

# THE RECORDER

ESSENTIAL CALIFORNIA LEGAL CONTENT

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## Mixed Results on Mixed Motives

*The California Supreme Court clears things up on discrimination defense, but it may be a prompt for legislative action, says Scott Lawson of Pennington Lawson.*

Scott Lawson

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In a much-anticipated decision, the California Supreme Court in *Harris v. City of Santa Monica* responded to the long-standing question of whether and to what extent the mixed-motive defense is recognized in employment discrimination cases in this state. The decision is not a clear-cut win for either employers or employees, but provides much-needed guidance in an area that has engendered confusion for many years.

The court's unanimous Feb. 7 opinion, delivered by Justice Goodwin Liu, held that, under California's Fair Employment and Housing Act, where an adverse employment decision was motivated by both discriminatory and nondiscriminatory reasons, but the employer proves that it would have made the same decision regardless of the discrimination, "a court may not award damages, backpay, or an order of reinstatement. But the employer does not escape liability."

These so-called "mixed-motive" scenarios have always presented a policy dilemma. On the one hand, because the employee would otherwise have been terminated, he or she arguably should not be the beneficiary of a damages windfall; on the other hand, an employer found to have acted for illegal discriminatory reasons should not escape liability altogether.

Emphasizing that the FEHA's policy against discrimination "is plainly one that 'inures to the benefit of the public at large rather than to a particular employer or employee,'" the court's decision places important limitations on both the plaintiff's right of recovery and the scope of the "mixed-motives" defense. At the heart of the decision are the following seminal conclusions:

1. In a "mixed motives" case, if the plaintiff proves that discrimination "was a substantial factor motivating the adverse employment action," but the employer establishes that it would have made the same decision for legitimate business reasons, the plaintiff may not recover damages.
2. The plaintiff may, however, obtain a judicial declaration that the employer engaged in illegal discrimination and an injunction against further discrimination.
3. Where liability is found, even in the absence of money damages, the plaintiff may recover attorney fees and costs.

These conclusions have several important ramifications. First, *Harris* establishes the causation standard for disparate-treatment discrimination cases: discrimination must have been a "substantial motivating factor" in the employment decision. The plaintiff had argued for the standard set forth in California Civil Jury Instruction No. 2500: that so long as her pregnancy was "a motivating reason for the discharge," defendant was liable and she should recover damages. The defendant had argued for a "but for" causation standard — i.e., that the plaintiff was required to prove that, but for discrimination, she would not have been fired. Under the court's view, the defendant would not be liable if, despite evidence of some discriminatory motive, it proved it would nonetheless have terminated the plaintiff for other legitimate business reasons.

The *Harris* court adopted a middle ground, holding the plaintiff must show discrimination was a "substantial motivating factor" in the termination decision. This newly announced standard will eliminate an argument that has taken place in countless pretrial conferences over the past 10 years. Because the court did not undertake to define the precise parameters of this standard, however, the traditional arguments concerning CACI No. 2500 will likely be replaced by arguments as to the precise meaning of "substantial motivating factor." Until a new, accurate CACI instruction is approved, this debate will take place in the trial courts' consideration of specially prepared jury instructions.

Second, by affirming the employee's right to attorney fees, even where no money damages are recovered, the court kept in place what it deemed a meaningful "deterrent" to discrimination. In practical terms, under the court's ruling, attorney fees will remain a significant consideration for employers in settlement discussions. Indeed, in the *Harris* case itself, the fees award of more than \$400,000 was the tail wagging the \$178,000 money damages dog.

Third, *Harris* will encourage employers to be all the more careful in documenting their reasons for and steps taken in disciplining and terminating employees, as they will be able to eliminate the threat of damages by showing their legitimate business reasons for an adverse employment action — even where evidence of discriminatory animus on the part of the decision maker may be present.

Fourth, in discussing the meaning of "significant motivating factor," the court briefly

addressed the "stray remarks" doctrine it took up in *Reid v. Google*. Although it declined to adopt Justice Sandra Day O'Connor's proposal in *Price Waterhouse* that a plaintiff should be required to produce direct evidence that a discriminatory criterion was a substantial factor, it wrote that the "significant motivating factor" standard "ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision."

While the *Harris* opinion itself is a thorough and sophisticated academic exposition of the history and theory behind the mixed-motive defense, its practical import will be felt by practitioners at that most critical of moments in the litigation process: when the jury deliberates. The decision points up the fact that, lest we practitioners forget, for all our elegantly presented evidence and endless law-and-motion arguments about the subtleties of the relevant case law, the verdict in a jury trial often comes down to the jury instructions and the verdict form. When it really matters, the jury looks to the instructions given it by the person in the robe behind the big bench.

As anyone who has tried a FEHA discrimination case in the past 10 years will attest, superior court judges are reluctant to give instructions other than those found in the CACI. This allows the CACI instructions to play an unusually powerful and persuasive role — out of sync, at times, with the relative persuasive power of the case law that purports to support them. As the underlying trial in *Harris* reveals, the CACI instructions often leave much to be desired (particularly in the area of employment discrimination). While they were meant to replace the BAJI instructions, they do not cover as much ground as those instructions and, indeed, leave important areas of the law untouched — including the absence of any instruction intended to address the "mixed motives" scenario.

Indeed, in a certain sense, the *Harris* decision is a testament to the limitations and inflexibility of form jury instructions. As the court noted, the language in Government Code §12940(a) could plausibly require any of three different showings of causation: (1) "but for," (2) "substantial factor," or (3) "a motivating factor." By the mere fact of its having been set forth in CACI No. 2500, however, the "a motivating factor/reason" standard transformed a none-too-clear area of the law into a hard-and-fast principal applied in trials throughout the state.

Now, 10 years after the CACI instructions were first published, we learn that the causation standard set forth there, as well as the complete mixed-motives defense described in BAJI instruction 12.26, were, for lack of a better term, "wrong." Although this fact is ultimately the result of the amount of time it takes these issues to bubble up to the state's highest court, it suggests that the attempt to create a standard set of "plain English" jury instructions may be a Sisyphean task. It raises the question, furthermore, whether in the absence of a standard set of instructions, these issues might not percolate more quickly.

One thing that remains to be seen is how long *Harris* will remain the law. As the

*Harris* opinion notes, just two years after the U.S. Supreme Court's *Price Waterhouse* decision recognized a complete "mixed motives" defense to liability under Title VII, a Democratic Congress amended the statute to eliminate the liability bar. Given the supermajority Democrats now hold in both the Assembly and the Senate, and a governor historically sympathetic to employees (indeed, the same governor who originally signed the FEHA into law more than 30 years ago), it is possible we will see a legislative effort to strip the law of the mixed-motive defense. The essential compromise position reached by the court, which rejects a complete liability bar in favor of the very same kind of remedies limitations contained in the Civil Rights Restoration Act of 1991, may, however, auger against such a move.

Issuance of an employment-law decision by the California Supreme Court is a relatively rare event. Expect a flurry of activity in the trial and appellate courts as lawyers scramble to incorporate the landmark *Harris v. City of Santa Monica* holding into their briefs and proposed jury instructions.

*Scott Lawson is a partner at Pennington Lawson in San Francisco. He is a trial lawyer practicing employment and trade secret law, as well as other forms of commercial litigation. He can be reached at [scottlawson@penningtonlawson.com](mailto:scottlawson@penningtonlawson.com).*

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