



KD Alert: FEHA's Murky Waters Cleared?

By Sarah K. Goldstein and Sanjay Bansal
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On Thursday, February 7, 2013, the California Supreme Court provided an answer to the perplexing question: "Does the mixed-motive^[1] defense apply to employment discrimination claims under the Fair Employment and Housing Act (Govt. Code, §12900 et seq.)?" In the long awaited *Harris v. City of Santa Monica* decision the Court held that a jury must first decide if discrimination is a substantial factor in the termination decision. If so, the employer is afforded an opportunity to prove by the preponderance of the evidence that it would have made the same decision regardless of the discriminatory intent. If the discrimination was indeed a substantial factor, yet the employer would have made the same decision in the absence of the discrimination, then the employee may recover only injunctive or declaratory relief and reasonable attorneys' fees. However, the employee is not entitled to any other relief.

The Facts

Plaintiff, Wynona Harris ("Harris"), worked as a probationary bus driver for the City of Santa Monica. She claimed that the city discharged her after learning that she was pregnant. The City countered that she was actually discharged due to unsatisfactory performance, including involvement in two preventable traffic accidents and being late to work twice. Shortly after she was late to work the second time, she had a chance encounter with her supervisor wherein she informed him that she was pregnant. The supervisor seemingly reacted with displeasure upon receiving the news. A few days later the supervisor attended a meeting and received a list of probationary bus drivers who were not meeting standards for continued employment—Harris was on the list and terminated.

Debate Over Jury Instructions

Harris sued the City for pregnancy discrimination. At the time of trial, the City requested jury instructions which stated that if the City would have made the same decision to terminate Harris regardless of any discriminatory intent the City may not be held liable at all. The instruction requested by the City read:

"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 decision...the essential premise of this defense is that a legitimate reason was present, and standing alone, would have induced the employer to make the same decision."

The court instead provided jury instructions along the lines of what Harris requested, to wit, if discrimination was a motivating factor in the termination decision then the City is liable. "Motivating factor" is 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 discrimination was a motivating factor in the termination decision and ruled 9-3 in favor of Harris.

What Does This Mean For Employers?

The Supreme Court adopted a "middle of the road" substantial factor test. The City wanted an instruction which stated that if there were any legitimate reasons for the termination then there was no liability. Harris wanted an instruction that said if discriminatory intent was part of the decision to terminate then complete liability would exist. The substantial factor test may be summarized as follows:

- If discrimination was not a substantial factor then no liability attaches.
- If discrimination was a substantial factor and the employer is able to show it would have made the same decision regardless, then the employee is entitled to limited relief.

- *If discrimination was a substantial factor and the employer is unable to show it would have made the same decision regardless, then the employee is entitled to the full panoply of relief.*

The key takeaway for employers is to understand the utmost importance of consistency in dealing with poor performing and/or rule breaking employees. Adopting and adhering to a consistent policy of discipline and performance counseling an employer will stand a much better chance of blocking a potential plaintiff from showing that discrimination was a substantial factor in the adverse employment decision. Consistency in an employer's workplace practices significantly betters its chances to avoid emotional distress damages, backpay or an order of reinstatement.

Supervisors and managers should be trained in the specifics of the company's policy and how it is to be used. Often, employing a trained Human Resources individual and centralizing personnel decisions goes a long way to ensure consistency and fairness.

For more information on this matter, please contact the attorneys in KD's Labor and Employment Law Group.

[1] "Mixed-motives" basically entails a situation where there are both legitimate and discriminatory reasons for the adverse employment action.

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