Client Alert.

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“Substantial” Benefit to Employers in California Supreme Court’s New Formulation of Mixed-Motive Defense
(or, Ding Dong, the Wicked Witch Motivating Factor Instruction Is Dead)

By Linda Shostak and Colette LeBon

Today in *Harris v. City of Santa Monica*, the California Supreme Court, in a decision that favors employers, answered this question: “What is the trier of fact to do when it finds that a mix of discrimination and legitimate reasons motivated an employer’s decision to terminate employment?” Trial courts and practitioners have long grappled with this question of how to deal with a mixed-motive case. The answer: the trier of fact must decide whether discrimination was a substantial factor in the decision and if it was, whether the employer would have made the same decision in the absence of any discriminatory views. If so, because both discriminatory and legitimate considerations were at play, the successful plaintiff may recover only injunctive or declaratory relief and attorneys’ fees. No other damages are available.

The *Harris* decision does away with the troublesome and difficult-to-overcome “motivating factor” instruction found in CACI No. 2500 and previously applied in mixed-motive cases.

BACKGROUND

The facts: Plaintiff Wynona Harris, a probationary driver for the city-owned Big Blue Bus Company of Santa Monica, was in two preventable traffic accidents while driving her city bus and was twice late to work. Her performance review rating was “further development needed,” but also had the notation “Keep up the Great Job!” A short time after her second tardy, Harris told her supervisor that she was pregnant and he was seemingly displeased by the news. A few days later, Harris was terminated.

The trial court: Harris sued the city of Santa Monica for pregnancy discrimination. The trial court was asked by the city to give a mixed-motive instruction to the effect that if the city would have reached the same decision without the discriminatory rationale, there was no liability. Instead, the court gave CACI No. 2500, which instructed that if discrimination was a motivating factor in an employment decision there was liability. The term “motivating” factor was defined as “something that moves the will and induces action even though other matters may have contributed to the taking of the action.” The jury found that the Harris pregnancy was a motivating factor in the decision to terminate her employment and ruled 9-3 in her favor.

The Court of Appeal: The intermediate appellate court remanded for a retrial after determining that the trial court should have used the city’s mixed-motive instruction. The court found that the mixed-motive defense, permitted in federal employment discrimination cases under Title VII, was good law and could be used by employers in FEHA cases.

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THE DECISION

In a six-member unanimous decision authored by Justice Liu, the Court considered how best to weigh mixed motives present in a case in which both legitimate and discriminatory factors contributed to the decision. In other words, what caused the decision to terminate the employment? Rejecting proposals from all the litigants, the Court went its own way by accepting the substantial factor test as the measure of whether the discriminatory motive caused the termination and the “same decision” standard as a limitation, not on liability, but on damages.

IMPLICATIONS

Finally, there is a clear standard for liability in a mixed-motive case. Importantly, defendant employers will no longer have to toil under the problematic motivating factor instruction. The fact that in such cases the plaintiff will not be entitled to actual damages if the same decision defense is sustained has practical and strategic implications we will have to see play out.

To view the Court's decision, click here.

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