

Labor and Employment Alert

February 11, 2013

California Supreme Court Clarifies Available Remedies In Mixed Motive Cases

On February 7, 2013, the Supreme Court of California issued its opinion in *Harris v. City of Santa Monica*, clarifying the scope of available remedies when the defendant proves a mixed-motive defense in employment discrimination cases under California's Fair Employment and Housing Act ("FEHA"). An employer asserting the mixed motive defense argues that, regardless of any discriminatory motive in an adverse employment action, it would have taken the same action against the employee for lawful reasons. *Harris* confirms that the FEHA standard is identical to the standard under Title VII: that an employer's successful mixed-motive defense limits the plaintiff's recovery to declaratory relief, injunctive relief, and attorney's fees. This decision is significant for employers in California because it confirms that employees cannot recover damages or reinstatement if the employer successfully proves the defense.

Background

In October 2004, Wynona Harris was a probationary bus driver for the City of Santa Monica's bus service, Big Blue Bus ("BBB"). During her training and probation period, Harris was involved in two traffic accidents and had two unexcused work absences. After a review of her file, BBB placed Harris on a list of drivers who were not meeting expectations. Around the same time, Harris told her direct supervisor that she was pregnant. The supervisor asked Harris what her plans were and to provide a doctor's note clearing her for work. Shortly after providing the doctor's note, Harris was fired. In October 2005, Harris sued the City of Santa Monica asserting that she was fired because she was pregnant.

At trial, the court refused to give a mixed-motive jury instruction, instead instructing the jury that it must find for plaintiff if her pregnancy was a "motivating factor/reason for the discharge." Subsequently, the jury awarded plaintiff back pay and non-economic damages, and the court awarded her attorney's fees. On appeal, the court of appeal reversed in favor of the City, holding that an employer can avoid liability by showing that it would have reached the same decision even absent discrimination. The Supreme Court of California then granted review.

If Employer Proves Mixed Motive, Plaintiff Cannot Recover Backpay, Reinstatement or Non-Economic Damages

The *Harris* Court held that, if an employer can prove that it would have reached the same employment decision even absent discriminatory motivation, the plaintiff cannot recover an award of damages, back pay, or reinstatement. This holding is consistent with the federal standard that makes an employer liable for discrimination when it is a "motivating factor," but denies the employee damages if the employer would

have made the same decision for non-discriminatory reasons. See 42 U.S.C. §§ 2000e-2(m); 2000e-5(g)(2)(B).

The court also made clear that “mere discriminatory thoughts or stray remarks are not sufficient to establish liability under the FEHA.” In order to implicate the mixed-motive defense, the plaintiff must first show that discrimination was truly a motivating factor. Once it has made that showing, the burden shifts to the employer to show that it would have made the same decision for non-discriminatory reasons. If the employer meets that burden, the plaintiff is barred from recovering damages, back pay or reinstatement. The Court concluded that permitting plaintiffs to recover such remedies would provide “plaintiffs an unjustified windfall and unduly limit[] the freedom of employers to make legitimate employment decisions.”

As always, employers should be cautious to ensure that supervisors avoid considering protected characteristics, even where there are clear, legitimate reasons to take an employment action. Nonetheless, where the employer can demonstrate that it would have taken the same action regardless of the allegedly discriminatory motive, it can avoid damages or reinstatement of the employee.

Employee Can Still Obtain Injunction, Declaratory Relief, and Attorney’s Fees

While denying damages and reinstatement, the Court found that in a mixed-motive case, the employee may still obtain declaratory relief, injunctive relief, and attorney’s fees. The Court emphasized that the purpose of FEHA is to prevent and deter discrimination. Permitting the employer to escape liability where discrimination played even a small role in its decision would, in the Court’s view, defeat this preventative purpose. The Court considered these remedies sufficient to achieve FEHA’s goals without providing the plaintiff any windfall benefit from an employment decision that could be justified by non-discriminatory reasons.

Employers Should Plead Mixed Motive Defense In The Answer

Finally, Harris argued that the mixed motive defense should have been barred because it was not pled in the City’s answer. The Court disagreed, noting that the City did plead that its actions were motivated by legitimate, nondiscriminatory reasons. Nonetheless, “[b]ecause the burden is on a defendant to make a same-decision showing,” the most cautious and advisable approach is to plead the mixed moved defense in the answer.

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