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**CALIFORNIA SUPREME COURT ISSUES NEW OPINION CLARIFYING  
MIXED-MOTIVE DEFENSE**

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The California Supreme Court recently affirmed the availability of the mixed-motive defense as a complete bar to damages under the Fair Employment and Housing Act (FEHA). *Harris v. City of Santa Monica*, No. S181004 (Cal., Feb. 7, 2013). The court ruled that even in the face of discrimination, an employer can defeat the employee's claim for damages if it can show that it would have terminated the employee anyway. This decision provides a beneficial defense to employers in California cases with challenging facts.

A bus service owned by the City of Santa Monica employed Wynona Harris as a bus driver trainee. During her initial training period, Harris caused a minor but "preventable" accident. Still, Harris successfully completed her training period and became a probationary part-time bus driver. While on probation, Harris had yet another preventable accident. She also reported to work late on at least one occasion. During her probationary period, Harris' supervisor prepared a written evaluation that assigned her an overall performance rating that indicated she needed "further development." A few weeks after her evaluation, Harris' supervisor saw her with her uniform shirt un-tucked and told her to tuck it back in. Harris confided in him that she was pregnant. According to Harris, her supervisor reacted by saying, "Wow. Well, what are you going to do? How far along are you?" Her supervisor then told her that she needed to have a doctor's release to continue working. Four days later, Harris provided a release. On the same day, her supervisor participated in a meeting to review under-performing employees, including Harris. The City decided to terminate the employment of Harris and others at that meeting.

Harris sued the City claiming that she was fired due to her pregnancy. The City denied her allegations and asserted that it had legitimate, non-discriminatory reasons to fire her since she was an at-will probationary employee with performance and attendance problems.

The City asked the court to instruct the jury that it should prevail in the face of pregnancy discrimination if the employer would have terminated the employment relationship of Harris for legitimate and sufficient reasons regardless of her pregnancy. The trial judge refused the mixed-motive instruction and instead required only that Harris prove that her pregnancy was a "motivating factor" in the termination—defined as "something that moves the will and induces action even though other matters may have contributed to the taking of the action." On that standard, Harris was

successful at trial and was awarded nearly \$200,000 in damages. The City appealed and argued that the refusal to give a mixed-motive instruction was error.

The California Supreme Court ruled that, under FEHA, a plaintiff in a mixed-motive case must prove that discrimination was a “substantial motivating factor” in the adverse employment action. The employer, however, is also entitled to a mixed-motive instruction that provides a defense if it can demonstrate that “legitimate, nondiscriminatory reasons would have led it to make the same decision at the time.” If an employer successfully proves by a preponderance of the evidence that it would have made the same decision regardless of any discrimination, the plaintiff cannot be awarded damages, back pay or an order of reinstatement. The court, however, determined that a plaintiff still may be entitled to other equitable relief and attorney’s fees if discrimination is established.

The opinion is significant. Essentially, the mixed-motive defense can be an alternate defense presented to the jury. Even though it is not a complete affirmative defense and questions about the application of *Harris* remain, the decision clarifies that an employer may rely on its legitimate motivations, even in the face of evidence of unlawful ones, to limit its liability.

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