No. S181004

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WYNONA HARRIS,
Plaintiff and Respondent,

v.

CITY OF SANTA MONICA,
Defendant and Appellant.

Court of Appeal, Second Appellate District, Division Eight, Case No. B199571
Los Angeles Superior Court, Case No. BC341569
Hon. Soussan G. Bruguera

APPLICATION FOR PERMISSION TO FILE *AMICI CURIAE* AND BRIEF FOR *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES:

Pursuant to California Rules of Court, rule 8.250(f), the League of California Cities and California State Association of Counties respectfully request leave to file the accompanying brief of *amici curiae* in support of Defendant and Appellant City of Santa Monica ("Appellant").

I. THE *AMICI CURIAE*

The League of California Cities ("League") is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance

The California State Association of Counties ("CSAC") is a non-profit corporation with all of California's 58 counties as members. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee

monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

II. INTERESTS OF THE *AMICI CURIAE*

There are approximately 1,726,140 local government employees employed within the State of California, a significant number of whom are employed by the cities and counties represented by the League and CSAC.[1] Thus, this case presents an issue in which members of the League and CSAC have a significant stake.

This brief has been drafted in whole or in part by Liebert Cassidy Whitmore, the League and CSAC. None of these entities have made a monetary contribution intended to fund the preparation or submission of this brief.

III. NEED FOR FURTHER BRIEFING

Counsel for the League and CSAC have reviewed the briefs filed by the parties to this appeal and are intimately familiar with the questions involved and the scope of their presentation. The League and CSAC believe the Court will benefit from additional briefing on the issues identified herein. Prohibiting mixed-motive consideration in employment discrimination cases will have negative consequences on public sector

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[1] See U.S. Census Bureau, Local Government Employment and Payroll Data, 2009, available online at http://www.census.gov/govs/apes. The cited figure includes full and part-time employees employed by counties, municipalities, townships, special districts, and school districts within California.

employment and on the effectiveness of public entities in carrying out their missions.

IV. CONCLUSION

For the foregoing reasons, the League and CSAC respectfully request that the Court accept the accompanying brief for consideration.

Dated: February 7, 2011

Respectfully submitted,

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AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT

INTRODUCTION

The issues before this Court have far-reaching implications for all California employers, and especially for government employers.

This Court has held that public employment in California is governed by statute, not by contract, and thus permanent government employees must be afforded due process protections before they can be terminated from public employment. However, government entities can release probationary employees from probation without cause and without the right to appeal. Probationary employees can be terminated for any reason, so long as the reason is not in violation of the law.

The Fair Employment and Housing Act ("FEHA") prohibits intentional discrimination, but should not be construed in a way to prevent public employers from evaluating performance or discipline. Despite Harris being pregnant, the City of Santa Monica still owed a duty to the public to evaluate Harris' abilities as a City bus driver before affording her the extra protections of a permanent public employee. Thus, the trial court's refusal to instruct the jury on a mixed-motive defense eviscerated the City's ability to prove that it had legitimate, non-discriminatory reasons for terminating Harris even though the City had knowledge she was pregnant before she was terminated.

Further, the trial court's conduct resulted in prejudice to the City of Santa Monica. Specifically, CACI 2500, the jury instruction given at trial, describes a causation standard for discrimination that does not comport with the requirements of FEHA and supporting case law. For example, CACI 2500 fails to codify the "because of" or "but for" causation standard expressly set forth in FEHA. Instead, it adopts a "motivating factor" standard. In addition, CACI 2500 fails to provide for the mixed-motive defense available to employers where the evidence warrants it.

Next, City of Santa Monica requested that BAJI 12.26 be given, but the trial court refused. BAJI 12.26 codifies the mixed-motive defense, but it still does not adequately capture the "because of" causation standard required by FEHA. A plaintiff must demonstrate a "but for" causal connection between the alleged discriminatory motive (here, Harris' pregnancy) and the adverse employment action (here, Harris' termination). The "but for" or "because of" standard is consistent with the causation standard adopted by the United States Supreme Court, is expressly called for in FEHA, and flows directly from this Court's treatment of causation in employment cases. Further, even where more than one motive may exist, an employer should not be held liable unless the discriminatory motive made a difference.

Finally, if this Court does not adopt the "but for" or "because of" causation standard it should nonetheless allow City of Santa Monica to

assert a mixed-motive defense as described in its Answering Brief and as supported in the underlying decision of the Court of Appeal. Under either analytical framework, the City of Santa Monica should have been allowed to have an instruction that took into account the fact that Harris would have been terminated for poor performance despite the City's knowledge that Harris was pregnant.

ARGUMENT

I. FAILURE TO GIVE PROPER JURY INSTRUCTIONS CONSTITUTES REVERSIBLE ERROR

Failure to properly instruct a jury is grounds for review for prejudice. Review is proper if "it is probable that the error prejudicially affected the verdict." (*LeMons v. Regents of the University of California* (1978) 21 Cal. 3d 869, 875.) The City of Santa Monica had the right to have the jury instructed on all defenses supported by the evidence introduced at trial or contained in the pleadings. (Cal. Code of Civ. Proc. §§607a, 608; *Hasson v. Ford Motor Co.* (1977) 19 Cal. 3d 530, 543-544.) Failure to adequately instruct the jury which results in an adverse affect on the verdict constitutes prejudice and reversible error. (*Kinsman v. Unocal* (2005) 37 Cal. 4th 659, 682; *Lundquist v. Reusser* (1994) 7 Cal. 4th 1193, 1213.)

Here, the trial court did not give the mixed-motive jury instruction requested by the City of Santa Monica (i.e., BAJI 12.26), but instead gave

CACI 2500. The effect was that Harris had a lower burden of proof than required by law, and the jury was not properly instructed to consider the legitimate business reasons posited by the City for terminating Harris. The City of Santa Monica was effectively deprived of its right to adequately present its defense to the jury, thereby resulting in prejudice. On appeal, the Second District Court of Appeal ordered retrial in the matter.[2]

II. PUBLIC POLICY MANDATES THAT THE MIXED-MOTIVE DEFENSE BE ALLOWED FOR PUBLIC EMPLOYERS

FEHA prohibits intentional discrimination on the basis of a protected classification, but FEHA should not be construed in a way to exempt Harris from appraisal of performance or discipline just because she is pregnant. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal. 4th 1026, 1042; *Guz v. Bechtel National* (2000) 24 Cal. 4th 317, 362.)

This Court has held that public employment in California is governed by statute, not by contract. (*Miller v. State of California* (1977) 18 Cal. 3d 808, 813-814; *Kemmerer v. County of Fresno* (1988) 200 Cal. App. 3d 1426, 1432.) Once a public employee passes the probationary period and obtains permanent civil service status, good cause must exist to terminate the employee. Plus, multiple due process protections must be

[2] Harris argues that the retrial is limited to certain issues and some findings of jury must be taken as a given. Harris failed to raise the issue of the scope of the retrial in her Opening Brief to this Court, and thus, the scope of retrial is not before the Supreme Court. Moreover, the Court of Appeal's opinion does not address limiting the scope of retrial, which should mean the retrial is a complete retrial.

afforded to the permanent employee prior to the government entity being able to terminate employment. (*Skelly v. State Personnel Bd.* (1975) 15 Cal. 3d 194.) No such good cause or due process requirements exist for probationary and/or at-will employees.

Local government entities can release probationary employees from probation without cause and without right to appeal the decision to release the employee. (Compare *Skelly, supra,* 15 Cal. 3d 194; with *Bd. of Regents of State Colleges v. Roth* (1972) 408 U.S. 564 and *Perry v. Sinderman* (1972) 408 U.S. 593.) Probationary employees, such as Harris, are treated more like at-will employees in this context: they can be terminated for any reason, so long as the reason is not in violation of the law. (*Hersant v. Dept. of Social Services* (1997) 57 Cal. App. 4th 997.)

The probationary period is an integral part of the recruitment, hiring and evaluation process. This time is relied upon by government employers in California as an opportunity to gauge objective and subjective factors relating to work performance during the period before the employee gains permanent status. (*Bell v. City of Torrance* (1990) 226 Cal. App. 3d 189, 195.) Failing to apply the mixed-motive defense can severely hamper this opportunity.

For example, suppose a probationary employee is nearing the end of her probationary period and three supervisors gather to evaluate her performance to determine whether the employee will be awarded

permanent status. Assume that two of the supervisors describe compelling and overwhelming legitimate, nondiscriminatory reasons to terminate the employee during the probationary period. However, assume that one of the supervisors makes a discriminatory remark about the employee's gender during the meeting. That supervisor will surely be counseled and disciplined for making such an inappropriate remark. Assume the probationary employee is still terminated during the probationary period because of the legitimate and nondiscriminatory performance-based reasons, and despite the discriminatory remark about her gender. If the "motivating reason" standard were to be applied in this context, liability could be triggered.

This hypothetical serves as an example of the need for public employers to be able to assert the mixed-motive defense. It is vital that an employer's ability to take action not be chilled out of fear that the application of the "motivating reason" standard could trigger liability. The public employer's hands should not be tied where one supervisor, for example, makes a stray discriminatory remark where compelling and legitimate reasons exist and are relied upon for the dismissal of an employee. Moreover, the public employer's hands should not be tied where the same decision would have been reached even if the discriminatory remark had not been made.

Public employers cannot afford to let probationary employees gain permanent status unless the employee's performance warrants it. This is particularly important given California's budgetary problems that require public agencies to do more with less. Application of the "motivating reason" standard would impede a public employer's ability to make necessary job-related decisions.

Here, Harris' poor work performance manifested she announced her pregnancy to a supervisor. The City of Santa Monica's expectations that Harris show up for work and avoid bus accidents are reasonable demands of any Motor Coach Operator. The City's reasonable job requirements should not become moot or meaningless because Harris shared news of her pregnancy after she was investigated for poor work performance. Any other outcome chills a public employer's ability to take an action against a probationary employee for otherwise lawful reasons (e.g., poor work performance) without having to actually demonstrate good cause. In other words, despite Harris being pregnant, the City of Santa Monica still owed a duty to the public to evaluate Harris' abilities as a City bus driver before affording her the protections of a permanent status public employee.

The City evaluated Harris's performance, including preventable accidents and absences, and found that it was not adequate to justify passing probation. As a result, she was released from her probationary position.

The trial court's refusal to instruct the jury on a mixed-motive defense deprived the City of its right to have the jury decide whether the City had proved its legitimate, non-discriminatory reasons for terminating Harris even though the City had knowledge she was pregnant before she was terminated.

III. FEHA EXPRESSLY REQUIRES A "BECAUSE OF" (OR "BUT FOR") CAUSATION STANDARD TO BE APPLIED IN DISCRIMINATION CASES

The Fair Employment and Housing Act (FEHA), Government Code section 12940(a), only imposes liability for (i) employment decisions, (ii) made "because of [discrimination]." (Cal. Gov. Code §12940(a).) CACI 2500 fails to properly instruct on the FEHA's mandate that an adverse action be taken "because of" discrimination.

A. THIS COURT HAS ALREADY ADOPTED A "BUT FOR" CAUSATION STANDARD IN STATE EMPLOYMENT CASES

This Court itself has previously adopted the "but for" causation standard in employment cases. In California, any plaintiff who brings a discrimination claim alleging disparate treatment is required to show that she was intentionally discriminated against "because of" membership in a protected class, and the intentional discrimination resulted in an adverse employment action. (*Guz, supra,* 24 Cal. 4th 317, 358.)

While a plaintiff need not prove that intentional discrimination was the only motivating factor behind an adverse employment action, she must

indeed prove that there was "actionable" discrimination. (*Reid v. Google* (2010) 50 Cal. 4th 512, 520.) Plus, the adverse employment action claimed to be wrongful must be significant, and even then, there must not be anything that would suggest that the outcome likely would have been the same anyway. (*Lyle v. Warner Bros. Television* (2006) 38 Cal. 4th 264, 279-280.)

In *Lyle, supra,* this Court considered a sexual harassment claim under FEHA and applied to it a "but for" causation standard. Sexual harassment is a form of sex-based discrimination, this Court explained. Therefore, the plaintiff must prove (among other things) that, "if the plaintiff 'had been a man she would not have been treated in the same manner.'" (*Lyle*, 38 Cal. 4th 264, 280 (citation omitted).) In other words, plaintiff must show "but for" causation (i.e., that sex made the difference). Plus, in *Williams v. City of Los Angeles* (1988) 47 Cal. 3d 195, this Court adopted a "but for" causation test where an employee was terminated for unsatisfactory performance and for exercising his constitutional rights.

This Court has also adopted the "but for" causation standard in tortious discharge cases. For example, in *General Dynamics Corp. v. Superior Court*, (1994) 7 Cal. 4th 1164, this Court states that when a plaintiff alleges that he or she was discharged for a reason that offends public policy, the plaintiff has the burden of proof, and the proof is analyzed "under a 'but for' standard of causation." (*General Dynamics*

Corp., 7 Cal 4th 1164, 1191; see also *Walker v. Boeing Corp.*, (C.D. Cal. 2002) 218 F. Supp. 2d 1177, 1187 [to establish tortious discharge under California law, plaintiff must show "that he would not have been terminated but for his participation in the protected activity."].) California courts have held that retaliation under FEHA — which uses the same "because of" language as claims arising under section 12940(a) — requires proof of "but for" causation. (*Reeves v. Safeway Stores, Inc.* (2004) 121 Cal. App. 4th 95, 100 ["[S]o long as the supervisor's retaliatory motive was an actuating, but-for cause of the dismissal, the employer may be held liable for retaliatory discharge."].)

Harris offers no reason why this Court should redraft FEHA's causation test in a way that differs from the standard this Court adopted in *Lyle, supra,* in FEHA cases or in *General Dynamics, supra,* for public policy tortious discharge cases. Often a plaintiff will plead both a FEHA claim and a public-policy tort claim in which the public policy derives from FEHA. (See, e.g., *Stevenson v. Superior Court*, (1997) 16 Cal. 4th 880, 886 (the FEHA's age discrimination remedy is not exclusive; FEHA can supply the public policy for a tortious discharge action).[3] If substantially identical

[3] *Amici curiae* acknowledge that public entities in California cannot be held liable for wrongful termination in violation of public policy after this Court's *Miklosy* decision, but the point remains the same: the causation test for tort claims is usually the "but for" or "because of" standard. (*Miklosy v. Regents of Univ. of Cal.* (2008) 44 Cal. 4th 876.)

claims were subject to different standards of proof, then this would lead to confusion on the part of jurors.

Here, Harris claims she was terminated because she was pregnant. Harris bore the burden of showing, by a preponderance of the evidence, that she was terminated because of her pregnancy (*Lyle*, *supra*, 38 Cal. 4th 264, 279-284.) CACI 2500, as given, failed to properly instruct the jury, as further discussed below.

B. THE U.S. SUPREME COURT HAS APPLIED THE "BUT FOR" TEST TO THE ADEA. THE ADEA IS WORDED THE SAME AS FEHA, IN RELEVANT PART, SO THE SAME STANDARD SHOULD BE APPLIED.

The United States Supreme Court recently applied the "but for" test to the Age Discrimination in Employment Act ("ADEA"). In *Gross v. FBL Fin. Servs., Inc.* (2009) ___ U.S. ___, 129 S. Ct. 2343, 2350, the United States Supreme Court held that the causation standard in age discrimination cases under ADEA is the "because of" test that means that "a plaintiff must prove that [discrimination] was the "but-for" cause of the employer's decision." (*Gross, supra,* 129 S. Ct. 2342, 2350.) "The words 'because of' mean 'by reason of: on account of.'" (*Id.* [citation to Webster's New International Dictionary omitted].) In addition, the court explained that this means that the prohibited characteristic must have "had a determinative influence on the outcome." (*Id.*) (citation and internal quotation marks omitted; also see *Hazen Paper Co. v. Biggins*, (1993) 507 U.S. 604, 610 [a

discrimination claim "cannot succeed unless . . . [discrimination] had a determinative influence on the outcome"].)

FEHA's statutory language is identical, in relevant part, to that of the ADEA. For example, under both FEHA and the ADEA, discrimination exists only if the employer takes adverse action "because of" an individual's legally protected status. (Compare Cal. Gov't Code § 12940(a) with, for example, 29 U.S.C. § 623(a)(1) (Age Discrimination in Employment Act) – both statutes use the "because of" language to describe the causation standard.)

Both ADEA and FEHA have the same causation test: did the adverse action occur "because of" discrimination? Hence, this Court should apply the U.S. Supreme Court's "but for" causation test.

C. THIS COURT HAS LOOKED TO FEDERAL LAW TO DETERMINE THE STANDARD OF PROOF IN STATE EMPLOYMENT CASES

This Court has looked to federal law in the past to aid in addressing employment discrimination issues. For example, this Court looked to the Americans with Disabilities Act in assigning to the plaintiff the burden of proving that he or she was a qualified individual with a disability entitled to sue under FEHA. (*Green v. State of California* (2007) 42 Cal. 4th 254, 264 ["Had the Legislature actually intended to relieve a plaintiff employee of the burden of proving an actionable discrimination on [a] basis [that FEHA

prohibits], thereby departing significantly from federal law, we believe it could and would have done so in a more conspicuous manner."].)

In another example, in *Martori Bros. Dist v. AG Lab. Rel Bd.* (1981) 29 Cal. 3d 721, 729-730, this Court held that a claimant alleging retaliatory discharge for union activities under the Agricultural Labor Relations Act should bear the same burden of proof as a retaliation claimant under the federal National Labor Relations Act. This Court noted that some labor-board cases had held "that if antiunion bias played any part in, or partially motivated, the discharge, the employee is entitled to [prevail] even though other legitimate grounds for discharge may exist." (*Martori Bros. Distributors*, 29 Cal. 3d 721, 729.) Those cases are wrong, this Court said. "In light of the recent [federal authority], the ALRB henceforth should apply the 'but for' standard in assessing the dual motive for discharge of agricultural workers under the Agricultural Labor Relations Act." (*Id.* at 730 [noting the need to have state law track federal law].) Under that test, "When it is shown that the employee is guilty of misconduct warranting discharge, the discharge should not be deemed an unfair labor practice unless the board determines that the employee would have been retained 'but for' his union membership or his performance of other protected activities." (*Id.*)

IV. THIS COURT MUST REJECT CACI 2500 BECAUSE IT DOES NOT COMMUNICATE THE PROPER "BECAUSE OF" OR "BUT FOR" CAUSATION STANDARD

The jury received CACI 2500 as the instruction on causation. CACI 2500 is not in line with FEHA because it did not instruct the jury that Harris was required to prove that she was terminated "because of" her pregnancy. Instead, the instruction read that City was liable if Harris' pregnancy "was a motivating reason/factor for the discharge." "Motivating factor" was defined as "something that moves the will and induces action even though other matters may have contributed to the taking of the action." CACI 2500 failed to instruct the jury to consider whether Harris would have been terminated "but for" being pregnant, and failed to instruct the jurors to assess whether there were reasons that would have led to Harris losing her job regardless of being pregnant.

Harris cites cases to support her position that CACI 2500 adopts the proper causation standard. (See Opening Brief on the Merits at p. 25.) Indeed, the cases Harris relies on do not support her contention.

For example, *Gelfo v. Lockheed Martin Corp.*, (2006) 140 Cal. App. 4th 34, did not consider the validity of the "a motivating reason" test, but only the unrelated issue of analyzing so-called "regarded as" liability in a disability-discrimination case. (*Gelfo*, 140 Cal. App. 4th 34, 50.) In addition, in *West v. Bechtel Corp.*, (2002) 96 Cal. App. 4th 966, the court did not consider what the proper jury instruction in a discrimination case

should be. The court granted the employer judgment notwithstanding the verdict on appeal because the employer made no independent decision of its own; instead plaintiff was terminated because the customer directed the employer to do so. (*West,* 96 Cal. App. 4th 966, 980.) Next, in *Caldwell v. Paramount Unified School Dist.*, (1995) 41 Cal. App. 4th 189, the court did not consider a challenge to "a motivating reason" test. The court considered only whether the elements of a plaintiff's prima facie case present questions of law for the court, or should be submitted to the jury in an instruction. (*Caldwell,* 41 Cal. App. 4th 189, 205.) The court quoted the jury instruction the trial judge had given, but did not consider whether "a motivating factor" was the proper legal test. Finally, in *Mixon v. FEHC*, (1987) 192 Cal. App. 3d 1306, 1319, the court held that a plaintiff "need not prove that [discriminatory] animus was the sole motivation behind [a] challenged action." Based on review of the parties' opening and answering briefs, this point is not disputed.

Harris also improperly argues that the Fair Employment and Housing Commission applies "a motivating factor" standard for causation. (See Opening Brief on the Merits at p. 26-28.) However, in *Robinson v. FEHC* (1992) 2 Cal. 4th 226, 235, fn. 6, this Court noted that interpretations of an administrative agency's regulations and statutes are "questions of law which the court must ultimately resolve." This Court has not hesitated to disagree with the Fair Employment and Housing

Commission in the past. For example, in *Jones v. Lodge at Torrey Pines Partnership*, (2008) 42 Cal. 4th 1158, 1173, this Court rejected FEHC's interpretation that the FEHA imposes personal liability for retaliation on individuals. Likewise, in *Kelly v. Methodist Hosp. of So. Cal.*, (2000) 22 Cal. 4th 1108, 1118, this Court declined to follow a FEHC Precedential Decision that "appears to reflect not what the Legislature actually set forth in the statutory language, but, rather, the FEHC's opinion of what, in an ideal statute, a religious-entity exemption should provide." Finally, in *Fiol v. Doellstedt*, (1996) 50 Cal. App. 4th 1318, 1326 n.5, this Court noted disagreement with a FEHC regulation.

Here, CACI 2500, as given, fails to instruct jurors that liability can be imposed where an adverse action resulted "because of" discrimination. The requirement that a plaintiff prove causation flows directly from the plain language of the FEHA statute. Any instruction given to jurors must capture the "because of" requirement. CACI 2500 fails to do so and consequently Harris's burden of proof was improperly diluted. Harris was relieved of her burden to prove causation before being entitled to relief.

A plaintiff seeking to recover for an injury must prove that the injury was caused by an unlawful act. The instruction given (and the proffered instruction rejected) meant that Harris did not have to carry her burden of proving that her injury was caused by a wrongful act. Harris must prove that she was terminated "because of" her pregnancy – then and only then

would she be entitled to relief. Instead, jurors were invited to hold the City of Santa Monica liable if they found that the City took Harris' pregnancy into consideration at all, even if there were other non-discriminatory factors that caused the City to terminate Harris.

The jury was *not* instructed that in the face of both discriminatory and non-discriminatory motives, it could not find the City liable where the non-discriminatory reason would have caused the City to make the same decision. Instead, the jury was allowed, even directed, to find liability where an improper motive was present, even though it did not cause the termination. As a result, the City was deprived of its right to have the jury decide whether the outcome would have been the same regardless of whether Harris was pregnant. Thus, this Court must reject CACI 2500 because it does not properly reflect the law.

V. THE MIXED-MOTIVE DEFENSE AS CODIFIED IN BAJI 12.26 IS AVAILABLE AS A DEFENSE TO FEHA CLAIMS

If this Court chooses not to apply a "but for" causation standard in this case, then it should adopt BAJI 12.26 instead of CACI 2500 as the proper jury instruction. The City of Santa Monica asked the trial court for BAJI 12.26 (i.e., a mixed-motive instruction), which recognizes that an employer is not liable for discrimination even if discriminatory and non-discriminatory reasons exist for an action if the evidence shows that the

legitimate business reason was the reason for taking the action. The trial court did not order this instruction.

The result of refusing to give this instruction was that the jury was essentially directed to find liability where mixed motives may have existed, so long as one of the motives was discriminatory, even if termination would have occurred without the improper motive. This is the exact opposite of the law. In effect, City of Santa Monica was deprived of its right to have the jury decide the validity of its defense. Failure to give BAJI 12.26 as an instruction resulted in prejudicial error that adversely affected the verdict. (*Kinsman v. Unocal* (2005) 37 Cal. 4th 659, 682; *Lundquist v. Reusser* (1994) 7 Cal. 4th 1193, 1213.)

The law is clear that the mixed-motive defense is available as a defense to employers in Title VII cases alleging discrimination on the basis of any protected classification except for on the basis of age. (*Gross, supra,* 129 S.Ct. 2343; *Desert Palace v. Costa* (2003) 539 U.S. 90, 94-95; see also *Reeves, supra,* 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].)

The California test for causation under FEHA has not been fully resolved by this Court, but the United States Supreme Court has dealt with the issue under federal anti-discrimination laws. Not one Justice in recent

history has opined that "a motivating reason," without more, results in liability under a statute resembling FEHA. Nor has any Justice opined that an employer is liable for damages if it would have taken the same adverse employment action for nondiscriminatory or nonretaliatory reasons. (*Village of Arlington Heights v. Metro. Housing Dev. Corp.* (1977) 229 U.S. 252 (constitutional housing-discrimination claim); *U.S. Postal Serv. Bd. of Governors v. Aikens* (1983) 460 U.S. 711 (Title VII); *NLRB v. Transp. Mgmt. Corp.* (1983) 462 U.S. 393 (National Labor Relations Act); *Mt. Healthy Sch. Dist. Bd. v. Doyle* (1977) 429 U.S. 274 (First Amendment); *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228 (Title VII), superseded by statute in Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991); *Desert Palace, supra,* 539 U.S. 90 (Title VII); *Gross, supra,* 129 S. Ct. 2343 (ADEA).

In *Price Waterhouse*, for example, the plurality held that the plaintiff's claim failed, even if "gender played a motivating part in an employment decision," if the employer "would have made the same decision even if it had not allowed gender to play such a role." (*Price Waterhouse*, 490 U.S. 228, 244-245.) In effect, the Justices disagreed with CACI 2500's "motivating factor" causation test. More recently, in *Gross*, the United States Supreme Court considered the issue of causation under the Age Discrimination in Employment Act (ADEA). The ADEA and FEHA are identically worded in relevant part. Here again, as in *Price*

Waterhouse, not one Justice said that the causation test should be anything resembling CACI 2500. (*Gross*, 129 S. Ct. 2343, 2352.)

There is also authority that the mixed-motive defense applies to FEHA claims as well. First, there is a valid BAJI instruction (i.e., BAJI 12.26 which City of Santa Monica requested be given at trial) that codifies the mixed-motive defense into a California jury instruction traditionally given in FEHA cases. BAJI 12.26 provides, in pertinent part:

> 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.

This instruction extracts the principles established in California cases which have recognized a "mixed-motive" defense in employment discharge and FEHA cases. For example, in *Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal. App. 4th 1361, 1379, the court states that "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." In addition, in *Heard v. Lockheed Missiles & Space Co.*, (1996) 44 Cal. App. 4th 1735, 1747-1749, the court, citing the *Price Waterhouse*

plurality, concludes that "mixed motive" defense is a defense in that FEHA case. And, in *Bekiaris v. Board of Education* (1972) 6 Cal. 3d 575, this Court recognized that where the reason for a teacher's dismissal involved both poor work performance and the teacher's exercise of constitutional rights, there would be no impermissible discrimination if the same decision would have been made absent the exercise of constitutional rights. Finally, in *Martori Bros. Distributors, supra,* 29 Cal. 3d 721, this Court concluded that where an agricultural worker claimed he was terminated because of his protected union activities, he could not thereby be insulated from termination where he was also found to be insubordinate and his work performance was poor.

Second, although the United States 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 typically looks to federal law when interpreting a state law with similar protections. For example, CACI 2507, which defines "motivating reason," cites the federal law 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].) It

follows then that the mixed-motive defense is available to employers in FEHA cases as well. (*Gross, supra*, 129 S.Ct. 2343, 2349; *Desert Palace, supra*, 539 U.S. 90, 94-95; *Arteaga v. Brink's, Inc.* (2008) 163 Cal.App.4th 327, 357 [dicta in FEHA case noting court need not address mixed-motive defense in the case before it]; *Grant-Burton, supra*, 99 Cal.App.4th 1361, 1379.)[4]

Finally, this Court has a history of looking to the anti-discrimination statutory provisions of other states to aid in interpreting provisions of the FEHA as well. (*Romano v. Rockwell Int'l, Inc.* (1996) 14 Cal. 4th 479, 495; *Robinson v. FEHC* (1992) 2 Cal. 4th 226, 239; *Peralta Community College Dist. v. Fair Employment and Housing Comm'n* (1990) 52 Cal. 3d 40, 57.) Hence, this Court should look to other states in this instance as well. As pointed out by City of Santa Monica in its Answering Brief filed

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[4] Title VII of the Civil Rights Act of 1964 was amended in 1991 to codify the mixed-motive defense. The 1991 Act changed Title VII's discrimination provision to provide that an "unlawful employment practice is established" when a protected characteristic is "a motivating factor" in the employment action, "even though other factors also motivated the practice." (42 U.S.C. § 2000e-2(m).) However, the amendment also allows for limited remedies even where an employer establishes the defense. (42 U.S.C. §§ 2000e-2(m), 2000e-5(g)(2)(B).) The Court of Appeal in this matter noted that the California Legislature has not made a comparable change to FEHA to allow for limited remedies even where the defense is shown to justify analyzing mixed motive cases in the way Title VII does: "[W]e may not add language to state statutes that the Legislature has not enacted. Accordingly, the federal [Title VII rule] in a mixed-motive case does not apply in this case because no similar language exists in FEHA, our state anti-discrimination statute." (*Harris v. City of Santa Monica*, (2010) 181 Cal. App. 4th 1094, 1103 n.7, review granted, depublished, 108 Cal. Rptr. 3d 555.)

with this Court, 25 other states have adopted the mixed-motive defense to claims under their respective state civil rights statutes. (See City of Santa Monica's Answering Brief on the Merits at pp. 35-37.) Thus the mixed motive defense has been broadly recognized as legitimate and appropriate in the employment discrimination context. There is no reason to depart from this widely recognized principle in the application of California's FEHA.

VI. HARRIS' ARGUMENTS AGAINST A MIXED-MOTIVE DEFENSE ARE WITHOUT MERIT

The City of Santa Monica addresses the arguments made by Harris in its Answering Brief, and *amici* hereby incorporates those arguments. *Amici* further addresses some points below.

A. CITY DID NOT WAIVE A MIXED-MOTIVE DEFENSE BY NOT PLEADING IT IN ITS ANSWER NOR BY NOT ADMITTING TO DISCRIMINATORY ANIMUS AT TRIAL

Harris argues that mixed-motive is an affirmative defense that should be pleaded; otherwise it is waived. The law does not support this argument.

Defendants are required to plead only "[a] statement of any new matter constituting a defense." (Cal. Civ. Proc. Code § 431.30(b)(2).) A defendant does not raise "new matter" when the issue already has been "put in [play] by the plaintiff." (*Carranza v. Noroian* (1966) 240 Cal. App. 2d 481, 486 (quoting *Bridges v. Paige* (1959)13 Cal. 640, 641.) In a

discrimination case like this one, the defendant disputes the causal connection between the discriminatory motive and the adverse employment decision. The plaintiff has pleaded improper motive and causation. The defendant may demonstrate its legitimate, nondiscriminatory reason(s) as the cause of the adverse employment action without pleading an affirmative defense because the analysis does not raise a "new matter." Here, neither the City's motive for terminating Harris, nor the cause of that termination, were new matters. Instead, its motive and causation were both elements of the plaintiff's claim.

The purpose of the affirmative pleading requirement is to "guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it." (*Hassan v. U.S. Postal Serv.*, (11th Cir. 1988) 842 F.2d 260, 263.) In the fact of an employee's claim that a discriminatory motive caused an adverse employment action, an employer is always entitled to raise a legitimate, nondiscriminatory justification for its actions. Thus, the plaintiff has received ample notice of the possibility that the jury could find that both permissible and impermissible motivations played a role. (*Chambless v. Louisiana-Pacific Corp.*, (11th Cir. 2007) 481 F.3d 1345, 1349 [where plaintiff was put on notice "that one or more reasons other than retaliation would be at issue," there was sufficient notice of what would be argued at trial; the judge did not err in permitting a mixed-motive defense].)

In *Pulliam v. Tallapoosa County Jail*, (11th Cir. 1999) 185 F.3d 1182, the Eleventh Circuit addressed the notice required to raise a mixed-motive ("same decision") issue. The plaintiff sued his former employer for unlawful discharge after he filed an EEOC charge. The employer did not affirmatively plead a mixed-motive theory. In the pretrial order, the employer claimed that "the plaintiff was an unsatisfactory employee and that any reprimands, demotions or changes in his employment status were either a result of his own request or of his unsatisfactory performance in his position." (*Pulliam,* 185 F. 3d 1182, 1185.) The trial court concluded that the defendant adequately warned plaintiff of a potential mixed-motive analysis. The court of appeals affirmed, finding that the "pretrial order did make it plain that it would be impossible to determine the issue of whether Defendant's retaliatory acts caused Plaintiff's discharge without considering Plaintiff's own acts. . . . That Defendant's motives and Plaintiff's conduct would be in issue was no unfair surprise." (*Id.*)

Harris also argues that a defendant should be barred from prevailing under a mixed-motive theory unless it admits to bias or animus during the trial. This is not accurate. An employer "...need not admit a discriminatory motive to assert a mixed-motives defense." (*Pulliam*, 185 F.3d 1182, 1186.)

Thus, neither failure to use the words "mixed-motive" in an Answer, nor failure to admit to animus or bias at trial, constitute waiver of the mixed-motive defense.

B. NO CLEAR AND CONVINCING EVIDENCE STANDARD CAN BE APPLIED IN MIXED-MOTIVE CASES; THE PREPONDERANCE OF THE EVIDENCE STANDARD APPLIES

Harris argues that if a mixed-motive defense were to be recognized, the employer should have to prove by "clear and convincing evidence" that it would have made the same decision independent of any discriminatory motive. (See Opening Brief on the Merits at pp. 46-50).

FEHA requires nothing more than a preponderance of the evidence standard. (See, e.g., the following cases that all apply the preponderance standard in employment discrimination cases: *Frank v. County of LA* (2007) 149 Cal. App. 4th 805, 823; *Perez v. County of Santa Clara* (2003) 111 Cal. App. 4th 671, 677; *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal. App. 4th 1735, 1749-50; *Univ. of S. Cal. v. Superior Court* (1990) 222 Cal. App. 3d 1028, 1035.)

In addition, the preponderance of the evidence standard presumptively applies in all California civil cases. The clear-and-convincing standard generally applies in unusual cases involving both important rights and non-monetary remedies such as termination of parental rights, the appointment of a conservator, sterilization of a conservatee,

involuntary electroconvulsive therapy, or discipline of judges. (See *Conservatorship of Wendland*, (2001) 26 Cal. 4th 519, 546.) Employment cases, on the other hand, typically involve monetary remedies except in rare cases.

C. HARRIS' POSITION THAT ONLY ECONOMIC DAMAGES ARE LIMITED IN A MIXED MOTIVE CASE IS NOT SUPPORTED BY AUTHORITY

Harris argues that in mixed-motives cases only economic damages should be lost — not emotional distress or punitive damages. (See Opening Brief at pp. 68-73.) But there is no such distinction in FEHA. The Legislature could have included language creating a dichotomy in the elements of proof for different kinds of damages, but it did not. There is no basis upon which to interpret the language of FEHA to create different standards of proof for different damages. Harris alternatively argues that her attorney deserves attorney's fees for litigating and losing a mixed-motive case. In addition to the point that the language of FEHA does not support such an interpretation, the argument cannot be reconciled with this Court's recent holding that attorney's fees bear a resemblance to the plaintiff's success/recovery. (*Chavez v. City of Los Angeles* (2010) 47 Cal. 4th 970, 989-91.)

Moreover, a fundamental problem in Harris's argument pertaining to damages is that an adverse employment action that is not taken "because of" discrimination is not an unlawful action under FEHA. If, for example,

emotional distress results from a termination results, a plaintiff is not entitled to compensation for it if the termination occurred for legitimate, nondiscriminatory reasons and was not "because of" discriminatory animus.

CONCLUSION

Prohibiting juries from deciding that an adverse employment action was justified by a legitimate reason, even if a contributing motive was impermissible discrimination, will have negative consequences on public sector employers who should be able to carry out their missions in the most efficient and effective way possible. If public employers are not free to release employees from probation when, for example, those employees do not demonstrate competent performance, then our public entities will be burdened with ineffective employees. Once such individuals pass probation, the public entity that must divert resources from its core missions, to terminate an ineffective employee who has been given a due process property right in employment. Thus, *amici* respectfully request that this Court hold that FEHA requires the plaintiff to prove discrimination under a "but for" standard. Further, *amici* respectfully request that this Court hold that juries should be instructed that an employer may not be found liable if legitimate, nondiscriminatory reasons would have produced the same decision, thereby rendering CACI 2500 an improper jury instruction and BAJI 12.26 the proper jury instruction in its place.

In the alternative, *amici* respectfully request, that if this Court characterizes the issue as one of an affirmative defense, then the City of Santa Monica should be entitled to a defense verdict if it proves by a preponderance of the evidence that it would have made the same decision for legitimate, nondiscriminatory reasons.

Dated: February 7, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.204(c) FOR CASE NO. S181004

This *amicus curiae* brief consists of 6,793 words as counted by the Microsoft Word word-processing program used to generate this brief.

Dated: February 7, 2011

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CERTIFICATE OF SERVICE

I, the undersigned, declare:

I am employed in the County of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action. My business address is 153 Townsend Street, Suite 520, San Francisco, California 94107.

On the date set forth below, I served the within:

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By placing a true copy thereof enclosed in a sealed envelope(s), addressed as above, and placing each for collection by overnight mail service or overnight courier service. I am readily familiar with my firm's business practice of collection and processing of correspondence for overnight mail or overnight courier service, and any correspondence placed for collection for overnight delivery would, in the ordinary course of business, be delivered to an authorized courier or driver authorized by the overnight mail carrier to receive documents, with delivery fees paid or provided for, that same day, for delivery on the following business day.

I declare under penalty of perjury that the foregoing is true and correct and of my personal knowledge.

Executed at San Francisco, California on February 7, 2011.

Vanessa Buffington