A Timely Analysis of Legal Developments

ASAP®

February 28, 2013

California Supreme Court Rules "Mixed Motive" Is a Mixed Bag for Employers

By Margaret Hart Edwards, Lucas Muñoz, and Stephanie Lee

The California Supreme Court recently clarified the defenses available to employers defending against claims of discrimination. In *Harris v. City of Santa Monica*, No. BC341469 (Cal. Feb. 7, 2013), the court ruled that, if a discriminatory motive was a substantial factor in the decision to terminate an employee, an employer can still cut off all damages by proving that, even in the absence of any discriminatory motive, it would have made the same decision to terminate the plaintiff. In theory, the *Harris* decision will provide employers with a tool to cut off damages in claims of discrimination where an employee was clearly headed for termination. The court also held, however, that when a jury finds that the termination was substantially motivated by discrimination, the employee may still seek and receive declaratory and injunctive relief, and an award of attorneys' fees. Because of the availability of attorneys' fees and declaratory and injunctive relief, the *Harris* decision may result in more cases going to trial.

Factual Background

The plaintiff was hired by Santa Monica's bus service, Big Blue Bus, as a bus driver trainee in October 2004. The city's policies require that new drivers go through a 40-day training period, followed by a probationary period before becoming full-fledged drivers. The plaintiff completed her training period, but was terminated during her probationary period.

Shortly after beginning her training period, the plaintiff got into an accident that the city deemed "preventable." Nevertheless, the city elevated her to the probationary level, at which point she became an at-will city employee. During this probationary period, the plaintiff got into a second preventable accident in which she sideswiped a parked car and tore off its side mirror. She also incurred her first "miss-out," *i.e.*, she failed to give her supervisor at least one hour's warning that she would not be reporting to her shift. A few months later, the plaintiff's supervisor rated her overall as "further development needed" in her probationary performance review. The plaintiff incurred another miss-out soon thereafter.

During a chance encounter in May 2005, the plaintiff told her supervisor that she was pregnant. According to the plaintiff, her supervisor reacted with seeming displeasure, exclaiming: "Wow. Well, what are you going to do? How far along are you?" He then requested that she provide a doctor's note clearing her to continue working. Four days later, the day the plaintiff provided her supervisor with her doctor's clearance note, the supervisor attended a meeting at which he

©2013 Littler Mendelson, P.C. All rights reserved.

received a list of probationary drivers who were not meeting standards for continued employment, including the plaintiff. Her employment was terminated effective May 18, 2005.

The plaintiff sued, alleging that the city fired her because she was pregnant, a form of sex discrimination. At the trial, the city asked the trial court to instruct the jury regarding the so-called "mixed-motives defense," asserting that, even if the supervisor's decision was motivated in part by discriminatory intent, the city would have fired the plaintiff anyway for her poor performance. The city argued such a showing would absolve it of all liability. The trial court refused this instruction and instead gave the California model jury instruction that the plaintiff was entitled to damages if she proved that her pregnancy was a motivating factor or reason for the discharge.

In a nine-to-three vote, the jury found that the plaintiff's pregnancy was, in fact, a motivating reason for her termination and awarded her $177,905 in damages, of which $150,000 were for non-economic losses (*i.e.*, mental suffering).

California Supreme Court's Analysis

The California Fair Employment and Housing Act (FEHA) makes it illegal for an employer to discriminate in its employment decisions "*because of*" an employee's protected status, such as disability, race, or sex—which includes discrimination because of pregnancy.

The crux of the question for the court, then, was the precise meaning of the phrase "because of." There was no dispute that the phrase requires a plaintiff to prove a causal link between an employer's consideration of the protected characteristic and its action. However, what was disputed was the *degree* of causation required. The court considered three alternative approaches to the plaintiff's burden of proof: (1) the employer's consideration of a protected characteristic was *necessary* to its decision to take the employment action—also known as *but for* causation; (2) the employer's consideration of a protected characteristic was a *substantial* motivating factor in the employer's decision; or(3) the employer's consideration of a protected characteristic was a motivating factor in the employer's decision.

The court found the changes to federal law regarding mixed motive cases that were embodied in the Civil Rights Act of 1991 most persuasive and consistent with the expressed goals of the California Legislature in enacting the FEHA. The FEHA expresses goals not just to *redress* aggrieved employees when they have been discriminated against, but also to "*prevent* and *deter* unlawful employment practices."

In light of those goals, the court found that if a plaintiff would have been terminated, even in the absence of any discriminatory intent, it made no sense under the FEHA to provide that plaintiff with a financial windfall in the form of financial damages. On the other hand, where a plaintiff has proven that discrimination was a *substantial* motivating factor for the adverse employment action, it likewise did not make sense to absolve the employer of all liability, even though that plaintiff was rightfully terminated for other reasons.

In the end, the court selected a middle road: employers that can prove an employee would have been terminated even in the absence of discrimination are not liable for back pay, emotional distress, or other monetary damages. However, a plaintiff who has proven that a discriminatory motive was a substantial motivating factor in the termination decision may still be entitled to declaratory relief (essentially the court stating that the discriminatory decision was against the law), injunctive relief (the court ordering the employer to take steps to prevent further discrimination), and reasonable attorneys' fees incurred in bringing the lawsuit, at the discretion of the trial court.

Considerations for Employers and Practitioners

The most lasting effect from the *Harris* decision will likely be the new causation standard articulated by the court that is necessary to prove a discrimination claim, requiring a showing that discrimination was a *substantial* motivating factor for the employment decision. This test will apply to mixed-motive and non-mixed-motive cases alike. Although the court does not delineate precisely what evidence plaintiffs must prove to meet this burden, it did take care to highlight that stray remarks in the workplace, statements by non-decision makers, and statements by decision makers unrelated to the decision making process cannot, by themselves, establish that an improper bias was in fact a substantial motivating factor behind a particular employment decision.

The probability of a true mixed-motive finding (*i.e.*, where a jury finds that a plaintiff was discriminated against, but would have been terminated anyway) is probably low. However, even in that case, employers still have exposure for attorneys' fees, which is often a driving concern even

ASAP® is published by Littler Mendelson in order to review the latest developments in employment law. ASAP® is designed to provide accurate and informative information and should not be considered legal advice.
©2013 Littler Mendelson, P.C. All rights reserved.

in cases where there is additional exposure for back pay and emotional distress. Thus, as always, employers must remain vigilant in enacting, maintaining, and enforcing their anti-discrimination policies, and in providing anti-discrimination training. However, *Harris* potentially provides a significant tool to cut off meritless allegations prior to trial, and to limit exposure to damages.

The *Harris* decision is important for employers because it underscores the need for employers to keep strong documentation of performance problems and of business reasons for terminations.

The *Harris* decision also is important for in-house counsel and defense attorneys because it:

- Sets forth options for pleading the affirmative defense of "same-decision."
- Sets out the burdens of proof on each side.
- Identifies useful examples of discrimination as a "substantial factor," which can be used for briefing, training, etc.
- Disapproves of jury instructions that set a lower standard of proof of discrimination.

Margaret Hart Edwards is a Shareholder, and Lucas Muñoz is an Associate, in Littler Mendelson's San Francisco office, and Stephanie Lee is an Associate in the Los Angeles (Century City) office. If you would like further information, please contact your Littler attorney at 1.888.Littler or info@littler.com, Ms. Hart Edwards at mhedwards@littler.com, Mr. Muñoz at lmunoz@littler.com, or Ms. Lee at slee@littler.com.

ASAP® is published by Littler Mendelson in order to review the latest developments in employment law. ASAP® is designed to provide accurate and informative information and should not be considered legal advice.
©2013 Littler Mendelson, P.C. All rights reserved.