was discriminatory or retaliatory. Although none of those cases involved the refusal to give a jury instruction, the Court of Appeal was persuaded by their general reasoning and also noted that federal and out-of-state cases have held that refusing to give a business judgment instruction at trial was prejudicial error.

The Court of Appeal also faulted the trial court for instructing the jury that “a potential hazard to a fetus or an unborn child is not a defense to pregnancy discrimination.” This abstractly correct instruction was prejudicial here, the Court of Appeal

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explained, because it could mislead the jury into believing that it was *per se* illegal for the employer to be concerned for the safety of the fetus. Moreover, the instruction “could be interpreted as saying Lucasfilm could not have a conscience - and, inferentially at least, if it acted with one, it would violate the FEHA.”

In addition, Lucasfilm asked the Court of Appeal to address California Civil Jury Instruction (“CACI”) 2500, which instructed the jury to find liability if pregnancy was a “motivating reason” for the employment decision. Lucasfilm argued that CACI 2500 is wrong, and that the appropriate test for causation is the “but for” test, requiring a plaintiff to establish that discrimination was the “determining factor” in the employer’s decision. The Court of Appeal deferred this issue, however, which is now pending before the California Supreme Court in *Harris v. City of Santa Monica*, a case on which the Supreme Court heard oral argument earlier this month.

What *Lucasfilm* Means for Employers

This is a significant win for employers. Many judges, unfortunately, have relied on the often pro-plaintiff CACI instructions without analyzing how they apply to the specific evidence presented at trial, and without considering the most recent authorities available for guidance. Trial judges have thus been hesitant to give essential special instructions, such as the “business judgment” instruction at issue here. *Lucasfilm* is a powerful authority to the effect that employers can question the legitimacy of CACI instructions and insist on special instructions on issues that CACI has failed to address.

By: [Andrew M. McNaught](#) & [Cassandra Hanley Carroll](#)

[Andrew M. McNaught](#) is a partner and [Cassandra Hanley Carroll](#) is an associate in Seyfarth Shaw's San Francisco Office. If you would like further information, please contact your Seyfarth Shaw LLP attorney, Andrew M. McNaught at amcnaught@seyfarth.com or Cassandra Hanley Carroll at ccarroll@seyfarth.com.

www.seyfarth.com

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