No. S181004

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

WYNONA HARRIS,
Plaintiff and Respondent,

vs.

CITY OF SANTA MONICA,
Defendant and Appellant.

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

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TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES vi

INTRODUCTION 1

ISSUES PRESENTED 5

SUMMARY OF FACTS AND PROCEDURAL HISTORY 6

A. Harris worked as a driver for the City's Big Blue Bus 6

B. Eleven weeks after her positive performance evaluation, and within two weeks after Harris told her manager she was pregnant, the City terminates Harris 8

C. The City's alleged performance-based reasons for terminating Harris were a pretext to mask pregnancy animus 9

1. The City changed its articulated basis for terminating Harris several times 9

2. The City failed to establish an actual "practice, protocol or policy" for Reynoso's requesting Harris to provide a doctor's note 10

3. The April 27 miss-out would have been excused under the City's own practice 12

D. The City consistently denied that Harris' pregnancy was a motivating reason in her termination, claiming she was fired for unsatisfactory performance 13

E. The jury trial, the jury's verdict and post-trial motions 15

F. The Appellate Court's Opinion, grant of re-hearing and re-issuance of its published Opinion 15

TABLE OF CONTENTS (cont.)

ARGUMENT 16

I. THE MIXED-MOTIVE DEFENSE HAS NO APPLICATION TO FEHA DISCRIMINATION AND RETALIATION CLAIMS 16

A. The mixed-motive defense arose as a matter of federal common law and later was legislatively-fixed 16

B. The mixed-motive defense is inconsistent with the FEHA's text and the core policies behind the FEHA 18

1. Unlike Title VII, nothing in the FEHA's text provides for, or supports, the creation of a mixed-motive defense 18

2. 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 such a defense 20

3. Title VII's mixed-motive defense is inconsistent with key FEHA policies as well as the FEHA's overall structure 22

a. Besides demanding liberal construction, and aggressive prevention of discrimination, the FEHA is much more remedy-focused than is Title VII 24

b. The FEHA's statutory reach is broader than Title VII's in many other respects - each of which confirms the Legislature's desire for greater employee protection under FEHA than exists under Title VII 30

4. Dicta in prior appellate decisions cannot justify creating this non-statutory defense, nor can the fact that the BAJI drafters prophylactically provided a form instruction for the defense 32

TABLE OF CONTENTS (cont.)

II. ANY ADOPTION OF A MIXED-MOTIVE DEFENSE MUST LIMIT THE DEFENSE TO TRUE MIXED-MOTIVE CASES, AND REQUIRE CLEAR AND CONVINCING PROOF 36

A. The "Use Note" of the BAJI jury instruction the City sought confirms that the instruction does not apply to our "pretext" case 36

B. A mixed-motive instruction is not automatically required in every FEHA discrimination or retaliation case 37

1. The instruction's text 37

2. Any mixed-motive defense should only apply if the employer acknowledges that it actually harbored mixed-motives 39

a. The defense can only be created as a matter of equity, and equity supports requiring this condition for asserting the defense 39

b. In other contexts, the law requires a party to make a similar election 42

c. This approach is consistent with the BAJI "Use Notes," will simplify mixed-motive cases, and allow for a logical presentation of it to the trier of fact 44

C. Compelling policy dictates that an employer is required to offer "clear and convincing" evidence to establish any mixed-motive defense 46

1. The standard of proof is a judicial determination based on the weighing of policy considerations 46

2. The pertinent policy considerations dictate a higher standard of proof than mere preponderance 47

TABLE OF CONTENTS (cont.)

a. The employer whose proven discrimination created the need for this difficult-to-assess same-decision question should bear the risk of error – especially considering the important FEHA rights at stake 47

b. The fact that the defense requires evaluating the employer's state of mind supports imposing a higher standard of proof 48

c. The FEHC has adopted the clear and convincing standard, which is entitled to "great weight" 50

III. IF THIS COURT ADOPTS A MIXED-MOTIVE DEFENSE, FEDERAL PREEMPTION PRECLUDES CALIFORNIA FROM ADOPTING A STATE LAW VERSION THEREOF WHICH PERMITS THAT WHICH TITLE VII PROHIBITS. MOREOVER, CALIFORNIA PUBLIC POLICY COMPELS ADOPTION OF A DEFENSE EVEN NARROWER THAN TITLE VII'S 51

A. A complete defense to FEHA liability would create an indefensible anomaly forbidden by Title VII's preemption clause 51

1. Mixed-motive as a complete liability defense under the FEHA would "permit" an employer to engage in conduct prohibited under Title VII 52

2. Title VII expressly preempts any state law which "permits" conduct which Title VII prohibits 54

B. A complete liability defense is inconsistent with the FEHA's statutory scheme, encourages discrimination and conflicts with the FEHA's policies of deterrence, effective remedies and liberal construction 60

TABLE OF CONTENTS (cont.)

C. Any mixed-motive defense should limit only economic damages flowing exclusively from the challenged adverse action (and any reinstatement) 64

1. Because our Legislature strongly favored monetary damages over non-monetary relief (in contrast to Title VII's longstanding preference for non-monetary relief), any FEHA mixed-motive defense should not limit all monetary relief 64

2. Both logic and compelling policy considerations justify limiting the effect of any mixed-motive defense to only bar those economic damages actually caused by the challenged employment decision 68

IV. EVEN IF THIS COURT WERE TO RECOGNIZE A MIXED-MOTIVE DEFENSE TO FEHA CLAIMS, THE JURY'S VERDICT MUST STILL BE AFFIRMED OR, AT MOST, ONLY A LIMITED RE-TRIAL GRANTED 74

A. Mixed-motive is an affirmative defense ("new matter") which must be pled in the answer or is waived 74

B. The City's proposed mixed-motive jury instruction misstated the law and, thus, the trial court acted within its discretion in denying it 78

C. Even if this Court were to conclude that the City's failure to plead its mixed-motive defense did not waive the defense, any re-trial should be limited only to those issues necessarily remaining to be decided on the defense . 79

CONCLUSION 82

CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.520 83

TABLE OF AUTHORITIES

California State Cases ***Page(s)***

Armendariz v. Foundation Health Psychcare Services, Inc.
(2000) 24 Cal.4th 83 67

Arteaga v. Brinks Incorporated
(2008) 163 Cal.App.4th 327 . . . . . 37 n. 17

Brewer v. Second Baptist Church
(1948) 32 Cal.2d 791 80

Cahill Bros., Inc. v. Clementina Co.
(1962) 208 Cal.App.2d 367 76-77

Caldwell v. Paramount Unified School District
(1995) 41 Cal.App.4th 189 26

Century Surety Co. v. Polisso
(2006) 139 Cal.App.4th 922 78

Commodore Home Systems
(1982) 32 Cal.3d 211 . . . . . *passim*

Colmenares v. Braemar Country Club
(2003) 29 Cal.4th 1019 50

Curran v. Mount Diablo Council of the Boy Scouts
(1998) 17 Cal.4th 670 . . . . . 71 n. 25

DeGarmo v. Goldman
(1942) 19 Cal.2d 755 40

Dickson, Carlson & Campillo v. Pole
(2000) 83 Cal.App.4th 436 . . . . . 39, 40

In re Marriage of Ettefagh
(2007) 150 Cal.App.4th 1578 47

TABLE OF AUTHORITIES (cont.)

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Fibreboard Paper Products Corp. v. East Bay Union of Machinists
(1964) 227 Cal.App.2d 675 . . . . . 78, 79

Fisher v. San Pedro Peninsula Hospital
(1989) 214 Cal.App.3d 590 23

Flannery v. Prentice
(2001) 26 Cal.4th 572 . . . . . 70 n. 24

Fogarty v. Superior Court
(1981) 117 Cal.App.3d 316 20

Fuller v. Superior Court
(2001) 87 Cal.App.4th 299 43

Galland v. City of Clovis
(2001) 24 Cal.4th 1003 . . . . . 71 n. 25

Gay Law Students Assn. v. Pacific Tel. & Tel. Co.
(1979) 24 Cal.3d 458 . . . . . 71 n. 25

Gelfo v. Lockheed Martin Corp.
(2006) 140 Cal.App.4th 34 25-26

George v. California Unemployment Ins. Appeals Board
(2009) 179 Cal.App.4th 1475 71

Grant-Burton v. Covenant Care, Inc.
(2002) 99 Cal.App.4th 1361 . . . . . 34 n. 17

Heard v. Lockheed Missiles & Space Co.
(1996) 44 Cal.App.4th 1735 . . . . . *passim*

Huffman v. Interstate Brands Companies
(2004) 121 Cal.App.4th 679 . . . . . 34 n. 17, 36

TABLE OF AUTHORITIES (cont.)

California State Cases ***Page(s)***

Hughes v. Nashua Mfg. Co.
(1968) 257 Cal.App.2d 778 . . . . . 74, 76

Johnson v. United Cerebral Palsy/Spastic Children's Foundation of L.A.
(2009) 173 Cal.App.4th 740 49

Joyce v. Simi Valley Unified School Dist.
(2003) 110 Cal.App.4th 292 77

Kraus v. Trinity Management Services, Inc.
(2000) 23 Cal.4th 116 59

La Manna v. Stewart
(1975) 13 Cal.3d 413 80

Long Island University v. Spirt
(1983) 463 U.S. 1223 55

Mixon v. Fair Employment & Housing Commission
(1987) 192 Cal.App.3d 1306 26

Page v. Superior Court
(1995) 31 Cal.App.4th 1206 . . . . . 23, 64

Peatros v. Bank of America NT & SA
(2000) 22 Cal.4th 147 . . . . . 28, 59, 65

Peralta Community College District v. FEHC
(1990) 52 Cal.3d 40 70

In re Marriage of Peters
(1997) 52 Cal.App.4th 1487 46

Piercy v. Sabin
(1858) 10 Cal. 22 76

TABLE OF AUTHORITIES (cont.)

California State Cases	*Page(s)*
Reeves v. Safeway Stores, Inc. (2004) 121 Cal.App.4th 95	34 n. 17
Robinson v. Fair Employment & Housing Commission (1992) 2 Cal.4th 226	25, 61
Rojas v. Superior Court (2004) 33 Cal.4th 407	20, 60
Rotary Club of Duarte v. Board of Directors (1986) 178 Cal.App.3d 1035	71 n. 25
Sanchez v. Unemployment Ins. Appeals Bd. (1977) 20 Cal.3d 55	49
Schelbauer v. Butler Manufacturing Co. (1984) 35 Cal.3d 442	81
Smith v. Fair Employment & Housing Com. (1996) 12 Cal.4th 1143	71
Soldberg v. Superior Court (1977) 19 Cal.3d 182	49
Soule v. General Motors Corp. (1994) 8 Cal.4th 548	37
State Department of Health Services v. Superior Court (2003) 31 Cal.4th 1026	*passim*
Torres v. Automobile Club of Southern California (1997) 15 Cal. 4th 771	81
Trujillo v. North County Transit Dist. (1998) 63 Cal.App.4th 280	50

TABLE OF AUTHORITIES (cont.)

California State Cases ***Page(s)***

Viva! Intern. Voice For Animals v. Adidas Promotional Retail Operations, Inc.
(2007) 41 Cal.4th 929 54

Walnut Creek Manor v. Fair Employment & Housing Com.
(1991) 54 Cal.3d 245 ..... 71 n. 25

Weiner v. Fleischman
(1991) 54 Cal.3d 476 ..... 46, 47

Conservatorship of Wendland
(2001) 26 Cal.4th 519 46

West v. Bechtel Corp.
(2002) 96 Cal.App.4th 966 26

Yanowitz v. L'Oreal USA, Inc.
(2005) 36 Cal.4th 1028 62

Non-California State Cases ***Page(s)***

Cutright v. Metropolitan Life Ins. Co.
(W. Va. 1997) 201 W.Va 50 ..... 56, 57

Federal Cases ***Page(s)***

Bibbs v. Block
(8th Cir. 1985) 778 F.2d 1318 ..... 17 n. 9

Boyd v. Providence Healthcare Co., Inc.
(S.D. Ala. 2005) 2005 WL 3132394, at *10 75

Brown v. City of Chicago
(N.D. Ill. 1998) 8 F.Supp. 1095 ..... 55, 58 n. 21

TABLE OF AUTHORITIES (cont.)

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(7th Cir. 2001) 239 F.3d 848 66

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(1998) 524 U.S. 742 . . . . . 68 n. 23

In re Buspirone Patent Litigation
(S.D. N.Y. 2002) 210 F.R.D. 43 43

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(D.C. Cir. 1976) 530 F.2d 1083 48

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(2003) 539 U.S. 90 19

Faragher v. City of Boca Raton
(1998) 524 U.S. 775 . . . . . 68, 68 n. 23

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(1999) 527 U.S. 526 . . . . . 29, 65

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(8th Cir. 2002) 284 F.3d 944 66

Lambert v. Travel Centers of America
(D. Colo. 2009) 2009 WL 3838780 75

Marshall v. Westinghouse Elec. Corp.
(11th Cir.,1978) 576 F.2d 588 77

Medlock v. Ortho Biotech, Inc.
(10th Cir. 1999) 164 F.3d 545 . . . . . 19 n. 10

O'Donnell v. LRP Publications, Inc.
(E.D. Pa. 2010) ___F.Supp.2d ___, 2010 WL 571849 . . . . . 77, 81

TABLE OF AUTHORITIES (cont.)

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(1989) 490 U.S. 282 ..... *passim*

Selgas v. American Airlines, Inc.
(1st Cir. 1997) 104 F.3d 9 29

Spirt v. Teachers Ins. and Annuity Association
(2nd Cir. 1982) 691 F.2d 1054 ..... 54, 57, 58

Taylor v. Brinker Intern. Inc.
(N.D. Tex. 2006) 2006 WL 453209 75

White v. Baxter Healthcare Corp.
(6th Cir. 2008) 533 F.3d 381 52

Wright v. Murray Guard, Inc.
(6th Cir. 2006) 455 F.3d 702 19

California State Statutes ***Page(s)***

Civil Code

§3294 72

§3294(a) 73

Code of Civil Procedure

§431.30(b)(2) 74

§437c(e) 49

Evidence Code

§115 46

TABLE OF AUTHORITIES (cont.)

California State Statutes ***Page(s)***

Government Code

§12920 ..... *passim*

§12920.5 ..... 28, 48, 61, 65

§12921 25

§12921(a) 24, 48

§12926(d) 31

§12926.1(a) 31

§12940 21

§12940(a) 20, 31

§12940(a)(1) 21

§12940(a)(5) 21

§12940(d) 21

§12940(f)(2) 21

§12940(h) 20

§12940(j) 24

§12940(j)(4)(A) 31

§12940(l) 21

§12940(m) 21

§12993(a) 24, 61

TABLE OF AUTHORITIES (cont.)

Non-California State Statutes	*Page(s)*
W. Va. Code §33-12A-3	56, 57

Federal Statutes	*Page(s)*
42 U.S.C. §1981a(b)	29
42 U.S.C. §1981a(b)(1)	72
42 U.S.C. §1981a(b)(3)	29, 29 n. 14, 65
42 U.S.C. §2000e-2	52
42 U.S.C. §2000e-7	55, 57
42 U.S.C. §2000e(b)	31
42 U.S.C. §2000e-2(m)	35 n. 18, 52, 53
42 U.S.C. §2000e-5(g)(1)	669
42 U.S.C. §2000e-5(g)(2)(B)	*passim*
42 U.S.C. §2000e-5(g)(2)(B)(I)	70
42 U.S.C. §2000e-5(g)(2)(B)(ii)	72

Administrative Decisional Authority	*Page(s)*
DFEH v. Carpenters Joint Apprenticeship & Training Committee Fund for Southern California (Cal. F.E.H.C. 1983) FEHC Dec. No. 83-19, 1983 WL 36468	27
DFEH v. Church's Fried Chicken, Inc. (Cal. F.E.H.C.) FEHC Dec. No. 90-11, 1990 WL 312878	*passim*

TABLE OF AUTHORITIES (cont.)

Administrative Decisional Authority (cont.) ***Page(s)***

DFEH v. Ev Jones, et al.
(Cal. F.E.H.C. 1999) FEHC Dec. No. 99-06, 1999 WL 55067 27

DFEH v. San Mateo County Sheriff's Office
(Cal. F.E.H.C. 1980) FEHC Dec. No. 80-28, 1980 WL 20901 27

DFEH v. Seaway Semiconductor, Inc.
(Cal. F.E.H.C.) FEHC Dec. No. 00-03, 2000 WL 33943383 27

Administrative Regulation Authority ***Page(s)***

2 Cal. Code Regs. §7285.1(b) 19

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Rule 2.1050 ..... 35 n. 19

Rule 2.1050(a) 35

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§7:150 ..... 23, 31

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§7:335 31

§10:356 68

TABLE OF AUTHORITIES (cont.)

Other Authority (cont.) ***Page(s)***

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INTRODUCTION

It is undeniable that a person cannot be a little bit pregnant. It is no more debatable that a company cannot be guilty of "only a little bit" of discrimination. Either you are discriminating or you are not, and the FEHA demands that any proven discrimination entitle the plaintiff to relief and subject the defendant to consequences. A mixed-motive defense – especially in the complete defense to liability form adopted by the appellate court – would turn these basic principles upside down.

Congress incorporated the mixed-motive defense, originally a creature of federal common law, into Title VII's statutory text. By striking contrast, the FEHA's statutory text recognizes no such defense. Our Legislature did adopt other enumerated statutory defenses, but chose not to adopt a mixed-motive defense. Thus, established principles of statutory construction preclude judicial creation of this non-statutory defense.

Moreover, by granting tacit approval of *some discrimination*, the mixed-motive defense is a direct affront to the FEHA's statutory mandate of aggressive prevention of discrimination. The defense also results in an unduly narrow construction of the FEHA's core prohibitions – contrary to the legislative mandate of liberal construction. Incorporating this Title VII defense into the FEHA also ignores the key fact that the FEHA is

intentionally broader than Title VII and, thus, Title VII defenses cannot be reflexively applied to the FEHA.

For these reasons, this Court should decline to adopt any form of mixed-motive defense.

But, assuming *arguendo* that this Court does adopt a mixed-motive defense, the appellate court's version cannot withstand scrutiny.

To begin with, because the statute's text does not support this defense, it can only be created as a judicial recognition of equitable principles. Consequently, this Court can, and should, impose equitable conditions on the right to assert the defense.

A maxim of equity is that "one who seeks equity must do equity" by recognizing and protecting the other party's transactionally-related rights. Consistent with this principle, this Court should require that an employer asserting the mixed-motive defense must acknowledge the very factual basis for the defense – that it actually operated under mixed-motives. This rule would ensure that the assertion of the defense protects (not defeats) the plaintiff's transactionally-related rights. It would also prevent an employer from inequitably engaging in inconsistent double-speak by first asserting that it did not operate under mixed-motives, but then (only after the trier of

fact disbelieves this assertion) invoking a defense the very factual basis of which is directly inconsistent with the employer's stated position.

This Court should also require clear and convincing proof to establish the defense.

The difficulty of proving (or disproving) what the employer would have done absent the discrimination is necessarily caused by the fact that the employer did discriminate. Had it not done so, there would be no need to engage in this hypothetical, retrospective analysis. Thus, fairness demands that the discriminating employer bear the risk of an erroneous decision.

Likewise, the fact that the defense requires the inherently difficult exercise of proving (or disproving) another's state of mind also justifies imposing a higher standard of proof.

Turning to the effect of a proven mixed-motive defense, the complete defense to liability approach adopted by the appellate court cannot stand. Such a defense would "permit" under the FEHA conduct prohibited by Title VII. The Supremacy Clause, and Title VII's express preemption statute, forbid this result. Thus, as a starting point, any FEHA mixed-motive defense cannot be less-protective than the federal analogue.

But recognizing a FEHA mixed-motive defense which merely parallels Title VII's is an unsupportable result. The FEHA is decidedly more employee-protective than is Title VII. Nowhere is this more clearly seen than in the comparison of the FEHA's provision of literally unlimited damages to Title VII's strict statutory ceiling on damages. These statutory distinctions, and other key FEHA policies, demand that any FEHA mixed-motive defense limit *fewer remedies* than does the Title VII counterpart.

Lastly, regardless of how this Court decides the issues above, the jury's verdict in this case must be affirmed.

The mixed-motive jury instruction the City offered does not apply in pretext cases. And, here, both sides framed this case as a pretext case.

The City also twice waived the right to assert the defense at trial. First, it waived the defense by not asserting it in its Answer. Second, it waived the defense by failing to propose a legally-correct and complete instruction. Either of these waivers requires affirming the jury's verdict.

Finally, if the Court disagrees with our waiver arguments, only a limited re-trial should be ordered. The jury's predicate liability and resulting damage findings must be kept intact and the re-trial limited solely to issues relating to the defense.

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. Harris worked as a driver for the City's Big Blue Bus.[1]

On October 4, 2004, Harris began working as a Motor Coach Operator (MCO, a bus driver) Trainee. (5RT 2165:14-2167:26; 1AA 156-157, 174.) Harris was one of five trainees (out of a class of ten) to successfully complete the training program. (3RT 415:13-16, 416:5-7, 417:10-25.) Near the beginning of her training, Harris was involved in a minor accident where the back door of her bus bumped the bumper of a van. (5RT 2178:27-2179:15.)

Notwithstanding this accident, on November 14, 2004, the City promoted Harris to MCO Part Time. (5RT 2180:10-2181:15, 19-21; 2407:8-26; 1AA 190.) In this position, Harris was a probationary, at-will employee for a period of one year. (3RT 415:17-416:1.)

On March 1, 2005, Sheila Terry (Harris' supervisor) conducted Harris' first and only performance evaluation. (5RT 2407:8-13, 2407:27-2408:9; 4RT 968:8-10.) Terry gave Harris only positive feedback on her work performance and wrote the following in Harris' written evaluation under "Work Habits/Reliability":

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[1] The Court of Appeal correctly held "there was substantial evidence to support the jury's verdict for Harris." (Opinion, 12.) The City did not seek review of this finding and, thus, no substantial evidence challenge is before this Court so we present an abbreviated factual summary.

> 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 [sic]) no miss out[2], no late reports, no running hot."

At the end of the report, Terry wrote: "Keep up the Great Job!" and Terry did believe Harris was doing a "great job."[3] (4RT 968:11-974:28; 5RT 2408:16-19; 1AA 195-198.)

Elsewhere on this same evaluation, Terry wrote: "Harris has demonstrated quality performance as set forth in the Operator manual under job requirements." (1AA 195.) Terry rated Harris' performance as the second highest rating out of four ("Further Development Needed"), and told Harris that the only reason she did not receive the highest rating was

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[2] A "miss-out" occurs when a driver does not "report to the Dispatch office, in person, ready for work, sixty (60) minutes, or more after the established sign on time." (1AA 183.) Harris incurred a "miss-out" on February 18, 2005; but, Terry did not even mention this during the March 1 performance evaluation meeting. (4RT 969:12-19; 972:21-24.)

[3] Every City employee who supervised Harris testified that Harris was a good employee, and they had no issues with her performance. (Johnson – 3RT 351:6-16; Ramirez – 3RT 416:2-22; Terry – 4RT 965:27-966:19.)

because Harris had an accident during training.[4] (1AA 198; 5RT 2409:9-15.)

B. Eleven weeks after her positive performance evaluation, and within two weeks after Harris told her manager she was pregnant, the City terminates Harris.

In early May 2005, George Reynoso (Harris' second-level supervisor) mentioned to Harris that her uniform shirttail was not tucked in. Harris replied that she had a "little situation," at which time Harris told Reynoso that she was expecting. Reynoso "did not seem too pleased" about the news and responded by saying: "Wow. How far along are you?" and "what are you going to do?" Reynoso then asked Harris to obtain a note from her doctor confirming that it was safe for Harris to drive a bus. (5RT 2424:5-2425:13.)

On or about May 12, 2005, Harris obtained the requested doctor's note, confirming that she had been under medical care for her pregnancy and verifying that she could safely drive for work. (5RT 2425:14-2426:28; 1AA 209.) On May 16, 2005, Harris gave the doctor's note to Reynoso while Reynoso was standing with Robert Ayer (the City's Transit Services Manager and Reynoso's direct supervisor). Ayer did not know if the City

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[4] After Harris' promotion, she had a second accident where she bumped a parked vehicle damaging its side-view mirror. (5RT 2409:27-2411:8.) Terry did not know the circumstances of this accident, nor did she discuss it during Harris' evaluation. (4RT 975:20-23; 5RT 2411:6-8.)

had decided to terminate Harris' employment at the time Harris gave the note to Reynoso. (5RT 2151:13-27.)

On May 18, 2005, two days after she provided the City with the doctor's note confirming that it was safe for her to drive a bus, Ayer fired Harris. Ayer gave no reason for Harris' termination. (5RT 2428:11-27, 2430:24-2431:18.)

C. The City's alleged performance-based reasons for terminating Harris were a pretext to mask pregnancy animus.

1. The City changed its articulated basis for terminating Harris several times.

Throughout pre-trial litigation, the City repeatedly asserted that it terminated Harris because she had accumulated fifty demerit points for two miss-outs in ninety days.[5] (5RT 2500:18-2505:10; 3RA 595-625; 1RA 161 - ¶ 18:8-11.) But, the City's original claimed reason found no support in its

[5] Harris' first miss-out occurred on February 18, 2005. Harris' second miss-out occurred on April 27, 2005 when – because of stress she was enduring dealing with her daughter's court appearance – she forgot to call her dispatcher, Marcella Johnson, as she had agreed to do. Ayer investigated the circumstances of this miss-out and concluded that it should remain in Harris' file. (Opinion, 3-4.) But Ayer never told Harris she was being considered for termination based on these miss-outs or any other performance-related reason. (5RT 1808:27-1809:3, 2418:26-2430, 2420:25-2424:4; 4RT1620:1-1626:19; 1AA 200, 205, 207.)

own policies. The City's policies did *not* state that a probationary employee is subject to termination for accumulating fifty points within ninety days.[6]

Thus, at trial, the City modified its supposed justification for terminating Harris. Now, the City claimed that Harris was terminated because of the two miss-outs, two preventable accidents and her evaluation rating of "further development needed." (5RT 2113:28-2114:12.) Even on appeal, the City changed its justification again, this time failing to assert that Harris' accidents played any role in the termination decision.[7] (Appellant's Opening Brief, 28.)

2. The City failed to establish an actual practice, protocol or policy justifying Reynoso's request that Harris provide a doctor's note.

To explain the demand that Harris supply a doctor's note regarding her pregnancy, the City claimed at trial that it had a practice since the

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[6] Harris showed that no such policy was written in the "Motor Coach Manual" (1AA 181-184), the "Guidelines For Job Performance Evaluation" (1AA 176-177), or the "Criteria for Probationary Termination." (1AA 179.) The City's employees acknowledged as much. (Ramirez - 3RT 422:25-423:9,423:21-427:3 427:6-27; Gonzalez - 4RT 1022:14-1024:27; Reynoso - 4RT 1534:9-1535:23, 1556:7-24, 1575:5-15, 1584:21-1586:20; Negriff - 6RT 2767:28-2768:9, 2769:4-17, 2772:7-2774:2; Terry – 4RT 964:8-965:26; Ayer - 5RT 1841:6-1843:17, 2130:8-26.)

[7] This change on appeal is not surprising given that Terry testified at trial that a probationary employee has to be involved in *four* preventable accidents to warrant termination. (4RT 990:20-991:3.)

1980's of "requiring" pregnant MCOs to provide such a doctor's note. However, the City's own witnesses belied this claim.

Reynoso testified at trial that he does not know of any protocol that required management to ask pregnant MCOs to provide such a doctor's note. (4RT 1531:14-20; 1AA 209.) At trial, during examination by Harris' counsel, Ayer confirmed both that he, too, was unaware of any such written guidelines and that he had never asked a pregnant MCO to provide him with a doctor's note. (5RT 1821:11-23.) When questioned by defense counsel, Ayer changed his testimony now stating that there was a "practice" to request a doctor's note from pregnant drivers. According to Ayer, this practice was for the safety of the driver and their passengers. (5RT 2114:23-2115:2.) But yet again, in response to re-cross examination by Harris' counsel, Ayer changed his testimony, confirming there was no "requirement" to provide a note, but more of a practice or procedure. Ayer further testified he would not call it a "great policy," and admitted that it is not one that he follows. (5RT 2135:28-2136:23.)

Jill Jones, the Assistant Director of Human Resources for the City, confirmed that the City did not regulate this supposed "practice" of requiring a doctor's note. (5RT 2518:22-2519:8.) When asked by a juror: "If the practice of requesting doctor's note from pregnant MCOs has been

in place since the late 80's, why has it never become a written policy?," Jones could not directly answer the juror's question. (5RT 2524:6-13.)

3. The April 27 miss-out would have been excused under the City's own practice.

The evidence at trial established that one of the claimed bases for termination – the April 27 miss-out – would have been excused had the City not terminated Harris after learning she was pregnant. City employees testified that miss-outs can be excused as long as there is a legitimate reason (including court appearances) if the absence can be corroborated with appropriate documentation. While Reynoso testified at trial that he had never excused a miss-out caused by an MCO's need to appear in court, he was impeached with his deposition where he admitted that if proof of a court appearance was provided, then the miss-out *would have been* removed. (4RT 1537:13-1539:25; 2RA 378-380.)

Likewise, at trial Manuel Gonzalez, another supervisor, tried to testify that if the note dated April 27, 2005 from Inglewood Juvenile Court was presented to him (1AA205), it would not give him cause to consider excusing Harris' April 27 miss-out. But, Gonzalez too was impeached with his deposition where he testified that the opposite was true – such

documentation would have given him cause to excuse the miss-out. (4RT 1030:2-1031:15; 2RA 429-434.)

And, finally, Marzella Johnson, the dispatcher who received Harris' telephone call from the Inglewood courthouse, testified that the note Harris obtained from court – if it had a "time stamp" – would have been sufficient to excuse a miss-out. (3RT 362:3-363:10; 1AA 205; 2RA 410-411.)

D. The City consistently denied that Harris' pregnancy was a motivating reason in her termination, claiming she was fired for unsatisfactory performance.

From the outset, the City framed the issue as a classic "pretext" case, not a mixed-motive case. The City did not plead mixed-motive as an affirmative defense in its Answer. (1AA 22-30.) Instead, it plead that Plaintiff's termination "was based on one or more legitimate, nondiscriminatory reasons. *Nor was the termination of plaintiff taken under pretext.*" (1AA 28) (italics added.)

Consistent with the City's treating this case as a non-mixed-motive case, its original set of jury instructions did not contain a mixed-motive instruction. (1AA 67-73.) Likewise, the City's initial proposed verdict form did not contain questions related to mixed-motive defense. (1AA 90-93.) The City submitted an offer of proof to demonstrate that it did not

discriminate against Harris at all – not alleging at all that it operated under mixed-motives. (1AA 117-123.)

The City's opening statement drove home this point: "[This trial] is not about pregnancy. It is about failing to meet probationary standards." (3RT 329:17:19.) Minutes later, counsel reiterated: ["Plaintiff's termination] was not because of her pregnancy but because she did not meet the probationary standards." (3RT 330:12-14.) Finally, defense counsel concluded her opening statement as follows: "So the evidence will show that this case is not about a cover-up, it's not about pregnancy, but it's about not meeting probationary standards." (3RT 339:3-5.)

Consistent with this denial that mixed-motives were at play, the City's interrogatory responses stated that "Plaintiff was terminated because she had a total of 50 points of demerit due to miss-outs" and its witnesses categorically disclaimed any reliance on Harris' pregnancy in deciding to terminate her. (5RT 2500:18-2505:10; 3RA 595-625.) Ayer, for example, testified that Harris' pregnancy "did not make any difference" to him when he made the recommendation to terminate Harris' employment. (5RT 2108:8-17.) Similarly, in pre-trial proceedings, Ayer had testified that his knowledge of Harris' pregnancy "had absolutely no influence on [his] decision to terminate" Harris. (1RA 161 - ¶ 18:8-11.)

E. The jury trial, the jury's verdict and post-trial motions.

On February 22, 2007, after a multi-week jury trial, the trial court instructed the jury. (1AA263-291; 6RT 3087-3100.) On February 27, 2007, the jury returned its verdict finding that Harris' pregnancy was a motivating reason in the City's termination of her, and awarding damages totaling $177,905.00. (2AA 292-293.) Judgment was entered pursuant to the jury's verdict. (2AA 298.)

Thereafter, the City moved for new trial and JNOV, which the trial court denied. (2AA 299-310; 2AA 339-363; 2AA 532.) Finally, Harris moved for attorney's fees as the prevailing party under the statute, and the trial court awarded such fees. (3AA 721-726.)

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

The City appealed and, on October 29, 2009, the appellate court issued an opinion reversing the jury's verdict. Harris sought rehearing, which the appellate court granted. Then, on February 4, 2010, the appellate court issued its opinion on re-hearing, again holding that the trial court erred by failing to instruct the jury on the mixed-motive defense, requiring a new trial.

ARGUMENT

I. THE MIXED-MOTIVE DEFENSE HAS NO APPLICATION TO FEHA DISCRIMINATION AND RETALIATION CLAIMS.

A. The mixed-motive defense arose as a matter of federal common law and later was legislatively-fixed.

The mixed-motive defense is now a creature of federal statutory law under Title VII of the Civil Rights Act of 1964. (42 USC §§ 2000e-2(m) & 2000e-(5)(g)(2)(B).) Its genesis was the United States Supreme Court's highly fractured opinion in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 282.[8] There, the employer denied partnership to a female employee based on seemingly legitimate considerations (lack of interpersonal skills); but inextricably tied to those considerations was 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 tied together), the plurality decision held that Title VII plaintiffs bear 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

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[8] *Price Waterhouse* consisted of a four justice plurality opinion, two individual concurrences, and a dissent signed by three justices.

decision even if it had not considered the impermissible considerations. (*Id.* at 258.)

The *Price Waterhouse* decision was harshly criticized, especially because it provided a complete liability defense despite the showing that the employer's decision-making was infected by discriminatory animus. The decision "severely undermines protections against intentional discrimination by allowing such discrimination to escape sanction completely under Title VII." (H.R. Rep. 102-40, *reprinted at* 1991 U.S.C.C.A.N. 694, 1991 WL 87020 (Leg. Hx.) at *18.)

Congress responded. It enacted the Civil Rights Act of 1991, amending Title VII to provide that the mixed-motive defense could only limit available remedies – not defeat liability. (42 U.S.C.§2000e-5(g)(2)(B).) Thus, even if the mixed-motive defense was proven by an employer, the plaintiff could still obtain declaratory and injunctive relief, attorneys' fees and costs.[9] (42 U.S.C.§2000e-5(g)(2)(B).)

[9] 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.

B. The mixed-motive defense is inconsistent with the FEHA's text and the core policies behind the FEHA.

The threshold question is whether the federally-created mixed-motive defense applies to FEHA claims. The appellate court's Opinion assumed that it does based on: (1) its assumption that federal authority should control the FEHA on this point (Opinion, 8-11); (2) the fact that BAJI contained a "mixed motive" jury instruction (Opinion, 7-9); and (3) the fact that some California appellate decisions have *assumed* in dicta that the defense would apply. (Opinion, 5 fn. 2 & 7.)

Below we demonstrate that neither the statute, nor the core policies behind the FEHA, support this result. We also show why the Opinion's reliance on the above factors is not persuasive.

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

In holding that California recognizes a mixed-motive defense, the appellate court's Opinion expressly relied on federal law. (Opinion, 5 fn. 2 and 8-11.) But this reliance on federal law was erroneous.

California courts are not bound by federal decisions which "interpret a federal statutory scheme not at issue" and Title VII precedent is entitled to "little weight" in construing the FEHA when the relevant statutory schemes

are different. (*State Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1040; *see also* 2 Cal. Code Regs. §7285.1(b) ["Except as required by the Supremacy Clause of the United States Constitution, federal laws and their interpretations regarding discrimination in employment ... are not determinative of the construction of these rules and regulations and the California statutes which they interpret and implement but, in the spirit of comity, shall be considered to the extent practical and appropriate."].)

The Civil Rights Act of 1991 added express statutory authorization for the mixed-motive defense to Title VII. (42 USC §§ 2000e-2(m)[10] & 2000e-(5)(g)(2)(B); *see Desert Palace, Inc. v. Costa* (2003) 539 U.S. 90, 102, O'Connor, J. concurring; *Wright v. Murray Guard, Inc.* (6th Cir. 2006) 455 F.3d 702, 711-12.) Thus, Title VII's very language makes a mixed-motive defense part of the statutorily-protected right.

Conversely, nothing in the FEHA's text creates (or supports) a mixed-motive defense. The FEHA's prohibitory provisions certainly do not. The provision prohibiting discrimination makes it an "unlawful employment practice" for an employer "to discriminate" against an

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[10] This section overruled *Price Waterhouse*'s holding that the employer could defeat 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.)

employee on the basis of enumerated protected characteristics (*e.g.*, age, race, gender, etc.). (Gov. Code §12940(a).) Similarly, the provision prohibiting retaliation makes it an "unlawful employment practice" for an employer "to discharge, expel or otherwise discriminate against any person" based on legally-protected activity. (Gov. Code §12940(h).)

Thus, unlike Title VII, there is simply no language within the FEHA that purports to adopt or establish a mixed-motive defense.

2. 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 such a defense.

Statutory construction principles recognize that the inclusion of enumerated statutory exceptions or defenses excludes, "by necessary implication," 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."]

[italics added].) This rule compels the rejection of a mixed-motive defense to FEHA claims.

The FEHA's text creates multiple express 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 in disability cases]; Gov. Code §12940(a)(5) [compelled by law defense in age cases]; Gov. Code §12940(d) [similar]; Gov. Code §12940(f)(2) ["job-related and consistent with business necessity" defense in certain disability cases]; Gov. Code §12940(l) [undue hardship may excuse failure to accommodate religious beliefs]; Gov. Code §12940(m) [undue hardship may excuse failure to accommodate employee with disability].)

This detailed statutory specification of numerous defenses demonstrates the pains the Legislature took to identify those affirmative defenses that are available in the FEHA – and, presumably, those which are not. Strikingly absent from this detailed list of recognized statutory defenses is any form of mixed-motive defense. Thus, the "*expressio unius*"

doctrine dictates that courts cannot create this non-statutory mixed-motive defense.[11]

3. Title VII's mixed-motive defense is inconsistent with key FEHA policies as well as the FEHA's overall structure.

The Opinion uncritically relied on the assumption that "California customarily looks to federal law when interpreting analogous state statutes."

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[11] Nothing in *State Department of Health Services* is inconsistent with this point. There, this Court held that the "avoidable consequences" defense is available in FEHA actions even though FEHA's language does not expressly recognize that defense. (*State Department of Health Services*, 31 Cal.4th 1026.) But there are two key distinctions between the nature of the mixed-motive defense and the "avoidable consequences" defense, which demonstrate why judicial recognition of an "avoidable consequences" defense does not undermine the application of "*expressio unius*" in the context of our FEHA setting (involving mixed-motives).

First, before applying the "avoidable consequences" defense to FEHA claims, this Court carefully satisfied itself that the doctrine "is consistent with the two main purposes of FEHA – compensation and deterrence." (*Id.* at 1044.) In contrast, as we show in section III(B) below, the appellate court's creation of a complete liability defense (based on mixed-motives) is wholly inconsistent with *both* of these core FEHA purposes.

Second, the "avoidable consequences" defense is a damage defense only - not a complete defense to liability. (*State Department of Health Services*, 31 Cal.4th at 1044-1045 ["This defense will allow the employer to escape liability for those damages, and only those damages, that the employee more likely than not could have prevented ....].) This distinction is critical because the statutory defenses enumerated within the FEHA's text are all complete liability defenses, not damage defenses. Thus, logically, under the FEHA, the doctrine of *expressio unius* applies with especial vigor to liability defenses.

(Opinion, 10.) The appellate court erred in two ways. First, it overlooked key differences in the statutory language of Title VII versus the FEHA. Second, it over looked the critical policy differences behind the two statutory schemes.

Reflexive reliance on Title VII precedent in FEHA cases leads down a dangerous path. This is because "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) (italics added.) Accordingly, "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," California courts regularly reject reliance on Title VII authority. (*Page v. Superior Court* (1995) 31 Cal.App.4th 1206, 1216; *Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 606.)

Here, reliance on Title VII – especially *Price Waterhouse*'s complete liability defense, which Congress statutorily-overruled – is fundamentally "unsound" and "conflicts with the purposes of the FEHA."[12] For example, the FEHA demands liberal construction, specifically provides much greater

[12] Ironically, in treating *Price Waterhouse* as binding precedent for the FEHA, the appellate court combined the worst of both worlds. It reflexively applied a Title VII limitation to the FEHA despite the FEHA's much more expansive remedies; but, it applied it in a far more draconian way than even the federal system now does.

emphasis on remedial relief as a means to ensure employer compliance, and generally provides much broader employee protection than does Title VII.

a. Besides demanding liberal construction, and aggressive prevention of discrimination, the FEHA is much more remedy-focused than is Title VII.

As a matter of California "public policy" the FEHA statutorily declares "that it is necessary to *protect and safeguard* the right and opportunity of all persons to seek, obtain, and hold employment *without discrimination or abridgement* on account of" any legally-protected trait. (Gov. Code §12920) (italics added.) Moreover, enjoying employment "without discrimination" is a "civil right" enjoyed by all Californians. (Gov. Code §12921(a).)

The FEHA also places a heavy emphasis on requiring proactive steps to affirmatively prevent discrimination from occurring. (Gov. Code §12940(j) [separate unlawful employment practice to "fail to take *all* reasonable steps necessary to prevent discrimination and harassment from occurring."] [italics added].)

The Legislature further provided that the FEHA's provisions must be liberally construed to effectuate the statute's core purposes. (Gov. Code §12993(a).)

Giving meaning to these statutory mandates, this Court has summed-up the guiding principles of FEHA construction:

> Because the FEHA is remedial legislation, which declares '[t]he opportunity to seek, obtain and hold employment without discrimination' to be a civil right (§ 12921), and expresses a legislative policy that it is necessary to protect and safeguard that right (§ 12920), *the court must construe the FEHA broadly, not ... restrictively.*" (*Robinson v. Fair Employment & Housing Commission* (1992) 2 Cal.4th 226, 243) (italics added.)

A mixed-motive defense is inconsistent with these core policies because it amounts to judicial sanction of *some discriminatory* animus. The version of the mixed-motive defense adopted by the appellate court here (providing a complete liability defense) insulates an employer from liability despite the fact that the employer has done *precisely what* the FEHA prohibits: negatively considering protected traits in making an employment decision. This result – allowing a discrimination-infected decision to escape consequence (and, thus, deterrence) – is antithetical to the FEHA's core principles and purposes.

This result is also contrary to decades of established FEHA law, which – by use of the "a motivating reason" causal nexus standard – has consistently imposed liability against employers for *any* negative consideration of an employee's protected status.[13] (*See e.g., Gelfo v.*

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[13] The phrases "a motivating reason" and "a motivating factor" are (continued...)

Lockheed Martin Corp. (2006) 140 Cal.App.4th 34, 50-54 [applying "a motivating reason" test found in current Judicial Council approved jury instructions]; *West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 978 [age discrimination under the FEHA shown by proof that "age is a 'motivating factor' in the decision"]; *Caldwell v. Paramount Unified School District* (1995) 41 Cal.App.4th 189, 205 [defining "ultimate issue" for trier of fact as "whether the employer's discriminatory intent was a motivating factor in the adverse employment decision"]; *Mixon v. Fair Employment & Housing Commission* (1987) 192 Cal.App.3d 1306, 1319 ["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"].)

Likewise, in an unbroken chain of authority stretching back to 1980, the FEHC has uniformly used "a motivating reason" as its causal nexus standard and, for liability determinations, has held that this standard is satisfied "even if other factors may have also motivated [the employer's] actions." (*DFEH v. Church's Fried Chicken, Inc.* (Cal. F.E.H.C.) FEHC Dec. No. 90-11, 1990 WL 312878, at *15 ["...the only conceivable

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(...continued)
generally used interchangeably.

interpretation of the Act is one that deems discriminatory all conduct that is caused in *any* part by its victim's race or other prohibited basis of discrimination." (original emphasis); *see also DFEH v. Seaway Semiconductor, Inc.* (Cal. F.E.H.C.) FEHC Dec. No. 00-03, 2000 WL 33943383, *11-12; *DFEH v. Ev Jones, et al.* (Cal. F.E.H.C. 1999) FEHC Dec. No. 99-06, 1999 WL 55067, *10; *DFEH v. Carpenters Joint Apprenticeship & Training Committee Fund for Southern California* (Cal. F.E.H.C. 1983) FEHC Dec. No. 83-19, 1983 WL 36468, *11; *DFEH v. San Mateo County Sheriff's Office* (Cal. F.E.H.C. 1980) FEHC Dec. No. 80-28, 1980 WL 20901, *8 ["...the Department has failed to carry its burden of proving by preponderance of the evidence that race was a motivating factor in complainant's termination."].)

The "a motivating reason" causal nexus standard is consistent with the principle that *any* reliance by an employer on an employee's protected trait is a barrier to true workplace equality.

Thus, sound policy demands that actual consequences must flow when employers illegally rely on protected traits in making employment decisions. Only by prohibiting *any* negative reliance on discriminatory animus, can the law fulfill the FEHA's stated purpose of safeguarding against discrimination. Another benefit of such a bright-line rule (prohibiting *any* negative reliance on protected traits) is that it provides a

clear standard to employers, making compliance with the statute easy to achieve.

Adoption of the mixed-motive defense would undermine another core policy behind the FEHA. Unlike Title VII, the FEHA emphasizes vigorous remedies both as the most effective deterrent to discrimination and in recognition of an employee's right to full and fair compensation. For example, the FEHA expressly 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.) This unequivocal legislative intent is confirmed elsewhere in the statute: "It is the purpose of this part to provide *effective remedies* that will eliminate these discriminatory practices." (Gov. Code §12920) (italics added.) Thus, under the FEHA, the full range of remedies is available, "including 'unlimited compensatory and punitive damages.'" (*Peatros v. Bank of America NT & SA* (2000) 22 Cal.4th 147, 166-167; *Commodore Home Systems, Inc. v. Superior Court* (1982) 32 Cal.3d 211, 221.) Likewise, this Court has recognized that the "two main purposes of the FEHA" are "compensation and deterrence." (*State Department of Health Services*, 31 Cal.4th at 1044.) Exposure to substantial monetary compensation is statutorily intended to deter employer violations.

The FEHA's strong emphasis on complete monetary relief finds little equivalence in Title VII, which has traditionally placed much greater emphasis on non-monetary relief. For twenty-seven of its forty-six years, Title VII did not permit *any* recovery of non-economic or punitive damages. (*Kolstad v. American Dental Association* (1999) 527 U.S. 526, 534.) Moreover, even though front pay was available as an equitable remedy, the preferred remedy was (and is still) reinstatement in lieu of front pay. (*Selgas v. American Airlines, Inc.* (1st Cir. 1997) 104 F.3d 9, 13 ["overarching preference" for reinstatement].) Not until the Civil Rights Act of 1991, did compensatory and punitive damages first became recoverable under Title VII. (42 U.S.C. §1981a(b).) But, even that long-overdue liberalization placed rigid ceilings on the *amounts* of compensatory and punitive damages available under Title VII.[14] (42 USC §1981a(b)(3).) By contrast, the FEHA has no such limits.

These drastic differences between the two statutory schemes provide additional statutory support for the rejection of this Title VII defense under the FEHA.

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[14] 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.)

The FEHA's undeniably stronger focus on *complete and effective* remedies as a means of shaping employer conduct is inconsistent with the notion that an employer found to have discriminated by illegally considering a protected trait as part of its decision-making can avoid liability altogether by retrospectively demonstrating in litigation that it would have made the same decision anyway. There must be *some* price the employer pays for engaging in the illegal condcut, even if the plaintiff would have been fired anyway.

b. The FEHA's statutory reach is broader than Title VII's in many other respects - each of which confirms the Legislature's desire for greater employee protection under FEHA than exists under Title VII.

The FEHA is far broader than Title VII both in the practices it prohibits and the employees it covers. Each statutory difference underscores the point that the FEHA provides greater protection to employees than does Title VII – thus further supporting the conclusion that this federal defense should not be engrafted upon FEHA claims.

Besides protecting all the same categories of employees as Title VII (along with other federal anti-discrimination statutes), the FEHA *additionally* 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.)

Similarly, the FEHA's reach is broader than Title VII in another way. It governs smaller employers who are not covered by Title VII. Whereas Title VII only applies to employers with 15 or more employees, the FEHA's discrimination and retaliation provisions apply to any employer with five or more employees. (*Compare* Gov. Code §12926(d) & §12940(j)(4)(A) *with* 42 USC §2000e(b).)

Other provisions of the FEHA also evince a clear and 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) [California disability law "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*."].)

In short, these areas in which the FEHA is consistently and decidedly more expansive than federal law illustrate why reliance on Title VII limitations is a recipe for error in construing the FEHA's independent – and far more employee-protective – provisions.

4. Dicta in prior appellate decisions cannot justify creating this non-statutory defense, nor can the fact that the BAJI drafters prophylactically provided a form instruction for the defense.

The appellate court's next rationale for adopting a mixed-motive defense to FEHA claims is grounded upon dicta in prior California appellate decisions. The court of appeal simply misread these prior decisions.[15]

For example, the primary authority cited on this point, *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, never held that mixed-motive is a viable FEHA defense. Indeed, given the fact that the plaintiff lost the case and no mixed-motive instruction had been given, it would have been impossible for *Heard* to "hold" anything about the viability or existence of a mixed-motive defense.

In *Heard*, the jury rejected the plaintiff's FEHA race discrimination case, finding no discrimination had occurred. (*Heard*, 44 Cal.App.4th at 1746.) The plaintiff appealed challenging the jury instructions which defined the elements of a primae facie race discrimination claim. (*Id.* at

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[15] The appellate court evidently did not consider the mention of mixed-motive within prior published decisions, such as *Heard*, to be dicta: "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.)" (Opinion, 5 fn. 2.) In this respect, the appellate court plainly erred.

1747.) No mixed-motive instruction had been sought or given. (*Id.* at 1745-1746.)

Before addressing whether the jury instructions were correct, the appellate court reviewed what it called "the pertinent legal principles" generally applicable to employment discrimination cases. (*Heard*, 44 Cal.App.4th at 1747.) The court began with the general proposition that "[s]ince the antidiscrimination objectives and public policy purposes of the two laws [Title VII and the FEHA] are the same, we may rely on federal decisions to interpret analogous parts of the state statute." (*Ibid.*) Having started with the *assumption* that Title VII and FEHA "the same," the court surveyed general principles gleaned virtually entirely from *federal Title VII cases*, rather than FEHA cases.[16]

(*Id.* at 1748-1752.)

It was in this context that *Heard* made passing reference to the mixed-motive concept. (*Id.* at 1747-1748.) In doing so, the court neither held nor analyzed whether this Title VII concept actually applied to FEHA claims. (*Ibid.*) In its passing reference to the concept of mixed-motive

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[16] This near-exclusive reliance on federal case law is striking. By our count, *Heard* cited twenty Title VII cases and only two FEHA cases in its review of the so-called "pertinent legal principles." (*Heard*, 44 Cal.App.4th at 1747-1755.)

analysis, the only authority the court cited was federal authority - principally, *Price Waterhouse*. (*Id.* at 1747-1748.)

After reviewing these general principles gleaned from Title VII cases, the *Heard* court turned to the actual issue before it - whether the jury instructions were erroneous. (*Id.* at 1754.) Needless to say, it resolved that issue without any need to analyze or apply anything having to do with the mixed-motive defense.[17] (*Ibid.*)

The appellate court's final rationale is the BAJI drafters' prophylactic inclusion of a mixed-motive instruction. Yet, this fact cannot justify the incorporation of this federal defense into FEHA.

It is true that the BAJI drafters opted to include a mixed-motive affirmative defense instruction. (*B.A.J.I. California Jury Instructions, Civil*

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[17] Likewise, none of the other California FEHA decisions that mention the mixed-motive concept hold that it applies to FEHA claims. (*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"].)

Grant-Burton v. Covenant Care, Inc. (2002) 99 Cal.App.4th 1361, 1379, quoted at the beginning of the Opinion's legal discussion, was *not even a FEHA case*. (Opinion, 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.) Thus, it, too, cannot be considered FEHA authority recognizing a mixed-motive defense.

(Fall 2009 Edition) [hereafter BAJI], Instr. No. 12.26.) However, in doing so they simultaneously highlighted the *uncertainty* surrounding the threshold question of whether the defense had any 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.[18] (BAJI, Instr. No. 12.26 "Comment") (italics added.)

In any event, to the extent that any jury instructions are considered persuasive authority on this issue, the *pertinent* instructions are the controlling, Judicial Council-approved jury instructions (CACI).[19] (California Rules of Court, Rule 2.1050(a) ["The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California."].) The CACI drafters chose not to include a "mixed motive" affirmative defense instruction to FEHA claims. (Opinion, 9.)

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

[19] 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.)

II. ANY ADOPTION OF A MIXED-MOTIVE DEFENSE MUST LIMIT THE DEFENSE TO TRUE MIXED-MOTIVE CASES, AND REQUIRE CLEAR AND CONVINCING PROOF.

A. The "Use Note" of the BAJI jury instruction the City sought confirms that the instruction does not apply to our "pretext" case.

The City claims the BAJI mixed-motive instruction was erroneously denied. But the BAJI drafters emphasized that the instruction should not apply to pretext cases:

> 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.)

In our case, neither party perceived this case as a "true mixed-motive situation." (*Cf. Huffman v. Interstate Brands Companies* (2004) 121 Cal.App.4th 679, 702 ["mixed motive" not applicable where the "case was plead and tried as a pretext case"].)

Instead, at every stage, *both* parties defined the issue as one of pretext: Were the asserted legitimate reasons a pretextual mask for pregnancy discrimination? (Opinion, 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."].)

The City did not allege mixed-motive as an affirmative defense in its Answer; it simply asserted that the termination was based on legitimate

reasons and not "taken under pretext." (1 AA 28) (emphasis added.) Neither the City's initial proposed jury instructions nor special verdict form addressed any mixed-motive defense. (1 AA 67-73; 1 AA 90-93.)

During trial, from opening statement through witness examinations, the City's position was consistent: pregnancy played *no role whatsoever* in Harris' termination; there were no mixed-motives. (1 AA 117-123; 3 RT 329:17:19; 3 RT 330:12-14; 3 RT 339:3-5; 5 RT 2500:18-2505:10; 3 RA 595-625; 5 RT 2108:8-17; 1 RA 161 - ¶ 18:8-11.)

Thus, given this clear evidentiary record, and consistent with the BAJI "Use Note," the trial court properly denied the City's belated request for a mixed-motive instruction, reasoning that the issue before the jury was simply whether all of the City's purported legitimate reasons were "pretext." (6 RT 2758:28-2759:11.)

Nothing about this decision constituted prejudicial error resulting in a miscarriage of justice; by its own terms, the instruction did not apply. (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 580.)

B. A mixed-motive instruction is not automatically required in every FEHA discrimination or retaliation case.

1. The instruction's text.

The text of the BAJI instruction which the City sought reads:

> 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. (BAJI, Instr. No. 12.26) (italics added.)

From this, a key point emerges.

A mixed-motive defense is only appropriate where the employer "was actually motivated by *both* discriminatory *and* non-discriminatory reasons."

Therefore, assuming *arguendo* that this Court adopts a mixed-motive defense, we submit that it should require the employer to make an election to present this defense – *after* adequate discovery – by acknowledging that it acted upon mixed-motives.

2. Any mixed-motive defense should only apply if the employer acknowledges that it actually harbored mixed-motives.

a. The defense can only be created as a matter of equity, and equity supports requiring this condition for asserting the defense.

We begin with the premise that because the mixed-motive defense is not part of the statutory text – indeed, by permitting discrimination, it is decidedly counter-statutory – the only conceivable rationale which could justify adopting it is the equitable notion that an employer's damage liability should be limited if factors wholly independent from discriminatory animus would have compelled the same decision.

But, if the basis for recognizing this defense is an equitable notion, then this Court has the power to condition the defense on appropriate equitable concessions. This Court should exercise that power.

One fundamental equitable maxim is that "[o]ne who seeks equity must do equity." (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 445.) Thus, "a court will not grant equitable relief unless the [party seeking it] acknowledges or provides for the [other party's] equitable rights arising from the same subject matter." (*Id.* at 445-446.) Similarly, "a court can compel a [party] seeking equitable relief to accommodate the equities of the [other party] by conditioning the [first party's equitable] relief upon the enforcement of those equities." (*Id.* at

446; *see also DeGarmo v. Goldman* (1942) 19 Cal.2d 755, 765 [when competing "rights have arisen from the same subject matter or transaction," the party seeking equitable relief "is required to *recognize and provide for*" the other party's rights and relief is granted only if the other party's "rights are protected"] [italics added].)

If, as we contend in section III below, a successful mixed-motive defense under the FEHA can, at most, limit certain remedies, then the very defense (itself) recognizes that competing "rights have arisen from the same subject matter or transaction, some in favor of [the employer] and some in favor of [the employee]." (*DeGarmo*, 19 Cal.2d at 765.)

By statutory text, having suffered discrimination, the employee has the right to compensation for the violation of her civil rights. By judicial equity, this Court may conclude that the employer has the right to avoid some of the damage liability. Thus, because the defense necessarily involves rights of each party, to receive the equitable benefits of it, equity demands that the employer must acknowledge that it *did act* upon mixed-motives. This will ensure that the plaintiff is not denied compensation outright, *i.e.*, the plaintiff's rights are protected. (*Dickson, Carlson & Campillo*, 83 Cal.App.4th at 445-446.) It will also protect the plaintiff (and the overtaxed judicial system) from having to spend limited resources seeking to establish that the employer did act (in part) based on

discriminatory animus. Any other result would permit the employer to engage in inequitable double-speak in hopes of denying the plaintiff's rights entirely.

Consider the following unacceptable alternative.

First, the employer could disclaim any wrongdoing whatsoever, relying instead on a pretextual excuse. If the plaintiff fails to pierce the pretext, the employer prevails. Thus, by denying the very factual predicate to this defense – that multiple motives were actually operating simultaneously – the employer has obtained a complete victory.

But, if the plaintiff succeeds in piercing the employer's original pretext, the employer could nonetheless retreat (with no cost to itself) to seek equitable refuge in the same-decision defense. In effect, the plaintiff is now required to pierce what may amount to a second pretext: that the same decision would have been made without reliance on the protected status. Meanwhile, the employer had no reason to abandon its original pretext because the system invited the employer to enjoy the right to raise the second pretext without any consequence.

In a related context, this Court has imposed certain conditions on the availability of a damage defense under the FEHA. In *State Department of Health Services*, in applying the "avoidable consequences" doctrine to sexual harassment claims, this Court imposed particular requirements for an

employer to avail itself of the defense, including that "the employer took reasonable steps to prevent and correct workplace sexual harassment." (*State Department of Health Services*, 31 Cal.4th at 1044.) Similarly, here, we propose that if this Court is inclined to adopt a mixed-motive defense, it should impose the condition of acknowledgment by the employer that mixed-motives were, in fact, operating when it made the challenged decision.

b. In other contexts, the law requires a party to make a similar election.

We do not propose that the employer must make this election at the outset. (*Price Waterhouse*, 490 U.S. at 247 fn. 12 [case need not "be correctly labeled as either a 'pretext' case or a 'mixed-motives' case from the beginning"].) It must plead the defense in its answer if there is any possibility it will rely upon the defense at trial. But only after adequate discovery must the employer "decide whether a particular case involves mixed motives," thereby electing to invoke the defense. (*Ibid.*)

Procedurally, the plaintiff would be required to seek discovery (through requests for admissions or contention interrogatories) to force the employer to elect whether to admit the factual predicate – that mixed-motives did exist – and, thereby, assert the defense. Conversely, the

employer can deny that mixed-motives were involved and, thereby, take the all-or-nothing position that no discriminatory animus at all played any role. But, in such a case the employer would have waived the defense.

In other contexts, courts have approved the use of discovery procedures to set a bar date by which a certain election must be made.

For example, when a party to a civil lawsuit is exposed to the threat of concurrent criminal prosecution, the trial court can set a date by which the party must elect to either assert self-incrimination (and thereby waive the right to testify at trial) or waive privilege (and thereby be subject to discovery but permitted to testify). (*Fuller v. Superior Court* (2001) 87 Cal.App.4th 299, 310.)

Similarly, in the context of the assertion of advice of counsel (which thereby waives privilege), courts have often imposed a deadline by which the party must elect whether to assert or waive its reliance on advice of counsel. (*See e.g., In re Buspirone Patent Litigation* (S.D. N.Y. 2002) 210 F.R.D. 43, 54-55.)

c. This approach is consistent with the BAJI "Use Notes," will simplify mixed-motive cases, and allow for a logical presentation of it to the trier of fact.

There are additional sound justifications for adopting the rule we propose.

First, this rule is consistent with the BAJI drafters' recognition that not every pretext case warrants a mixed-motive instruction. It thus preserves the distinction between cases where the defense should, and should not, apply. (BAJI, Instr. No. 12.26 "Use Note".)

Second, this approach will ensure that a mixed-motive defense is presented to the trier of fact in a clear, understandable and logical fashion. In cases where the employer did harbor mixed-motives – and, therefore, the protected trait was a motivating reason for the disputed action – our suggested approach ensures that the jury's focus remains where it should remain: deciding whether the same decision would have been made regardless of the discriminatory animus. Effectively, the animus is already established by virtue of the fact that the case is a mixed-motives case and, thus, the trial becomes focused on the *real* issue it should focus upon – whether the same result would have happened without the discrimination.

By contrast, any alternative approach results in the confusing double-pretext scenario described above where the jury must first pierce the initial

pretext to decide if the prohibited trait was a motivating reason and, if so, then pierce a second pretext at the "we would have done it anyway" stage.

Our proposed rule also protects against the potential overreaching abuse which this defense is ripe for. It is always easy for an employer to assert that it would have made the same decision without reliance on the protected trait. After all, that assertion is one concerning the employer's *own state of mind.* Likewise, rebutting the defense by disproving an employer's state of mind is an inherently difficult task. (*See* Section (II)(C)(2)(b) & (c) below.)

In fact, even the *Price Waterhouse* plurality recognized the potential for abuse inherent in this defense by requiring that the employer "should be able to present some objective evidence as to its probable decision in the absence of an impermissible motive." (*Price Waterhouse*, 490 U.S. at 252 & fn. 14.) This requirement of "objective evidence" was undoubtedly intended to ensure that the defense did not prevail in cases where it was a mere after-the-fact fabrication lacking a legitimate basis. The rule we propose would prevent such abuse by imposing some consequences creating a fair balance for the employers who are electing whether to invoke the defense.

C. Compelling policy dictates that an employer is required to offer "clear and convincing" evidence to establish any mixed-motive defense.

1. The standard of proof is a judicial determination based on the weighing of policy considerations.

Courts may adopt a standard of proof higher than preponderance "because the determination of proof to be applied in a particular situation is the kind of question which has traditionally been left to the judiciary to resolve." (*In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1491; *see also* Evidence Code §115.)

> This Court summarized the guiding principles as follows: The function of a standard of proof is to instruct the fact finder concerning the degree of confidence our society deems necessary in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the ultimate decision. Thus, the standard of proof may depend upon the gravity of the consequences that would result from an erroneous determination of the issue involved. (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 546.)

"[C]ourts have applied the clear and convincing evidence standard when necessary to protect important rights." (*Wendland*, 26 Cal.4th at 546; *see also Weiner v. Fleischman* (1991) 54 Cal.3d 476, 488 [clear and convincing appropriate "where particularly important individual interests or rights are at stake"].)

2. The pertinent policy considerations dictate a higher standard of proof than mere preponderance.

a. The employer whose proven discrimination created the need for this difficult-to-assess same-decision question should bear the risk of error – especially considering the important FEHA rights at stake.

In determining the appropriate standard of proof, courts must "allocate the risk of error between the litigants...." (*Weiner*, 54 Cal.3d at 487.) The preponderance standard makes the parties "share the risk of an erroneous determination more or less equally." (*In re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578, 1589.) Conversely, "[a]ny other standard expresses a preference for one side's interests" given the nature of the dispute. (*Weiner*, 54 Cal.3d at 488.)

Here, the "risk of error" should fall on the employer's shoulders. The mixed-motive defense arises *only after* a factual determination has been made that the employer unlawfully acted upon discriminatory animus. Only then does the defense allow a backward-looking hypothetical evaluation by which the factfinder theorizes what the discriminator would have done had he not aced upon discriminatory animus. Fairness demands that the "risk of error" on the question is allocated to the already-proven discriminator:

> The reason for this is straightforward. 'Unquestionably, it is now impossible for an individual discriminatee to recreate the past with exactitude. Such a showing is impossible precisely because of the employer's unlawful action; it is only equitable

> that any resulting uncertainty must be resolved against the party whose action gave rise to the problem. ... These broad and insistent purposes [behind the equal employment laws] dictate that the employer be held to a strict showing, once discrimination has been established. (*Day v. Mathews* (D.C. Cir. 1976) 530 F.2d 1083, 1086.)

This result is also supported by the fact that FEHA cases involve "important rights." The rights which the FEHA provides are inalienable civil rights, and state public policy demands vigorous protection of them. (Gov. Code §§12920, 12920.5 & 12921(a).) In enacting the FEHA, the Legislature emphasized the far-reaching deleterious consequences that employment discrimination causes:

> [T]he practice of denying employment opportunity and discriminating in the terms of employment for these reasons foments domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interest of employees, employers, and the public in general. (Gov. Code §12920.)

b. The fact that the defense requires evaluating the employer's state of mind supports imposing a higher standard of proof.

There is another compelling justification for applying a higher standard of proof. Both proving the defense, and rebutting it, require the ever-so-difficult journey into the discriminator's mental processes.

But, proving another's "state of mind" is "inherently difficult." (*Johnson v. United Cerebral Palsy/Spastic Children's Foundation of L.A.* (2009) 173 Cal.App.4th 740, 765; *see also Soldberg v. Superior Court* (1977) 19 Cal.3d 182, 192 ["we recognized the inherent difficulty of proving a state of mind"].) Thus, in other contexts, both the Legislature and the courts have altered or relaxed traditional rules of proof to level the slanted playing field of having to prove another's state of mind.

One example is California's summary judgment statute, which vests courts with discretion to deny summary judgment "where a material fact is an individual's state of mind, or lack thereof, and that fact is sought to be established solely by the individual's affirmation thereof." (Code of Civ. Proc. §437c(e).)

Another example is this Court's shifting the burden of proof where the evidence necessary to establish a fact lies peculiarly within the knowledge of one of the parties. (*See e.g., Sanchez v. Unemployment Ins. Appeals Bd.* (1977) 20 Cal.3d 55, 71.)

If this Court adopts any mixed-motive defense, these same principles strongly support requiring clear and convincing proof to establish it.

Consider the actual evidence which will typically be offered to prove the defense. Undoubtedly, the decision-maker will proclaim that even without any reliance on prohibited status, he would have reached the same

decision. If, as is often the case, there are multiple layers of decision-makers, each will likely testify that the same-decision would have been made regardless of the protected status. The undeniable obstacles to disproving another's declared state of mind justifies imposing a higher standard than mere preponderance.

c. The FEHC has adopted the clear and convincing standard, which is entitled to "great weight."

The Fair Employment and Housing Commission has also held that once an employee has proven discrimination, the employer may only avoid reinstatement and back pay only by "demonstrating that a non-discriminatory factor would have compelled the complainant's termination" and that proof of this "wholly independent cause for the termination" must be established "by clear and convincing evidence..." (*Church's Fried Chicken, Inc.*, (Cal. F.E.H.C.), 1990 WL 312878, at *15.)

The Commission's interpretation is entitled to "great weight" or "substantial weight" unless "clearly erroneous." (*Colmenares v. Braemar Country Club* (2003) 29 Cal.4th 1019, 1029-1030; *see also Trujillo v. North County Transit Dist.* (1998) 63 Cal.App.4th 280, 288 fn. 4 ["Administrative decisions of the FEHC are given great weight by the courts...."].)

III. IF THIS COURT ADOPTS A MIXED-MOTIVE DEFENSE, FEDERAL PREEMPTION PRECLUDES CALIFORNIA FROM ADOPTING A STATE LAW VERSION THEREOF WHICH PERMITS THAT WHICH TITLE VII PROHIBITS. MOREOVER, CALIFORNIA PUBLIC POLICY COMPELS ADOPTION OF A DEFENSE EVEN NARROWER THAN TITLE VII'S.

A. A complete defense to FEHA liability would create an indefensible anomaly forbidden by Title VII's preemption clause.

The plurality opinion in *Price Waterhouse* had held that if the employer proved mixed-motives, this would be a complete defense – no liability could attach. (*Price Waterhouse*, 490 U.S. at 258.) Understandably, Congress quickly overruled this aspect of *Price Waterhouse*. Congress mandated that the federal mixed-motive defense merely limits the availability of remedies. (42 U.S.C. §2000e-5(g)(2)(B).)

Nonetheless, despite this remedy-limit-only defense even under the customarily less-protective federal discrimination laws, the Opinion here created a *complete liability defense* under the FEHA.

We demonstrate below that this result is forbidden by Title VII's preemption clause because it produces state law which "permits" that which Title VII forbids. As discussed in section III(A)(2) below, Title VII specifically provides that any state law which does so is preempted.

1. Mixed-motive as a complete liability defense under the FEHA would "permit" an employer to engage in conduct prohibited under Title VII.

The 1991 Amendments to Title VII codified the "mixed-motive" defense in two sections. First, Congress added subsection (m) to 42 U.S.C. §2000e-2, which reads in part:

> [A]n unlawful employment practice *is established* when the complaining party demonstrates that race, color, religion, sex, or national origin was *a motivating factor* for an employment practice, *even though* other factors also motivated the practice. (42 U.S.C.§2000e-2(m)) (italics added.)

Second, Congress added 42 U.S.C. §2000e-5(g)(2)(B), which provides that once discrimination is shown, but the employer demonstrates that it would have taken the same action even in the absence of any improper motivating factor the court "may grant declaratory relief, injunctive relief ... and attorney's fees and costs," but cannot award damages, back pay or orders to promote, reinstate, etc. (42 U.S.C. §2000e-5(g)(2)(B).)

Thus, with the corrections added by Congress' 1991 amendments, Title VII again makes clear that mixed motive is *never* a defense to liability, no matter how small the discriminatory element was. Instead, if proven, the defense simply places a limit on the range of available remedies which the plaintiff – who would have been fired anyway – can invoke. (*White v. Baxter Healthcare Corp.* (6th Cir. 2008) 533 F.3d 381, 397 [purpose and

effect of 42 U.S.C.§2000e-2(m) was to eliminate the employer's ability to escape liability in Title VII mixed-motive cases"].)

In stark and inexplicable contrast, the complete liability defense approach taken by the appellate court in our case means that an employer who proves the mixed-motive defense is exonerated from having done anything unlawful – no matter how much discriminatory animus contributed to the decision.

Thus, if this Court recognizes a form of mixed-motive defense which shielded the employer from *liability* (rather than merely limiting available remedies) a Supremacy Clause impossibility would occur. The same discriminatory action which would be *unlawful* conduct under Title VII could simultaneously be *lawful* conduct under the FEHA. This is precisely the result Congress precluded in enacting Title VII's preemption provisions.

Our case underscores the point. Under Title VII's version of mixed-motive, the City would have been liable for an "unlawful employment practice" based on the jury's finding that Harris' pregnancy was "a motivating reason" for her termination. Under the federal approach, if the City proved a mixed-motive defense, the finding that it engaged in an "unlawful employment practice" would remain intact and the City would be subject to the range of remedies permitted under Title VII in cases of mixed-motives. (42 U.S.C. §2000e-5(g)(2)(B).)

Contrast this with the *complete* liability defense approach adopted by the appellate court in our case. Under that approach, the City would *escape any liability* by proving its mixed-motive defense. The jury's finding that the City considered Harris' pregnancy in the termination decision would be irrelevant. Thus, proving this affirmative defense would render lawful - and, thereby, "permit" - the City's acting upon its anti-pregnancy animus.

In short, allowing mixed-motive to serve as a complete liability defense under the FEHA would "*permit*" a California employer to lawfully engage in conduct which is clearly unlawful under Title VII. Principles of federal preemption preclude this result. (*See* Section III(A)(2) below.)

2. Title VII expressly preempts any state law which "permits" conduct which Title VII prohibits.

"The supremacy clause of the United States Constitution establishes a constitutional choice-of-law rule, makes federal law paramount, and vests Congress with the power to preempt state law." (*Viva! Intern. Voice For Animals v. Adidas Promotional Retail Operations, Inc.* (2007) 41 Cal.4th 929, 935) (citations omitted.) In Title VII, Congress chose to exercise its preemptive powers under the Supremacy Clause by enacting a "broad and explicit preemptive provision." (*Spirt v. Teachers Ins. and Annuity Association* (2nd Cir. 1982) 691 F.2d 1054, 1065 *cert. granted, judgment*

vacated on other grounds, Teachers Ins. and Annuity Association v. Spirt (1983) 463 U.S. 1223 and *cert. granted, judgment vacated on other grounds Long Island University v. Spirt* (1983) 463 U.S. 1223.)

Congress defined Title VII's preemptive powers to vitiate any state laws which "purport to ... permit the doing of any act which would be an unlawful employment practice" under Title VII.[20] (42 U.S.C. §2000e-7.)

"By passing the Civil Rights Act of 1964, and Section 2000e in particular, Congress 'intended to supercede all provisions of State law which require or *permit the performance of an act* which can be determined to constitute an unlawful employment practice under the terms of Title VII of the Act or are inconsistent with any of its purposes." (*Brown v. City of Chicago* (N.D. Ill. 1998) 8 F.Supp. 1095, 1112) (italics added.) Thus, Title VII imposes a limit on FEHA by "the substantive rule that the [FEHA] not 'require or permit' any conduct that is unlawful under Title VII." (*Church's Fried Chicken*, FEHC Dec. No. 90-11 at *8.)

Based on this preemption provision, courts have nullified a variety of state laws where application of the state law would "permit the doing of any

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[20] The preemption portion of the statute reads in full: "Nothing in this title shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which *purports to require or permit* the doing of any act which would be an unlawful employment practice under this title. (42 U.S.C. § 2000e-7) (italics added.)

act which would be an unlawful employment practice" under Title VII. *Cutright v. Metropolitan Life Ins. Co.* (W. Va. 1997) 201 W.Va 50 illustrates Title VII's preemptive powers over less-protective, conflicting state laws. *Cutright* involved a state statute requiring "good cause" (as defined in the statute) for terminating a written contract with an insurance agent who had been with the company for more than five years. (*Cutright*, 201 W. Va. at 56, *citing* W. Va. Code §33-12A-3.) At issue was the employer's termination of the plaintiff agent based on multiple complaints that the agent was abusive and unprofessional in his "treatment of female co-workers." (*Id.* at 52-53.) The fired agent filed suit based on whistle blowing activites and also invoked the protections of the state "good cause" statute. (*Id.* at 54.) After cross motions for summary judgment, the trial court granted the employer's motion as to the whistle-blower claim, finding the employer had a legitimate business reason based on the agent's inappropriate conduct with female coworkers. (*Ibid.*) Nonetheless, believing it was constrained by the restrictive definition of "good cause" under the state statute, the trial court also granted the agent summary judgment on liability on the statutory "good cause" discharge claim because the asserted grounds for termination were not "statutorily sufficient." (*Ibid.*)

Finding Title VII's preemption language "dispositive," the West Virginia Supreme Court reversed the grant of summary judgment in favor of the plaintiff agent. (*Cutright*, 201 W. Va. at 59.) The court explained:

> The central and threshold issue which is finally dispositive of this case is whether this state legislation is preempted by federal law. We believe the "good cause" provisions of W. Va. Code § 33-12A-3 conflict with [Title VII] ... Under the Supremacy Clause of the United States Constitution, state legislation that interferes with or is contrary to federal law is pre-empted by the federal law. (*Id.* at 57.)

The court reasoned that the agent's conduct created a hostile work environment in "clear and actionable violation of Title VII," but "[o]ddly enough, he could not be discharged under [the West Virginia statute], because his egregious misconduct does not fit one of the six listed grounds for discharge." (*Id.* at 58.) Thus, the state law "good cause" statute conflicted with Title VII because it permitted doing that which Title VII prohibited:

> Simply put, the narrow "good cause" termination provisions listed in the [West Virginia statute] permit unlawful conduct which is prohibited by Title VII [hostile environment sexual harassment]. *The state statute, therefore, protects employees who violate these federal laws.* Title VII itself expressly pre-empts "any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter." (*Id.* at 57, *quoting* 42 USC §2000e-7) (italics added.)

Spirt v. Teachers Ins. and Annuity Association similarly illustrates Title VII's preemptive powers. There, a pension plan for teachers

calculated pension benefit rights by using gender-based mortality tables. (*Spirt*, 691 F.2d at 1056-1057.) The Second Circuit Court of Appeals held that use of gender-based mortality tables violated Title VII's ban on sex discrimination. (*Id.* at 1062-1063.) In defending against this practice which violated Title VII, the pension plan argued that state insurance laws permitted the practice. (*Id.* at 1065-1066.)

The Second Circuit squarely disagreed, finding any such state law preempted by Title VII:

> We hold, therefore, that Title VII explicitly pre-empts New York insurance laws to the extent that they "require or permit" a method of calculating pension benefits that we have found to be an "unlawful employment practice" under Title VII.[21] (*Id.* at 1066.)

Any recognition of a mixed-motive complete liability defense would produce the identical conflict with Title VII's substantive provisions and, therefore, be invalid. A complete liability defense would create FEHA protection for the very same conduct (using a protected trait as "a motivating reason" for an employment decision) which violates Title VII. This result cannot pass constitutional preemption muster.

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[21] *Brown v. City of Chicago* is another example of how powerful Title VII's preemptive powers are. There, the court held that a city employer was required to ignore a state court injunction where compliance with the state court injunction would have led to a violation of Title VII. (*Brown*, 8 F.Supp.2d at 1112.)

But a readily available solution to this preemption conundrum exists. "[A] court must, whenever possible, construe a statute so as to preserve its constitutional validity." (*Kraus v. Trinity Management Services, Inc.* (2000) 23 Cal.4th 116, 129.)

Therefore, assuming *arguendo* that this Court is inclined to adopt any mixed-motive defense to FEHA claims, the foregoing principle of construction dictates that any mixed-motive defense under the FEHA must merely limit certain remedies (like Title VII does) rather than being a complete liability defense. This construction of the FEHA would avoid constitutional preemption of the statute. (*Peatros*, 22 Cal.4th at 172 ["Conflict preemption of state law by federal law does not automatically and necessarily result in the *complete* displacement of state law by federal law *in its entirety*. Rather, it does so insofar ..., but only insofar ..., as there is conflict."] [internal citations omitted].)

However, merely replicating the federal defense is not a satisfactory solution for other reasons. We demonstrate below that construing a mixed-motive defense under FEHA as limiting remedies in the exact manner as does Title VII would be inconsistent with: (1) the FEHA's much more vigorous emphasis on monetary relief compared to Title VII and (2) other core FEHA policies. Thus, if adopted at all, the mixed-motive defense

under the FEHA must limit fewer remedies than does its Title VII counterpart.

B. A complete liability defense is inconsistent with the FEHA's statutory scheme, encourages discrimination and conflicts with the FEHA's policies of deterrence, effective remedies and liberal construction.

Besides federal preemption, adopting a complete liability defense would be a mistake under California law as well. Any such exoneration of discriminatory animus which an employer has acted upon would conflict with FEHA, itself, and virtually every policy behind it.

In section I(B)(II) above we established that because the FEHA's statutory text recognizes certain enumerated exceptions (*i.e.*, complete liability defenses), courts cannot create other such exceptions. (*Rojas*, 33 Cal.4th at 424.) This, alone, compels that any mixed-motive defense to be recognized under the FEHA must be limited to remedies only, not liability.

But there is more.

Allowing an employer to completely avoid any consequences despite a factual finding that it relied upon a protected trait such as race in making employment decisions is fundamentally inconsistent with every one of the FEHA's key policies – effective remedies, deterrence, preserving and safeguarding a discrimination free environment, and liberal construction to

achieve the statute's remedial purposes. (Gov. Code §§12920, 12920.5 & 12993(a); *Robinson*, 2 Cal.4th at 243.)

The windfall of a complete defense directly affronts the FEHA's inseparable "twin purposes" of "compensation and deterrence." (*State Department of Health Services*, 31 Cal.4th at 1044.) Effective deterrence flows from ensuring the availability of effective remedies which compensate victims for statutory violations. (*Ibid.*)

When Congress repudiated *Price Waterhouse*'s complete liability defense approach, it expressed similar concerns that any complete liability defense would undermine Title VII's anti-discrimination policies. In its Report on the Civil Right Act of 1991, the House Committee on the Judiciary stated:

> *Price Waterhouse* severely undermines protections .... "If Title VII's ban on discrimination in employment is to be meaningful, proven victims of intentional discrimination must be able to obtain relief, and perpetrators of discrimination must be held liable for their actions." (H.R. Rep. 102-40, *reprinted at* 1991 U.S.C.C.A.N. 694, 1991 WL 87020 (Leg. Hx.) at **14-15.)

Nor would a complete liability defense satisfy the statutory mandate to "protect and safeguard" a discrimination-free environment. Likewise, it would thwart the rule of liberal construction to achieve the statute's anti-discrimination goals. Both of these core policies demand interpreting the FEHA so as to disapprove of any form of invidious discrimination.

But, in the mixed-motive context, a complete liability defense does the opposite: it tacitly approves *some* undeniable discrimination as long as that discrimination is not factually deemed to be "too much." Any rule permitting "some discrimination" is the antithesis of the "generous protection against employment discrimination that the FEHA was intended to provide." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054.) For this Court to find such a rule to exist within the FEHA, itself, brings echos of George Orwell's *1984* in which "War is Peace" and "Freedom is Slavery."

The Fair Employment and Housing Commission, the agency charged with interpreting, implementing and protecting the FEHA, fully recognizes these truths. In a precedential decision, the Commission held that any same-decision/mixed-motive defense under the FEHA *cannot* serve as a complete liability defense, but may only limit *some* remedies. (*Church's Fried Chicken, Inc.*, FEHC Dec. No. 90-11, *11.)

In *Church's Fried Chicken*, the Commission reasoned that allowing proven discrimination to go unremedied is incompatible with the most basic FEHA policy:

> The fundamental purpose of the [FEHA] is to protect and safeguard the civil right to seek, obtain and hold employment "free from discrimination." To implement this purpose, the *only conceivable interpretation* of the Act is one that deems discriminatory all conduct that is caused in any part by its

> victim's race or other prohibited basis of discrimination. Any other standard would inevitably require us to blink at the very conduct the Act was plainly intended to remedy. (*Church's Fried Chicken, Inc.*, FEHC Dec. No. 90-11, *11) (italics added.)

In so holding, the Commission acknowledged that where an employer has proved that it actually and legitimately would have made the same decision without having relied on a prohibited basis, there is a "legitimate concern" weighing against requiring equitable reinstatement or back pay remedies for the employee.[22] (*Id.* at *11 fn. 7.) But, this concern cannot justify a complete liability defense; instead it "is properly considered ... at the remedy stage of each case, by permitting the employer to make this [same-decision/mixed-motive] showing, after liability has been found, to avoid an order to hire and pay back wages." (*Ibid.*)

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[22] The Commission reasoned: "If we determine that some factor wholly independent of respondent's discriminatory motive *would certainly have led* respondent to terminate Jackson in any event, he would still have lost the job and the attendant wages had discrimination not occurred, and back pay and an order to hire would *therefore be inappropriate*." (*Id.* at *15) (italics added.)

C. Any mixed-motive defense should limit only economic damages flowing exclusively from the challenged adverse action (and any reinstatement).

1. Because our Legislature strongly favored monetary damages over non-monetary relief (in contrast to Title VII's longstanding preference for non-monetary relief), any FEHA mixed-motive defense should not limit all monetary relief.

As discussed in section III(A)(1) above, Title VII's statutory mixed-motive defense enacted as part of the Civil Rights Act of 1991 permits a court to order injunctive or declaratory relief and allows the prevailing plaintiff to recover attorneys' fees and costs. (42 U.S.C.§2000e-5(g)(2)(B).) However, it bars the plaintiff from recovering *any* damages - economic, non-economic or punitive. (*Ibid.*)

We established that the FEHA's provision of broad monetary relief as a key mechanism for ensuring employer compliance finds no counterpart in Title VII. (*See* Section I(B)(3)(a) above.) Given the substantially different views on the subject of appropriate remedies between the two statutory schemes, it would be illogical (and unfair) to engraft Title VII's total denial of monetary relief into the FEHA. Instead, because Title VII and the FEHA so fundamentally differ regarding both remedies and overall scope, Title VII's complete damage bar approach would be inappropriate for the FEHA. (*State Department of Health Services*, 31 Cal.4th at 1040; *Page*, 31 Cal.App.4th at 1216.)

A comparative analysis of the different historical approach to remedies taken by Title VII versus the FEHA underscores our point. The FEHA has always provided full and complete remedies, "including 'unlimited compensatory and punitive damages.'" (*Peatros*, 22 Cal.4th at 166-167 (internal citations omitted); *see also Commodore Home Systems*, 32 Cal.3d at 221; Gov. Code §§12920 & 12920.5.)

Title VII's approach to remedies has always contrasted significantly with the FEHA's – only the scope of that contrast has ever changed.

As this Court has recognized, Title VII (in contrast to the FEHA) "does not permit all relief generally available...." (*Peatros*, 22 Cal.4th at 163.) Instead, for its first twenty-seven years Title VII refused to permit *any* damages. (*Kolstad*, 527 U.S. at 534.) Even though the 1991 statutory amendments provided for compensatory and punitive damages, the scope of these damages was constrained by strict ceilings which placed a combined limit of between $50,000 to $300,000 (depending on the size of the employer) on the *combined sum of*: (1) compensatory damages for "future pecuniary losses," (2) emotional distress damages; and (3) punitive damages. (*Ibid.*; *see also* 42 USC §1981a(b)(3); *Chin, et al., Cal. Practice Guide: Employment Litigation*, §§ 7:1180-7:1182.)

In stark contrast to the FEHA's emphasis on monetary relief, Title VII has long had a philosophical preference for non-monetary equitable

relief. As a well-known commentator notes, under Title VII, "[t]o compensate for future damages, reinstatement (or instatement) is the preferred, presumptive remedy for a discrimination victim...." (*Lindemann & Grossman, Employment Discrimination Law* (4th Ed.), Vol. II, Ch. 40.II.B.2.b, p. 2800; *see also Kucia v. Southeast Arkansas Community Action Corp.* (8th Cir. 2002) 284 F.3d 944, 948-949 ["Front pay is an equitable remedy 'given in situations where reinstatement is impracticable or impossible.'"].) In fact, only "[w]hen reinstating a successful Title VII plaintiff is not feasible" is front pay "available as an alternative remedy." (*Bruso v. United Airlines, Inc.* (7th Cir. 2001) 239 F.3d 848, 862.)

Other provisions of Title VII are similarly remedy-restrictive when it comes to monetary relief. For example, the statute itself limits liability for back pay to no more than two years prior to the filing of the charge of discrimination with the Equal Employment Opportunity Commission. (42 U.S.C. §2000e-5(g)(1).)

From this comparative analysis, two key points emerge.

First, Title VII's damage provisions could obviously not control the FEHA's damage provisions for the obvious reason that the two schemes are so different in words and philosophy concerning damages. (*Commodore Home Systems*, 32 Cal.3d at 217 [contrasting Title VII's statutory remedy limitations with FEHA's unlimited remedies].)

Second, the fact that the FEHA has always provided for broader monetary relief than Title VII strongly suggests the conclusion that any mixed-motive FEHA defense should provide a *narrower limit on remedies* than the analogous Title VII defense.

These distinctions between the FEHA and Title VII explain why this Court should declare that a mixed-motive defense precludes only certain types of damages (economic, not non-economic) rather than all damages. But there are two additional considerations favoring the same conclusion.

This Court has acknowledged in the FEHA context that "[t]o limit the damages available in a lawsuit might substantially deter the pursuit of meritorious claims, even where litigation expenses are payable to the successful employee." (*Commodore Home Systems*, 32 Cal.3d at 220-221.) A key component of the FEHA is the statute's heavy reliance on private enforcement to ensure compliance with the state's anti-discrimination polices. (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 112 ["private civil actions by employees are the primary means of enforcing employees' rights to be free of unlawful discrimination"].) The greater the limit on recoverable damages, the greater the adverse impact on such private enforcement.

Moreover, this Court has already provided clear precedent for adopting a defense analogous to a federal defense, but tailoring its scope in

recognition of California's broader protection of employee rights. In *State Department of Health Services*, this Court held that a proven "avoidable consequences" defense does not entirely bar a claim for sexual harassment damages under the FEHA, but instead provides only a partial damage defense. (*State Department of Health Services*, 31 Cal.4th at 1044.) In contrast, Title VII's analogous *Ellerth/Faragher* defense[23] provides a complete liability defense. (*Chin, et al., Cal. Practice Guide: Employment Litigation*, § 10:356.)

2. Both logic and compelling policy considerations justify limiting the effect of any mixed-motive defense to only bar those economic damages actually caused by the challenged employment decision.

If this Court adopts a mixed-motive defense, we acknowledge that the defense should logically bar economic damages caused by the challenged employment decision. If an employer proves that it would have terminated the employee regardless of the employee's protected status, the employee "would still have the lost job and the attendant wages had discrimination not occurred, and back pay and order to hire would therefore

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

be inappropriate." (*Church's Fried Chicken*, FEHC Dec. No. 90-11, at *15.)

We submit, however, that this damage – economic damage directly caused by the challenged employment action – is the only remedy which a proven mixed-motive defense logically should bar. The following hypothetical illustrates. Assume an employee is twice passed-over for promotion, and later fired for a subsequent violation of the company's safety policies. Assume further that the decision-maker on the promotion denials and termination is a proven racist and that the safety violation was not a mere pretext. At trial, the employee might easily prove that all three decisions were tainted by racial animus, but the employer could well prove the third decision (firing) would have occurred anyway. In this hypothetical, the successful mixed-motive defense should only bar those economic damages caused by the firing. To the extent that the employee's pre-termination wages and benefits were less than they would have been had the employee received the deserved promotions, that economic loss should still be recoverable.

Likewise, both logic and public policy dictate that the causal-link rationale cannot be applied to other available remedies – such as non-economic damages, punitive damages, statutory attorneys' fees, costs and declaratory or injunctive relief (other than reinstatement).

First, even the less-remedy focused Title VII permits a plaintiff to recover declaratory or injunctive relief, as well as statutory attorneys' fees and costs, notwithstanding a proven mixed-motive defense. (42 U.S.C. §2000e-5(g)(2)(B)(I).) There is no principled basis for rejecting this same relief under the more remedy-focused FEHA.[24]

Second, this Court has recognized that: (1) employment discrimination "can cause emotional distress" covering "the full gamut of intangible mental suffering, including not only physical pain, but also 'fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal"; and (2) that "such distress is a compensable injury under traditional theories of tort law." (*Peralta Community College District v. FEHC* (1990) 52 Cal.3d 40, 48 and fn. 4.) Thus, to fulfill the FEHA's policy of effective remedies, an employee must be entitled to recover non-economic damages for the fundamental dignity rights violated by the underlying discrimination.

This Court has recognized that the FEHA protects an individual's "legal and dignity interests in freedom from discrimination based on

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[24] For example, a rule prohibiting statutory attorneys' fees would conflict with the FEHA's goal of ensuring private enforcement of its public policies by adequate counsel. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 583 ["Attorneys considering whether to undertake cases that vindicate fundamental public policies may require statutory assurance that, if they obtain a favorable result for their client, they will actually receive the reasonable attorney fees provided for by the Legislature....].)

personal characteristics."[25] (*Smith v. Fair Employment & Housing Com.* (1996) 12 Cal.4th 1143, 1171 (housing discrimination). Indeed, "the primary right protected by FEHA is the right to be free from invidious discrimination and retaliation for opposing discrimination." (*George v. California Unemployment Ins. Appeals Board* (2009) 179 Cal.App.4th 1475, 1483.) Whenever an employer places negative reliance on an employee's protected status, the basic dignity right to a discrimination-free workplace is offended. That offense demands compensation. There is a qualitative difference between an employee being subjected to an adverse employment action for wholly legitimate reasons versus that employee being subjected to the same decision due to a combination of legitimate reasons *plus discriminatory animus*. From the perspective of the victim, mental harm and indignity flows axiomatically from being discriminated

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[25] The affront to the basic right of individual dignity caused by discrimination has been repeatedly recognized in a variety of contexts. (*See e.g., Galland v. City of Clovis* (2001) 24 Cal.4th 1003, 1050 (Brown, J. dissenting) [characterizing race discrimination as "an affront to personal dignity."); *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 287 (Kennard, J. dissenting) ["the act of discrimination itself demeans basic human dignity"]; *Rotary Club of Duarte v. Board of Directors* (1986) 178 Cal.App.3d 1035, 1062 [discrimination deprives persons of their "individual dignity"]; *Curran v. Mount Diablo Council of the Boy Scouts* (1998) 17 Cal.4th 670, 705 [discrimination constitutes an "invasion of interests in dignity and self-respect."]; *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 501 (Richardson, J. dissenting) [acknowledging the "detriment, trauma or indignity" suffered by victims of employment discrimination].)

against – even if it is later proven that the same decision would have happened anyway. From the victim's perspective, this retrospective legal defense does not remove the discriminatory stain and the resulting emotional indignity is concrete.

Third, a proven mixed-motive defense should not automatically bar punitive damages like it does under Title VII. Again, fundamental differences between federal and state law make our point.

As part of the Civil Rights Act of 1991, punitive damages first became a specific statutorily-provided remedy within Title VII itself. (42 U.S.C. §1981a(b)(1).) But, as part of the same Act, Congress opted to deny punitive damages (indeed, any damages) in cases where a mixed-motive defense is proven. (42 U.S.C. §2000e-5(g)(2)(B)(ii).) Thus, the very same statutory enactment which created the underlying right to seek punitive damages also determined, as a matter of Congressional choice, that this particular remedy not be available in mixed-motive cases.

Again, California law is radically different.

Under California law, the right to seek punitive damages – and the proof needed to obtain them – has been governed since 1872 by the general punitive damage statute, not any particular provision within the FEHA. (Civil Code §3294.) Our Legislature determined that punitive damages are available in *all* civil actions "not arising from contract," provided that the

proof requirements are met. (*Civil Code* §3294(a); *see also Commodore Home Systems*, 32 Cal.3d at 221.) Thus, the result under Title VII – where Congress chose to make punitive damages available in some type of discrimination cases but not others – has no analogue within the FEHA.

Moreover, an automatic bar to punitive damages in a mixed-motive context is contrary to the FEHA's goal of effective remedies to prompt anti-discrimination deterrence. The fact that a wholly legitimate ground existed does not alter the fact that the employer did, nonetheless, violate the FEHA's core mission of eradicating discriminatory reliance on protected traits. The employer's illegal conduct is still deserving of societal condemnation, and deterrence. Thus, the policies supporting the imposition of punitive damages still apply.[26]

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[26] We acknowledge that the substantive proof requirements for imposing of punitive damages may be difficult to meet where the employer succeeds in proving its mixed-motive defense. There will be cases where proof of the wholly legitimate basis for termination – or other facts – may defeat the threshold requirements of showing malice, fraud or oppression. But we can imagine at least some mixed-motive cases where punitive damages might be appropriate.

Consider the example of an African-American employee who commits a policy violation that is legitimate grounds for termination. Despite this policy, the employee offers evidence that past violations of the same policy by non-African Americans were excused by the employer. The employee also offers evidence that in connection with her termination, the employer's managing agent stated: "Let's not give this [n-word] a break." The jury finds discrimination was a motivating reason. But, in an apparently close call, finds for the employer on the mixed-motive defense.

(continued...)

IV. EVEN IF THIS COURT WERE TO RECOGNIZE A MIXED-MOTIVE DEFENSE TO FEHA CLAIMS, THE JURY'S VERDICT MUST STILL BE AFFIRMED OR, AT MOST, ONLY A LIMITED RE-TRIAL GRANTED.

A. Mixed-motive is an affirmative defense ("new matter") which must be pled in the answer or is waived.

Even if this Court were to recognize a mixed-motive defense, the jury's verdict must still be affirmed. In this case, no mixed-motive jury instructions were required (or even permitted) because the City waived this affirmative defense by failing to plead it in its Answer. (*Hughes v. Nashua Mfg. Co.* (1968) 257 Cal.App.2d 778, 783 ["An affirmative defense must be raised in the answer or else it is waived under well-established rules of pleading."]; Code of Civ. Proc. §431.30(b)(2).)

To relieve the City of this evident waiver, the appellate court offered two grounds – both of which were erroneous.

First, the court stated: "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." (Opinion, 12.) But such authority does exist.

(...continued)
In this hypothetical, the employer's overt animus and evident differential treatment of non-African Americans should still warrant punishment, including at the jury's informed discretion, punitive damages.

Price Waterhouse – the very case on which the appellate court predicated its holding – expressly declared that "the employer's burden is most appropriately deemed an *affirmative defense*" because "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 [italics added]; *see also* Answer to Petition for Review, p. 17 [conceding mixed-motive is an "affirmative defense"].) Because mixed-motive is an affirmative defense, federal courts do find that it is waived if not specifically pled in the answer. (*See e.g., Boyd v. Providence Healthcare Co., Inc.* (S.D. Ala. 2005) 2005 WL 3132394, at *10 ["the mixed-motive defense . . . is an affirmative defense that a defendant may raise or waive."]; *Taylor v. Brinker Intern. Inc.* (N.D. Tex. 2006) 2006 WL 453209 *8 [denying leave to amend answer to "assert the mixed motive affirmative defense" resulting in waiver of defense]; *Lambert v. Travel Centers of America* (D. Colo. 2009) 2009 WL 3838780 *7 n. 3 [addressing mixed-motive issue because "[i]n its Answer, the Defendant has pled the mixed-motive affirmative defense..."].)

Second, the appellate court reasoned that the mixed-motive affirmative defense need not be pled because "[t]he city's motive for firing Harris was not a new matter; to the contrary, its motive was the central disputed issue in the lawsuit." (*Ibid.*) This, too, was error.

Under California pleading practice, "whatever defendant bears the burden of proving at trial is 'new matter,' and thus must be specially pleaded in the answer." (*Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2009), §6:430.) This has been the established California rule for over a century. (*Piercy v. Sabin* (1858) 10 Cal. 22, 27 ["New matter is that which, under the rules of evidence, the defendant must affirmatively establish. If the onus of proof is thrown upon the defendant, the matter must to be proved by him is new matter."].)

Here, even the jury instruction which the City belatedly sought to support its mixed-motive defense placed the burden of proving the defense's requirements on the City. (BAJI, Instr. No. 12.26.) Thus, the defense constituted "new matter" and the failure to plead it waived it. (*Piercy*, 10 Cal. at 27; *Hughes*, 257 Cal.App.2d at 783.)

Analysis of the nature of a mixed-motive defense further confirms that it constitutes "new matter," and thus is waived if not pled. A defense of the nature of "confession and avoidance" constitutes "new matter." (*Cahill Bros., Inc. v. Clementina Co.* (1962) 208 Cal.App.2d 367, 385-386.) *Cahill* summed-up the governing rules:

> Whether the matter is new or not, must be determined by the matter itself, and not by the form in which it is pleaded – the *test being whether it operates* as a traverse or *by way of confession and avoidance*. ... New matter involves of necessity a new issue, or the *introduction of a new ingredient*

> *as the basis of one*, and a new issue can only arise upon a plea of confession and avoidance. (*Ibid.*) (italics added.)

A mixed-motive defense is a defense in the nature of "confession and avoidance." It arises *only if* the essential charging allegation of the complaint (*i.e.*, that the adverse action was motivated by discriminatory animus) is proven. (*O'Donnell v. LRP Publications, Inc.* (E.D. Pa. 2010) ___F.Supp.2d ___, 2010 WL 571849 at *6 fn. 7 [employer may "avail itself" of the mixed-motive defense "after a mixed-motive plaintiff establishes an unlawful employment practice."].) Only then does the employer tender the independent question of whether it would have made the same decision had it not considered the employee's protected status. Thus, the defense is one of "confession and avoidance." (*Cf. Marshall v. Westinghouse Elec. Corp.* (11th Cir.,1978) 576 F.2d 588, 591 ["A defendant who seeks to establish a [bona fide occupational qualification defense] is essentially asserting an 'affirmative defense' one in the nature of confession and avoidance."].)

Given the City's fatal waiver, even if this Court recognizes a mixed-motive defense, the jury's verdict here must still be affirmed because "[t]he court was not required to instruct on ... unpled defenses." (*Joyce v. Simi Valley Unified School Dist.* (2003) 110 Cal.App.4th 292, 302.)

B. The City's proposed mixed-motive jury instruction misstated the law and, thus, the trial court acted within its discretion in denying it.

There is another, independent ground on which the jury's verdict must be affirmed – even if this Court were to adopt a mixed-motive defense. The mixed-motive instruction proposed by the City misstated the law and, thus, the trial court was under no duty to give this instruction. (*Fibreboard Paper Products Corp. v. East Bay Union of Machinists* (1964) 227 Cal.App.2d 675, 717 ["Where a portion of a proposed instruction is erroneous, misleading or incomplete, the court may proper refuse the entire instruction...."].)

The City's proffered mixed-motive instruction stated that "the employer *is not liable* if it can establish" its mixed-motive defense.[27] (BAJI, Instr. No. 12.26) (italics added.) Thus, the instruction purported to establish a complete defense to liability ("is not liable").

However, for the reasons set forth in Section III above, this instruction is erroneous because any mixed-motive defense under the FEHA cannot be a complete defense to liability. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 961 ["Because the instructions were incorrect statements of law, the trial court properly refused to give them."].)

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[27] The entire text of the City's proposed instruction is found in section II(B)(1) above.

Nor can the City – without speaking out of both sides of its mouth – contend otherwise. The City acknowledged in the Court of Appeal that a mixed-motive defense is not a complete defense to liability, but only affects remedies. There, the City wrote: "*In a mixed-motive case*, ... a plaintiff's *remedies are limited* to declaratory or injunctive relief, attorneys' fees and costs...." (Appellant's Opening Brief, 33) (italics added.) Elsewhere in the same brief, the City confirmed its understanding that "the mixed-motive instruction ... *affects the remedies available* to Harris" because, if the defense is proven, "the jury may not award money damages or order reinstatement or promotion." (*Id.* at 36) (italics added.)

Because a party has a duty to provide complete, accurate and non-misleading instructions, the City's failure to do so bars its appellate challenge on this ground. (*Fibreboard*, 227 Cal.App.2d at 717.)

C. Even if this Court were to conclude that the City's failure to plead its mixed-motive defense did not waive the defense, any re-trial should be limited only to those issues necessarily remaining to be decided on the defense.

It is not entirely clear whether the appellate court's disposition of the case envisioned a plenary new trial. The Opinion simply concludes that "[t]he judgment and attorney's fee award are reversed, and the matter is

remanded for retrial." (Opinion, 14.) If this disposition intended a plenary new trial, this too was error.

Instead, assuming *arguendo* that this Court adopts a mixed-motive defense and rejects our waiver contentions, any new trial must still be limited to: (1) whether the City can prove the affirmative defense and (2) if so, those factual determinations, if any, necessary to evaluate the defense's effect on remedies.

However, the first jury's predicate liability findings and its monetary damage determinations must be respected, and no new trial should intrude upon them. This conclusion flows inescapably from California's strong policy against unnecessary re-trials.

In *La Manna v. Stewart* (1975) 13 Cal.3d 413, this Court pointed out that society has a "strong interest in avoiding needless retrials." (*La Manna*, 13 Cal.3d at 425.) Likewise, this Court has held that "[t]he appellate courts have power to order a retrial on a limited issue, if that issue can be separately tried without such confusion or uncertainty as would amount to a denial of a fair trial." (*Brewer v. Second Baptist Church* (1948) 32 Cal.2d 791, 801.)

More recently, this Court articulated the policy in favor of avoiding plenary re-trials when a limited re-trial could legitimately be ordered instead:

> The underlying rationale is easy to discern: To require a complete retrial when *an issue* could be *separately tried without prejudice* to the litigants would unnecessarily add to the burden of already overcrowded court calendars and could be unduly harsh on the parties. (*Torres v. Automobile Club of Southern California* (1997) 15 Cal. 4th 771, 776) (italics added.)

Applying these principles here, any mixed-motive defense is an "issue" which could be "separately tried without prejudice to the litigants." Because the mixed-motive defense only arises after a determination is made that the challenged decision was motivated at least in part by prohibited animus, a re-trial limited to the defense can be accomplished without prejudice to either side. (*O'Donnell*, 2010 WL 571849 at *6 fn. 7.)

The first jury already found that the City did consider Harris' pregnancy in terminating her and the appellate court found substantial evidence supporting this finding. (Opinion, 12-14.) Moreover, the City has never contended that the jury's damages verdict lacks substantial evidence. Under these circumstances – where both the underlying liability and damage findings are supported by substantial evidence and analytically independent of the affirmative defense – "[t]here is no reason to subject the parties and the courts to the expense and delay of retrial of those issues on which the jury and the trial court agreed and which are supported by the evidence." (*Schelbauer v. Butler Manufacturing Co.* (1984) 35 Cal.3d 442, 457.)

CONCLUSION

Based on the foregoing, we respectfully submit that this Court should decline to adopt any mixed-motive defense. If, however, it does so, it should require the employer to acknowledge that mixed-motives were actually operating and demand clear and convincing proof of the defense. It should further hold that the defense merely limits economic damages causally related to the challenged employment action.

Finally, regardless of how this Court decides these issues, the City should not receive a new trial. But, if it does, the new trial should be limited to only those issues necessarily required by the defense; the jury's liability and damage verdicts should not be disturbed.

DATED: June 21, 2010

Respectfully submitted,

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By_____

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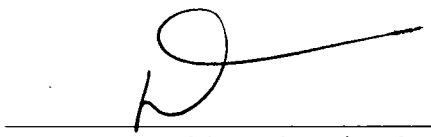
CERTIFICATE OF COMPLIANCE PURSUANT TO

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 17,432 words, excluding those items identified in Rule 8.520(c)(3).

DATED: June 21, 2010



David M. deRubertis

PROOF OF SERVICE

Case Name: Harris vs. City of Santa Monica
Supreme Court Case Number: S181004
Los Angeles County 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): **OPENING BRIEF ON THE MERITS.**

/____/ 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 June 21, 2010 at Woodland Hills, California.

Mollie Elicker

PROOF OF SERVICE (CONT.)

Case Name: Harris vs. City of Santa Monica
Supreme Court Case Number: S181004
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