



# **Harris v. City of Santa Monica**

## *“Mixed motive” or “same decision” defense in discrimination cases creates confusion*

BY ALEXIS MCKENNA

On February 7, 2013, the California Supreme Court issued a long-awaited decision in *Harris v. City of Santa Monica*, 56 Cal.4th 203. *Harris* adopted a “mixed motive” or “same decision” defense in discrimination cases and resolved the issue of the standard to apply in such cases under the Fair Employment and Housing Act (“FEHA”). However, rather than simply resolving the matter, it is likely *Harris* will create more disputes over its reach and application in employment matters. Further, while the decision is being generally touted as no clear-cut win for either side, certainly from a plaintiff’s perspective, the holding favors employers due to its deleterious effect on plaintiffs’ ability to collect damages in mixed-motive cases. The Court seems to have made a compromised decision which it states is intended to uphold the goals of FEHA and deter discrimination without causing a “windfall” to plaintiffs where an employer had mixed motives, but seems to lack a grasp of how things happen in the real world.

### **History and background**

Wynona Harris, the plaintiff, alleged that she had been terminated from her position as a Santa Monica city bus driver because she was pregnant. She testified at trial that when she informed her supervisor of her pregnancy, he looked “displeased” and requested she get a doctor’s note clearing her to continue work. Four days later, she supplied the requested note. That same day, her supervisor received a list of probationary employees who were not meeting standards for continued employment. Harris was on the list. She was terminated two days later. The City denied it terminated Harris

because of her pregnancy. Instead, it alleged, they terminated her as a probationary employee who had poor performance, including two “preventable” accidents and twice failing to report to work on time.

In the trial of the matter, the City requested an instruction based on BAJI 12.26, which stated that the City could not be held liable if it proved by a preponderance of the evidence that it would have discharged Harris for legitimate business reasons even if the jury concluded that the pregnancy was a motivating factor in the decision to terminate. The court denied the City’s request and instead instructed the jury based on CACI 2500 — that the City was liable if Harris proved that pregnancy was a “motivating factor” in the termination decision. The jury found in favor of the plaintiff, and awarded her \$177,905 in damages, \$150,000 of which was for emotional distress.

The City appealed. The Court of Appeal reversed the judgment, holding that the trial court should have granted the City’s instruction request. Harris then appealed to the California Supreme Court.

### **Supreme Court’s analysis**

Justice Liu wrote a unanimous decision for the Court<sup>1</sup>, which appears to be a compromise decision between the conservative and liberal members of the Court. In the first part of the decision, the Court examined the possible meanings of the Government Code section 12940(a)’s causation requirement, which requires a plaintiff to show that the employer’s adverse employment action was “because of” a protected characteristic. Plaintiff argued that CACI instruction 430 correctly states the law and a plaintiff need show that a protected characteristic was “a motivating factor reason” in the adverse

action for the employer to be liable. The City, on the other hand, argued for a “but for” causation standard; the plaintiff must show that “but for” a discriminatory reason, the employer would not have taken its adverse employment action. In the opinion, Justice Liu grappled with legislative intent, statutory language and interpretation, legislative history, Title VII and its own interpretive case law, and Fair Employment and Housing Commission’s interpretations. Ultimately, the Court rejected both sides’ proposed standards, and instead adopted a third standard — that discrimination may be established if it is proven that the discriminatory motivation was a “substantial motivating factor/reason” in the decision. In addition, the Court held that the plaintiff need not introduce direct evidence to prove some discrimination as a substantial factor.

Unfortunately, the Court also held that the employer need not admit discrimination to invoke this defense. Apparently, an employer can use ridiculous double-speak, arguing that it harbored no discriminatory animus whatsoever, but should the jury feel otherwise, that it still didn’t *totally* have a discriminatory motive. The employer is, however, required to plead the defense in their answer.

### **The bad news**

Having established that an employer is still liable in a “mixed motive”/“same decision” case where the discriminatory motive was a substantial factor, the Court then went on to the issues of remedies. If the “same decision” defense is proven (i.e., they would have made the same decision even without the discriminatory motive, although unlawful conduct has occurred), remedies are extremely limited. The Court held that reinstatement, back pay, front pay and future income



APRIL 2013

loss are not recoverable because they would be a “windfall” to the plaintiff who under this theory would have been terminated anyway. While this conclusion isn’t terribly surprising, what is worse is that the Court held that, even though it is a closer call, noneconomic damages will also not be recoverable. Recognizing that “the sting of unequal treatment can be quite real even if the challenged employment action would have occurred in any event,” (*Harris* at p. 233), nonetheless the *Harris* Court apparently does not think our jurors are capable of parsing out the portion of emotional distress that resulted from the discrimination as opposed to that solely arising from termination.<sup>2</sup> It seems that although juries are called upon to do this sort of thing all the time when apportioning comparative fault, they are unable to do so with damages. Recovering these damages, according to the Court, therefore would also be a windfall to the plaintiff; interestingly, the Court did not address why then the employer should get the windfall under “same decision” circumstances.

The Court did, however, indicate that a plaintiff can still obtain declaratory and/or injunctive relief, and more importantly, a plaintiff can recover his/her reasonable attorney’s fees and costs for obtaining a finding of unlawful discrimination. Therefore, contingency-based plaintiffs’ attorneys can still take cases even with this higher risk of no monetary recovery because at the very least, fees and costs will be available. Of course, obtaining a liability verdict with no damages is a very undesirable outcome for a plaintiff, but at least a plaintiff can find lawyers who are willing to take on a case despite that risk.

The Court also later in its opinion set the standard of proof for the “same decision” defense. Plaintiff argued that if the Court allowed employers to use a “same decision” defense, then employers should have to prove the defense by clear and convincing evidence. The Court rejected this, however, and held the

standard of proof to be preponderance of the evidence.

### The [relatively] good news

The upshot of the case isn’t so very good for plaintiffs in potential mixed-motive cases. However, given how hard the defense bar has been pushing over the years, and is pushed in this case, for “but for” causation, the result could have been much worse. The Court of Appeal deciding the case below in *Harris* had held the “mixed motive” defense to be a *complete bar* to liability. Had the Supreme Court adopted the Court of Appeals’ position, or allowed it to stand without review, things would be considerably more bleak. Employers could take actions based on discriminatory motives as long as they could provide some other reason for the decision as well; FEHA discrimination would have been rendered meaningless.

After all, won’t every employee, even the really good ones, have some sort of performance issue that the defendant can turn to as an alternative reason for termination? Even the best of employees sometimes mess up or have problems.

However, perhaps the best language in the case and the most useful for plaintiffs is this:

To be clear, when we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, would have made the same decision *at the same time it made its actual decision.* (*Harris*, at p 224. (emphasis in original.)

In other words, this is not an extension of the after-acquired evidence rule. The employer has to *prove* that it was aware of these other non-discriminatory reasons *at the time* it made its decision. The defense can’t look for and discover performance problems after the fact: for example, that the plaintiff lied on her application, and then claim this would have led to her termination. That might fall under the rubric of after-acquired evidence to limit front pay/future wage loss damages, but it does not trigger a “mixed motive” defense and limit other damages.

Moreover, the defense must prove that at the time the employer made this decision, these other non-discriminatory factors would have led to the same decision *on their own*, without the discriminatory motive involved. Therefore, a plaintiff can counter this defense if he/she can show that others not sharing the plaintiff’s protected characteristic did not suffer the same adverse employment action for the same alleged performance issue.

In addition, *Harris* held that a plaintiff may still obtain emotional distress damages through claims of intentional infliction of emotional distress. How the Court came to this, however, is hard to fathom as it is inconsistent with the Court’s assertion that jurors cannot disentangle emotional distress caused by discrimination from the emotional distress caused by the termination decision under 12940(a). The Court also confirmed that emotional distress damages may also be available under the FEHA for harassment.

Another relative positive is that the Court reiterated many times in its opinion the importance of FEHA and that employers must be deterred from engaging in discriminatory conduct. For instance, it stated that:

In light of the FEHA’s purposes, especially its goal of preventing and deterring unlawful discrimination, we conclude that a same-decision showing by an employer is not a complete defense to liability when the plaintiff has proven that discrimination on the basis of a protected characteristic was a substantial factor motivating the adverse employment action. As we explain below, mere discriminatory thoughts or stray remarks are not sufficient to establish liability under the FEHA. *But it would tend to defeat the preventive and deterrent purposes of the FEHA to hold that a same-decision showing entirely absolves an employer of liability when its employment decision was substantially motivated by discrimination.*

(*Harris*, at p. 225 (emphasis added).)

The Court also emphasized the Legislature’s goals set out in Government



APRIL 2013

Code section 12920.5 that in order to eliminate discrimination, effective remedies are necessary to prevent and deter discrimination. Again, though, the positives of restating the importance and goals of the FEHA were negated by the Court's gutting of remedies. The Court stressed that even a modicum of discrimination should not be tolerated, yet seemed to demonstrate it does not know how things play out in the real world. First of all, the types of employers who would be concerned about being labeled discriminatory through declaratory or injunctive relief are rarely the employers who would engage in discrimination in the first place. The cost of plaintiffs' attorneys fees, and fear of the use of a finding of discrimination in future cases is somewhat of a deterrent, but minor compared to actual damages. Second, on a practical level, few plaintiffs would subject themselves to the burden, hassle and potential invasion of privacy that plaintiffs face in such cases just to have a judgment stating they were discriminated against, yet receive no compensation for their damages. The Court expressed appropriate and serious concern about the evils of discrimination in our society, but has a disconnect between those evils and what will truly deter them in reality.

### What the decision didn't answer

Although it is a considerably lengthy opinion, *Harris* leaves a lot of unanswered questions. For example, what exactly is a "mixed motive" case? At the trial court level, the defense did not present the case as mixed motive necessarily, and instead claimed the plaintiff's pregnancy had no bearing in their decision at all, but asked for that instruction anyhow. So, couldn't just about any discrimination case, then, potentially be "mixed motive"? It seems logical that if the defense argues only a single, non-discriminatory motive for the adverse action, a mixed motive defense would not apply and an instruction on it should not be given; however, *Harris* states that the defense need not admit

that it had a discriminatory motive at all. On the other hand, the Court did seem to recognize that there are "single motive," or pretext, cases that would be different than mixed motive cases during its discussion regarding *McDonnell Douglas*. This seems, therefore, to be a contradiction. More importantly, the *Harris* Court did not address who decides if the case is mixed motive, and when. What information does a judge need to decide whether to allow a "mixed motive" instruction?

In addition, does *Harris* apply to retaliation claims? The Court quite distinctly only addressed Government Code section 12940(a) claims of discrimination, and in fact really only seemed to address termination claims. The Court engaged in no discussion at all about section 12940(h) retaliation claims. However, both sections use the term "because" in a similar manner and cases have analogized these two sections previously. While we must certainly try to argue that *Harris* does not change the analysis in retaliation cases, it will be a challenging argument. Notably, though, the Court relied heavily on Title VII and its case law, most particularly *Price Waterhouse v. Hopkins* (1989) 490 U.S. 288. The codification of the "mixed motive" defense in 42 USC section 2000e-2(m) following *Price Waterhouse* does not mention retaliation; it only refers to protected classes. Yet, the Ninth Circuit, among other circuits, holds that §2000e-(m) does not apply to retaliation claims, but not in a manner this is helpful to plaintiffs – if the employer can prove it had a valid reason for the action, it is a complete defense even if retaliatory motives were present as well.

Also, the Court, in its discussion about damages, did not address the idea of medical specials. What if, for example, a plaintiff received therapy because she suffered from discrimination? The defense will have a solid argument that the Court's rationale about non-economic damages and a jury's inability to parse them out properly would logically flow to this as well. On the other hand, you may have a treator who can testify that your client talked

about his/her feelings about discrimination, and did not focus on distress from the adverse action in particular. This is something that the Court has left open.

Finally, the Court did not detail the meaning of "substantial factor."<sup>3</sup> This will likely become a battleground in summary judgment motions, and lead to more appellate court decisions trying to hash this out. Case law in other contexts, though, demonstrates that "substantial" is not as high a hurdle as a Miriam-Webster definition of the term might imply. A number of cases seem to use the terms "substantial" and "a motivating" factor interchangeably. (See, e.g., *Mt. Healthy School Dist. Bd. v. Doyle* (1977) 429 U.S. 274, 286; *George v. California Unemployment Ins. Appeals Bd.* (2009) 179 Cal.App.4th 1475, 1492.) Comparing CACI 430, defining substantial factor, with CACI 2507, defining a motivating reason, (the instruction rejected in *Harris*) shows little difference between the two.

### What's a plaintiff's lawyer to do?

The only way we can really get around the barriers caused by *Harris* is to work on and hope for a legislative fix. In its absence, there are some things that plaintiffs' lawyers in any discrimination case, and probably retaliation case, should be sure to do:

- Be sure to plead injunctive and declaratory relief. At the very least, you know reasonable attorneys' fees will be available if a "same decision" defense is proven.
- If the facts support it, be sure to plead harassment and intentional infliction of emotional distress in order to give your client a shot at the full panoply of damages.
- Build your case to try to prove that this was not a "mixed motive" decision, but was solely pretextual. Also build your case to show that even if your client had some performance issues, these were not going to lead to the adverse employment action, and most importantly would not have caused the same decision at the same time it was made.

You must get your client's personnel file as soon as possible; in fact, pursuant



to Labor Code section 1198.5, have your client review and copy the file him/herself before you even file the case. Also, if possible before you file the case, talk to witnesses who can show your client did not have performance issues, or at least not significant ones.

Once the case is filed, be sure to ask for and bring motions to compel if necessary on discovery regarding the treatment of others with the same performance problems they claim your client had.

- If it comes down to it, be sure to argue to the jury the inconsistency in the defense’s position that they had no discriminatory intent at all (as they certainly wouldn’t admit to one) and that their lawyers are now saying the jury could find it was a mixed motive.

**Conclusion**

Obviously, it is now a real risk for plaintiffs in discrimination cases that they may end up winning, but be entitled to no damage award. Of course, we can expect in most cases alleging discrimination, and

probably retaliation, that the defense will plead a “mixed motive”/“same decision” defense. They will use it as leverage for smaller settlements. They will use it to bring more motions for summary judgment – in fact several employment defense firms’ blogs about *Harris* have promised this. However, after informing our clients of this risk, we cannot let this deter us from taking these cases. We cannot let a misguided decision render laws against discrimination meaningless.



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**Endnotes**

<sup>1</sup> The decision was 6-0 – Justice Baxter recused himself after the case was argued.  
<sup>2</sup> The Court only analyzed this in the context of termination, the adverse employment action at issue in *Harris*. Although probably a tough argument to make, perhaps a court could be persuaded to see that the analysis isn’t necessarily applicable in all situations of adverse employment actions. *Harris* states: “we believe it is a fair supposition that the primary reason for the discharged employee’s emotional distress is the discharge itself.” *Harris* at p. 233. This may not be so true in other circumstances. For example, a woman who did not receive a promotion with her gender playing a substantial factor in the decision may be much more upset that she has hit a glass ceiling than she is about not getting a particular promotion.  
<sup>3</sup> An in-depth discussion about this term goes beyond the scope of this article, and could easily encompass an entire article itself. One of the Plaintiff’s attorneys who handled the matter in the Supreme Court, David deRubertis, has expressed some extremely useful and thoughtful analysis on this term, which he will be explaining in his own article on the matter in the April issue of Advocate magazine ([www.theadvocatemagazine.com](http://www.theadvocatemagazine.com)).