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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

NEQUETTA THOMPSON, Plaintiff and Appellant, v. PACIFIC BELL TELEPHONE CO., Defendants and Respondents.	B232917 (Los Angeles County Super. Ct. No. BC429555) ORDER MODIFYING OPINION AND DENYING PETITION FOR REHEARING [NO CHANGE IN JUDGMENT]

THE COURT:*

It is ordered that the petition for rehearing, filed by appellants on February 15, 2013, is denied; and that the opinion filed herein on January 30, 2013, be modified in the following particulars:

At page 32, in footnote 11, the following is added to the end of the footnote text, starting as a new paragraph:

The Supreme Court's recent decision in *Harris v. City of Santa Monica* (February 7, 2013, S181004) __ Cal.4th __ [2013 Cal. LEX 941] (*Harris*) does not change our analysis. The Supreme Court held that *Guz* applies in FEHA employment discrimination cases that do not involve mixed motives. (*Id*. [2014 Cal. LEXIS 941, at *11].) Contrary to appellant's assertion, this matter did not involve mixed motives.

In *Fuller v. Phipps* (4th Cir. 1995) 67 F.3d 1137 (*Fuller*), overruled in part by *Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, the federal appellate court held that "[t]o earn a mixed-motive instruction . . ., a plaintiff must satisfy the evidentiary burden necessary to make out a mixed-motive case. This requires '. . . evidence that

decisionmakers placed substantial negative reliance on an illegitimate criterion.' [Citations]. Moreover, 'not all evidence that is probative of discrimination will entitle the plaintiff to a [mixed-motive] charge.' [Citation.] Otherwise, any plaintiff who is able to establish a prima facie showing in a pretext case would qualify for a mixed-motive instruction, conflating the two categories of cases and subverting the Supreme Court's efforts to distinguish the two theories. [Citations.] What is required instead is evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision. [Citations.]" (*Fuller*, 67 F.3d at p. 1142.) The U.S. Supreme Court later overruled *Fuller* to the extent it held that an employee must have direct evidence. (*Desert Palace, Inc. v. Costa*, 539 U.S. at pp. 95, 101; accord, *Harris*, __ Cal.4th __ [2013 Cal. LEXIS 941, at *53 [in FEHA employment cases involving mixed motives, both direct and circumstantial evidence can be used to show that an illegitimate criterion was a substantial motivating factor in the particular employment decision].)

In the trial court, appellant's theory that her case involved mixed motives was based upon her allegations that her firing was motivated by illegal discriminatory and retaliatory intents. That is not a mixed motives case, which is a case where "a mix of discriminatory and legitimate reasons motivated the employer's decision." (*Harris*, __ Cal.4th __ [2013 Cal. LEX 941, at *12].) Thus, she has forfeited this issue on appeal. (*North Coast Business Park v. Nielsen Construction Co*. (1993) 17 Cal.App.4th 22, 29.)

Even were we to consider it on appeal, we would conclude that appellant has not shown, by direct or circumstantial evidence, that illegal discrimination or retaliation was a substantial motivating factor in the decisions to suspend and fire her. Although appellant has produced some evidence showing a possible racial animus on the part of Baltes, she has not produced evidence showing that this racial animus was a motivating factor, let alone a substantial motivating factor, in the decision to suspend and fire her.

At page 32, in the first paragraph, the case citation is changed to:

(Cf. *Fuller*, 67 F.3d at p. 1142 [in mixed motives cases, the plaintiff must produce "evidence of conduct or statements that both reflect directly the alleged discriminatory attitude and that bear directly on the contested employment decision."].)

There is no change in the judgment.

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*EPSTEIN, P. J. MANELLA, J. SUZUKAWA, J.