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**EMPLOYMENT LAW  
BULLETIN**

**March 1, 2013**

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## **Employers Arguing “Mixed Motive” Defense to FEHA Discrimination Claims May Now Avoid Liability**

Until recently, an employee suing for discrimination under the Fair Employment and Housing Act (“FEHA”) only had to show that the alleged discrimination was “a motivating factor” for the adverse employment action to prevail. An “adverse employment action” could include demotion, unjust warnings, retaliation or termination. Thus, if any part of the employer’s decision was based upon discriminatory intent, the employee could still recover damages.

However, in a landmark decision the California Supreme Court recently held in *Harris v. City of Santa Monica* that employers may rely upon a “mixed motive” defense to shield themselves from liability in discrimination lawsuits. In other words, where the employer proves that its termination or other adverse employment action was based upon a combination of discriminatory and legitimate motives, it can escape liability by proving that a legitimate motive alone would have led to the same adverse employment action.

In *Harris*, a female bus driver for the City of Santa Monica sued her employer for sex discrimination alleging that she was fired after disclosing to her supervisor that she was pregnant. The City defended against *Harris*’s claims by maintaining that *Harris* had been terminated for poor performance.

At the trial the jury was instructed to hold the City liable if *Harris* showed that her pregnancy was a “motivating factor” in the City’s decision to terminate her employment. On this basis, the jury found in *Harris*’s favor and awarded her monetary damages. However, the California Supreme Court ruled that the instruction which had been given by the trial court to the jury represented a misstatement of the law.

In clarifying the proper legal standard for an employer’s “mixed motive” defense under FEHA, the Supreme Court held that an employee suing for discrimination under FEHA must demonstrate that the discrimination was a “substantial factor” motivating the employer’s adverse employment action. Merely establishing that the discrimination was “a motivating factor” is not enough to prove that the action was based upon an unlawful discriminatory ground.

If the employee proves that the discrimination was a substantial factor in the adverse employment action, the employer has the right to show that it would have made the same employment decision for legitimate, nondiscriminatory reasons. Where the employer proves that its non-discriminatory reasons for the adverse action, standing alone, would have led to the same result, the employee will not be entitled to recover monetary damages, back pay or to be reinstated. (The employee may, however, be entitled to a declaration that the employer’s acts are unlawful and must stop, in which case the employee could recover attorneys’ fees and costs.)

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