

February 8, 2013

### **The California Supreme Court's Opinion in *Harris v. City of Santa Monica* on "Mixed Motive" Discrimination Cases is a Mixed Bag for Employers and Employees**

In a long-awaited decision, the California Supreme Court has resolved the standard for determining liability in a "mixed motive" discrimination action under the Fair Employment and Housing Act (FEHA). *Harris v. City of Santa Monica*, No. S181004 (Feb. 7, 2013). The decision is not a clear-cut win for employers or employees and appears certain to spawn more disputes about the application and reach of rules it announced.

111 SUTTER STREET  
SUITE 700  
SAN FRANCISCO  
CA 94104  
415 464 4300 T  
415 464 4336 F

12121 WILSHIRE BLVD.  
SUITE 1300  
LOS ANGELES  
CA 90025  
310 943 8500 T  
310 943 8501 F

In *Harris*, the plaintiff, a former Santa Monica city bus driver, alleged that the defendant city had discharged her after learning she was pregnant. The city argued that it discharged plaintiff for unsatisfactory performance while a probationary employee. At trial, the trial court used the CACI instruction that told the jury that the plaintiff had to prove that her pregnancy was a "motivating factor/reason" for her discharge. The trial court gave this instruction after rejecting the city's request that it instruct the jury based on BAJI 12.26. That instruction would have told the jury that if it found that the discharge was caused by discriminatory and nondiscriminatory reasons, it also had to decide whether the employer had proved by a preponderance of the evidence that the nondiscriminatory reason, standing alone, would have induced it to make the same decision. If so, the employer would not be liable.

In a unanimous decision written by Justice Liu, the Supreme Court held that it was in error to give the CACI instruction. (The vote was 6-0, since Justice Baxter recused himself after the case was argued.) In the first part of the opinion, the court considered the possible meanings of the FEHA's causation requirement that requires a plaintiff to prove that the employer made an adverse employment action "because of" sex or other listed personal characteristic. The plaintiff argued that the CACI instruction correctly states the law, while the defendant argued that a "but for" causation standard should apply. Ultimately, the court rejected both arguments, concluding that the "because of" phrase is ambiguous and should be construed in a manner that best promotes the FEHA's stated purposes to provide a remedy for employees who have experienced an unlawful practice and to prevent and deter such practices on a prospective basis.

Specifically, to establish liability, the plaintiff must prove that prohibited discrimination was a “substantial factor” in causing the discharge or other adverse employment action. If the plaintiff makes that showing, the employer still has the opportunity to limit its exposure by proving by a preponderance of evidence that it would have made the same decision for nondiscriminatory reasons. Assuming the jury agrees that the employer has met this burden, the plaintiff cannot be awarded the usual compensatory damages, backpay, or an order of reinstatement. However, because the jury will have found that discrimination occurred, the plaintiff still may seek declaratory or injunctive relief (other than reinstatement). Of critical importance to employers, even though the plaintiff is not entitled to a damages award, the trial court would have the discretion to award attorney fees under the FEHA.

### **What does this mean for employers?**

The “substantial factor” causation standard should make it more difficult for a plaintiff to prevail in a mixed motives case. At the same time, however, *Harris* complicates matters for employers by creating a scenario whereby they can defeat a plaintiff’s right to recover damages but still face the threat of declaratory or injunctive relief and liability for attorney fees. The availability of injunctive and declaratory relief could have significant repercussions for the employer in litigation brought by other employees. Further, although *Harris*’s discussion of the attorney fee issue indicates that an award, if granted, should not be as large as the award the plaintiff would have received if he or she prevailed in obtaining a damages award, trial courts have broad discretion in this area and even a partial attorney fee award after a lengthy trial could be substantial. Finally, it is likely that *Harris* will affect related areas of employment law, such as *Tamney*/violation of public policy claims in which the mixed motives issue may arise.

Despite these potentially troubling consequences, employers will be able to use this decision to minimize damages in certain discrimination cases if they can demonstrate that the employee would have been discharged due to performance or behavioral reasons, company layoff or reorganization, or for financial or other legitimate business reasons. *Harris* will allow employers who have terminated employees following well documented and applied progressive discipline policies and procedures to employee discharges to have a strong defense to liability and greatly minimize damages. We would encourage all



employers to carefully review potential employee discharges to ensure that their processes have been followed and are well-documented.

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