

CLIENT ALERT

California Supreme Court Approves Partial Mixed Motive Defense Under FEHA

February 12, 2013

On February 7, 2013, the California Supreme Court issued its decision in *Harris v. Santa Monica*, No. S181004 (Cal. Sup. Ct. Feb. 7, 2013), rendering a partial victory for employers defending discrimination cases brought under the State's Fair Employment and Housing Act (FEHA). The Court held that even when discrimination is a substantial factor motivating a termination decision, the terminated employee may not recover damages or obtain reinstatement if the employer shows that it would have terminated the employee in the absence of any discriminatory motive. However, employers are not absolved of all liability. An employee whose discharge is motivated substantially, if not exclusively, by discrimination nevertheless may prevail on a claim for declaratory relief, may obtain an injunction, and may recover attorneys' fees and litigation costs.

The plaintiff in this case, Wynona Harris, was a bus driver employed by the City of Santa Monica on an at will basis. During her 40-day training period, she was involved in a traffic accident that was deemed preventable. She successfully completed her training, though, and was promoted to the next phase of employment, a three-month probationary evaluation period. Ms. Harris had a second preventable accident, was disciplined twice for reporting late to work, and received a written performance evaluation rating her "further development needed." She then informed her supervisor that she was pregnant and, in response to the supervisor's request, submitted a note from her physician permitting her to work with limited restrictions. The morning she provided this note, the supervisor attended a meeting at which he was provided a list of probationary drivers who were not meeting standards for continued employment. Ms. Harris was on that list. She was discharged two days later.

Ms. Harris brought an action under the FEHA, alleging that the City had discriminated against her because she was pregnant. At trial, the judge, over the City's objection, instructed the jury, pursuant to a standard form instruction, that Ms. Harris was required to prove only that her pregnancy was a "motivating factor/reason for the discharge." The City had sought, and was denied, a mixed motive defense instruction to the effect that it could not be held liable if (a) both discriminatory and non-discriminatory motives were present, and (b) it proved that its non-discriminatory reason alone would have led to the termination decision. The jury found in favor of Ms. Harris and awarded her economic and non-economic damages in the amount of \$177,905. Attorneys' fees in the amount of \$401,187 thereafter were added to the judgment in her favor.

On appeal, the City argued that the trial judge gave the wrong jury instruction because its mixed motive defense absolved it of all liability. In its opinion, the California Supreme Court analyzed in depth the statutory language prohibiting employers from taking action against employees "because of" their sex, race, disability, or other protected characteristic, as well as the legislative intent underlying that causation language. The Court considered state cases under the FEHA and other state statutory schemes, in addition to federal cases under Title VII and other federal laws protecting employees, such as the Age Discrimination in Employment Act. This analysis proved inconclusive as to the intended meaning of the phrase "because of" and its impact on the mixed motive defense.

In the end, the Court based its decision on the "two related but different purposes of the FEHA": (1) to provide compensation to redress the adverse effects of discrimination on individuals; and (2) to provide other remedies to "prevent and deter"

discrimination. *Id.* at 20-21, *citing* Cal. Govt. Code § 12920.5. As to the first of these purposes, the Court held that allowing an employee to recover economic damages, *e.g.*, backpay, or to be reinstated when the employer had legitimate, nondiscriminatory reasons for discharge, would result in the employee receiving an undeserved windfall. *Id.* at 31-32. The issue of an award of noneconomic damages, *i.e.*, emotional distress, was a closer call for the Court, but it likewise held that the employee is not entitled to recovery under such circumstances. *Id.* at 32. (The Court observed, however, that the employee may have recourse under a tort theory of intentional infliction of emotional distress.)

As to the second purpose, *i.e.*, preventing and deterring discrimination, the Court held:

[W]e conclude that a same-decision showing by an employer [*i.e.*, "proof that the employer, in the absence of any discrimination, would have made the same decision *at the time it made its actual decision*"] 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.... [I]t 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.

Id. at 19, 21 (emphasis in original).

Accordingly, the Court ruled that even when the employer shows that it would have made the same termination decision in the absence of any discrimination, if unlawful discrimination was a substantial factor in the decision, the terminated employee may obtain declaratory relief, an injunction, and recovery of reasonable attorneys' fees and costs. *Id.* at 33-34.

The Court also addressed the employer's burden of proof regarding this "same-decision" defense. Ms. Harris argued that an employer should be required to make a clear and convincing showing that it would have made the same decision absent evidence of a discriminatory motive. The Court determined, however, that preponderance of the evidence is the appropriate standard.

Although the *Harris* decision does not recognize a complete defense under the FEHA when an employer has mixed motives, on balance its ruling benefits employers. A plaintiff may not recover monetary damages if the employer establishes that it would have made the same adverse employment decision based on legitimate non-discriminatory reasons, regardless of any discriminatory motive that also may have been present. The employer's financial exposure thus is reduced significantly when a legitimate mixed motive defense is available. Members of the plaintiffs' bar will continue to have incentive to bring discrimination cases under the FEHA because of the Court's express recognition that they will recover attorneys' fees if they obtain declaratory relief or an injunction. To reduce costs of such litigation, employers should consider positioning legitimate mixed motive cases for settlement, using as leverage the employee's entitlement to no monetary damages if the case were to proceed to trial.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Kris D. Meade

Partner – Washington, D.C.

Phone: +1.202.624.2854

Email: kmeade@crowell.com

Glenn D. Grant

Senior Counsel – Washington, D.C.

Phone: +1.202.624.2852

Email: ggrant@crowell.com