



California Employment Law Alert

Cathy Arias and Brendan Brownfield

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A Win for California Employers: Employee's Burden of Proof in Discrimination Cases is Now "Substantial"

The California Supreme Court recently handed down a decision (Harris v. City of Santa Monica, California Supreme Court Case No. S181004 (Feb. 7, 2013)) that will significantly benefit employers in the defense of employment discrimination claims.

Harris was a pregnancy discrimination action under the California Fair Employment and Housing Act ("FEHA"). The plaintiff, Wynona Harris, was hired as a bus driver by the City of Santa Monica. Over her initial training and probation period, Harris had two "preventable" accidents and incurred two "miss-out" violations by arriving to work late without giving notice. She also received a performance review indicating that "further development" was needed. Toward the end of her probation period, Harris had a chance encounter with her supervisor, Reynoso, as she prepared to begin her shift. Reynoso asked her to tuck in her shirt, to which she responded by informing Reynoso that she was pregnant. According to Harris, he reacted with seeming displeasure, exclaiming: "Wow. Well, what are you going to do? How far along are you?" A few days later, Reynoso attended a supervisor's meeting and received a list of probationary employees who were underperforming. Harris' name was on the list, and she was terminated a few days later.

The critical question in most employment discrimination claims, as it was in Harris, is the employer's motivation for the adverse action taken against an employee. More often than not, the parties dispute whether the reason given by the employer is legitimate, or whether it is merely a pretext for discrimination. The issue resolved by the California Supreme Court is what happens when the employment decision is motivated by *both* discriminatory and non-discriminatory reasons. This also raised a previously unresolved question for the California Supreme Court – how significant a showing of discrimination did Harris have to make in order to carry her burden of proof?

"Substantial Motivation"

The issue arose in the jury instructions proposed by each party at trial. Harris requested an instruction stating that she should prevail if she could demonstrate that discrimination played *any* role in the termination decision, no matter how small. The City requested a more detailed instruction that allowed the jury to consider that the City may have had more than one reason for the termination ("mixed motives"), and that it should be permitted to avoid all liability by showing that it would have made the same decision in the absence of discrimination. The trial court gave the jury the more liberal instruction proposed by Harris, and accordingly, the jury found that discrimination was a motivating factor in the termination. Harris was awarded over \$325,000 in damages and \$400,000 in attorney's fees.

The Supreme Court reviewed the case and ordered it to be retried. It made two key holdings. First, plaintiffs in employment discrimination cases must now prove that discrimination was a "substantial" motivating factor in the employer's decision in order to satisfy their burden of proof. Second, where the employer demonstrates that it would have made the "same decision" even absent the "substantial" discriminatory motivating factor, the plaintiff may only recover declaratory relief, injunctive relief, and attorney's fees from the employer – *not* damages, reinstatement, or back pay.

The most significant takeaway from Harris, then, is that plaintiffs must now prove that discrimination was a “**substantial** motivating” factor, rather than simply a “motivating” factor, in order to carry their burden of proof. This added burden should help to reduce frivolous lawsuits.

The Harris decision is a victory for employers and should give them more freedom to lawfully manage their employees. Although employers may remain liable for declaratory relief, injunctive relief, and attorney’s fees even after a “same-decision” showing is made, plaintiffs must first get over the “substantial motivation” hill. It is anticipated that subsequent Court of Appeal decisions will illuminate what evidence is required for a plaintiff to prove “substantial” motivation, and we will provide further updates as this issue develops.

Cathy Arias is the chair of Burnham Brown's Employment Law Department and specializes in counseling and representing employers. Ms. Arias and Burnham Brown have extensive experience and proven success in defending employers in class action lawsuits. Ms. Arias brings this experience with her when asked to perform labor and employment policy audits, especially those designed to test employers' vulnerability to class based liability. Ms. Arias can be reached at 510-835-6806 and carias@burnhambrown.com. Brendan Brownfield is an associate at Burnham Brown. He represents and counsels businesses in employment matters, including discrimination, harassment, and retaliation, as well as ADA compliance and commercial litigation. He can be reached at 510-835-6732 and bbrownfield@burnhambrown.com.