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No. S________

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WYNONA HARRIS,
Plaintiff and Respondent,

vs.

CITY OF SANTA MONICA,
Defendant and Appellant.

SUPREME COURT FILED

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Court of Appeal, Second Appellate District, Case No. B199571
Los Angeles Superior Court Case No. BC 341569

PETITION FOR REVIEW

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INTRODUCTION

This *published* Opinion raises issues of fundamental and far-reaching importance to virtually every discrimination or retaliation claim under California's Fair Employment & Housing Act (FEHA). These key issues include: (1) Whether a "mixed motive" defense exists under the FEHA?; (2) If so, what factual predicates must be present to support this defense?; and (3) If proven, what effect does the defense have on the case's ultimate resolution? Until now, none of these questions have been squarely addressed in any holding - as opposed to passing dicta references - by any previous published California FEHA authority.

In this published Opinion, the appellate court created a non-statutory "mixed motive" affirmative defense which finds no support in the text of the FEHA. It also required the trial court to give a "mixed motive" instruction even though the appellate court acknowledged that the parties themselves both argued that the employer did *not* act out of any "mixed motives." Instead, each party maintained that only one motive influenced the termination decision (according to plaintiff: pregnancy animus; according to defendant: performance issues). In creating this defense, the appellate court borrowed from federal Title VII law, which does recognize (now, in the statutory text) this "mixed motive" defense. But, in reasoning

that turns the FEHA's broad remedial purposes literally upside down, the appellate court's Opinion makes this non-statutory FEHA defense a *complete liability defense* when the same defense under Title VII merely *limits remedies*.

The very viability of a "mixed motive" defense to FEHA claims is a critically important and unsettled question which only this Court can definitively answer. The FEHA's text contains no such defense, though it does contain other defenses. Similarly, the FEHA's interpretative regulations do not recognize this defense. Instead, the genesis of the "mixed motive" defense is a body of law that has developed under federal anti-discrimination law (Title VII). But there are many reasons why the FEHA should be construed differently than Title VII on this point - something this Court has done in other cases where the text or purposes behind the FEHA and Title VII differed.

Thus, the threshold question this petition presents is whether any form of "mixed motive" defense applies to FEHA claims.

But even if this Court were to conclude that the FEHA does or should contain a "mixed motive" defense, review must still be granted to decide unsettled and important questions regarding *both* the defense's

applicability and its effect - neither of which this published Opinion adequately analyzed.

This case was tried as a straightforward "pretext" type case where the employer's position was that it acted out of *purely legitimate* reasons (performance issues). The employee countered that these supposedly legitimate reasons were a pretext or mask for discriminatory animus. Neither party actually maintained that the employer acted under any combined or "mixed motives." Typically, federal courts that have applied a "mixed motive" analysis, have not done so in every straightforward "pretext" type case. Instead, only when certain factual predicates are met is a "mixed motive" instruction given. Nonetheless, the Opinion does not limit the applicability of the "mixed motive" analysis at all. Instead, it creates a sweeping, omni-present defense that juries must be instructed on any time a court could theorize that the employer harbored a "mixed motive" - even when both parties dispute this very fact.

Thus, review is also necessary to determine whether this limitless application of a "mixed motive" defense is appropriate or, as we submit, any adoption of this defense must carefully consider the *factual predicates* necessary for it so that every case does not automatically morph into a "mixed motive" case.

There is yet another compelling reason to grant review. In engrafting this "mixed motive" defense into the FEHA, the appellate court borrowed federal law to adopt it. But at the same time, it refused to apply any of the limitations to this defense found in federal law. If this published Opinion stands, the "mixed motive" defense under Title VII will merely limit certain remedies, while the analogous defense under the FEHA will provide a *complete liability defense*. Given the FEHA's express legislative purpose of providing broad remedies to prevent and deter violations - and the numerous instances where the FEHA is broader than Title VII - it only makes sense that any FEHA "mixed motive" defense would be narrower on its effect on remedies than the analogous Title VII defense.

Review is desperately needed in this case so that this Court can ultimately determine these fundamental issues of FEHA jurisprudence. If review is not granted at this time, and the Opinion is later determined to inaccurately describe the availability or limits of the "mixed motive" defense, then countless cases will be tried in the meantime with juries instructed on the incorrect principles required by this Opinion. Review now can stop before it starts what otherwise could become a widespread reversal of FEHA verdicts based on improper jury instructions that are now required by the Opinion in all future FEHA discrimination or retaliation trials.

ISSUES PRESENTED

1. Does the "mixed motive" defense - now a statutory defense found within the text of Title VII - apply to FEHA claims despite the absence of any text in the California statute authorizing the defense?

2. If the "mixed motive" defense does apply to FEHA claims, when does it apply? Is a "mixed motive" instruction warranted in *every* FEHA discrimination or retaliation case, or must certain *factual predicates* be present - for example, evidence that the employer actually considered *both* proper *and* improper factors - to justify a "mixed motive" instruction?

3. If the "mixed motive" defense does apply to FEHA claims, what effect does it have if proven? Is the defense broader under the FEHA than Title VII so that it provides a complete defense to FEHA claims? Or, consistent with the FEHA's broad remedial purpose, does the defense merely limit *some* remedies?

SUMMARY OF FACTS AND PROCEDURAL HISTORY

A. Wynona Harris' employment, pregnancy and termination.[1]

Wynona Harris was hired by the City of Santa Monica on an at-will basis as a bus driver trainee. (Opinion, p. 2.) In mid-November 2004, Harris successfully completed her training program and was promoted to a probationary bus driver. (*Ibid.*) In May of 2005, Harris advised her supervisor George Reynoso that she was pregnant. (*Id.*, p. 4.) Reynoso's response was: "Wow. Well, what are you going to do? How far along are you?" (*Ibid.*) Days later, Harris supplied Reynoso with a doctor's note permitting her to continue to work with limited restrictions. (*Ibid.*) Two days after she submitted her doctor's note, Harris was terminated. (*Ibid.*)

The City justified Harris' termination on grounds that she had gotten into two preventable accidents, suffered two "miss-outs" (absences without one hour's advance notice), and was warned in a review that "further development [was] needed." (*Id.*, pp. 2-4.) At all times, the City denied that Harris' pregnancy played *any role* in its termination decision. (*Id.*, pp. 7-8.)

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[1] Many of the underlying case facts are not critical to assessing the legal question of whether review should be granted. Therefore, an abridged version is presented now and, if review is granted, our merits briefing will supply more factual detail.

B. The litigation, the trial, the jury instructions and the jury's verdict.

Harris filed suit against the City alleging that she was terminated based on her pregnancy. (Opinion, pp. 4-5.)

The City's answer did *not* plead a "mixed motive" affirmative defense. (1 AA 22-30.) Likewise, the City's initial proposed jury instructions lacked a "mixed motive" instruction and the City's initial proposed verdict form lacked a "mixed motive" question. (1 AA 67-73; 90-93.)

However, during trial the City did eventually request a "mixed motive" instruction. (Opinion, p. 5.) The trial court denied the requested instruction, reasoning that the case had really been framed by the parties as "pretext" case and not a "mixed motive" case. (6 RT 2758-2759 ["[A]ll those allegations are circumstantial evidence that she was fired for discriminatory reasons, and all this is pretext; correct? Isn't that what you're saying."].)

The jury returned a verdict in Harris' favor, finding that her pregnancy did motivate her termination and awarding $177,905 in damages. (Opinion, pp. 5-6.) After the trial court denied the City's new trial and JNOV motions, the City appealed. (*Id.*, p. 6.)

C. The Appellate Court's Opinion, grant of re-hearing and re-issuance of its published Opinion.

After full briefing and oral argument, Division Eight of the Second District Court of Appeal vacated submission of the case and asked for further briefing regarding the applicability of the "mixed motive" defense to FEHA claims. Thereafter, the appellate court issued an opinion on October 29, 2009. Harris sought rehearing, which the appellate court granted. Then, on February 4, 2010, the appellate court issued its *published* opinion, holding that the trial court erred by failing to instruct the jury on the "mixed motive" defense, requiring a new trial.

WHY REVIEW SHOULD BE GRANTED

I. REVIEW SHOULD BE GRANTED TO DECIDE WHETHER THE "MIXED MOTIVE" DEFENSE APPLIES TO FEHA DISCRIMINATION AND RETALIATION CLAIMS.

A. The unsettled question of whether the "mixed motive" defense applies to claims under California's FEHA.

The "mixed motive" defense is a creature of federal law under Title VII of the Civil Rights Act of 1964. Its genesis was the United States Supreme Court's highly fractured opinion in *Price Waterhouse v. Hopkins*

(1989) 490 U.S. 282.[2] There, the employer denied a female employee partnership based on seemingly legitimate considerations (lack of interpersonal skills) but these same considerations reflected the employer's consideration of impermissible factors (sexual stereotypical assumptions about the way a female should act). (*Price Waterhouse*, 490 U.S. at 234-237.) In this "mixed motive" context (where *both permissible and impermissible* considerations were at play), the plurality decision held that the plaintiff in a Title VII case bears the burden of proving that the impermissible considerations were a motivating reason for the employer's decision and that, once this is shown, the employer can avoid liability altogether by proving as an affirmative defense that it would have made the same decision even if it had not taken into account the impermissible considerations. (*Id.* at 258.)

The *Price Waterhouse* decision was immediately the subject of much criticism, especially because, by providing a complete defense to liability even where the plaintiff established that the employer's decision-making was infected by discriminatory animus, it "severely undermines protections against intentional discrimination by allowing such discrimination to escape

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[2] *Price Waterhouse* consisted of a four justice plurality opinion, two individual concurring opinions, and a dissenting opinion signed by three of the justices.

sanction completely under Title VII." (H.R. Rept. 102-40(II) at 18 (1991), reprinted in 1991 U.S.C.C.A.N. 549.) Congress responded by the Civil Rights Act of 1991, which amended Title VII to provide that the "mixed motive" defense merely limited available remedies so that the plaintiff could still obtain declaratory and injunctive relief, attorney's fees and costs.[3] (42 U.S.C.§2000e-5(g)(2)(B).)

Without analyzing the specific statutory text, the general statutory scheme or the FEHA's remedial purposes, the Opinion holds that the "mixed motive" defense applies to FEHA claims. Its only apparent support for this far-reaching holding was: (1) the assumption that federal authority should control the FEHA on this point (Opinion, pp. 8-11); (2) the fact that BAJI contained a "mixed motive" jury instruction - though CACI does not and BAJI acknowledges the uncertainty of whether the defense applies to FEHA claims (Opinion, pp. 7-9); and (3) the fact that some California appellate decisions have *assumed* in dicta that the defense would apply to the FEHA. (Opinion, pp. 5 n. 2 & 7). Based on literally nothing more than this, the appellate court did what no previous California appellate authority

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[3] In the 1991 amendments, Congress adopted the position of the Eighth Circuit in *Bibbs v. Block* (8th Cir. 1985) 778 F.2d 1318 that the "mixed motive" defense did not bar liability, but only limited available remedies.

has done: concluded as a matter of the court's holding (not mere dicta) that the "mixed motive" defense applies to FEHA claims.

The Opinion's assumption that the "mixed motive" defense belongs in FEHA jurisprudence is far from a clear or established proposition. There are many reasons which cast serious doubt on this conclusion.

First, as elaborated on in Section (C)(1) - (3) below, nothing in the FEHA's actual text provides for this defense even though the FEHA does contain many other statutory defenses to discrimination and retaliation claims.

Second, this Court has never endorsed (nor even suggested) that the "mixed motive" defense applies to FEHA claims.

Third, the drafters of California's two sets of standard civil jury instructions have disagreed with each other on whether a "mixed motive" instruction should be contained within the standard instructions. The drafters of the controlling, Judicial Council-approved jury instructions (CACI[4]) chose *not* to include a "mixed motive" affirmative defense instruction to FEHA claims. (Opinion, p. 9 ["CACI's omission of a mixed-motive instruction does not appear inadvertent because CACI's drafters

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[4] As of September 2003, CACI replaced BAJI as California's official jury instructions. (Cal. Rules of Court, Rule 2.1050; *see also* www.courtinfo.ca.gov/jury/civiljuryinstructions.)

knew about decisions applying the principle" yet decided not to provide an instruction for this defense].) Indeed, the Opinion recognizes that CACI's decision not to include a "mixed motive" instruction is "a likely recognition by the drafters of CACI that the law involving the mixed-motive defense *is not stable and clear, but arguably in a state of flux.*" (Opinion, p. 10) (italics added.)

In contrast, the BAJI drafters had included a "mixed motive" instruction. (*B.A.J.I. California Jury Instructions, Civil* (Fall 2009 Edition) [hereafter BAJI], Instr. No. 12.26.) But even then, the BAJI drafters emphasized the *uncertainty* surrounding the defense's applicability to FEHA claims:

> *No California appellate decision has dealt with these issues.* However, since the federal statute and Government Code language in critical areas is similar, the instruction is presented should the trial court deem it appropriate and applicable.[5] (BAJI, Instr. No. 12.26 "Comment") (italics added.)

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[5] The BAJI drafter's statement that "the federal statute and Government Code language in critical areas is similar" is wrong. As explained in Section (C)(1) below, nothing within the FEHA's statutory text provides - expressly or implicitly - for a "mixed motive" defense to FEHA claims. In contrast, Title VII, after the 1991 amendments, *does* now directly provide for this defense. (42 USC §§ 2000e-2(m) & 2000e-(5)(g)(2)(B).)

Fourth, before the Opinion, no published California appellate court had actually *held* - as opposed to making passing dicta suggestions - that the "mixed motive" defense applies to FEHA claims.[6] (*See e.g.*, *Arteaga v. Brinks Incorporated* (2008) 163 Cal.App.4th 327, 357 ["we do not decide whether a mixed-motive analysis applies under the FEHA or in this case"]; *Huffman v. Interstate Brands Companies* (2004) 121 Cal.App.4th 679, 702 [court did *not* decide whether "mixed motive" applied to FEHA because the "case was pled and tried as a pretext case"]; *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 111 n. 11 [noting "mixed motive" in dicta, but not deciding whether it would apply because "Plaintiff has not invoked the competing model of 'mixed motive' analysis"]; *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1748-1752 [distinguishing between "pretext" and "mixed motive" cases, but not analyzing whether the "mixed motive" applied to FEHA].)[7]

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[6] *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379, which is quoted at the beginning of the Opinion's legal discussion did not arise under the FEHA. (Opinion, p. 6.) *Grant-Burton* was a common law wrongful termination in violation of public policy case not rooted in any FEHA violation. (*Grant-Burton,* 99 Cal.App.4th at 379.)

[7] Thus, the Opinion's statement within footnote 2 that "[a]fter *Price Waterhouse*, California courts followed suit by recognizing a mixed-motive defense was available under state employment discrimination statutes" is incorrect. The *Heard* case - which the Opinion relied on for this conclusion - did *not* hold that the "mixed motive" defense was available under the FEHA. *Heard* merely provided a quick history of different types of

Likewise, federal courts within California have consistently observed that no published California appellate authority had - before the Opinion - actually held that the "mixed motive" defense applied to FEHA claims. (*See e.g.*, *Metoyer v. Chassman* (9th Cir. 2007) 504 F.3d 919, 955 fn. 25 ["no California court has explicitly adopted the mixed-motive defense as a bar to liability under FEHA"]; *Behne v. Microtouch Systems, Inc.* (N.D. Cal. 1999) 58 F.Supp.2d 1096, 1100 ["the California Supreme Court has not yet determined whether to adopt *Price Waterhouse* and establish a similar affirmative defense under state law for a mixed-motive defendant"].)

The Opinion's conclusion that the "mixed motive" defense applies to FEHA discrimination claims does not shine a bright light on these muddied waters. Far from a definitive or comprehensive treatment of this issue, the Opinion offers precious little reasoning or analysis on this critically important question. It merely points to federal law and concludes - without independent analysis - that the defense should apply equally under the FEHA. But, as we show in Section (C) below, this assumption is far from clear. Thus, review by this Court is necessary to both to "settle an

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discrimination and summarized methods of proving discrimination. (*Heard*, 44 Cal.App.4th at 1748-1754.)

important question of law" and "secure uniformity of decision." (Cal. Rules of Court, Rule 8.500(b)(1).)

B. The issues raised by this petition are of fundamental and widespread importance to FEHA cases, particularly because the Opinion requires a "mixed motive" instruction in virtually every conceivable FEHA discrimination or retaliation case.

The question of whether a "mixed motive" defense should be recognized under the FEHA is not just an "important question of law." (Cal. Rules of Court, Rule 8.500(b)(1).) It is a question of such widespread importance to FEHA litigation that its scope and reach cannot be overstated. This is especially true given the sweeping and limitless applicability of the defense as articulated by the Opinion.

As the Opinion itself acknowledges, the City's defense in this case was *not* that it considered both proper and discriminatory considerations, *i.e.*, the City did *not* allege as a factual matter that it actually harbored "mixed motives" in terminating Harris. (Opinion, pp. 7-8.) Nor was this a case, like *Price Waterhouse*, where the employer's statements about its decision-making inherently established the potential that both permissible and impermissible motivations were at play. Rather, the City adamantly "denied Harris's pregnancy played *any role* in the termination decision" and

asserted instead that it terminated Harris based on "deficient performance which, standing alone, lawfully permitted the City to discharge an at-will employee such as Harris." (*Ibid.*) (italics added.) In short, the City disclaimed any "mixed motive": "The City asserts, however, that it had sufficient nondiscriminatory reasons to fire Harris, *and her pregnancy played no part in its decision to terminate her.*" (Opinion, p. 7) (italics added.)

Because the City adamantly disputed that Harris's pregnancy played "*any* role" in the termination decision, this case presented a classic "pretext" situation where the jury was simply required to assess which side's view of *the* reason for the termination was *the* true reason (pregnancy vs. performance). Nonetheless, the appellate court found that the trial court was required to provide a "mixed motive" jury instruction. The appellate court did so because, *it opined*, that a theoretical "third possibility also exists, lying between Harris's assertion that the City fired her because she was pregnant and the City's denial of her pregnancy playing any role in its decision: that the City took Harris's pregnancy into account, but also was motivated to discharge her on legitimate grounds." (*Id.* at p. 8.)

But this same "third possibility" exists in virtually every discrimination or retaliation case. Any time an employer says it took action

for one or more (lawful) reasons and the employee contends that the employer actually took action for a different (unlawful) reason, a court could always surmise that a "third possibility exists, lying between" the employer's proposed (lawful) reason and the employee's proposed (unlawful) reason. (Opinion, p. 8.) If that theoretical possibility, alone, justifies a "mixed motive" instruction, then a "mixed motive" instruction would be required in virtually every FEHA discrimination or retaliation case. This sweeping - indeed, literally limitless - reach of the Opinion's formulation of a "mixed motive" defense shows how broadly important this issue truly is.

The Opinion's reliance on the at-will status of the plaintiff to justify a "mixed motive" instruction underscores this point. (Opinion, pp. 6-8.) The Opinion notes: "Because Harris was at-will, any one of the five circumstances singly or in combination was a lawful reason for discharge." (Opinion, p. 7.) But the same could be said for every discrimination and retaliation case involving an at-will employee.

If the fact that the employee's employment was at-will justifies a "mixed motive" instruction, then the "mixed motive" defense would apply in almost all California private sector, non-unionized FEHA cases because all California employment is presumed to be at-will. (Labor Code §2922.)

As a practical matter, almost all non-unionized California employees work under California's at-will presumption and lack "for cause" termination requirements. The Opinion's reliance on the at-will status of the plaintiff to justify a "mixed motive" instruction underscores the broad, far-reaching impact of the Opinion.

If, as we submit, the Opinion's interpretation of the "mixed motive" defense is incorrect, and review is not granted in this case, trial courts throughout the state will begin to instruct juries on incorrect law in virtually every FEHA discrimination or retaliation case. If review of this issue is deferred to a later case and the Opinion's interpretation is then rejected, the guaranteed result will be the unnecessary reversal of many verdicts procured through erroneous jury instructions required by the Opinion's sweeping formulation of the "mixed motive" defense. Thus, this case presents a compelling example of "important question" requiring this Court's resolution. (Cal. Rules of Court, Rule 8.500(b)(1).)

C. The better-reasoned analysis is that no "mixed motive" defense applies to FEHA claims.

1. Unlike Title VII, nothing in the FEHA's text provides for, or supports, the creation of a "mixed motive" defense.

California's FEHA makes it an "unlawful employment practice" for an employer "to discriminate" against an employee on the basis of enumerated protected characteristics (*e.g.*, age, race, gender, etc.). (Gov. Code §12940(a).) Similarly, the FEHA prohibits retaliation by making it an "unlawful employment practice" for an employer "to discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden under this part or because the person has filed a complaint, testified or assisted in any proceeding under this part." (Gov. Code §12940(h).) Nothing within the FEHA's statutory text endorses, requires or suggests the availability of any "mixed motive" defense to either discrimination or retaliation claims.

Unlike the FEHA, following the Civil Rights Act of 1991, Title VII contains express statutory authorization for the "mixed motive" defense. (42 USC §§ 2000e-2(m)[8] & 2000e-(5)(g)(2)(B); *see Desert Palace*, 539

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[8] This section overruled *Price Waterhouse*'s holding that allowed the employer to avoid liability entirely by proving it would have taken the same action even absent the unlawful motive. (*See Medlock v. Ortho Biotech, Inc.* (10th Cir. 1999) 164 F.3d 545, 552.)

U.S. at 102, O'Connor, J. concurring; *Wright v. Murray Guard, Inc.* (6th Cir. 2006) 455 F.3d 702, 711-12.)

But a fundamental rule of FEHA jurisprudence is that "*only when the relevant language of the two laws is similar*" are "federal court interpretations of Title VII...helpful in construing the FEHA ." (*Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970 [2010 WL 114941 at *8]) (italics added.) California courts are not bound by federal decisions which "interpret a federal statutory scheme not at issue" and, when the statutory scheme is different, Title VII and federal precedents are entitled to "little weight" in construing the FEHA. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040.)

Because nothing in the FEHA's text supports or requires a "mixed motive" defense, the Opinion's conclusion that this federal defense should be imported into the FEHA lacks any statutory basis in California law.

2. Under settled rules of statutory construction, the fact that the FEHA provides for numerous other affirmative defenses to liability, but does not provide for the "mixed motive" defense, precludes judicial creation of this defense.

The FEHA's text contains numerous statutory affirmative defenses. (*See e.g.*, Gov. Code §12940 ["unless based on a bona fide occupational

qualification"]; Gov. Code §12940 ["except where based upon applicable security regulations"]; Gov. Code §12940(a)(1) [threat to self or others defense to disability-based claims]; Gov. Code §12940(a)(5) [compelled by law defense to age-based refusal to employ claim]; Gov. Code §12940(d) [defense to inquiry into age of applicant where law compels or provides for that action]; Gov. Code §12940(f)(2) ["job-related and consistent with business necessity" defense to improper disability-related inquiry claim]; Gov. Code §12940(l) [undue hardship may excuse failure to accommodate religious beliefs]; Gov. Code §12940(m) [undue hardship may excuse failure to accommodate disabled employee].)

As a matter of statutory construction, the inclusion of certain statutory defenses to discrimination and retaliation claims by necessary implication excludes the judicial creation of other, non-enumerated defenses. (*Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424 ["Under the maxim of statutory construction *expressio unius est exclusio alterius*, if exemptions are specified in a statute we may not imply additional exemptions unless there is a clear legislative intent to the contrary."]; *Fogarty v. Superior Court* (1981) 117 Cal.App.3d 316, 320 ["The legislative enumeration of certain exceptions by necessary implication excludes all other exceptions."].)

Ironically, in discussing the 1991 amendments to Title VII - which the Opinion recognized "codified the mixed-motive defense into federal statutory law" - the Opinion acknowledged that "we may not add language to state statutes that the Legislature has not enacted." (Opinion p. 11, n. 7). But then, by creating a non-statutory "mixed motive" defense to FEHA claims, the Opinion proceeds to do precisely that which it acknowledges it cannot do. The Legislature's creation of statutory affirmative defenses to FEHA claims precludes judicial creation of other, non-statutory defenses.

3. The FEHC - the administrative agency charged with enacting interpretative FEHA regulations - does not recognize a "mixed motive" defense.

The Fair Employment & Housing Commission (FEHC), the agency charged with enacting the FEHA's interpretative regulations, passed a regulation setting forth the "Affirmative Defenses to Employment Discrimination" under the FEHA. (2 Cal. Code Regs. §7286.7.) The FEHC regulations are entitled to "great weight" or "substantial weight" in construing the FEHA unless they are "clearly erroneous." (*Colmenares v. Braemar Country Club* (2003) 29 Cal.4th 1019, 1029-1030.) According to the FEHC, the "permissible defenses" to employment discrimination under the FEHA are: (1) bona fide occupational qualification; (2) business

necessity; (3) job-relatedness; (4) security regulations; (5) non-discrimination plans or affirmative action; and (6) otherwise required by law. (2 Cal. Code Regs. §7286.7(a) - (f).)

Thus, the FEHC regulations do *not* recognize a "mixed motive" defense to FEHA claims. This administrative interpretation of the FEHA is entitled to "great weight" unless it is "clearly erroneous" - something it cannot be considered in light of the absence of any statutory text authorizing the defense. (*Colmenares*, 29 Cal.4th at 1029-1030.)

4. Incorporating the federal defense into the FEHA is inconsistent with the FEHA's broader scope and reach when compared to Title VII - including the FEHA's vigorous emphasis on broad remedies to prevent and deter illegal practices.

The Opinion assumes that federal "mixed motive" law should be imported into the FEHA because "California customarily looks to federal law when interpreting analogous state statutes." (Opinion, p. 10.) In section (C)(1) above, we debunked the Opinion's assumption that the statutory text between Title VII and the FEHA is "analogous" on this point.

But there is yet another reason why courts should not engraft this federal defense into FEHA jurisprudence. "California's FEHA provides broader protections against discrimination than Title VII." (*Chin, et al.,*

Cal. Practice Guide: Employment Litigation (The Rutter Group 2009), § 7:150.) California courts regularly reject reliance on Title VII authority "where the distinct language of the FEHA evidences legislative intent different from that of Congress" or where Title VII case law "appears unsound or conflicts with the purposes of the FEHA." (*Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 1216; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 606.)

That the FEHA provides much broader protection, and places much greater emphasis on remedial relief as a way to ensure compliance, than does Title VII is easily illustrated.

The FEHA specifically provides that "to eliminate discrimination, it is necessary to provide *effective remedies* that will both *prevent and deter* unlawful employment practices and redress the adverse effects of those practices on aggrieved persons." (Gov. Code §12920.5 [italics added]; *see also Department of Health Services*, 31 Cal.4th at 1044 ["the two main purposes of the FEHA—compensation and deterrence"].) Thus, under the FEHA, the full range of compensatory and punitive damages are available to victims of discrimination or retaliation. (*Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 221.)

By contrast, until the Civil Rights Act of 1991, neither compensatory nor punitive damages were even recoverable in a Title VII action. But even now that Title VII does permit compensatory and punitive damages, there are statutory limits on the amounts of compensatory and punitive damages under Title VII.[9] (42 USC §1981a(b)(3).) The FEHA, of course, has no such limits.

The FEHA is also much broader than Title VII both in the practices it prohibits and the employees it applies to. The FEHA not only prohibits discrimination based on all the same factors as Title VII (taken together with other federal anti-discrimination statutes), but unlike federal law, the FEHA prohibits discrimination based on marital status and sexual orientation. (Gov. Code §12940(a); *see also Chin, et al., Cal. Practice Guide: Employment Litigation*, §§ 7:150 & 7:335.)

The FEHA also reaches smaller employers who are not covered by Title VII. The FEHA's discrimination and retaliation provisions apply to any employer with five or more employees, while Title VII only applies to

[9] These caps - which top out at $300,000 for employer with over 500 employees - apply to the *sum of* the compensatory damages awarded for "future pecuniary losses," emotional distress damages and punitive damages. (42 USC §1981a(b)(3); *see also Chin, et al., Cal. Practice Guide: Employment Litigation*, §§ 7:1180-7:1182.)

employers with 15 or more employees. (*Compare* Gov. Code §12926(d) & §12940(j)(4)(A) *with* 42 USC §2000e(b).)

Other provisions of the FEHA evince a clear, direct intent to exceed the scope of federal law's protections. For example, the FEHA's disability discrimination provisions are expressly greater than federal law's. (Gov. Code §12926.1(a) ["The laws of this state in the area of disabilities provides protections independent from those in the federal Americans with Disabilities Act of 1990 ... Although the federal act provides a floor or protection, this state's law has always, even prior to passage of the federal act, afforded additional protections."].)

Given that the FEHA both provides broader protection to employees than does Title VII and places greater emphasis on providing effective remedies - unlimited by statute - it would be anathema to the FEHA's purposes to create a defense permitting an employer who acts based on discriminatory or retaliatory animus to avoid liability entirely. In other words, the Opinion's adoption of a *complete liability defense* "mixed motive" framework substantially undermines the legislatively-declared purpose of the FEHA.

5. The struggles under federal law to craft a workable "mixed motive" approach provide further justification for not adopting a "mixed motive" defense under the FEHA.

As explained in section (I)(A) above, the *Price Waterhouse* decision was the subject of much criticism, prompting Congress to amend Title VII to expressly provide that a successful "mixed motive" defense merely limited remedies and did not provide a complete liability defense.

But even after the 1991 Amendments, federal courts continued to struggle with their application of the "mixed motive" defense. (*See e.g.*, *Bowles v. City of Camden* (D.N.J. 1998) 993 F.Supp. 255, 268 n. 3 ["There is some confusion among courts as to exactly what type of evidence is required to allow a plaintiff to proceed under a mixed-motives theory."].)

One lingering problem with *Price Waterhouse* was that Justice O'Connor's concurrence, which was largely considered the controlling opinion, posited that direct evidence was required for a plaintiff to be entitled to receive a "mixed motive" instruction. (*Price Waterhouse*, 490 U.S. at 276.) Various circuits adopted this view. (*See e.g.*, *Mohr v. Dustrol, Inc.* (8th Cir. 2002) 306 F.3d 636, 640-641; *Fernandes v. Costa Bros. Masonry, Inc.* (1st Cir. 1999) 199 F.3d 572, 580.)

Finally, in *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, the United States Supreme Court rejected the view that direct evidence of

discriminatory animus was required for the plaintiff to obtain a "mixed motive" instruction in a Title VII case. (*Desert Palace*, 539 U.S. at 101-102.)

But even after *Desert Palace*, much confusion and uncertainty remained in the federal courts on how to apply "mixed motive" at a practical level. Consequently, as recently as last year, the United States Supreme Court again confronted these challenges. In *Gross v. FBL Financial Services, Inc.* (2009) 129 S.Ct. 2343, the Court rejected the applicability of the "mixed motive" defense to claims under the ADEA (the federal age discrimination law), noting that the *Price Waterhouse* "mixed motive" construct "is difficult to apply," "courts have found it particularly difficult to craft an instruction to explain its burden-shifting framework," and "the problems associated with its application have eliminated any perceivable benefit to extending its framework to ADEA claims." (*Gross*, 129 S.Ct. at 2352.)

In short, the fact that the "[e]xperience with the mixed motive analysis in the federal courts generated [such] considerable controversy and criticism" provides additional justification for not taking FEHA jurisprudence down this convoluted path of uncertainty. (*Haddad v. Wal-Mart Stores* (2009) 455 Mass. 91, 113 n. 27.)

II. EVEN IF THIS COURT WERE TO CONCLUDE THAT THE "MIXED MOTIVE" DEFENSE IS OR SHOULD BE PART OF FEHA JURISPRUDENCE, REVIEW SHOULD STILL BE GRANTED TO DECIDE IMPORTANT AND UNSETTLED QUESTIONS ABOUT BOTH *WHEN* THE DEFENSE APPLIES AND *WHAT IMPACT* IT HAS IF PROVEN.

A. Even if the "mixed motive" defense does apply to FEHA claims, review should still be granted to provide necessary guidance on *what facts or circumstances* justify providing a "mixed motive" instruction.

1. Typical "pretext" cases, like this one, should not usually warrant "mixed motive" instructions.

Even the BAJI drafters observed that not every FEHA discrimination or retaliation case should be morphed into a "mixed motive" case. Thus, the Use Note for the BAJI "mixed motive" instruction cautioned:

> This instruction should *only be used in a true mixed-motive situation.* It does *not apply* to the circumstances *where it is claimed that a legitimate reason was in fact a pretext* for unlawful action. (BAJI, Instr. No. 12.26 "Use Note") (italics added.)

Nonetheless, by requiring a "mixed motive" instruction in potentially any FEHA discrimination or retaliation case (and, certainly, any in which the plaintiff is an at-will employee) the Opinion blows apart this necessary distinction between "pretext" and "mixed motive" cases. While we do not believe that California law should include a "mixed motive" defense at all, we submit that if this Court disagrees, any adoption of a "mixed motive"

defense must carefully consider the *factual predicate* to the defense's applicability - something the Opinion simply did not do.

There is some common ground between "pretext" (or "non-mixed motive") cases and "mixed motive" cases. In both, the plaintiff has the burden of proving that the discriminatory or retaliatory animus was a motivating reason for the adverse decision. But, there also must be differences between a "pretext" (or "non-mixed motive") case and a "mixed motive" case. Otherwise, the "mixed motive" defense would become a defense in every case - even where the record evidence does not support using the "mixed motive" analytic framework.

Justice White's concurring opinion in *Price Waterhouse* described one essential difference between "non-mixed motive" and "mixed motive" cases:

> In pretext cases, 'the issue is whether either illegal or legal motives, but not both, were the 'true' motives behind the decision. In mixed-motives cases, however, there is no one 'true' motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate. (*Price Waterhouse*, 490 U.S. at 260, White, J. concurring) (internal citations omitted.)

Stated differently, "[i]n a mixed-motives case the defendant condemns himself of invidious discrimination out of his own mouth or by

his own overtly biased acts. In a pretext case he lies or masks the reason for his act." (*Hook v. Ernst & Young* (3rd Cir. 1994) 28 F.3d 366, 374 n. 3.)

Our case was tried as a classic and straightforward "pretext" case. The City adamantly denied considering Harris' pregnancy and there was nothing to suggest that the City actually had "mixed motives" in terminating Harris. Instead, it was a classic "either/or, but not both" case. (Opinion, p. 7 ["The City asserts, however, that it had sufficient nondiscriminatory reasons to fire Harris, and her pregnancy played no part in its decision to terminate her."].) In this "either/or, but not both" scenario, no "mixed motive" defense should typically be required. (*See Arteaga*, 163 Cal.App.4th at 357 ["because the evidence does not support Arteaga's contention that Brink's had legitimate *and illegitimate* reasons for his termination, we do not decide whether a mixed-motive analysis applies under the FEHA or in this case"] [original italics]; *Huffman*, 121 Cal.Appp.4th at 702 ["mixed motive" analysis not applicable where the "case was plead and tried as a pretext case"].)

There is a strong policy reason to reject a "mixed motive" defense in a typical "either/or, but not both" type of case. Permitting a "mixed motive" defense in cases where the employer disclaims any impermissible animus and, instead, argues that it acted only based on legitimate reasons

would create a perverse incentive. Employers would be encouraged to falsely deny their impermissible animus knowing full well that if the jury rejects their false denials, they can simultaneously seek comfort in a potential complete liability defense, even though the employer flatly denies what should be the very factual predicate for the defense: that it harbored any "mixed motives" at all. The Opinion's limitless application of the "mixed motive" defense would encourage this troubling result.

We do not articulate now a comprehensive rule for what factual predicate (or predicates) must be present for "mixed motive" analysis to apply in a given case. If review is granted, we will do so in our merits briefing.[10]

For present purposes, we submit that if the "mixed motive" defense is to have any place in FEHA jurisprudence, some distinction must still remain between typical "pretext" (or "non-mixed motive") cases and "mixed motive" cases. Not every case warrants a "mixed motive" instruction. But if review is not granted, that is precisely what will occur

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[10] While we do not now propose a comprehensive rule, one basic factual predicate must be that the defendant employer pled "mixed motive" as an affirmative defense in its answer. Here, the City did not. (1 AA 22-30.) Another necessary factual predicate must be that there is some actual factual support (not just after-the-fact speculation or theorizing) for the threshold proposition that the employer was, in fact, motivated by *both* lawful *and* unlawful considerations.

because the Opinion compels a "mixed motive" instruction any time a court can theorize or surmise that a "third possibility also exists, lying between" the employee's claim of discrimination and the employer's denial of any improper motive. (Opinion, p. 8.)

Thus, even if this Court concludes that "mixed motive" is a viable FEHA defense, review is still necessary to determine what *factual predicates* are necessary to receive a "mixed motive" instruction.

2. Contrary to the Opinion's limitless application of the "mixed motive" defense, true "mixed motive" cases are the exception not the norm.

The Opinion's limitless formulation of a "mixed motive" defense - applying anytime one can theorize that the employer acted out of both proper and improper motives (even when the employer itself adamantly denies the improper motives) - would create a peculiar result under California law. "Mixed motive" analysis would become the norm, not the exception. This would turn years of employment discrimination law upside down.

In fact, "[m]ost discrimination cases are pretext cases." (*Fuller v. Phipps* (4th Cir. 1995) 67 F.3d 1137, 1141 *abrogated on other grounds by Desert Palace*, 539 U.S. 90; *Gazarov ex rel. Gazarov v Diocese of Erie* (3rd

Cir. 2003) 80 Fed.Appx. 202, 205 ["most discrimination cases turn on" whether the plaintiff can "establish pretext."]; *see also Mockler v. County of Orange* (2007) 157 Cal.App.4th 121, 140 [once the employer articulates a nondiscriminatory reason, "the burden then shifts back to the plaintiff to prove the employer's proferred reasons for termination are pretextual"]; *McRae v. Department of Corrections and Rehabilitation* (2006) 142 Cal.App.4th 377, 388 ["the plaintiff's burden is to prove by competent evidence that the employer's proffered justification is mere pretext"].)

In contrast to "pretext" cases - where the focus is on the "either/or" analysis - there are cases where the evidence actually suggests that the employer considered multiple different bases for the adverse action (some lawful, some unlawful). If "mixed motive" applies under the FEHA, it should only apply to these scenarios.

One example of where the "mixed motive" defense could factually apply is where the employer readily acknowledges that discrimination played some role in the adverse employment action, but the employer can point to other simultaneous considerations that would have produced the same result. For example, one commentator hypothesizes a true "mixed motive" situation as follows:

> Jim "Bad News" Barnes, managing partner of a leading law firm, sends associate Harriet Hopeful written notice that he

> will block her request for partnership this year for two reasons: 1) her billable hours have been below par, and 2) he does not want too many female partners in a firm that has so many male clients. A disappointed Hopeful brings a sex discrimination claim against the firm based on Bad News' notice, which the firm stipulates to be an accurate statement of the two reasons why Hopeful was not made partner. (*Kaminshine, Steven, Disparate Treatment as a Theory of Discrimination: A Need for a Restatement not a Revolution*, 2 Stan. J. Civ. Rts. & Civ. Liberties 1, 12 (2005)) (italics added.)

A more typical application of a "mixed motive" defense is seen in the facts of *Price Waterhouse.* There, in defending its decision not to offer partnership to Hopkins, Price Waterhouse offered evidence that she was perceived as aggressive, brusque and had interpersonal skill problems. (*Price Waterhouse*, 490 U.S. at 234-235.) These proposed justifications could be legitimate reasons not to offer an employee partnership in a firm. But, Hopkins countered with evidence that these attacks on her interpersonal skills were fueled by the company's view that Hopkins did not conform to gender stereotypes and, thus, actually constituted impermissible discrimination. (*Id.* at 235-236.) For example, Hopkins relied on evidence that the partners had described her as "macho," "overcompensated for being a woman," having "matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more

appealing lady [partner] candidate" and had also complained of her use of foul language "because it's a lady using foul language." (*Id.* at 235.)

These examples of fact patterns in which the "mixed motive" defense could factually apply are offered to illustrate the fact that any adoption of the "mixed motive" defense must carefully consider the *factual predicates* to the defense. We submit that any creation of a FEHA "mixed-motive" defense should limit the defense to certain factual situations, such as: (1) where there is clear evidence (not just after-the-fact speculation) suggesting that *both* improper *and* proper considerations simultaneously actually motivated the decision (like where the employer acknowledges the improper consideration) or (2) where the employer's statements about the bases for termination were proxies for discriminatory animus (like *Price Waterhouse*'s sexual stereotyping).

The Opinion's sweeping formulation of the "mixed motive" defense fails to consider or analyze what *factual predicates* should limit the defense's applicability in FEHA claims. Thus, even if this Court were to conclude that "mixed motive" should apply to the FEHA, review is still necessary to determine this additional important question.

B. Another critical reason to grant review is to decide the effect of a "mixed motive" defense if proven.

1. The Opinion creates an indefensible anomaly: the "mixed motive" defense under federal law merely *limits remedies*, but the analogous defense under the traditionally more protective FEHA is a *complete liability defense*.

In *Price Waterhouse*, the plurality opinion had held that if the employer proved its "mixed motive" defense, the defense was a complete liability defense. (*Price Waterhouse*, 490 U.S. at 258.) Understandably, Congress quickly overturned this complete liability defense aspect of *Price Waterhouse* so that the "mixed motive" defense merely limits remedies. (42 U.S.C. §2000e-5(g)(2)(B).)

Nonetheless, despite that the customarily less protective federal discrimination law provides that the "mixed motive" defense merely limits remedies, the Opinion here created a *complete liability defense* under the FEHA. Given the undisputable fact that the FEHA provides much broader protection and decidedly more vigorous remedies for discrimination and retaliation than does Title VII (*see* section (C)(4) above), this result makes no sense.

Nor does the Opinion's justification for this result pass analytic scrutiny. The Opinion's reasoning is that Title VII expressly codified a remedy limitation-only defense, whereas the FEHA has not. Thus, the

Opinion reasoned that "we may not add language to state statutes that the Legislature has not enacted." (Opinion p. 11, n. 7). But this overlooks the simple fact that nothing in the FEHA's text provides for any form of "mixed motive" defense. Thus, if a court is going to create a non-statutory defense - something we believe should not occur - at a minimum, the defense must be created in a way that is consistent with the overall statutory purposes. Put simply, given the FEHA's much greater emphasis on remedial relief than Title VII's, any judicially-created FEHA "mixed motive" defense cannot provide a complete liability defense when the same defense under Title VII merely limits remedies.

2. A successful "mixed-motive" defense to FEHA claims should *not* bar liability but, at most, limit *some* remedies.

We submit that, if a non-statutory "mixed motive" defense is to be created in FEHA jurisprudence, the effect of the FEHA's defense should be narrower than the effect of the analogous defense under Title VII. In other words, the defense under the FEHA should, first, merely limit *some* remedies and, second, not limit as many remedies as does the Title VII counterpart.[11]

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[11] As discussed above, a proven "mixed-motive" defense under Title VII bars any compensatory or punitive damages; the plaintiff may still

There is authority under the FEHA for a partial-damage defense that provides less of a defense than does the analogous federal defense. In *State Department of Health Services*, this Court held that a proven "avoidable consequences" defense did not entirely bar a claim for sexual harassment damages but instead "will allow the employer to escape liability for those damages, and only those damages, that the employee more likely than not could have prevented..." (*State Department of Health Servcies*, 31 Cal.4th at 1044.) In contrast to the FEHA's version of an "avoidable consequences" defense, Title VII's *Ellerth/Faragher* defense[12] may provide a complete liability defense. (*Chin, et al., Cal. Practice Guide: Employment Litigation*, § 10:356.)

We submit that, if a "mixed motive" defense is created under the FEHA, any such defense should merely limit *some* remedies and not provide a complete liability defense as the Opinion did.[13] After all, if the "mixed motive" defense is established, the trier of fact must necessarily

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obtain declaratory relief, injunctive relief against continued or future discrimination, attorney's fees and costs. (42 U.S.C. §2000e-5(g)(2)(B).)

[12] *See Burlington Industries, Inc. v. Ellerth* (1998) 524 U.S. 742, 765; *Faragher v.City of Boca Raton* (1998) 524 U.S. 775, 807.

[13] We reserve for our merits briefing, if review is granted, the full analysis of what relief should be barred by a proven "mixed motive" defense. The brief discussion that follows is intended simply to illustrate the issue and not to provide a definitive answer.

have already determined that the employer considered and acted upon illegal motivations in taking the disputed action. In other words, the employee was, in fact, discriminated or retaliated against on prohibited grounds. If a jury determines that an employee was subjected to discriminatory or retaliatory decision-making, damages for, at least, the resulting emotional harm should be recoverable.

Likewise, if an employer is found to have considered a statutorily unlawful motive, there should be no bar to imposing punitive damages. The need to impose punitive damages - the purposes of which are to set an example and punish the wrongdoer - is not diminished simply because the employer acted for both unlawful and lawful reasons. (*See* Civ. Code §3294 [punitive damages are "damages for the sake of example and by way of punishing the defendant]; *see also Ferguson v. Lieff, Cabraser, Heimann & Bernstein* (2003) 30 Cal.4th 1037, 1046 [punitive damages are intended "to punish the tortfeasor whose wrongful action was intentional or malicious, and to deter him and others from similar extreme conduct"].)

Finally, like under federal law, even if a "mixed motive" defense is proven, the employee should still be entitled to declaratory and injunctive relief and attorney's fees and costs. If, for example, attorney's fees are

barred by a "mixed motive" defense, this potential could greatly impair access to counsel in civil rights FEHA cases.

CONCLUSION

For the reasons analyzed above, we respectfully urge this Court to grant review in this matter to decide these far-reaching questions of statewide importance regarding the applicability - if any - of the "mixed motive" analysis to FEHA litigation.

DATED: March 15, 2010

Respectfully submitted,

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By______________________________
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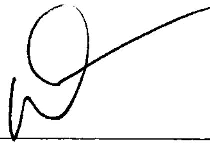
CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.520

Pursuant to California Rules of Court, Rule 8.520(c)(1), and in reliance on the word count feature of the Word Perfect software used to prepare this document, I certify that this Petition for Review contains 8,314 words, excluding those items identified in Rule 8.520(c)(3).

DATED: March 15, 2010



David M. deRubertis, Esq.

Filed 2/4/10; on rehearing

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

WYNONA HARRIS, Plaintiff and Respondent, v. CITY OF SANTA MONICA, Defendant and Appellant.	B199571 (Los Angeles County Super. Ct. No. BC341569)

APPEAL from the judgment of the Superior Court of Los Angeles County. Soussan G. Bruguera, Judge. Reversed and remanded.

Marsha Jones Moutrie, City Attorney, Joseph Lawrence, Assistant City Attorney, Carol Ann Rohr and Barbara Greenstein, Deputy City Attorneys, for Defendant and Appellant.

Kokozian & Nourmand and Michael Nourmand for Plaintiff and Respondent.

The City of Santa Monica appeals from the judgment in favor of discharged city bus driver Wynona Harris in her pregnancy discrimination lawsuit against the city. Because of instructional error, we reverse and remand for retrial.

FACTS AND PROCEEDINGS

Santa Monica's city-owned bus service, Big Blue Bus, hired Wynona Harris as a bus driver trainee in October 2004. Shortly into her 40-day training period, Harris had what she calls a minor accident, which the city deemed "preventable." No passengers were on her bus and no one was injured, but the accident cracked the glass on the bus's back door. When the city hired Harris, it gave her its "Guidelines for Job Performance Evaluation." The guidelines stated, "Preventable accidents . . . [are] an indication of unsafe driving. . . . [T]hose who drive in an unsafe manner will not pass probation."

In mid-November 2004, Harris successfully completed her training period, and the city promoted her to the position of probationary part-time bus driver. (Her formal title was "Motor Coach Operator Part Time.") As a probationary driver, Harris was an at-will employee. Sometime during her first three-month probation evaluation period (the record is not clear when), Harris had a second preventable accident, in which she sideswiped a parked car and tore off its side mirror. According to Harris, she hit the parked car after swerving to avoid a car that cut her off in traffic.

On February 18, Harris reported late to work, thus earning her first "miss[-]out." The job performance guidelines that she received when hired defined a "miss[-]out" as a driver failing to give her supervisor at least one hour's warning that she will not be reporting for her assigned shift. The guidelines noted that most drivers get one or two late reports or miss-outs a year, but more than that suggested a driver had a "reliability problem." The guidelines further provided, "Miss-outs and late reports have a specific [demerit] points value [of 25 points]. Probationary employees are allowed half the points as a permanent full time operator, which is 100 points." For her miss-out, Harris received 25 demerit points. Harris's training supervisor testified she told Harris that a

probationary employee faced termination if she accumulated 50 points in any rolling 90-day period.

On March 1, 2005, Harris's supervisor gave Harris a written performance evaluation covering her first three months as a probationary driver from mid-November 2004 to February 14, 2005. In grading Harris's "overall performance rating," her supervisor indicated "further development needed." Harris testified at trial that her supervisor told her that, except for her accident the previous November as a trainee, she was doing a good job and that her supervisor would have graded her as "demonstrates quality performance" but for that accident.[1] Underscoring Harris's claim, her supervisor wrote "Keep up the Great Job!" for the category "Goals to Work on During the Next Review Period."

On April 27, 2005, Harris incurred her second miss-out. Her daughter had a hearing that day in juvenile court which required Harris to accompany her. To avoid Harris's losing a day's pay, Harris's supervisor agreed to reschedule her to work the 5:00 p.m. shift. Around 2:30 or 3:00 p.m. that afternoon, Harris called her work dispatcher to report that the juvenile court judge had not yet called her daughter's case. The dispatcher told Harris that Harris could wait until 4:00 p.m. -- one hour before her shift started -- to report that she would be arriving late for her 5:00 p.m. shift. A driver's failure to give at least one hour's warning that she would be tardy for work triggered a miss-out. Harris's daughter's case was called shortly after Harris spoke to the dispatcher. The court hearing resulted in the daughter being charged with a felony. Due to the stress from her daughter's plight, Harris testified she forgot to call her dispatcher by 4:00 p.m. as promised. Following her miss-out, Harris's supervisor prepared a miss-out report.

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[1] Under "Work Habits/Reliability," Harris's supervisor noted more fully: "Follows policies and procedures, Wynona Harris operates vehicle with minimum supervision. During this evaluation period, Wynona Harris had no absences, no complaints, no compliments, two accidents (preventable), no miss[-]out, no late reports, no running hot." The supervisor presumably did not note Harris's February 18 miss-out because it happened after February 14, the end of the evaluation period covered by the form.

The report stated Harris had incurred two miss-outs for a total of 50 demerit points, but Harris's supervisor denied having written that part of the report.

Transit Services Manager Bob Ayer investigated the circumstances of Harris's miss-out "right after it happened" beginning "probably" the next day. Ayer met with Harris on May 3 to discuss what had happened. Harris explained she had forgotten to call the dispatcher because she was upset from her daughter being charged with a felony. Based on his investigation, on May 4 or 5, Ayer recommended to his supervisor, the bus company's assistant director, that the miss-out should remain in Harris's file. Ayer testified the assistant director asked him to examine Harris's complete personnel file. Ayer testified he did so and told the assistant director that the file showed Harris was not meeting the city's standards for continued employment because she had two miss-outs, two preventable accidents, and had been evaluated as "further development needed."

About one week after Ayer recommended that the city sustain Harris's miss-out, Harris had a chance encounter on or about May 12 with her supervisor, George Reynoso, as she prepared to begin her shift. Seeing Harris's uniform shirt hanging loose, Reynoso told her to tuck in her shirt. Beckoning him to step aside so she could speak to him, Harris told Reynoso she was pregnant. Harris testified Reynoso reacted with seeming displeasure at her news, exclaiming, "Wow. Well, what are you going to do? How far along are you?" He then asked her to get a doctor's note clearing her to continue to work. Four days later, on May 16, Harris gave Reynoso her doctor's note permitting her to work with some limited restrictions. (Neither party argues the restrictions are relevant to this appeal.) The morning Harris gave him the note, Reynoso attended a supervisors' meeting and received a list of probationary drivers who were not meeting standards for continued employment. Harris was on the list. Harris testified that Ayer summoned her to a meeting where he told her the city had been evaluating all part-time drivers and, although he had heard a lot of good things about her, the city was terminating her. Harris's last day was May 18, 2005.

In October 2005, Harris sued the city. She alleged the city fired her because she was pregnant. (Gov. Code, §§ 12940, subd. (a) [prohibits discrimination based on "sex"];

12926, subd. (p) ["sex" discrimination includes pregnancy].) Answering Harris's complaint, the city denied her allegations and asserted as an affirmative defense that it had legitimate, nondiscriminatory reasons to fire her as an at-will employee.

The case was tried to a jury. The city asked the court to instruct the jury with BAJI No. 12.26, which instructed on the city's "mixed-motives" defense. The instruction states:

> "If you find that the employer's action, which is the subject of plaintiff's claim, was actually motivated by both discriminatory and non-discriminatory reasons, the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision. [¶] An employer may not, however, prevail in a mixed-motives case by offering a legitimate and sufficient reason for its decision if that reason did not motivate it at the time of the decision. Neither may an employer meet its burden by merely showing that at the time of the decision it was motivated only in part by a legitimate reason. The essential premise of this defense is that a legitimate reason was present, and standing alone, would have induced the employer to make the same decision." [2]

The court refused to give the instruction. The court's reason for rejecting the instruction appears to have been that Harris conceded she was an at-will employee (by which the court presumably meant she conceded she could be fired without cause), but the city's purported reason for terminating her -- poor performance -- was pretextual.[3] By special

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2 The mixed-motive defense appears to have been first applied to employment discrimination in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228, 244-245 (*Price Waterhouse*), a United States Supreme Court decision. After *Price Waterhouse*, California courts followed suit by recognizing a mixed-motive defense was available under state law employment discrimination cases. (See, e.g., *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1747-1748 (*Heard*).)

3 More fully, the court stated: "This at-will business is not an issue. Plaintiff isn't saying that she wasn't an at-will employee. She's just saying that all of the things that she's bringing up to show that, to try to show that the city didn't use their own regulations or that the city had mixed regulations [*sic*: motivations], or that the city had different regulations [*sic*: motivations], or didn't know what they were doing, all those allegations are circumstantial evidence that she was fired for discriminatory reasons, and

verdict, the jury found by a vote of nine-to-three that Harris's "pregnancy [was] a motivating factor/reason for [the city's] decision to discharge" her. The jury awarded her $177,905 in damages.

The city moved on multiple grounds for judgment notwithstanding the verdict and a new trial. In its motions the city argued, among other things, that the court's refusal to instruct the jury with the city's mixed-motive instruction deprived the city of a legitimate defense. The court denied both motions. Harris thereafter moved for her attorney's fees, which the court awarded at slightly more than $400,000. (Gov. Code, § 12965, subd. (b) [prevailing plaintiff in discrimination lawsuit entitled to attorney's fees].) This appeal followed.

DISCUSSION

A. Instructional Error Entitles City to Retrial

We begin with the following observation from our colleagues in Division 1 of this district:

> "'In some cases, the evidence will establish that the employer had "mixed motives" for its employment decision. . . . In a mixed motive case, both legitimate and illegitimate factors contribute to the employment decision.' [Citation.] 'Once the [employee] establishes . . . that an illegitimate factor played a motivating or substantial role in an employment decision, the burden falls to the [employer] to prove by a preponderance of the evidence that it would have made the same decision even if it had not taken the illegitimate factor into account.' [Citations.]" (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379 (*Grant-Burton*).)

Harris was an at-will employee. (Lab. Code, § 2922.) The anti-discrimination provisions of the Fair Employment and Housing Act under which she sued the city do not "'require the employer to have good cause for its [termination] decisions. The employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory reason.'" (*Arteaga*

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all this is pretext; correct? [¶] Isn't that what you're saying?"

v. Brink's, Inc. (2008) 163 Cal.App.4th 327, 344 (*Arteaga*), quoting *Nix v. WLCY Radio/Rahall Communications* (11th Cir. 1984) 738 F.2d 1181, 1187, brackets added.) In other words, the city could fire Harris for any reason, or no reason, so long as it did not do so for an illegal reason.[4]

Harris claims the city fired her because she was pregnant, a reason that, if true, the city concedes is unlawful. (Gov. Code, §§ 12940, subd. (a), 12926, subd. (p).) The city asserts, however, that it had sufficient nondiscriminatory reasons to fire Harris, and her pregnancy played no part in its decision to terminate her. The circumstances to which the city points as giving it adequate cause to fire Harris were undisputed and emerged before the city knew Harris was pregnant: two preventable accidents, two miss-outs, and a performance evaluation warning "further development needed." Because Harris was at-will, any one of the five circumstances, either singly or in combination, was a lawful reason for discharge. Moreover, Harris's own testimony about meeting to discuss her second miss-out with Transit Manager Ayer on May 3 -- nine days before she told Supervisor Reynoso she was pregnant -- establishes that her bosses were scrutinizing her job performance before they knew she was expecting a child.

The city asked the court to instruct the jury with BAJI No. 12.26. As offered by the city, that instruction states in part:

> "If you find that the employer's action . . . was actually motivated by both discriminatory and non-discriminatory reasons, the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision." (BAJI No. 12.26; see also *Heard, supra*, 44 Cal.App.4th at p. 1748.)

The instruction was well tailored to the city's defense, which rested on substantial evidence of Harris's deficient performance which, standing alone, lawfully permitted the

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[4] An employee "'cannot simply show that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent.'" (*Arteaga, supra*, 163 Cal.App.4th at p. 343, quoting *Hersant v. Department of Social Services* (1997) 57 Cal.App.4th 997, 1005.)

city to discharge an at-will employee such as Harris. But the evidence of deficient performance did not stand alone, because the city knew Harris was pregnant before it fired her. The city denied Harris's pregnancy played any role in the termination decision, but the city's knowledge of her pregnancy could allow a rational jury to conclude her pregnancy was the reason for her discharge.[5] It so happens, however, that a third possibility also exists, lying between Harris's assertion that the city fired her because she was pregnant and the city's denial of her pregnancy playing any role in its decision: that the city took Harris's pregnancy into account, but also was motivated to discharge her on legitimate grounds.

Instead of BAJI No. 12.26, the court instructed the jury with the Judicial Council's California Civil Jury Instruction (CACI) No. 2500. That instruction stated the city was liable if Harris's pregnancy "was a motivating reason/factor for the discharge." A "motivating factor," the court told the jury, "is something that moves the will and induces action even though other matters may have contributed to the taking of the action." The court's instructions permitted Harris to prevail by showing her pregnancy led to her termination, even if other factors contributed to it. To the extent the court's instructions permitted the jury to find against the city if Harris's pregnancy was a consideration in the city's decisionmaking process, the instructions overlapped BAJI No. 12.26 proffered by the city. But the overlap was incomplete, to the city's detriment, because the instructions as given did not provide the city with a complete defense if the jury found the city would have terminated Harris anyway for performance reasons even if she had not been

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[5] See, e.g., *Ray v. Henderson* (9th Cir. 2000) 217 F.3d 1234, 1244 [discriminatory intent may be inferred from adverse action coming "close on the heels" of protected activity]; *Gleklen v. Democratic Congressional Campaign* (2000) 199 F.3d 1365, 1368 [same]; but see *Arteaga*, *supra*, 163 Cal.App.4th at p. 353 ["temporal proximity alone is not sufficient to raise a triable issue as to pretext once the employer has offered evidence of a legitimate, nondiscriminatory reason for the termination. [Citations.] This is especially so where the employer raised questions about the employee's performance *before* he disclosed his symptoms, and the subsequent termination was based on those performance issues"].)

pregnant. The court's refusal to instruct the jury with BAJI No. 12.26 therefore prejudiced the city.

The city presumably turned to BAJI for its mixed-motive instruction because CACI, implicitly favored by the trial court's local rules (Super. Ct. L.A. County, Local Rules, rule 8.25), does not contain a mixed-motive instruction similar to BAJI No. 12.26.[6] CACI's omission of a mixed-motive instruction does not appear inadvertent because CACI's drafters knew about decisions applying the principle. An early draft of the CACI instruction defining "Motivating Reason" in employment discrimination cases cited as authority for the instruction the discussion of mixed motive in *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90 (*Desert Palace*) and *Grant-Burton, supra,* 99 Cal.App.4th 1361. (CACI No. "2507. 'Motivating Reason' Explained" [CACI 07-01 (Winter 2007 Revisions, pp. 91-92) at <http://www.courtinfo.ca.gov/invitiationstocomment/pastprop.htm> (as of October 29, 2009)] (CACI 07-01).) But after a period for public comment, a revised draft and the final version of the authority for the instruction omitted without explanation the citations to *Desert Palace* and *Grant-Burton*. The instruction's wording itself, however, did not change between the drafts and final version except for a minor grammatical change. (Compare CACI 07-01, *supra*, at pp. 91-92, with CACI 07-03 (Fall 2007 Revisions, p. 71) <http://www.courtrinfo.ca.gov/invitationstocomment/pastprop.htm> (as of October 29, 2009) and CACI No. 2507.)

CACI's omission of a form instruction for mixed motive does not undermine the viability of the defense. CACI aims to state the law clearly and concisely. (Cal. Rules of Court, rule 2.1050, subd. (a) ["The goal of [CACI] instructions is to improve the quality of jury decision making by providing standardized instructions that accurately state the law . . ."]; CACI Preface [goal "was to write instructions that are legally accurate and understandable to the average juror"].) We take from CACI's omission of a mixed-

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6 See "Table 1 of Related Instructions: BAJI to . . . (CACI)," page TRI- 6, at <http://www.courtinfo.ca.gov/jury/civiljuryinstructions/correlation_tbl.pdf> [as of October 29, 2009].

motive instruction a likely recognition by the drafters of CACI that the law involving the mixed-motive defense is not stable and clear, but instead arguably in flux. Indeed, as recently as a few months ago, the United States Supreme Court stated in *Gross v. FBL Financial Services, Inc.* (2009) 557 U.S. __ [129 S.Ct. 2343] (*Gross*) that the defense was subject to criticism for its workability while continuing to be available in employment discrimination cases other than those based on age discrimination. (*Id.* at pp. 2349 [mixed motive available under title VII (42 U.S.C. § 2000e et seq.) involving among other things, race or gender, but not under the Age Discrimination in Employment Act (29 U.S.C. § 621 et seq.)].) In doing so, the *Gross* court restated its holding in *Desert Palace* that Congress had expressly permitted mixed-motive employment discrimination claims under title VII. (See *Gross*, at p. 2349, citing *Desert Palace*, *supra*, 539 U.S. at pp. 94-95; see also *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95, 111, fn. 11 [review of summary judgment favorably discussing "mixed motive" as an analytical model competing with shifting burdens of proof established by *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792].)

Although the Supreme Court was interpreting federal anti-discrimination statutes in *Gross* (29 U.S.C. § 621 et seq.) and in *Desert Palace* (42 U.S.C. § 2000e-2(m)), California customarily looks to federal law when interpreting analogous state statutes; indeed, CACI No. 2507, defining "Motivating Reason," cites the federal statute at issue in *Desert Palace* as one of the instruction's sources and authority. (*Desert Palace*, *supra*, 539 U.S. at pp. 94-95; see also 8 Witkin, Summary of Cal. Law (10th ed. 2008) Constitutional Law, § 849, p. 287 [citing *Desert Palace* in support of mixed-motive instruction]; Chin et al., Cal. Practice Guide: Employment Litigation (The Rutter Group 2008) § 7:485 et seq. [discussing mixed-motive employment discrimination].) The mixed-motive defense thus remains good law available to employers in the right circumstances. (*Gross*, *supra*, 129 S.Ct. at p. 2349; *Desert Palace*, *supra*, 539 U.S. at pp. 94-95; *Arteaga*, *supra*, 163 Cal.App.4th at p. 357 [dicta noting court need not address

mixed-motive defense in the case before it]; *Grant-Burton*, *supra*, 99 Cal.App.4th at p. 1379.)[7]

Harris suggests the mixed-motive rule stated in BAJI No. 12.26 is no longer good law. In support she cites only our Supreme Court's grant of review in *Harvey v. Sybase, Inc.* (2008) 161 Cal.App.4th 1547 (review granted July 23, 2008, No. S163888, 80 Cal.Rptr.3d 628), a review that was later dismissed by stipulation of the parties on September 10, 2008 (84 Cal.Rptr.3d 35). A Court of Appeal decision as to which the Supreme Court grants review may not be cited as authority, and the Supreme Court's decision to grant review is itself of no precedential value. (Cal. Rule of Court, rule 8.1100, subd. (e)(1), 8.1115, subd. (a); accord *Thompson v. Department of Corrections* (2001) 25 Cal.4th 117, 125 [Supreme Court minute orders not binding precedent]; *In re Rose* (2000) 22 Cal.4th 430, 451 [denial of review no precedential value]; *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 523 (dis. opn. of Mosk, J.).)

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[7] In 1991, Congress amended federal anti-discrimination law in response to the Supreme Court's holding in *Price Waterhouse*. (See *Washington v. Garrett* (9th Cir. 1993) 10 F.3d 1421, 1432, fn. 15.) The amendment's effect was two-fold: it codified the mixed-motive defense into federal statutory law, but it limited the remedies available to a plaintiff when an employer established the defense. The 1991 amendment to title VII at 42 United States Code section 2000e-5(g)(2B) stated: "On a claim in which an individual proves [bias in employment practices] . . . and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court -- [¶] (i) may grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney's fees and costs demonstrated to be directly attributable only to the pursuit of [that] claim . . . and [¶] (ii) shall not award damages or issue an order requiring any admission, reinstatement, hiring, promotion, or payment [as described elsewhere in the statute]." Although California courts look to federal anti-discrimination law as an aid in interpreting analogous state law provisions (*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 354; *Kelly v. Stamps.com Inc.* (2005) 135 Cal.App.4th 1088, 1099), we may not add language to state statutes that the Legislature has not enacted. Accordingly, the federal limit on remedies in a mixed-motive case does not apply in this case because no similar language exists in FEHA, our state anti-discrimination statute. The Legislature, of course, is free to enact legislation on the mixed-motives defense that is either consistent or inconsistent with federal law.

Harris also contends the court did not err in refusing to instruct the jury with BAJI No. 12.26 because the city's answer to Harris's complaint did not plead mixed motive as an affirmative defense. According to Harris, the defense was only an afterthought developed by the city in the midst of trial, evidenced by the city's failure to include the instruction in its initial set of jury instructions. Harris cites no authority, however, that the mixed-motive instruction constitutes an affirmative defense that a defendant waives if not alleged in its answer to the complaint. A defendant's answer must allege affirmative defenses that involve a "new matter" or risk waiving the defense. (Code of Civ. Proc., § 431.30, subd. (b)(2) ["The answer to a complaint shall contain: [¶] . . . [¶] 2. A statement of any new matter constituting a defense"].) A "new matter" is something not put at issue by the plaintiff's claims. (*Carranza v. Noroian* (1966) 240 Cal.App.2d 481, 488.) The city's motive for firing Harris was not a new matter; to the contrary, its motive was the central disputed issue in the lawsuit. And in any case, the city's answer asserted the city had legitimate reasons for discharging Harris, an assertion that by implication raises poor job performance as a reason for her discharge.

B. Judgment Notwithstanding the Verdict Properly Denied

Although we hold that the court erred in not instructing the jury with the mixed-motive defense of BAJI No. 12.26, we hold the error does not entitle the city to judgment notwithstanding the verdict because there was substantial evidence to support the jury's verdict for Harris. The city contends it is entitled as a matter of law to a verdict in its favor because its reasons for firing Harris, who was an at-will employee, were sufficiently unassailable that no rational jury could conclude the city fired her because she was pregnant. (Cf. *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 201 ["whether or not a plaintiff has met his or her prima facie burden, and whether or not the defendant has rebutted the plaintiff's prima facie showing, are questions of law for the trial court, not questions of fact for the jury"].) In support, the city cites trial testimony that in the years preceding Harris's discharge, not one of 15 probationary drivers with performance records similar to hers was retained by the city.

The city's reliance on this and other evidence suggesting the city did not fire Harris because she was pregnant is misplaced, however, because the jury was entitled to disbelieve the city's evidence that Harris's pregnancy played no role in her discharge. (Cf. *Addy v. Bliss & Glennon* (1996) 44 Cal.App.4th 205, 216 [employee could not make prima facie case of discrimination because job required, among other things, four-year college degree, which employee lacked].) Moreover, Harris offered sufficient evidence to permit a jury to conclude the city acted with discriminatory animus against her. For example, in the only written periodic evaluation she received at the end of her first three months as a probationary driver, Harris's supervisor wrote positive things about her, including "Keep up the Great Job!" as well as, Harris testified, telling her she would have received a positive grade but for her accident early in her training period. (See *Colarossi v. Coty US Inc.* (2002) 97 Cal.App.4th 1142, 1154 [termination of highly rated employee can be circumstantial evidence of discriminatory intent].) Only after the city learned she was pregnant, Harris argues, did the city cite her accidents as evidence of poor performance, even though the city promoted her from trainee to probationary bus driver after her first accident, proving that accidents did not preclude continued employment. Moreover, Harris notes, one of her supervisors testified she believed a probationary employee was subject to termination only after four accidents.

Harris also presented evidence that the city did not welcome news of her pregnancy. For example, Supervisor Reynoso exclaimed with seeming displeasure at hearing of her pregnancy, "Wow. Well, what are you going to do? How far along are you?" And rather than congratulate her, he asked her for a doctor's note, even though there was no evidence the city had a formal written policy of requesting a doctor's clearance for a pregnant employee to continue working.[8]

Finally, Harris offered evidence arguably casting doubt on whether her accumulation of 50 demerit points in 90 days was the reason the city fired her. First, Ayer did not tell her he was firing her because she had accumulated too many demerit

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[8] Although the jury could very well have found the comment innocuous and only an inquiry into whether Harris intended to continue working, it was not compelled to do so.

points. The rule of "50 in 90" was not written down in any employee manual or handbook, and Harris contends the city had no such policy. In support, she notes the guidelines for employee performance that she received the day she was hired do not state 50 points in 90 days means termination. Also, the "Criteria for Probationary Termination" developed by Ayer for separating probationary drivers does not mention the 50-points-in-90-days rule. And finally, Harris testified she interpreted the guidelines as stating that upon her promotion to probationary driver she was permitted the same number of 100 points per year for miss-outs and late reports as permanent drivers before she was subject to discharge.

In sum, the parties disputed the reason the city fired Harris. Harris offered sufficient evidence that, if believed by a trier of fact, suggested the city fired her because she was pregnant. On the other hand, the city's competing evidence focusing on Harris's purportedly poor performance, even if believed, did not *obligate* the city to fire her even though she was an at-will employee; the city could have stayed its hand and kept her on as a driver. Accordingly, the city was not entitled to judgment notwithstanding the verdict.

C. Award of Attorney's Fees Is Premature

The trial court awarded Harris over $400,000 in attorney's fees because she was a prevailing plaintiff. In light of our reversal of the judgment for Harris, an award of attorney's fees is premature. Accordingly, we direct the trial court to vacate the award.

DISPOSITION

The judgment and attorney's fee award are reversed, and the matter is remanded for retrial. Each side to bear its own costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.

PROOF OF SERVICE

Case Name: Harris vs. City of Santa Monica
Los Angeles Superior Court Case Number: BC341269
Court of Appeals Case Number: B199571

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 21800 Oxnard Street, Suite 1180, Woodland Hills, California 91367. On the below executed date, I served upon the interested parties in this action the following described document(s): **PETITION FOR REVIEW.**

/____/ MAIL: by placing a true copy thereof enclosed in a sealed envelope with First Class prepaid postage thereon in the United States mail at Woodland Hills, California address(es) as set forth below, pursuant to Code of Civil Procedure Section 1013a(1):

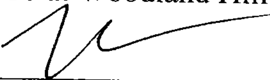
/**XXX**/ OVERNIGHT DELIVERY: by causing it to be mailed by a method of overnight delivery with instructions for delivery the next business day with delivery fees paid or provided for in the United States mail at Woodland Hills, California address(es) as set forth below, pursuant to Code of Civil Procedure Section 1013(c):

/_____/ PERSONAL SERVICE: by delivering a true copy thereof by hand to the person or office, indicated, at the address(es) set forth below:

/_____/ FAX & ELECTRONIC TRANSMISSION: by transmitting a true copy thereof by hand to the person or office, as indicated, at the address(es) telefax number(s) & email(s) set forth below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 15, 2010 at Woodland Hills, California.



Mollie Elicker

PROOF OF SERVICE (CONT.)

Case Name: Harris vs. City of Santa Monica
Los Angeles Superior Court Case Number: BC341269
Court of Appeals Case Number: B199571

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