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MCLE Self-Study Credit:

The Mixed-Motive Defense: Mixed Blessings Following the California Supreme Court's Decision in *Harris v. City of Santa Monica*?

By Michael E. Whitaker and Andrew H. Friedman

In the typical workplace discrimination case, the employee claims that an adverse employment action, such as a termination, was motivated by the employee's protected characteristic; for example, because the employee is of a particular race, sex, age, or sexual orientation. The employer usually contends that the termination was based on legitimate business reasons, which the employee attempts to overcome by establishing that the articulated reasons are pretextual. Under this scenario, proving discrimination is an "either/or" proposition—either the termination was discriminatory or it was not.

But what happens when the adverse employment action could have been taken for both discriminatory and non-discriminatory reasons? In such a case, the employee presents evidence that the adverse action was tainted by a discriminatory motive; for example, the decision maker was heard to have said that she wanted to fire the employee because of the employee's race. Notwithstanding the adverse evidence, the employer contends it would have made the decision to discharge the employee because of poor performance even absent the decision maker's racial animus. In these so-called "mixed-motive" cases, where there is no single "real" reason for the adverse employment action, the causation standard had been unclear for many years. Into the late 1980s, there was no consensus among the federal and state courts that the "mixed-motive" or "same-decision" defense applied to discrimination cases and, if so, whether a successful mixed-motive defense was a complete bar to liability or only a limitation of the remedies available to the employee. The viability of the defense therefore was in question until the United States Supreme Court put its imprint on the issue in 1989.

FEDERAL LAW: *PRICE WATERHOUSE* AND SUBSEQUENT LIMITATION OF THE MIXED-MOTIVE DEFENSE

The United States Supreme Court first adopted the mixed-motive defense for Title VII cases in *Price*

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Waterhouse v. Hopkins.[1] Ann Hopkins was a senior manager for Price Waterhouse who was up for partnership. Instead of granting or denying her partnership, the firm initially decided to delay her candidacy for one year. Shortly thereafter, the firm decided not to reconsider her candidacy after she lost support among some of the partners. Hopkins later resigned.[2]

Hopkins filed suit under Title VII claiming sex discrimination. Both the district court and the appellate court held in her favor on the question of liability.[3] The evidence showed that Hopkins had poor interpersonal skills, especially among staff members, which destroyed her candidacy. However, the evidence also demonstrated that some of the partners reacted to Hopkins negatively because of her gender. For example, one partner commented that Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[4]

In adopting the mixed-motive defense,[5] a plurality of the Court held:

> The central point is this: while an employer may not take gender into account in making an employment decision (except in those very narrow circumstances in which gender is a BFOQ), it is free to decide against a woman for other reasons. We think these principles require that, once a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role.[6] This balance of burdens is the direct result of Title VII's balance of rights.[7]

Two years after *Price Waterhouse*, Congress amended Title VII through the Civil Rights Act of 1991, in direct response to the Supreme Court's interpretation that Title VII included a complete mixed-motive defense to liability. First, as amended, Title VII now provides that an "unlawful employment practice" is established by an employee showing that a protected characteristic, such as gender, was "a motivating factor" for the practice, although other factors also may have contributed to the practice.[8] Second, Congress affirmed the *Price Waterhouse* holding that the mixed-motive defense is an affirmative defense for which the employer bears the burden of production and persuasion.[9] Third, Congress limited the effect of a mixed-motive defense. If successful, an employer would not be absolved of liability, but the employee's available remedies would be limited.[10]

Over a decade later, the Supreme Court, in *Desert Palace, Inc. v. Costa*, held that direct evidence of discrimination is not required under Title VII before a jury may be instructed on a mixed-motive defense.[11]

Then, in *Gross v. FBL Financial Servs., Inc.*, the Supreme Court held that the mixed-motive defense was not applicable to Age Discrimination in Employment Act [ADEA] claims.[12] The high court based its decision on the ADEA's statutory language, which states that it is unlawful for an employer to take an adverse employment action "because of such individual's age."[13]

Following the Civil Rights Act of 1991 and the Supreme Court's decision in *Costa*, the Ninth Circuit considered the application of the mixed-motive defense in the summary judgment context.[14] In approving the application of the defense to Title VII cases, the circuit court nevertheless stated that the mixed-motive defense precludes summary judgment for the employer because the defense necessarily demonstrates that the employee has established that an adverse employment action was motivated in part by a protected characteristic. Thus, when the mixed-motive defense is successfully established at the summary judgment stage, a triable issue of material fact has been raised that compels a trial.[15]

Similarly, the Ninth Circuit has considered whether the mixed-motive defense applies to claims under 42 U.S.C. § 1981.[16] Upon considering the pre- and post-*Price Waterhouse* Ninth Circuit opinions and the Civil Rights Act of 1991, the court concluded that a "defendant cannot raise a mixed-motive defense to liability for discrimination claims brought under § 1981. The mixed-motive defense, even if proven as an undisputed fact, does not provide a basis for summary judgment in a § 1981 discrimination case."[17]

CALIFORNIA LAW: "A MOTIVATING FACTOR"

Some California state courts and the California state agency formerly responsible for administrative adjudication of Fair Employment and Housing Act (FEHA) claims—the Fair Employment and Housing Commission (FEHC)[18]—interpreted the FEHA to require only that an employee prove "a causal connection" between his or her protected status and the employer's adverse employment action:

> While a complainant need not prove that [discriminatory] animus was the sole motivation behind a challenged action, he must prove by a preponderance of the evidence that there was a "causal connection" between the employee's protected status and the adverse employment decision.[19]

Under this "causal connection" standard, an employee needs only to establish that his or her protected characteristic was "a motivating" factor[20] for the adverse employment action.[21]

In 1996, however, the Sixth District Court of Appeal became the first appellate court to recognize the mixed-motive defense in FEHA civil litigation:[22]

> 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. The plaintiff in a mixed motives case must demonstrate 'direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion.' In other words, 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.'[23]

Subsequently, in *Reeves v. Safeway Stores, Inc.*, the Sixth District Court of Appeal advocated for the displacement of the "pretext" burden-shifting framework in favor of the mixed-motive defense.[24] The mixed-motive defense "has the virtue of a more direct and logical method for the assessment of conflicting proofs of motive than has developed under what Judge [Richard] Posner calls the 'the *McDonnell Douglas* quadrille.'"[25]

HARRIS v. CITY OF SANTA MONICA: ADOPTING THE SUBSTANTIAL FACTOR STANDARD AND MIXED-MOTIVE DEFENSE IN FEHA DISCRIMINATION CASES

In *Harris v. City of Santa Monica*,[26] the Second District Court of Appeal reversed a jury verdict in favor of an employee who alleged pregnancy discrimination, holding that the trial court erred in not instructing the jury with the mixed-motive defense.

Wynona Harris was a probationary part-time bus driver with Santa Monica's city-owned bus service. On her first written performance evaluation, her supervisor had given her the rating "further development needed." However, Harris alleged that her supervisor had told her that, except for one minor accident, she was doing a good job and he would have graded her as "demonstrates quality performance," but for the accident. Underscoring Harris's claim, her supervisor wrote "Keep up the Great Job!" on the evaluation. Shortly thereafter, Harris informed her supervisor that she was pregnant. Harris testified that he reacted with seeming displeasure at her news, responding, "Wow. Well, what are you going to do? How far along are you?" He also asked Harris for a doctor's note, even though the city did not have a formal written policy of requesting a doctor's clearance for a pregnant employee to continue working. The morning Harris gave her supervisor a doctor's note, he attended a supervisors' meeting and received a list of probationary drivers who were not meeting standards for continued employment. Harris was on the list. The city then fired Harris and she sued for pregnancy discrimination.

At trial, the city asked the court to instruct the jury with BAJI No. 12.26, which includes a mixed-motive defense. The court refused to give the requested instruction, apparently because CACI does not provide a mixed-motive jury instruction. By special verdict, the jury found that Harris's pregnancy was a motivating factor 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, arguing, 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 the motions.

On appeal, the Second District Court of Appeal, acknowledging that the drafters of the CACI jury instructions intentionally omitted a mixed-motive instruction, nonetheless held that it was instructional error for the trial court not to give a mixed-motive instruction. Accordingly, the court of appeal reversed and remanded for retrial.[27]

The California Supreme Court granted Harris's petition for review and a unanimous court, led by Justice Goodwin Liu, pronounced its decision in February 2013, thereby changing the landscape of discrimination cases under the FEHA.[28]

The supreme court, in concluding that the court of appeal was partly correct, held that under the FEHA "when a plaintiff has shown by a preponderance of the evidence that discrimination was a substantial factor motivating his or her termination, the employer is entitled to demonstrate [by a preponderance of the evidence][29] that legitimate, nondiscriminatory reasons would have led it to make the same decision at the time."[30] "To be clear, when we refer to a same-decision showing, we mean proof that the employer, in the absence of any discrimination, **would have made the same decision *at the time it made its actual decision***."[31] For the first time, the supreme court pronounced that the mixed-motive or same-decision defense is applicable in discrimination cases under the FEHA.

In adopting the mixed-motive defense, the court began by addressing the issue of causation:

> [California Gov't Code] section 12940(a) prohibits an employer from taking an employment action against a person "because of" the person's race, sex, disability, sexual orientation, or other protected characteristic. The phrase "because of" means there must be a causal link between the employer's consideration of a protected

> characteristic and the action taken by the employer. The existence of this causation requirement in the statute is undisputed. What is disputed is the kind or degree of causation required.[32]

The court explained that there were multiple possible interpretations of the phrase "because of." First, as urged by the city, a protected characteristic could be a "but for" cause of the adverse employment action. In other words, the employer would not have taken the action "but for" the protected characteristic. Second, the phrase could mean that a protected characteristic is simply a motivating factor for the action, even if other reasons were considered in taking the action. Harris advocated for the "motivating factor" standard, as some California courts and the FEHC had interpreted causation under the FEHA, as previously discussed.[33]

In determining what the phrase "because of" means in FEHA, the supreme court did not find its legislative history revealing, nor did it find federal authorities pre- and post-*Price Waterhouse* illuminating.[34] Instead, the court relied in part on its own precedent, in which it held the phrase "because of" in other statutes includes a substantial factor standard.[35] The court was swayed by Justice O'Connor's concurring opinion in *Price Waterhouse*, in which she stated that "the plaintiff must produce evidence sufficient to show that an illegitimate criterion was a *substantial factor* in the particular employment decision."[36] The court reasoned that "requiring the plaintiff to show that discrimination was a *substantial* motivating factor, rather than simply a motivating factor, more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision."[37]

MIXED BLESSINGS FROM *HARRIS*?

The supreme court's decision in *Harris* is a mixed blessing for both employees and employers. Following are some issues that may arise as the mixed-motive defense is applied in future FEHA litigation.

First, in adopting the mixed-motive defense and the "substantial factor" causation standard, the supreme court declined to define the term "substantial factor": "[W]e refrain from opining in the abstract on what evidence might be sufficient to show that discrimination was a substantial factor motivating a particular employment decision."[38] Similarly, the court omitted any discussion of CACI No. 430, which defines "substantial factor."[39] By declining to provide meaningful guidance, the court readily subjects the phrase to conflicting interpretations by courts of appeal as well as uneven application in the trial courts. It remains to be seen whether the heightened causation standard will be an actual impediment to proving discrimination claims under FEHA. What seems likely is that the "substantial factor" standard will be just as elusive as the "motivating reason" standard.

Second, the supreme court rejected the city's position that a successful application of the mixed-motive defense should bar liability in a discrimination case.[40] The court specifically held that when an employee establishes that a protected characteristic was a substantial factor in an adverse employment action, but the employer establishes it would have made the same decision anyway, the employee is not entitled to damages, economic or non-economic.[41] However, the court noted that establishment of the mixed-motive defense does not preclude monetary damages for claims grounded in tort, such as intentional infliction of emotional distress, or for harassment claims under FEHA.[42] The court's ruling on the remedies available in a successful mixed-motive case ensures that employees will assert tort claims and other theories of liability as a matter of course.[43] By not doing so, they run the risk of being left without a compensable claim even if discrimination is established.

On the other hand, to advance FEHA's purposes to redress the adverse effects of, and to prevent and deter, unlawful employment practices,[44] an employer found to have made an adverse employment action substantially motivated by discrimination may be subjected to: (1) a judicial declaration of wrongdoing; (2) an injunction to prevent or stop discrimination; and (3) an adverse award for attorneys' fees and costs.[45] Employers, as well as their counsel, know that awards for fees and costs can be significant.[46] Thus, these remedies have the potential to expose employers to unfavorable financial consequences.

Third, employers must affirmatively plead the mixed-motive defense when responding to complaints.[47] Failure to do so may result in a waiver.[48] An employer may pursue a legitimate non-discriminatory reason defense and a mixed-motive defense simultaneously.[49] If the legitimate reason defense fails, then the employer can fall back on the mixed-motive defense. Because of the benefits that flow from a successful mixed-motive defense, employees should expect to see the defense asserted in most, if not all, discrimination cases under FEHA.

When an employer raises a mixed-motive defense, all parties must ensure that the CACI or BAJI jury instructions are modified to accurately reflect the supreme court's holding in *Harris*, which may be easier said than done. Parties may have legitimately different opinions on how to implement the court's decision in the crafting of jury instructions and special verdict forms. Even so, parties may agree that BAJI No. 12.26's first paragraph could be modified to read as follows:

> If you find Plaintiff's *[protected characteristic, e.g.*

gender] was a [substantial] factor in Defendant's decision to *[adverse employment action, e.g., terminate]* Plaintiff, then you must determine whether Defendant proved by a preponderance of the evidence it would have made the same decision at the time it made its actual decision even if Defendant had not considered Plaintiff's *[protected characteristic]*.

In *Harris*, the California Supreme Court undoubtedly changed the landscape for FEHA discrimination cases. For all of the issues *Harris* resolved, the court posits more for litigants to wrangle over, and for courts to ponder, in the coming years. Will the substantial factor standard of causation and mixed-motive defense apply to FEHA retaliation claims? Will the California Legislature, as Congress did following *Price Waterhouse*, intervene and amend FEHA to either restore "a motivating factor" standard of causation or codify the mixed-motive defense? How will the courts handle the inevitable argument by employers that CACI No. 2430 (wrongful discharge/demotion in violation of public policy)[50] must be revised to change the third element from "a motivating reason" to "substantial factor"? These issues, about which both employers and employees will have much to say, will inevitably arise as a result of *Harris*.

ENDNOTES

1. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).
2. *Id.* at 231-32, n.1.
3. *Id.* at 231-32.
4. *Id.* at 235.
5. The Supreme Court opined that the mixed-motive defense did not encompass a burden-shifting analysis similar to the "pretext" burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981). "Since we hold that the plaintiff retains the burden of persuasion on the issue whether gender played a part in the employment decision, the situation before us is not the one of 'shifting burdens' that we addressed in *Burdine*. Instead, the employer's burden is most appropriately deemed an affirmative defense: the plaintiff must persuade the factfinder on one point, and then the employer, if it wishes to prevail, must persuade it on another." *Price Waterhouse*, 490 U.S. at 246 (citation omitted).
6. The Supreme Court determined that a defendant-employer must make the showing by a preponderance of the evidence, rejecting the lower court's determination that the defendant-employer makes the requisite showing by clear and convincing evidence. *Price Waterhouse*, 490 U.S. at 252-53.
7. *Id.* at 244-45.
8. 42 U.S.C. § 2000e-2(m).
9. 42 U.S.C. § 2000e-5(g)(2)(B).
10. *Id.* (precludes court from awarding monetary damages, including back pay, front pay, compensatory damages, and punitive damages, or ordering instatement, reinstatement, or promotion, but allows court to hold employer liable for attorneys' fees and to grant declaratory relief and prohibit future retaliation or discrimination).
11. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). *Desert Palace* was the high court's first opportunity to construe the 1991 amendments to Title VII, which upended the mixed-motive defense adopted in *Price Waterhouse*.
12. 557 U.S. 167, 180 (2009).
13. *Id.* at 175-76; *see also* 29 U.S.C. § 623(a)(1) ("It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age").
14. *Dominguez-Curry v. Nevada Transp. Dept.*, 424 F.3d 1027 (9th Cir. 2005).
15. *Id.* at 1041-42.
16. *Metoyer v. Chassman*, 504 F.3d 919, 934 (9th Cir. 2007).
17. But the circuit court did hold that the mixed-motive defense applied to retaliation claims brought under § 1981 because the defense is available in a Title VII retaliation claim as to liability. *Id.* at 934.
18. Federal and state courts have held that decisions of the FEHC should be accorded great deference. *See Rodriguez v. Airborne Express*, 265 F.3d 890, 898 (9th Cir. 2001) ("We accord great respect to the Commission's interpretation of its authority and will follow it unless it is clearly erroneous."); *Reno v. Baird*, 18 Cal. 4th 640, 660 (1998) ("We assign great weight to the interpretations an administrative agency like the FEHC gives to the statutes under which it operates.").
19. *Mixon v. Fair Emp't & Hous. Comm'n*, 192 Cal. App. 3d 1306, 1319 (1987); *see also Clark v. Claremont Univ. Ctr. Graduate Sch.*, 6 Cal. App. 4th 639, 665 (1992) (employee need not show he would have been rejected or discharged solely on basis of his race, without regard to alleged deficiencies).
20. *See Guz v. Bechtel Nat'l, Inc.*, 24 Cal. 4th 317, 358 (2000) (rejecting employer's argument that reduction-in-force standing alone was sufficient non-discriminatory reason for termination, court opined that "[i]nvocation of a right to downsize does not resolve whether the employer had *a discriminatory motive* for cutting back its work force, or engaged in intentional discrimination when deciding which individual workers to retain and release" and stated that in FEHA discrimination cases, "the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*") (emphasis added); *Green v. Laibco, LLC*, 192 Cal. App. 4th 441, 443 (2011) (concluding that "there was substantial evidence supporting the jury's finding that plaintiff's

complaint of sexual harassment of a colleague was a motivating reason for her discharge"); *West v. Bechtel Corp.*, 96 Cal. App. 4th 966, 978 (2002) (noting that "[a] discharge is not 'on the ground of age' within the meaning of [FEHA's] prohibition unless age is a 'motivating factor' in the decision"); *Caldwell v. Paramount Unified Sch. Dist.*, 41 Cal. App. 4th 189, 205 (1995) (stating that once a FEHA discrimination case is submitted to the trier of fact, it "will have only to decide the ultimate issue of whether the employer's discriminatory intent was a motivating factor in the adverse employment decision").

21. The "motivating reason" causation standard has not been applied or adopted uniformly by California courts in FEHA cases. The California Supreme Court, as well as courts of appeal, have previously adopted a "but for" causation standard based on the statutory language in FEHA. For example, in *Lyle v. Warner Bros. Television Prods.*, 38 Cal. 4th 264 (2006), the California Supreme Court noted that in a FEHA sex harassment case, "'To plead a cause of action for [hostile work environment] sexual harassment, it is 'only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff "had been a man, she would not have been treated in the same manner."' [Citation.] Accordingly, it is the disparate treatment of an employee on the basis of sex—not the mere discussion of sex or use of vulgar language—that is the essence of a sexual harassment claim." *Id.* at 280 (citations omitted); *see also Reeves v. Safeway Stores, Inc.*, 121 Cal. App. 4th 95, 100 (2004) ("We hold that so long as the supervisor's retaliatory motive was an actuating, but-for cause of the dismissal, the employer may be liable for retaliatory discharge"); *Ewing v. Gill Indus., Inc.*, 3 Cal. App. 4th 601, 609 (1992) (appellate court upheld jury instruction that "plaintiff has the burden of proving that plaintiff's age was a determining factor in defendant's decision to terminate plaintiff's employment").
22. *Heard v. Lockheed Missiles & Space Co.*, 44 Cal. App. 4th 1735 (1996). However, the court of appeal's discussion of the mixed-motive defense is dicta. The court's analysis of the underlying jury verdict centered on the "pretext" burden-shifting framework first expounded in *McDonnell Douglas*. Under the "pretext" framework, "first, it is the plaintiff's burden to prove by a preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff proves the prima facie case, then the burden shifts to the defendant to provide some legitimate nondiscriminatory reason for its employment decision. Third, if the defendant carries this burden, then the plaintiff must have an opportunity to show by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Heard*, 44 Cal. App. 4th at 1749-50 (citing in part *McDonnell Douglas*, 411 U.S. at 802-04). The Second District Court of Appeal later cited to *Heard* and discussed with approval the mixed-motive defense. *See Grant-Burton v. Covenant Care, Inc.*, 99 Cal. App. 4th 1361, 1379 (2002).
23. *Heard*, 44 Cal. App. 4th at 1748-49 (citation omitted).
24. *Reeves v. Safeway Stores, Inc.*, 121 Cal. App. 4th 95 (2004).
25. *Id.* at 111, n.11 (citing *Shager v. Upjohn Co.*, 913 F.3d 398, 401 (7th Cir. 1990)).
26. 181 Cal. App. 4th 1094 (2010), *aff'd in part*, 56 Cal. 4th 203 (2013).
27. Similarly, in *Alamo v. Practice Mgmt. Info. Corp.*, 210 Cal. App. 4th 95 (2012), *rev. granted*, 2013 Cal. LEXIS 549, 2013 WL 260539 (2013), the defendant argued that the trial court erred by instructing the jury that the plaintiff had to prove her pregnancy-related leave was "a motivating reason" for her discharge, as opposed to applying a "but for" causation standard. The defendant also argued that the trial court erred in failing to instruct the jury on the mixed-motive defense set forth in BAJI 12.26. The court of appeal affirmed the judgment, but the California Supreme Court granted review pending its decision in *Harris*.
28. *Harris v. City of Santa Monica*, 56 Cal. 4th 203 (2013).
29. The supreme court rejected the plaintiff's argument that the defendant-employer must establish a mixed-motive defense by "clear and convincing evidence." *Id.* at 238-39.
30. *Id.* at 224.
31. *Id.* (emphasis in original & added).
32. *Id.* at 215.
33. *See* note 18, *infra*.
34. *Harris*, 56 Cal. 4th at 221.
35. *Id.* at 216-17.
36. *Id.* at 232 (citing *Price Waterhouse*, 490 U.S. at 278 (O'Connor, J., concurring)).
37. *Id.* at 225.
38. *Id.* at 232.
39. "A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm." Judicial Council of California Civil Jury Instruction 430.
40. *Harris*, 56 Cal. 4th at 224-25.
41. *Id.* at 233.
42. *Id.* at 234.
43. Of course, the California Supreme Court has previously suggested that "a responsible attorney handling an employment discrimination case must plead a variety of statutory, tort and contract causes of action in order to fully protect the interests of his or her client." *Rojo v. Kliger*, 52 Cal. 3d 65, 74 (1990) (quoting *Brown v. Superior Court* 37 Cal. 3d 477, 486 (1984)).
44. *Harris*, 56 Cal. 4th at 230.
45. *Id.* at 234.
46. "A plaintiff subject to an adverse employment decision in which discrimination was a substantial

motivating factor may be eligible for reasonable attorney's fees and costs expended for the purpose of redressing, preventing, or deterring that discrimination." *Id.* at 235.

47. "If an employer wishes to assert the defense, it should plead that if it is found that its actions were motivated by both discriminatory and nondiscriminatory reasons, the nondiscriminatory reasons alone would have induced it to make the same decision." *Id.* at 240.
48. In *Harris*, the supreme court held that the city's failure to plead the defense was not fatal because the plaintiff's substantial rights were not affected; she had notice that the city intended to argue that it did not engage in unlawful discrimination. *Id.*
49. "But there is no inconsistency when an employer argues that its motive for discharging an employee was legitimate, while also arguing, contingently, that if the trier of fact finds a mixture of lawful and unlawful motives, then its lawful motive alone would have led to the discharge." *Id.*
50. "That [*insert alleged violation of public policy, e.g.*, "[*name of plaintiff*]'*s refusal to engage in price fixing*"] was a motivating reason for [*name of plaintiff*]'s [discharge/demotion]." Judicial Council of California Civil Jury Instruction 2430.

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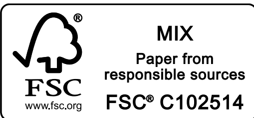

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