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## Employment Lawyers Await State High Court's Decision on Mixed Motives

By Catherine Ho  
Daily Journal Staff Writer

The California Supreme Court granted review Thursday on a case that could affect virtually every discrimination and retaliation case against employers filed under the state's anti-discrimination law.

In *Harris v. Santa Monica*, the state's high court can establish whether employers can ask juries to consider a "mixed motive" defense, which could potentially shield employers from some liability in discrimination and retaliation suits under the Fair Employment and Housing Act. The act bars discrimination based on race, religion, sex, age and medical conditions, and retaliation by employers in whistleblower cases.

The litigation stemmed from a 2005 discrimination lawsuit filed by Wynona Harris, a bus driver who sued the city of Santa Monica, claiming she was fired because she was pregnant. The city said it fired Harris because of poor performance, citing two bus accidents, two unexcused absences and a performance review that said she needed "further development."

Before the *Harris* case, the way juries determined whether an employer was at fault was to consider the protected trait, such as race or sex, and whether it factored into the employer's decision to fire or demote the employee. If the plaintiff could show that the protected trait was a motivating factor behind their firing or demotion — even if other reasons, such as poor performance, also were considered — the plaintiff would prevail.

Harris' lawyer argued that her pregnancy prompted the city to fire her because the basis of her termination — that she had accrued 50 demerit points within 90 days — was never stated explicitly. There also were inconsistencies in testimony from city employees about why she was terminated, said her trial attorney Michael Nourmand.

At trial, lawyers for the city of Santa Monica asked the court to allow the jury to consider a mixed-motive defense, which would have allowed the city to show that it would've fired Harris regardless of her pregnancy. The court refused and a

jury awarded Harris \$178,000. The city appealed, saying the court's refusal to allow it to use mixed motive prevented it from presenting a legitimate defense.

In February, a panel in Division Eight of the Second District Court of Appeal agreed. The opinion opened the door for many unanswered questions and Harris' lawyers said the state's high court now has a chance to clarify: can employers use a mixed-motive defense in FEHA cases? If so, when? And under what circumstances?

"If what the appellate court did is wrong in any way, every FEHA discrimination or retaliation case will now be tried under wrong jury instruction," said David deRubertis of the deRubertis Law Firm in Woodland Hills, an employee rights trial and appellate lawyer who petitioned the Supreme Court to review the case.

Nourmand said the Court of Appeal erred in allowing mixed motive, a defense under federal civil rights law barring discrimination, in a matter regarding FEHA, a state statute. He said he hopes the

justices find that mixed motive does not apply to FEHA. But if they do, he said, justices need to make clear under what circumstances and what effect it will have on remedies.

"I'm very happy to see the justices were able to see the importance of this issue," said Nourmand, an employee rights lawyer in Los Angeles. "It applies to all employees and employers throughout California. Hopefully the Supreme Court — if it is inclined to apply mixed motive to FEHA — will provide a proper analysis as to why it applies and how it applies to FEHA."

Barbara Greenstein, one of several appellate lawyers for the city of Santa Monica, said the Court of Appeal applied mixed motive appropriately and she maintained that the city fired Harris for poor performance.

The jury was asked to consider only whether or not the city factored in Harris' pregnancy in deciding to fire her. But under mixed motive, the jury also would have had to weigh whether the city considered other reasons, she said.

"The city does not concede we fired her because she was pregnant," Greenstein said. "But if the jury believed we considered impermissible reasons, then that itself is a mixed motive. If the jury believes that, we're entitled to an assessment of what would've happened in any case because she was a poorly performing employee."

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