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THE STRATEGY ISSUE

State Supreme Court to hear BBB discrimination case

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DOWNTOWN A former Big Blue Bus driver who sued City Hall for allegedly firing her because she got pregnant will have a chance to argue her case before the California Supreme Court.

The high court, which agreed to take the case April 22, will be asked to make a ruling on whether a "mixed-motive" defense exists under the state's Fair Housing and Employment Act (FEHA), providing employers with more ammunition in discrimination cases. The ruling could significantly impact every discrimination or retaliation claim filed in California.

Wynona Harris claims that in May of 2005 she was fired because she told her supervisor that she was pregnant. Attorneys for City Hall said Harris, who had recently completed her training and was a probationary driver, was let go because of her poor driving record, which included two preventable accidents. Harris also allegedly failed to properly notify her supervisor that she would not arrive on time for a shift because she was in juvenile court proceedings with her daughter.

Harris sued City Hall for discrimination in October 2005, saying she was unfairly treated once people found out about her pregnancy. She was fired roughly one week after disclosing that she was pregnant.

A jury ruled in favor of Harris, awarding her more than \$177,000 in damages and more than \$400,000 in attorney fees.

City Hall appealed and won on the

grounds that the jury should have been instructed to consider a mixed-motive defense, which is allowed in federal court. Attorneys for Santa Monica's City Hall argued that a mixed-motive defense does apply to FEHA and the jury should have been instructed to consider whether or not the bus company would have fired Harris regardless of her pregnancy. Mixed-motive defenses force juries to consider both discriminatory and non-discriminatory factors.

City Hall is not admitting pregnancy was a factor.

"We fired her because she had a bad driving record," said Deputy City Attorney Barbara Greenstein. "It's a public safety issue. We have an obligation to have safe drivers working for us."

The appellate court ordered a new trial. This led Harris' attorneys to file a request for consideration with the high court.

"I'm very happy that the Supreme Court granted a review because it is an important issue not only for employees but for employers, both public and private," said Michael Nourmand, who is representing Harris. "Everyone needs to understand how [mixed-motive defense] is going to work if it applies to FEHA ..."

Nourmand said his client was terminated because of her pregnancy and that there were several inconsistencies made by BBB management during trial. Harris is "struggling" financially, he said, and losing her job with the Big Blue Bus, "has affected her life drastically."

"She thanks God for her health, but financially she's on life support," Nourmand said. Nourmand is working on contingency and has not received any money from Harris for his services.

Mixed-motive defenses were allowed in

1989, when the U.S. Supreme Court held in the seminal case *Price Waterhouse v. Hopkins* that an employer could escape liability in a civil rights case even if a discriminatory motive was involved in an employment action.

In that case a female attorney up for partnership at the accounting firm said she was denied a promotion because she was not feminine enough and had an aggressive personality. She claimed she was denied because she was a strong woman. *Price Waterhouse* said she was denied because of her rough dealings with staff.

The court ruled that even though her sex may have been a consideration, *Price Waterhouse* showed that they would have come to the same conclusion not to promote her based on her performance on the job.

Two years after that decision, Congress passed the Civil Rights Act of 1991 that said a mixed-motive defense would not guard against liability, but would only limit remedies.

Nourmand said mixed motive should not be considered in the Harris case since City Hall's position from the beginning is that Harris was fired for purely legitimate reasons — performance issues. At no time did they argue mixed motive, which is why the trial judge did not give the jury instruction to consider it.

Nourmand claims the appellate court erred in its judgment and created several unanswered questions that the high court must clarify, one of them being whether or not mixed-motive jury instruction is warranted in every discrimination case filed under FEHA and whether or not it offers a complete defense or merely limit some remedies.

A date for the court hearing has not been set.