

CALIFORNIA SUPREME COURT'S "MIXED MOTIVE" RULING MAY HAVE MAJOR IMPACT ON FAIR EMPLOYMENT AND HOUSING CLAIMS

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On February 7, 2013 the California Supreme Court, in a unanimous decision, affirmed that backpay and reinstatement are not available remedies for a plaintiff under the Fair Employment and Housing Act ("FEHA") when an employer has proved by a preponderance of evidence that it would have made the same decision to terminate that individual for lawful reasons. The legal impact of the much-anticipated decision is far reaching. *Wynona Harris v. City of Santa Monica*.

Harris, a bus driver, alleged she was terminated because of her pregnancy. The City claimed Harris was fired for job performance. Specifically, within the first five months of her employment, Harris was involved in two preventable accidents, reported late to work twice and had been evaluated as needing "further development."

At trial, the City requested a mixed-motive defense jury instruction be read to the jury. The essential premise of this defense is that there was a legitimate reason for the termination and, standing alone, this legitimate reason would have caused the employer to make the same decision. The Superior Court refused to give the instruction and ultimately the jury awarded Harris \$177,905 in damages, of which \$150,000 were for non-economic damages.

On appeal, the Court of Appeal determined the requested jury instruction was an accurate account of California law and that it was prejudicial error for the Superior Court to refuse to give the instruction. On the other hand, Court of Appeal also determined there was substantial evidence

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supporting the jury's verdict that Harris had been terminated because of her pregnancy.

The Supreme Court held the Court of Appeal was correct in part. The Supreme Court summarized its holding as follows:

"In sum, we construe section 12940(a) as follows: When a plaintiff has shown by a preponderance of evidence that discrimination was a substantial factor motivating his or her termination, the employer is entitled to demonstrate that legitimate, nondiscriminatory reasons would have led it to make the same decision at the time. If the employer proves by a preponderance of evidence that it would have made the same decision for lawful reasons, then the plaintiff cannot be awarded damages, backpay or an order of reinstatement. However, where appropriate, the plaintiff may be entitled to declaratory or injunctive relief [and] ... may be eligible for an award of reasonable attorneys' fees and costs ..."

The Supreme Court emphasized that in a mixed motive case, although an employee may not be able to recover damages, FEHA's purpose of redressing, preventing or deterring discrimination is still being served because a plaintiff is eligible to seek reasonable attorneys' fees and costs.

The impact of this decision is favorable to employers as it may be a useful tool in cutting down some, if not all, damages in certain FEHA claims. However, because the decision will not prevent an employee from seeking reasonable attorneys' fees and costs, it is still important for employers to continue to develop strategies and preventive measures by conferring with legal counsel when deciding to terminate employees.

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