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California Supreme Court Rejects Damages, Back Pay, and Reinstatement Where Employer Proves Legitimate Mixed-Motive

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On February 7, 2013, the California Supreme Court issued a long-awaited decision on whether the “mixed-motive” defense applies to employment discrimination claims under the California Fair Employment and Housing Act (FEHA). The court held that where an employee demonstrates that unlawful discrimination was a substantial motivating factor in a challenged adverse employment action, and the employer proves that it would have made the same decision absent such discrimination, a court may not award damages, back pay, or reinstatement. *Harris v. City of Santa Monica*, No. S181004, California Supreme Court (February 7, 2013).

Wynona Harris was hired by the City of Santa Monica as a bus driver trainee in October 2004. During her training period, she had a “preventable accident” where she cracked the glass on the bus’s back door. After completing her training, Harris was promoted to probationary part-time driver. During the three-month probationary period, Harris was involved in a second “preventable accident” in which she sideswiped a parked car. In February 2005, she reported late to work and received her first “miss-out.” Under the city’s job performance guidelines, a “miss-out” is defined as a driver’s failure to give his or her supervisor at least one hour’s notice that the driver will not be reporting to an assigned shift. In March 2005, Harris received a written performance evaluation covering her first three months as a probationary driver. Her supervisor gave her a rating of “further development needed.”

The next month, Harris incurred another miss-out. According to Harris, the stress from attending her daughter’s juvenile court hearing that day caused her to forget to notify the dispatcher that she would be late for her shift. Bob Ayer, the transit services manager, investigated the circumstances and later, after reviewing her personnel file, told the bus company’s assistant director that Harris was not meeting the city’s standards for continued employment. On May 12, Harris told her supervisor that she was pregnant. Four days later, her employment was terminated. Harris sued the city claiming that she was fired because of her pregnancy in violation of FEHA’s prohibition against sex discrimination.

At trial, the city maintained that Harris was fired for poor job performance and asked the court to instruct the jury with a mixed-motive instruction. The instruction stated: “If you find

that the employer's action, which is the subject of plaintiff's claim, was actually motivated by both discriminatory and non-discriminatory reasons, the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision." The trial judge refused to give this instruction. Instead, the jury was instructed that the city should be held liable if Harris's pregnancy was a "motivating factor/reason for [her] discharge." The jury found in favor of Harris and awarded her more than \$300,000 in damages. The city appealed the decision.

The California Court of Appeal looked to prior appellate cases in holding that the mixed-motive instruction is consistent with California law but at the same time held that there was substantial evidence to support the jury verdict that Harris was fired because of pregnancy discrimination. The case ultimately reached the California Supreme Court.

The California Supreme Court ruled that where a jury finds that unlawful discrimination was a substantial factor motivating an employee's termination, the employer is "entitled to demonstrate that legitimate, nondiscriminatory reasons would have led it to make the same decision at the time." And if the employer succeeds in proving that it would have made the same decision, the court held, it will not be liable for damages, back pay, or reinstatement. However, the court noted that the employee may be entitled to declaratory or injunctive relief, where appropriate, as well as attorneys' fees and costs.

According to Keith Watts, managing shareholder of Ogletree Deakins' Orange County office: "Employers can finally exhale a small sigh of relief. The Supreme Court's decision is a welcome development, providing clarity and guidance in mixed-motive cases. While liability may yet be imposed on behalf of plaintiffs, at the very least, the universe of potential damages is much smaller. Employers are now armed with the authority to defeat claims for damages, back pay, and reinstatement."

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