No. S181004

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WYNONA HARRIS,
Plaintiff and Respondent,

v.

CITY OF SANTA MONICA,
Defendant and Appellant.

Court of Appeal, Second Appellate District, Division Eight, Case No. B199571
Los Angeles Superior Court, Case No. BS 341569

ANSWER BRIEF ON THE MERITS

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INTRODUCTION AND SUMMARY

Years after the enactment of the Fair Employment and Housing Act (the FEHA) (Gov. Code §12900 *et seq.*),*1* this Court is called upon to settle the scope of permissible jury instructions. In particular, in keeping with the time honored approach that under California law it is the totality of the circumstances that determines intentional discrimination under the FEHA, the inquiry before this Court is how should juries be instructed so that they fairly consider all facts, properly weighing suggestions of discrimination against evidence of no discrimination? Another way of phrasing this is, what set of instructions properly convey to juries the need for them to address competing policy interests -- whether the claimed discrimination really had any legally cognizable and actionable impact on what happened, especially given an employee's overall employment record and the possibility that, because of that record, she would have been terminated even if no claimed discrimination existed?

This Court is far from the first court to confront such issues. For the most part, the federal courts and courts of other states have answered similar questions by concluding that, yes, juries must be provided with such instructions. Now Appellant, City of Santa Monica (City), urges this Court to also agree.

The jury instructions at issue are often called "mixed-motive" instructions. They arise commonly from the Supreme Court's decision in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228 (*Price Waterhouse*) and essentially state that even if there was some evidence of discrimination, if because of non-discriminatory reasons the same outcome would have

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[1] All references to the FEHA are to Government Code §12940 *et seq.* unless otherwise indicated.

occurred anyway, the jury should find that there is no actionable discrimination.

But whether the instructions are called a "mixed-motive" defense or something else makes little difference. Rather, their significance springs from the legal requirement under the FEHA, Title VII and other similar laws that employment discrimination liability must arise "because of" impermissible intentional discrimination. As noted time and time again, "because of" is shorthand for causation. The phrase has meaning, even if it can be sometimes elusive. In almost every context and in all but its simplest use, the phrase is understood through the lens of nuance – that is, only in the full appreciation of the totality of the circumstances can its meaning be found. When used in law, "because of" inherently balances cause and effect and competing values.

For good reason, litigants spar over jury instructions. The presence or absence of a jury instruction in employment litigation affects the jury's decision. (Devine, *"The Critical Effect of a Pretext Jury Instruction"* 80 Denv.U.L.Rev.549 (2003); see generally also, *Reid v. Google* (2010) 50 Cal.4th 510.)

Here, as the Court of Appeal concluded and as the City agrees, the trial court infected the jury with an incomplete and inaccurate set of instructions. The instructions given not only allowed, but essentially directed the jury to disregard evidence that discrimination played no genuine actionable role in the City's decision to fire Wynona Harris (Harris) for her history of poor job performance – preventable bus accidents and not showing up to work. The insufficient instructions inexorably led to the jury's finding of discrimination. They eviscerated Harris's burden to prove intentional discrimination "because of" pregnancy, while denying the City its proper defense, which is grounded in the totality of the circumstances. Whether or not the parties requested the instructions, the

court has the duty to give legally correct instructions. (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286.)

A review of the salient facts reveals just why such instructions are critically necessary. Harris was a probationary, at-will motor coach operator (bus driver). Chief among her basic duties, Harris had to drive safely and report to work when scheduled during her twelve-month probation period. In her first four months she caused two accidents. Within the first eight months, she also twice failed to report to work as scheduled. Because of this, the management of the City's bus company decided to investigate her performance. In doing so, they concluded she did not merit advancing to the status of a permanent public employee. They believed that she simply could not be entrusted with the responsibilities of the job. They initiated the investigation process. After it was underway, and after Harris had been interviewed about her performance, Harris told one of her supervisors that she was pregnant. Harris was fired several days later along with two other probationary bus drivers, who were also not performing adequately.

There is no debate that the City's review of Harris's work record overlapped, albeit barely, with Harris's voluntary disclosure that she was pregnant. The question is how legally significant is that?

As this Court's FEHA rulings demonstrate, the workplace is not perfect, and no one expects it to be. The workplace is also complex, with many competing interests. For good reason then, neither this nor any other court has ruled that liability in the work environment, under the FEHA or any comparable law, is triggered easily, that liability is automatically reducible to a syllable or to a single act. "[T]he determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the context of the claim." (*Yanowitz v. L'Oreal USA*

(2005) 36 Cal.4th 1028, 1052; *Lyle v. Warner Bros. Television* (2006) 38 Cal.4th 264, 279-284.)

The FEHA does not exist in legal isolation. Federal and numerous other states' laws use virtually the same language as the FEHA. They each advance and balance the same interests as the FEHA. As Justice Brennan noted in *Price Waterhouse*:

> In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. Yet, the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions . . . This balance between employee rights and employers prerogatives turns out to be decisive . . . .

(*Price Waterhouse, supra,* 490 U.S. at 239.)

The same is true under the FEHA. It is precisely because of the tension between employee and employer rights and prerogatives that something like the mixed-motive defense becomes necessary. Employees cannot be fired because of prohibited reasons. But they can be fired for many, many other reasons, be those wise or not. (*Arteaga v. Brink's* (2008) 163 Cal.App.4th 327.)

Whether under the FEHA, Title VII or any comparable law, the fundamental question is whether an employee was intentionally subjected to impermissible discrimination. As with Title VII and laws elsewhere, the FEHA bars discrimination "because of" sex, pregnancy or other protected status. In attempting to grapple with exactly what "because of" means in any dispute, courts in California, at the federal level and across the country

have come up with various phrases. In this dispute, this Court is called on to do so as well.

In the end, whatever the phrasing used to describe discrimination, none can skirt the ultimate issue – namely, genuine causation. Here this should mean that, even accounting for discrimination as Harris defines it, how likely was it that the City would have fired her anyway because of her well-documented probationary performance? By necessity, the inquiry cannot avoid Harris's repeated shortcomings in judgment and in skill. In prohibiting intentional discrimination "because of," the FEHA does not insulate anyone from the consequences of his or her conduct.

STATEMENT OF FACTS

Harris began working as a probationary bus driver on October 4, 2004 for the City's Big Blue Bus (BBB), a municipal transit system which operates within the County of Los Angeles. (AA 174).2 She was one of ten trainees who took part in a 40-day orientation and training program. During training, Harris and her classmates received instruction regarding BBB rules and employee expectations. The BBB gave Harris "Guidelines for Job Performance Evaluation," which stressed the importance of safety, attendance and customer service, as well as the Motor Coach Operator's (MCO) Manual. (AA 176-177, 181; RT 2176:2-6). With respect to attendance, Harris was instructed and the written materials provided that missing work (a "miss-out") can lead to dismissal. (AA 183).3 Harris was

[2] As used in this Answer Brief, "RT" refers to the "Reporter's Transcript" and "AA" refers to the "Appellant's Appendix."

[3] As part of its evaluation protocol, the BBB uses a point-based system as an aide to gauge employee performance. Under that system, miss-outs have a point value of 25 and any probationary employee who accumulates 50 points in a 90-day period is subject to termination. (RT 919:23-27; 960:12-961:10; 964:18-965:26; AA 187,183).

also informed that preventable accidents indicate unsafe driving. (AA 177). And because safety is the most important aspect of the job, Harris was informed that those who drive in an unsafe manner do not pass probation. (AA 177). Harris was also notified that even if she successfully completed the initial 40-day training period, she would still be a probationary "at will" employee for the first 12 months of her employment. (RT 2718:26-2719:3; AA 176).

On November 14, 2004, Harris was promoted to a part-time bus driver. However, Harris's bus driving career did not get off to a good start. During her first 90-day evaluation period, Harris caused two accidents. The first accident cracked the bus's back door glass. (RT 2180:10-14). During her second accident, Harris sideswiped a parked car and tore off its side mirror. (RT 975:8-14; 2410:6-2411-2; AA 195).

The accidents were just the beginning of Harris's work problems. On February 18, 2005, a mere four days after her first review period, Harris received her first "miss-out." (AA 192-193; RT 1014:9-24; 938: 2-25; 1005:2-1006:7; 1036:1-12). Harris had a second miss-out on April 27, 2005. Harris had previously asked to change her work schedule so that she could accompany her daughter to a juvenile court hearing. (RT 2413:18-2414:25). The BBB accommodated Harris's request and scheduled her to start work on April 27th at 5:00 p.m. (RT 2415:7-10). Sometime between 2:30 and 3:00 p.m., Harris called the BBB and told the dispatcher she was still in court. Harris agreed to call the dispatcher back by 4:00 p.m. if she believed she could not report for work by 5:00 p.m. (RT 2416:13-21; 2450:24-2451:5). At that point, Harris still could have asked for the day off, but she did not want to lose a day's pay. (RT 2414:13-2415:10). Harris failed to call the dispatcher by 4:00 p.m. as she said she would do. (RT 2416:13-21; 2446:1-9; 2417:23-24; AA 251). Consequently, Harris received a second miss-out. (RT 358:18-359:8; AA 202, 203). The

following day, a supervisor prepared a notice advising Harris that she had received two miss-outs within the preceding 90-day period and put it in Harris's mailbox. (RT 1026:20-1027:1; 1032:16-1033:21; AA 203).

On April 28, 2005, after learning of Harris's latest miss-out, BBB Assistant Director Stitcher asked Transit Services Manager Ayer to investigate. (RT 1610:27-1611:17; 1612:4-10; AA 202). Ayer's investigation included meeting with the dispatcher and listening to the audio dispatch recording between Harris and the dispatcher. (RT 3017:4-5; AA 251). Ayer also interviewed Harris personally on May 3, 2005. (RT 1613:1-1614:16).

When Ayer met with Harris, she acknowledged the miss-out and that she had spoken with the dispatcher on April 27th. Harris admitted she was irresponsible not to have called the dispatcher back. (RT 1619:1-28; 1624:3-7; 2106:20-25). As an excuse, Harris stated she had not gotten out of court until after 4:30 p.m., was upset by her daughter's legal problems, and as a single mother she was "going through a lot." (RT 1624:5-7).

Even though Harris took responsibility for the miss-out, in Ayer's opinion her excuse did not negate that it happened. (RT 1622:1-1624:22; 1624:28-1625:6; 2107:12-15; AA 207). By the end of the May 3rd meeting, Ayer had decided to recommend that the miss-out be sustained. (RT 1808:17-23; 2107:12-28). At that time, Ayer had no knowledge Harris was pregnant. (RT 1811:2-9; 2108:1-3; 1819:1-5; 2109:24-27).

Within a day or two after the May 3rd meeting, Ayer communicated his recommendation to Stitcher. (RT 1809:4-12). In response, Stitcher asked Ayer to review Harris's personnel file to determine if Harris should be retained or dismissed during her probationary period. (RT 1823:2-5). Ayer complied and noted that Harris's three-month probationary performance review rated her "Further Development Needed," that she had been involved in two preventable accidents, and that Harris also had one

previous miss-out. (RT 1823:13-22; 1824:6-25; 2109:1-24; AA 192, 195, 202). Ayer concluded that overall Harris was not meeting BBB performance standards, and he reported his findings to Stitcher. (RT 1827:1-13).

According to Harris, on either May 11 or 12, 2005, some eight or nine days after Ayer interviewed her, she informed her immediate supervisor, Transit Operations Manager George Reynoso, that she was pregnant. (RT 2424:5-14; 2426:1-20; AA 209). This occurred during a chance encounter after Reynoso observed that Harris was not properly dressed in her uniform. When he asked her to tuck in her shirt, Harris took Reynoso aside and told him she was pregnant. (RT 1527:13-1528:10; 2425:6-13). Reynoso was happy to hear the news and asked Harris how far along her pregnancy was. (RT 1530:27-1531:5; 1528:11-19). According to Harris, Reynoso reacted negatively and asked her, "Wow. Well, what are you going to do?" [4] (RT 2424:15-26). Reynoso denied asking such a question. (RT 1528:20-22). Consistent with BBB practice, Reynoso asked Harris to obtain a doctor's note verifying any driving restrictions. [5] (RT 1528:23-1529:7; 1564:1-19; 1565:3-13).

Harris obtained a doctor's note dated May 12, 2005, which authorized Harris to drive at work, but restricted her from heavy lifting or strenuous physical labor. (AA 209). According to Harris, she obtained the note either the same day or the day after she told Reynoso she was pregnant. (RT 2426:1-20). Reynoso reviewed the doctor's note on May

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[4] In closing argument, Harris's counsel contorted Reynoso's seemingly innocent question into a suggestion that he wanted Harris to consider an abortion. (RT 3042:16-19).

[5] Since at least the late 1980s, BBB has had a practice of asking pregnant drivers for medical clearance to safely drive a bus. (RT 2114:23-2115:2; 2728:15-2729:6; AA 188). Such a request is lawful. See ¶ IV-E, infra.

16th, upon his return from vacation. (RT 1566:1-1567:4; 2427:8-28). Later that same morning, Reynoso attended a supervisors' meeting at which time he was given a list of BBB probationary employees who were not meeting BBB expectations. Harris was included on that list. (RT 1567: 9-23). After the meeting, Reynoso advised the Human Resources Department of the pending probationary separation of three BBB employees, including Harris. (RT 1567:21-27; 1569:13; AA 248).

At Stitcher's direction, Ayer met with Harris on the morning of May 18, 2005 to tell her she was not meeting probationary standards and that she would be terminated effective May 19, 2005. (RT 1834:8-16; 1838:14-18; 1836:15-1837:3; 2113:5-18; AA 211,215). That same day, Human Resources informed then City Manager Susan McCarthy of the action. She acknowledged receipt of the e-mail and expressed her support of the decision. (AA 213). In a follow-up letter to Harris dated May 24, 2005, Reynoso confirmed that her separation on probation was effective May 19, 2005. (AA 227). In none of these or in any other communications was any mention, written or oral, made of Harris's pregnancy.

PROCEDURAL HISTORY

Harris's lawsuit, filed on October 17, 2005, alleged pregnancy discrimination in violation of the FEHA. (AA 13-17). The City's answer contained a general denial and asserted, among other things, that the termination was for legitimate, non-discriminatory reasons. (AA 23-24).

Before trial, the City and Harris filed motions *in limine*. (AA 6; 31-58; 74-85). The trial court granted Harris's motion to exclude testimony or evidence regarding the City's treatment of other pregnant employees. (RT Vol.2 B-3:4-B-5:17; AA 110). On January 29, 2007 (AA 88-89), and again on February 2, 2007 (AA 94-102), the City submitted jury instructions, which included the Book of Approved Jury Instructions – Civil (BAJI)

number 12.26 – mixed-motive instruction.

The jury trial began on February 6, 2007. (RT 1, 5). During trial, the judge refused the City's request to introduce evidence showing the number of female bus drivers employed at the BBB (AA 255), which was offered to rebut any inference that the BBB discriminated against female employees. (RT 2468:16-2471:26).

The court instructed the jury on February 22, 2007. (RT 3087-3100; AA 263-291). Although the City requested the court give the BAJI 12.26 mixed-motive instruction (RT 2752:21-25; 2755:23-2756:4; 2758:4-19; AA 89), the court refused to give it. (RT 3087:15-3100; AA 263-291). Instead, the court limited the pertinent instruction to the Judicial Council's California Civil Jury Instruction (CACI) 2500.

On February 27, 2007, the jury by a nine-to-three vote found that "pregnancy [was] a motivating factor/reason for [the city's] decision to discharge" Harris and awarded her $177,905.00 in damages. (AA 293). Judgment was entered March 7, 2007. (AA 298).

The City moved for judgment notwithstanding the verdict and new trial. The City argued that the court's refusal to instruct the jury on the mixed-motive instruction deprived it of a legitimate defense. The court denied the motions. Thereafter, Harris moved for attorney's fees, which the court awarded in the sum of $401,187.50. (AA 719).[6]

The City appealed and the Court of Appeal reversed the judgment and attorney's fee award and remanded for retrial. Harris petitioned for rehearing, which resulted in the February 4, 2010 opinion after rehearing.

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[6] The Court of Appeal did not consider the City's appeal from the attorneys' fee award because the issue was "premature" in light of the reversal and remand.

ARGUMENT

I. THE DENIAL OF A MIXED-MOTIVE INSTRUCTION PREVENTED THE JURY FROM CONSIDERING THE TOTALITY OF THE CIRCUMSTANCES, NOTABLY SERIOUS PERFORMANCE LAPSES, YIELDING AN UNFAIR RESULT AT TRIAL.

The FEHA required that Harris prove she was harmed "because of" her pregnancy. (Govt. C. §12940(a).)7 The CACI jury instructions given by the trial court did not require that Harris prove meaningful causation. The CACI jury instructions do not accurately reflect Harris's burden under the FEHA. The failure of the trial court to give a mixed-motive instruction (such as BAJI 12.26) prevented the jury from considering the totality of the circumstances, including the City's permissible non-discriminatory reasons for Harris's termination, and thus led to an unfair result in the trial below. The Court of Appeals recognized this miscarriage of justice, as should this Court.8

Failure to give proper jury instructions in a civil case is reviewable for prejudice, which is assumed if "it is probable that the error prejudicially affected the verdict." (*LeMons v. Regents of the University of California*

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[7] All statutory references are to the California Government Code unless otherwise noted.

[8] Just because the CACI instructions are approved does not mean they accurately reflect the law. "[P]attern jury instructions . . . are not the law itself[.]" (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.) Moreover, CACI instructions are not entitled to a presumption of correctness. (*Bowman v. Wyatt* (2010) 186 Cal.App.4th 286, 298.) California Rules of Court, rule 2.1050(b) also notes that while the Judicial Council "makes every effort to ensure that they accurately state existing law," "[t]he articulation and interpretation of California law . . . remains within the purview of the Legislature and the courts of review." Under rule 2.1050(e), the trial court should not use the form instruction where "a different instruction would more accurately state the law." (*Id.*)

(1978) 21 Cal.3d 869, 875; *Logacz v. Limansky* (1999) 71 Cal.App.4th 1149 [prejudicial instructional error for trial court to refuse a jury instruction on concurrent causation in wrongful death case].)

The City had the right to have the jury instructed on all theories of its case which were supported by the pleadings and evidence. (*Hasson v. Ford Motor Co.* (1977) 19 Cal. 3d 530, 543-544. Code Civ. Proc. §§607a, 608; *Bernal v. Richard Wolf. Medical Instruments Corp.* (1990) 221 Cal.App.3d 1326, 1338.)

In reviewing the record in the light most favorable to the City, the Court assumes the jury might have believed the evidence upon which the instruction favorable to the City was predicated. (*Henderson v. Harnischfeger Corp.* (1974) 12 Cal.3d 663; *Whiteley v. Philip Morris Inc.* (2004) 117 Cal.App.4th 635, 655.)

The trial court did not give the mixed-motive jury instruction as the City requested. Instead, the court gave CACI 2500. In so doing, Harris tacitly obtained an advantage of a lower burden of proof without also affording the City the opportunity to argue the effect of evidence supporting its mixed-motive defense. CACI 2500 merely required that the jury determine if pregnancy was "*a motivating factor*" in Harris's termination. Harris had the benefit of the lower burden of proof (essentially, the jury need only find whether any improper discrimination was present no matter how slight or even relevant, as with the requirement for a doctor's note), yet the City was deprived of the concomitant defense provided by the mixed-motive instruction. In such a setting, it is more than reasonably probable that the court's denial of a mixed-motive jury instruction misled the jury into believing that any degree of discrimination, even so slight that it would not have made a difference in the outcome, led to liability. This adversely affected the verdict and constituted prejudicial, reversible error. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1213;

Kinsman v. Unocal (2005) 37 Cal.4th 659, 682.)

A. Proof Of Causation Is Central To Any Employment Litigation.

Harris's claim is one of disparate treatment, that is, intentional discrimination "because of" her pregnancy. (*International Brotherhood of Teamsters v. United States* (1977) 421 U.S. 324, 334-336; see *Caldwell v. Paramount Unified Sch. Dist.* (1995) 41 Cal.App.4th 189.) As a disparate treatment plaintiff, Harris bore the burden of proving, by a preponderance of the evidence, that the City intentionally discriminated against her "because of" her pregnancy, and that this intentional discrimination caused her job loss. (*Desert Palace v. Costa* (2003) 539 U.S. 90, 99; *Guz. v. Bechtel National* (2000) 24 Cal.4th 317, 358.) Her pregnancy must have been "a substantial factor" in the determination. (*Lyle v. Warner Bros. Television, supra*, 38 Cal.4th at 280.) Put a little differently, "[w]hatever the employer's decisionmaking process, a disparate treatment claim cannot succeed unless the employee's protected trait . . . had a determinative influence on the outcome." (*Hazen Paper Co. v. Biggins* (1993) 507 U.S. 604, 610; *Green v. State of California* (2007) 42 Cal.4th 254.)

As Justices White and O'Connor also recognized twenty years ago in *Price Waterhouse,* the discriminatory "because of" motive must, at the very least, be a "substantial factor" in the outcome. (*Price Waterhouse, supra,* 490 U.S. at 259 (White, J. concurring), at 265 (O'Connor, J. concurring).)[9]

In attempting to grapple with exactly what "because of" means in any dispute, courts in California, at the federal level and across the country have come up with various phrases – e.g. "motivating factor," "actionable

[9] Justice O'Connor stated her belief that "because of" under Title VII means "'but for' causation." *Id.* at 262-263.

conduct," "causal connection," "but for," "motivating reason," "substantial motivating reason" - in an effort to describe just what has been prohibited and why. (*Yanowitz v. L'Oreal, supra*, 36 Cal.4th at 1052.) This Court has used both "substantial factor" and "actionable." (*Lyle v. Warner Bros. Television, supra*, 38 Cal.4th at 280; *Reid v. Google, supra*, 50 Cal.4th 512.)

The logic of each is that most determinations of "because of" liability under civil rights laws are complex and involve multiple overlays of fact and policy, many of which are competing. In the end, no one term may be talismanic. Each is a proxy for causation.

Commentators have struggled to reconcile this often confounding language. "Employment discrimination law has befuddled most of those who have attempted to master it. Confusion arises when one attempts to reconcile the two frameworks that govern individual treatment cases: the *McDonnell Douglas* approach and the *Price Waterhouse* approach." (Davis, *Price-Fixing: Refining the Price Waterhouse Standard and Individual Disparate Treatment Law* (2004) 31 Fla.St.Univ.Law Review 859.)

Some commentators argue for collapsing "pretext" and "mixed motive" into one standard. (Corbett, *McDonnell Douglas, 1973-2003: May You Rest in Peace?* (2003) 6 U.Pa.J.Lab.& Emp.L 199, 212; Note, *Dare to Step Out of the Fogg: Single Motive Versus Mixed Motive Analysis in Title VII Employment Discrimination Cases* (2008) 47 U. Louisville L.Rev. 409, 424.) This Court need not necessarily decide that question here, although the City believes that such an approach has merit.

Regardless, the City agrees with Professor Davis: Courts have often used "befuddling" language to describe intentional discrimination. Nonetheless, there exists a common, if elusive, touchstone in the FEHA and in its numerous counterparts throughout the country. That touchstone is

that intentional discrimination must occur "because of" a prohibited attribute and that Harris and others must prove at a minimum that intentional discrimination played a key legally cognizable part in whatever occurred.10

Webster's *New World Dictionary* defines "because of" as "by reason of; on account of"; see also *Kelly v. State Personnel Bd.* (1939) 31 Cal.App.2d 443, which uses the terms synonymously with "'on account of' or 'in consequence of.'" This Court's analysis in *In re M.S.* (1995) 10 Cal.4th 698 also helps define the term. Justice Werdegar, writing for the majority, interpreted the state's hate crime laws, Penal Code §§422.6 and 422.7:

> The language of causation employed in [Penal Code] sections 422.6 and 422.7 ("because of") is commonly and properly used to indicate that an event, in this case the crime, was caused in fact by something.

(*Id.* at 716.)

> [A]s a matter of common usage, "because of" means the conduct must have been *caused by* the prohibited bias.

(*Id.* at 719.)11

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[10] "Because of" may or may not be elegant language, but it is near ubiquitous in civil rights laws throughout the country. It exists alongside "equal protection," "due process" or any number of other simply stated yet perplexing phrases. Like them, "because of" is not susceptible to easy aphorism.

[11] In footnote 7, Justice Werdegar discussed *Price Waterhouse* and acknowledged that in civil rights laws "because of" had sparked "some disagreement"; nonetheless, she also remarked: "As will appear, we interpret the "because of," as used in section 422.6 and 422.7, in light of traditional rules of causation under the state's criminal law, and find

In her concurring opinion, Justice Kennard observed:

> Deceptively simple in appearance, the words "because of" as used in these criminal statutes mask a host of difficult problems. These problems may generally be divided into two categories: problems of proof and problems of interpretation.

(*Id.* at 730.)

Justice Kennard also explained:

> Perhaps the most that can be said is that when the defendant has entertained both discriminatory and nondiscriminatory motives, and either alone would have been sufficient to produce the behavior, the defendant should not be found to have acted "because of" the victim's statutorily enumerated characteristic if nonbias motives so predominated over the bias motives that imposing a punishment designed particularly for bias-motivated conduct would be inherently unfair and would come perilously close to punishing improper thoughts or beliefs.

(*Id.* at 733-734.)

In the criminal law context, this Court's understanding of "because of" comports closely with what the City believes the FEHA also requires. This Court's FEHA jurisprudence says as much also. As stated in *Lyle v. Warner Bros. Television, supra,* in discussing harassment because of sex:

> While the use of vulgar or sexually disparaging

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nothing in *Price Waterhouse v. Hopkins,* [as] dictating a different analysis." (*Id.* at 719, fn.7.)

> language may be relevant to such discrimination, it is not necessarily sufficient, by itself to establish actionable conduct.

(38 Cal.4th at 281.)

> That means a plaintiff . . . will not prevail under the FEHA if a reasonable person in plaintiff's position, considering all the circumstances, would not share the same perception.

(*Id.* at 184.)

While a plaintiff need not prove that discriminatory animus was the sole motivation behind a challenged action, she must prove by a preponderance of the evidence that there was legally "actionable" discrimination, (*Reid v. Google* (2010) 50 Cal.4th 512, 520 ["causal connection" between the employee's protected status and the adverse employment decision]; see also *Mixon v. Fair Employment and Housing Commission* (1987) 192 Cal.App.3d 1306, 1319; *O'Mary v. Mitsubishi Electronics America*, Inc. (1998) 59 Cal.App.4th 563, 584 [recognizing propriety of mixed-motive instruction]; *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1748; *Lyle v. Warner Bros. Television*, *supra*, 38 Cal.4th at 280.) But even then there is more. The action complained about must have been significant in context. (*Lyle v. Warner Bros. Television*, *supra*, 38 Cal.4th at 280.) And even if it was, as recognized in the *Price Waterhouse* line of decisions, there must not be anything that would suggest the outcome would likely have been the same anyway.

B. The CACI Instruction Did Not Require Harris To Prove That She Lost Her Job "Because Of" Her Pregnancy As Required By The FEHA.

The City requested that the court give BAJI Instruction No. 12.26,[12] the mixed-motive jury instruction. Instead, the trial court gave CACI No. 2500.[13] That instruction stated the City was liable if Harris's pregnancy "was a motivating reason/factor for the discharge." A "motivating factor" was defined as "something that moves the will and induces action even though other matters may have contributed to the taking of the action."

The effect is that CACI 2500 directed the jury to find against the City if the jury believed that the City took Harris's pregnancy into consideration at all, regardless of whatever other factors likely contributed to the City's decision. CACI 2500, as formulated, does not ask the jury whether Harris's pregnancy was a "substantial" factor in the City's decision, whether she would have been terminated "but for" the pregnancy, or whether the City's permissible reasons, standing alone, would have

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[12] BAJI 12.26 reads in full: "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."

[13] CACI 2500 reads in full: "Wynona Harris clams that City of Santa Monica wrongfully discriminated again her. To establish this claim, Wynona Harris must prove all of the following: 1. That City of Santa Monica was an employer; 2. That Wynona Harris was an employee of City of Santa Monica; 3. That City of Santa Monica discharged Wynona Harris; 4. That Wynona Harris's pregnancy was a motivating reason/factor for the discharge; 5. That Wynona Harris was harmed; and 6. That the discharge was a substantial factor in cause Wynona Harris's harm.

resulted in Harris losing her job. In fact, CACI 2500 does not ask the jury to contemplate at all the City's permissible, non-discriminatory reasons for separating Harris on probation. In sum, CACI 2500 does not ask the jury to contemplate the totality of the circumstances surrounding Harris's dismissal.

C. Harris's Termination Presents A Classic Case Of Mixed-Motive.

Given the timing of Harris's pregnancy announcement and her job loss, it was understandable that she would question whether she was discriminated against. But timing is not necessarily dispositive. (*King v. United Parcel Services, Inc.* (2007) 152 Cal.App.4th 426, 436.) The jury's task should have been to sort out what happened and why within the context of the competing interests. At trial Harris offered excuses for her accidents and miss-outs, but she did not dispute their occurrences. Nor does Harris dispute that the BBB management initiated its investigation into her performance before she disclosed her pregnancy. Yet because of the timing of her dismissal, close to her pregnancy disclosure, she claims discrimination which the City expressly denies. This type of situation is exactly why the mixed-motive defense was recognized - so that a jury would consider whether, despite Harris's pregnancy disclosure, the City would have ended her employment in any case. (*Price Waterhouse*, *supra*, 490 U.S. at 239.)

D. A Mixed-Motive Instruction Would Have Required The Jury To Consider The Totality Of The Circumstances And Promote Full And Fair Consideration Of The Facts And Protect Both Parties' Rights.

The City asked the court for BAJI Instruction 12.26, which provides, in part:

> If you find that the employer's action . . . was actually motivated by both discriminatory and non-discriminatory reasons, the employer is not liable if it can establish by a preponderance of the evidence that its legitimate reason, standing alone, would have induced it to make the same decision.

The court declined to order this instruction. In a mixed-motive case, to establish "because of" causation, the plaintiff's ***initial*** burden is to prove that discrimination was "a" motivating factor in the adverse employment action, even though other factors may also have been involved. This is a much lighter evidentiary burden than is mandated by the FEHA in disparate treatment cases, where a plaintiff must prove a discriminatory motive was *the cause* of the adverse employment action. (*Hazen Paper v. Biggins* (1993) 507 U.S. 605, 610.) In appreciation of this, the remainder of the instruction provides some balance. The employer has an opportunity to demonstrate that legitimate other reasons came into play so as to defeat liability.

But here, while Harris had the benefit of the lower initial burden of proof (essentially, the jury need only find whether *any* improper discrimination was present no matter how slight or even relevant, as with the requirement for a doctor's note), the instruction was out of harmony. The jury was never asked to consider if her claim of discrimination made

any actual legally cognizable difference – to consider whether the City's non-discriminatory reasons countered any claim of discrimination. The City was, therefore, deprived of the equalizing component provided by mixed-motive analysis – that the outcome would have been the same anyway.

In other contexts, this Court has made clear that the "totality" of the circumstances in the record is relevant to assessing motivation in employment discrimination claims. (*Reid v. Google, supra*, 50 Cal.4th 512 [declining to exclude "stray remarks" from summary judgment consideration because a court must consider all of the evidence in the record]; see also *Lyle v. Warner Bros. Television, supra*, 38 Cal.4th at 184 "consider [ ] all the circumstances".) Mixed-motive asks nothing less – that a jury must consider in context the claim of discrimination and determine whether, even if a claimant has met her burden of initially demonstrating some discrimination, was it legally meaningful given the context.

When a jury is properly instructed, mixed-motive defense gives effect to "because of" as used in the FEHA. It honors the long-standing recognition that before liability can be determined in the workplace, competing interests must be balanced. (*Price Waterhouse, supra*, 490 U.S. at 239, see also *Martori Bros. Dist. v. AG Lab. Rel Bd.* (1981) 29 Cal.3d 721, 729-30.) By providing the jury with a correct analytical framework, the trial court would have adhered to the language of the FEHA and addressed fully the law's requirement for Harris to prove that she was fired "because of" pregnancy. (*Lyle v. Warner Bros. Television, supra*, 38 Cal.4th at 180.) Instead, it did not and this adversely affected the verdict; thus, refusal to do so was prejudicial error. (*Lundquist v. Reusser* (1994) 7 Cal.4th 1193, 1213; *Kinsman v. Unocal* (2005) 37 Cal.4th 659, 682.)

II. THE UNITED STATES SUPREME COURT RECOGNIZED MIXED-MOTIVE BASED ON LANGUAGE AND POLICY CONSIDERATIONS THAT MIRROR THOSE PRESENT IN CALIFORNIA AND, BASED ON CALIFORNIA LAW AND POLICY, THIS COURT SHOULD ADOPT MIXED-MOTIVE ALSO.

A. The Mixed-Motive Defense Rests On The Principle Of Balancing Employers' And Employees' Rights.

Section 12940 states:

> "It shall be an unlawful employment practice, . . . [¶](a) For an employer, ***because of*** the . . . sex . . . of any person, to refuse to hire or employ the person . . . or to bar or to discharge the person from employment . . . or to discriminate against the person in compensation or in terms, conditions, or privileges of employment." [Emphasis added.]

Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-2, provides:

> (a) Employer Practices.
> It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, ***because of*** such individual's

. . . sex . . .;" [Emphasis added.]

Both the FEHA and Title VII use almost identical language. Both use "because of" to describe causation. It is this language that prompted the Supreme Court in *Price Waterhouse* to fashion what has become known as the "mixed-motive" defense to employment liability.

The plurality opinion, authored by Justice Brennan, recognized that Title VII creates a balance of employee rights and employer prerogatives:

> In passing Title VII, Congress made the simple but momentous announcement that sex, race, religion, and national origin are not relevant to the selection, evaluation, or compensation of employees. Yet, the statute does not purport to limit the other qualities and characteristics that employers *may* take into account in making employment decisions. The converse, therefore, of "for cause" legislation, Title VII eliminates certain bases for distinguishing among employees while otherwise preserving employers' freedom of choice. This balance between employee rights and employer prerogatives turns out to be decisive in the case before us.

(*Price Waterhouse, supra,* 490 U.S. at 239 [original emphasis].)

In harmonizing these principles Justice Brennan concluded:

> The central point is this: while an employer may not take gender into account in making an employment decision . . . it is free to decide against a woman for other reasons. We think these principles require that, once a plaintiff in a

> Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII's balance of rights.

(490 U.S. at 244-45 [footnote omitted].)

Finally, in formulating this analysis, the Court concluded that its approach was consistent with the analysis in *Mt. Healthy City Bd. of Education v. Doyle* (1977) 429 U.S. 274 (*Mt. Healthy*). There, a public school teacher asserted that he had not been rehired because of First Amendment protected speech. Yet the facts revealed permissible reasons for the school board's actions. The Supreme Court acknowledged that it did not want to "place an employee in a better position as a result of the exercise of constitutionally protected conduct than he would have occupied had he done nothing." (*Id.* at 285.) The Court recognized that even where First Amendment rights are in the balance, an employee exercising those rights should not be able to prevent the employer from assessing job performance and deciding not to rehire based on that record. (*Id.* at 286.)

What resulted in *Mt. Healthy* was the formulation of essentially a mixed-motive standard. The Court held that the initial burden was on the employee to "show that his conduct was constitutionally protected" and "was a 'substantial factor' or . . . a 'motivating factor' in the [employer's] decision not to rehire him." (*Id.* at 287.) Once the employee carries that burden, the trial court's next determination should be whether the employer proved "by a preponderance of the evidence that it would have reached the same decision as to [the employee's] re-employment even in the absence of the protected conduct." (*Ibid.*)

California has repeatedly borrowed heavily from Title VII jurisprudence while also recognizing limited differences where appropriate. In reviewing the FEHA and comparing it to Title VII, this Court has recognized that the FEHA encompasses more forms of discrimination than Title VII. (*State Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026.) So too, in comparing the different forms of relief under each statute, this Court has appreciated that the FEHA provides more forms of relief, especially compensatory, than that provided by Title VII. (*Commodore Home Systems, Inc. v. Superior* Court (1982) 32 Cal.3d 211). Yet despite these differences, this Court has also recognized the significant similarities between the FEHA and Title VII. (*Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 463; *Lyle v. Warner Bros. Television, supra,* 38 Cal.4th at 278.) Because of these fundamental similarities this Court and courts throughout the state have not hesitated to utilize repeatedly the teachings of Title VII in interpreting the FEHA. *Price Waterhouse* is but yet another example where the Supreme Court's analysis informs how the FEHA should also be understood. But it is not alone.

Even more recently, in *Gross v. FBL Financial Services, Inc.* (2009) 557 U.S. ___, 129 S.Ct. 2343, the Supreme Court again addressed "because of", this time, as used in the Age Discrimination in Employment Act (ADEA). In doing so, the Court held that ADEA plaintiffs must prove "but for" causation, which closely follows what Justice O'Connor argued in *Price Waterhouse*. The ADEA uses identical "because of" language as the FEHA. Unlike Title VII, Congress did not codify the mixed-motive defense to discrimination into the ADEA. See Section IV(D), below. In this respect, the ADEA does not include Title VII's 1991 amendments, and in this respect, the ADEA is more like the FEHA than is Title VII.

In focusing on the textual meaning of "because of" the *Gross* Court held that: "the ordinary meaning of the ADEA's requirement that an

employer took adverse action 'because of' age is that the age was the 'reason' the employer decided to act." (*Id.* at 2350) (citing to *Hazen Paper Co., v. Biggins*, *supra*, 507 U.S. 604 [protected trait must have a determinative influence on outcome]). This is certainly much more than the trial court's or Harris's formulation, and not much different than this Court's approach. (*Lyle v. Warner Bros' Television*, *supra*.)

Plainly, the "mixed-motive" inquiry arises to assist courts and juries in sorting out conflicting theories of causation. (*Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1748; *O'Mary v. Mitsubishi*, *supra*, 59 Cal.App.4th at 583-84; *Grant-Burton v. Covenant Care* (2002) 99 Cal.App.4th 1361.) "In some cases, the evidence will establish that the employer had 'mixed-motives' for its employment decision." (*Heard v. Lockheed Missiles & Space Co., Inc.*, *supra*, 44 Cal.App.4th at 1748; see *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 199-202; see also *O'Mary v. Mitsubishi Electronics America, Inc.* (1998) 59 Cal.App.4th 563.)

Consequently, in figuring out how to sort through the evidence and how to provide balance to the various interests and values, *Price Waterhouse's* jurisprudence remains a useful and instructive guide.[14]

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[14] Harris argues that Title VII jurisprudence deserves little weight in construing the FEHA because the statutory schemes differ, mistakenly relying on *State Dept. of Health Services v. Superior Court* (2003), *supra*, for support. In that case, this Court distinguished Title VII sexual harassment jurisprudence from the FEHA, finding that the FEHA sexual harassment provisions differ significantly from Title VII, which does not address sexual harassment. (*Id.* at 1040.) Nonetheless, this Court independently analyzed the FEHA's anti-harassment provisions to arrive at conclusions similar to those of the United States Supreme Court regarding the effect of employer anti-harassment policies on an employee's duty to report harassing behavior and an employer's duty to remedy it.

Unlike the differences between Title VII and the FEHA regarding sexual harassment, both laws comparably treat sex discrimination (compare

B. The Policy Considerations Of Mixed-Motive Apply No Less Equally In California.

All of the policy concerns at issue in *Price Waterhouse* are of equal concern in California. All employment in California is presumed to be at-will, or terminable at the option of either party. (Labor Code §2922.) With respect to public employees, until they complete their probationary periods, they are not entitled to the full array of due process rights available to civil servants with permanent status. (*Riveros v. City of Los Angeles* (1996) 41 Cal.App.4th 1342.) Government employment in California is governed by statute, not by contract. It is not a right. (*Miller v. State of California* (1977) 18 Cal.3d 808, 813-14; *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1432.) The City, as any other similar public employer, can decide against providing a probationary employee with permanent civil service protections prior to the end of the probationary period, without cause, and without right of appeal. (Compare, *Skelly v. State Personnel Bd.* (1975) 15 Cal.3d 194, with *Bd. of Regents of State Colleges v. Roth* (1972)

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§12940, subd. (a), with 42 U.S.C. §2000e2, subd. (a)(1)), and consider pregnancy discrimination as sex discrimination (compare §12926, subd. (p), with 42 U.S.C. §2000e, subd. (k)). Given the similar statutory provisions, it naturally follows, as this Court has repeatedly recognized, that the FEHA and Title VII share common goals of preventing discrimination in the workplace, and this Court therefore considers federal authorities on Title VII when interpreting the FEHA. (See, e.g., *Miller v. Department of Corrections* (2005) 36 Cal.4th 446, 463; *Lyle v. Warner Bros. Television* (2006) 38 Cal.4th 264, 278.)

Ignoring these similarities, Harris urges this Court also to ignore Title VII if any Title VII jurisprudence threatens her potential for recovery. This is nonsense. Nothing in *Price Waterhouse*, or related cases, or this Court's own jurisprudence guarantees that a discrimination claimant will prevail. In all situations, an employee's burden of establishing liability exists and Title VII jurisprudence remains vital to how an employee proves that she was discriminated against "because of" a pregnancy.

408 U.S. 564 and *Perry v. Sinderman* (1972) 408 U.S. 593.) In the end, as everyone appreciates, the probationary period for a public employee is a period of enhanced scrutiny, which some do not survive.

Thus, just as in *Price Waterhouse* and Title VII, the FEHA operates within competing values. Employees cannot be fired because of prohibited reasons. But they can be fired for many, many other reasons, be those wise or not. (*Arteaga v. Brink's, Inc.*, *supra,* 163 Cal.App.4th at 344; *Hersant v. Dept. of Social Services* (1997) 57 Cal.App.4th 997.)

As this Court's FEHA jurisprudence already reveals, while the workplace is not perfect, different values need to be recognized in order for it to have any hope of operating reasonably. (*Lyle v. Warner Bros. Television*, *supra*; *Miller v. Dept. of Corrections*, *supra*; *Yanowitz v. L'Oreal USA*, *supra*; *Reid v. Google*, *supra*; *Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121.) The same is true outside of the FEHA. (See, e.g., *Bekiaris v. Bd. of Education of City of Modesto* (1972) 6 Cal.3d 575; *Martori Bros. Dist v. Agric. Labor Rel. Bd.*, *supra*; and *Williams v. City of Los Angeles* (1988) 47 Cal.3d 195.)

For public employers in particular, the probationary period is an integral part of the recruiting, testing and hiring process. It allows public employers to evaluate both objective and subjective factors in assessing whether an employee is a good fit for the job and for the organization. (*Bell v. City of Torrance* (1990) 226 Cal.App.3d 189, 195.)

Given this, surely a public employer has rights and duties that must be given effect alongside of those recognized in the FEHA. At a minimum, a public employer has to have the ability to establish work rules and standards and to hold an employee accountable.

Under the facts here, it is indeed a very low threshold to expect any employee, let alone a probationary employee, to show up for work and, if her job is to drive a bus, to do so safely. No rational policy suggests that

the City's work rules become functionally meaningless after Harris's pregnancy announcement. The City still had a duty to determine whether she any longer should be considered a promising permanent employee candidate and whether she should be retained. The City still had to operate a bus system safely and reliably. In short, in harmony with the FEHA, the City had an independent responsibility to determine if Harris could be a safe and reliable public employee.

Thus, Harris's position that an employer's interests are all but irrelevant is all the more extreme when applied because it just doesn't fit comfortably into the totality of the circumstances and all competing values. Harris's accidents and failures to report to work predated her pregnancy disclosure. Even after Harris disclosed her pregnancy, there is no evidence that she was treated differently than any other probationary bus driver. Indeed, every previous BBB probationary bus driver who had multiple unexcused absences and multiple accidents had been fired regardless of gender. Harris never claimed her pregnancy caused her performance issues, or that because of it those issues should be excused.

Beyond this, there is no evidence that other pregnant bus drivers were similarly fired. (*Johnson v. United Cerebral Palsy/Spastic Children's Foundation of Los Angeles & Ventura Counties* (2009) 173 Cal.App.4th 740, 759-67 [significance of the presence of "me too" discrimination].) Two other underperforming probationary bus drivers were fired along with her. No one has suggested that any discrimination was involved in those decisions. Significantly also, there exists no evidence that the City's senior management, most of whom were women and who ultimately ratified the decision to terminate Harris, knew anything of her pregnancy.

More than this, having had pregnancy introduced into what was otherwise a routine performance review, the City cannot reasonably be expected to prove a negative, "clearly and convincingly" at that – that

pregnancy played no role in the City's subsequent decision making. The workplace cannot be expected to function under such a standard, especially when probationary employees are involved. Unfortunately, such a standard invites and rewards too much mischief. It effectively creates a quagmire. For public employers in particular, it transforms any probationary worker who discloses some protected status during her review into a *de facto* tenured public employee, someone who can no longer be fired for almost any or even no reason. (*Mt. Healthy, supra.*)

Yet despite this, under Harris's approach the mere timing of events and precious little else proves discrimination. Finding a "little bit of discrimination," however tenuous or inferred, is all that's needed to overcome other values. A "bright line" is crossed. Neither court nor jury need look further.

In actuality, in neither the language nor purpose of the FEHA does the FEHA support a "bright line" standard which eviscerates competing values and interests. To the contrary, this and other courts routinely recognize that to comprehend intentional discrimination in the workplace, what occurs in the workplace must be analyzed in context. What appears as discrimination in one setting may be permissible in another setting. (See e.g., *Lyle v. Warner Bros. Television, supra.*) It is in this totality of the circumstances and in full appreciation of all values, and not just in one circumstance or in hard and fast rules, where justice toils, where fairness dwells, and ultimately where the FEHA thrives.

Whether it is *Price Waterhouse* or *Lyle v. Warner Bros. Television*, the ultimate issue – namely, genuine causation – cannot be skirted. It must be confronted honestly. Here this means coming to grips with -- even accounting for discrimination as Harris sees it -- wasn't it likely that the City would have fired her anyway because of her well-documented poor probationary performance? By skewing the inquiry away from this Harris

sidesteps the competing interests at stake – the City's responsibilities as a public employer to evaluate public employees' performance before advancing them beyond probation, and that the City alone, using its expertise and discretion, gets to determine whether someone is suited to be a bus driver working in the congested streets of the County of Los Angeles. (*Arteaga v. Brink's, supra.*)

Given the totality of all of this, balanced, complete and accurate jury instructions that incorporated the mixed-motive defense are necessary in order to honor everyone's interests, including Harris's. The truth be told, this dispute probably never should have advanced beyond summary judgment nor survived judgment notwithstanding the verdict.15 Skewed as it was, there is little wonder why the trial court outcome occurred as it did.

The FEHA prohibits intentional pregnancy discrimination. By design and policy, the FEHA does not insulate Harris or anyone else from the appraisal of performance or from the consequences of conduct. (*State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1042 [even strict liability does not preclude all defenses or guarantee recovery under the FEHA]; *Guz v. Bechtel Nat'l, Inc.*, *supra*, 24 Cal.4th at 362 [weak evidence of discrimination can be overcome by evidence of no discrimination].) Maybe not in every situation but certainly here, a mixed-motive defense allows for the balance necessary to satisfy the competing public interests.

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[15] More than even incomplete and inaccurate jury instructions were present at trial. The trial court prevented the City from putting forward evidence demonstrating that it employed many women bus drivers, some of whom were pregnant. The City does not agree with everything stated in the Court of Appeal decision, notably that it was proper for the trial court to deny the City's motion notwithstanding the verdict. If ever there existed a "weak issue" of discrimination which was countered, it exists here. (*Guz v. Bechtel Nat'l Inc., supra,* 24 Cal.4th at 362.)

III. THIS COURT AND MOST OTHER STATES ALREADY ALLOW A MIXED-MOTIVE DEFENSE IN EMPLOYMENT CASES.

A. This Court Has Already Adopted A Mixed-Motive Defense In Employment Cases Under The Labor Code And Education Code.

While this Court has yet to expressly allow the mixed-motive defense under the FEHA, this Court has essentially applied it in other employment contexts. As noted, *Price Waterhouse* remains the genesis of mixed-motive in federal and state employment law, but, also as noted, mixed-motive defense is rooted in the United States Constitution. As discussed above, both Justices Brennan and White noted in their respective *Price Waterhouse* opinions that the slate on which they wrote was already inscribed with the teachings of *Mt. Healthy*, *supra*. 16

Consistent with *Mt. Healthy,* this Court in *Bekiaris v. Bd. of Education, supra,* facing a claim under the Education Code that an employee was dismissed because he exercised his First Amendment rights, held:

> If the board finds that the reason for dismissal was *both* the causes stated in the accusation *and* official dissatisfaction with the teacher's exercise of constitutional rights, it should make a finding to that effect and further should determine whether, absent the exercise of

[16] In her concurring opinion, Justice O'Connor did not refer to *Mt. Healthy*, but did refer to *Arlington Heights v. Metropolitan Housing Development Corp.* (1977) 429 U.S. 252, 270-271, fn.21, which applied the *Mt. Healthy* standard. (*Price Waterhouse, supra,* 490 U.S. at 268-69.)

> constitutional rights, it would dismiss the teacher.

(6 Cal.3d at 593 [original emphasis] [followed in *Powers v. Comm. on Professional Competence* (1984) 157 Cal.App.4th 560, 578].) This Court reached the same result in *Miller v. Chico Unified School Dist. Bd. of Education* (1979) 24 Cal.3d 704, another Education Code case, ordering that:

> On remand, the trial court should determine whether absent the [ ] memoranda, the board would have reassigned plaintiff. If the court determines that the board would have reassigned plaintiff in any case, it should deny plaintiff's petition for reinstatement. If the court determines that the [ ] memoranda played a crucial role in the board's decision to reassign plaintiff, it should . . . require[ ] the board to reinstate plaintiff . . . .

(*Id.* at 716 [citations omitted].)

This Court applied similar reasoning to provisions of the Labor Code. In *Martori Bros. Dist. v. Agric. Labor Relations Bd., supra*, an agricultural worker claimed that he was discharged "because of" his union activities. The employer claimed that the worker was discharged for insubordination and lack of work. This Court observed that "[t]he mere fact an employee is or was participating in union activities does not insulate him from discharge for misconduct or give him immunity from routine employee decisions." (29 Cal.3d at 729-30.) This Court concluded that when assessing "dual motives" in the discharge of agricultural employees under the Agricultural Labor Relations Act, the "but for" standard applies; and "[w]hen it is shown that the employee is guilty of misconduct

warranting discharge, the discharge should not be deemed an unfair labor practice unless the board determines that the employee would have been retained 'but for' his union membership or his performance of other protected activities." (*Id.* at 730; see *United Farm Workers v. Ag. Lab. Rel. Bd.* (1993) 16 Cal.App.4th 1629, 1638-39.)17

Finally, in analyzing the Public Safety Officers Procedural Bill of Rights Act (Gov. Code §§3300 *et seq.* (POBOR).), this Court confirmed and adopted the same standard. (*Williams v. City of Los Angeles, supra,* 47 Cal.3d at 205 [applying a "but for" test where the employee was "allegedly discharged both because of dissatisfaction with his performance and because of his exercise of constitutional rights" and finding that "reinstatement is not mandated if the employer can demonstrate that it would have reached the same decision even had the employee not engaged in protected conduct"]; see also *In re M.S.*, *supra*, 10 Cal.4th at 716-20.)

What has been upheld as the proper analytical standard under the Constitution, the Education Code, the Agricultural Labor Relations Act, and the POBOR, applies equally to the FEHA. In balancing competing rights, availability of a "dual" or "mixed-motive" analysis serves the complex purposes of guarding an employee's protected status or activities, while simultaneously recognizing the employer's legitimate interests in maintaining a qualified workforce. Allowing for the mixed-motive defense ensures that the employee is no better off for having voluntarily introduced her protected status later into the equation than she would have been otherwise. (*Mt. Healthy*; see also, *State Dept. of Health Services v. Superior Court*, *supra*, 31 Cal.4th at 1042 [strict liability does not preclude all

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[17] Consistent with the objectives of the FEHA, the Agricultural Labor Relations Act strives to protect agricultural employees' labor rights and prevent unfair labor practices, and in furtherance of these goals, uses language similar to that of the FEHA. (See Lab. Code, §§1140 *et seq.*)

defenses or guarantee recovery under the FEHA]; *Guz v. Bechtel Nat'l, Inc.*, *supra*, 24 Cal.4th at 362 [weak evidence of discrimination can be overcome by evidence of no discrimination].) And more importantly, a mixed-motive defense gives an employer a fair chance of proving that legitimate nondiscriminatory factors were the reasons for the claimed adverse employment action.

B. Likewise, Most Other States Have Adopted The Mixed-Motive Analysis.

Even apart from Title VII, the FEHA does not exist in isolation. It is part of a nationwide mosaic of laws designed to eradicate impermissible discrimination. Similar antidiscrimination laws operate in nearly every other state and they employ language akin to the FEHA, barring discrimination "because of" certain protected statuses, including sex and pregnancy. These states and the District of Columbia have codified or adopted the mixed-motives analysis as part and parcel to advancing fundamental civil rights in their respective jurisdictions:

- Alaska (*VECO, Inc. v. Rosebrock* (Alaska 1999) 970 P.2d 906, 920-21);
- Arizona (*Timmons v. City of Tucson* (1991) 171 Ariz. 350, 356);*[See Table of Authorities for parallel citations.]
- Arkansas (*Flentje v. First Nat'l Bank of Wynne* (2000) 340 Ark. 563, 571);
- Connecticut (*Levy v. Comm'n On Human Rights and Opportunities* (1996) 236 Conn. 96, 105-07);
- District of Columbia (*Hollins v. Fed. Nat'l Mortgage Assoc.* (D.C. 2000) 760 A.2d 563, 574-76);
- Hawai'i (*Shoppe v. Gucci America, Inc.* (2000) 94 Hawai'i

368, 378);

- Illinois (*Chicago Housing Auth. v. Human Rights Comm'n* (2001) 325 Ill.App.3d 1115, 1122-29);
- Indiana (*Filter Specialists, Inc. v. Brooks* (Ind. 2009) 906 N.E.2d 835, 839);
- Louisiana (*Mbarika v. Bd. of Sup. of Louisiana State Univ.* (La.Ct.App. 2008) 992 So.2d 551, 561-62);
- Maine (*Doyle v. Dept. of Human Services* (Me. 2003) 824 A.2d 48, 54 fn.6);
- Maryland (*Brandon v. Molesworth* (1995) 104 Md.App. 167, 188-89);
- Massachusetts (*Wynn & Wynn, P.C. v. Massachusetts Comm'n Against Discrimination* (2000) 431 Mass. 655, 666);
- Michigan (*Harrison v. Olde Financial Corp.* (1998) 225 Mich.App. 601, 611);
- Missouri (*Wentz v. Industrial Automation* (Mo.Ct.App. 1993) 847 S.W.2d 877, 879-80);
- Montana (*Laudert v. Richland County Sheriff's Dept.* (2000) 301 Mont. 114, 122);
- New Jersey (*Myers v. AT&T* (N.J.Super.Ct.App.Div. 2005) 882 A.2d 961);
- New Mexico (*Behrmann v. Phototron Corp.* (1990) 110 N.M. 323, 326-27);
- New York (*Michaelis v. State of New York* (N.Y.App.Div. 1999) 258 A.D.2d 693, 694);
- Ohio (*Ohio Civil Rights Comm'n v. Kent State Univ.* (1998) 129 Ohio.App.3d 231, 244-46);

- Oregon (*Hardie v. Legacy Health Sys.* (2000) 167 Or.App. 425, 433-36);
- Pennsylvania (*Spanish Council of York, Inc. v. Pennsylvania Human Relations Com'n* (Pa.Commw.Ct. 2005) 879 A.2d 391, fn.19);
- Rhode Island (R.I. Gen. Laws, § 28-5-7.3 [codifying mixed-motives analysis.)
- Texas (*Reber v. Bell Helicopter Textron, Inc.* (Tex.Ct.App. 2008) 248 S.W.3d 853, 856-59);
- Vermont (*Graff v. Eaton* (1991) 157 Vt. 321, 323); and
- West Virginia (*Skaggs v. Elk Run Coal Co., Inc.* (1996) 198 W.Va. 51, 75).

States that bar discrimination "based on" or "on the basis of" sex, including pregnancy, also follow a mixed-motives analysis, including Iowa (*Boelman v. Manson State Bank* (Iowa 1994) 522 N.W.2d 73, 78) and Wisconsin (*Hoell v. Labor and Industry Review Comm'n* (1994) 186 Wis.2d 603, 611.)

Even states that have not expressly adopted the mixed-motive approach indicate that they follow federal law in analyzing discrimination under their respective state civil rights statutes, including Delaware (*Holland v. Zarif* (2002) 794 A.2d 1254); Florida (*Carsillo v. City of Lake Worth* (2008) 995 So.2d 1118, 1119); Idaho (*O'Dell v. Basabe* (1990) 119 Idaho 796, 811); and Wyoming (*Rollins v. Wyoming Tribune-Eagle* (Wyo. 2007) 152 P.3d 367, 370.)

As for the few states that do not follow mixed-motive jurisprudence, the language and logic of *Price Waterhouse* nonetheless remains present, as in Kentucky (*First Property Mgmt. Corp. v. Zarebidaki* (Ky. 1994) 867 S.W.2d 185, 188; Minnesota (*Anderson v. Hunter, Keith, Marshall & Co.,*

Inc. (Minn. 1988) 417 N.W.2d 619, 626; Washington (*Mackay v. Acorn Custom Cabinetry* (1995) 127 Wash.2d 302, 310-12; Tennessee (*Bruce v. Western Supply Auto Supply Co.* (Tenn.Ct.App. 1984) 669 S.W.2d 95; Utah (*Univ. of Utah v. Industrial Comm'n of Utah* (Utah 1987) 736 P.2d 630, 636; and Virginia (*Shaw v. Titan Corp.* (1998) 255 Va. 535, 544.)

This Court has regularly looked to similar statutory provisions in other states in construing various provisions of the FEHA, (See *Peralta Community College Dist. v. Fair Employment and Housing Comm'n* (1990) 52 Cal.3d 40, 57; *Robinson v. FEHA* (1992) 2 Cal.4th 226, 239; *Romano v. Rockwell Int'l, Inc.* (1996) 14 Cal.4th 479, 495), and should do so here as well. There is no reason to do otherwise here.

IV. NONE OF THE WIDELY VARIED REASONS ADVANCED BY HARRIS UNDERCUTS THE APPROPRIATENESS OF MIXED-MOTIVE ANALYSIS.

Almost in a flurry, this Court is presented with one reason or another why it should not follow the reasoned approach of the Court of Appeal, the Supreme Court, this Court's own jurisprudence or the jurisprudence of many other states. None of the arguments apply; many do not make sense given the law and facts. At least two, "federal preemption" and "clear and convincing" evidence, were never raised below or in the Petition for Review to this Court.

A. The FEHA Does Not Purport To Set Forth All Possible Defenses To Liability Nor Should It Be Interpreted To Do So.

Citing to *Rojas v. Superior Court* (2004) 33 Cal.4th 407, Harris claims that because the FEHA enumerates some defenses to liability, no other defenses are allowed. Not so. None of the so-called "affirmative defenses" mentioned by Harris are even called that by the FEHA. Rather,

they are tailored to very specific situations not applicable here. For instance, in its first sentence, the FEHA states that unless it is a "bona fide occupational qualification" or based upon "applicable security regulations," discrimination is not permitted. (§12940.) Similar principles govern disability discrimination, which is prohibited although an employer may consider essential functions, safety factors, accommodation principles or undue hardship, depending on the situation. (§12940(a)(1), (a)(2) & (m).) With respect to age, among other things, nothing prohibits an employer from refusing to employ someone because of age if the law compels that to occur. (§12940(a)(5).) Business necessity allows for certain job-related examinations. (§12940(f)(2).) Reasonable accommodation principles come into play when religious rights are at issue. (§12940(l).)

In stating each consideration, the FEHA nowhere suggests that they are the exhaustive list of what may defeat a claim of discrimination. Nor could the FEHA be correctly interpreted as attempting to so limit defenses. Taken to its logical extreme, because the FEHA also does not expressly mention that an employer can deny discrimination, the FEHA prohibits an employer from "affirmatively" replying that no discrimination occurred – an absurd construction removed from the intent of the Legislature. (*Dyna-Med, Inc. v. Fair Employment and Housing Comm.*, (1987) 43 Cal.3d 1379, 1387.) At all times, Harris must establish that she suffered discrimination "because of" pregnancy. Nothing bars an employer from stating in any number of ways that she failed to do so. Indeed, nothing in the FEHA detracts from the basic rule that: "[A] party may plead in the alternative and may make inconsistent allegations." (*Adams v. Paul* (1995) 11 Cal.4th 583, 593.)

B. The FEHA's Guarantee Of Broad Relief Does Not Compel Or Even Suggest A Lower Threshold For Establishing Liability.

The City does not dispute that the FEHA authorizes broad relief that is more expansive than that provided under Title VII, once intentional discrimination is established, or even that broad remedies may be essential to achieving the compensation and deterrence goals of the FEHA. But it does not follow, as Harris posits, that the FEHA tolerates nothing more than hair trigger liability in order to effectuate the law's purposes.

Harris's assertion that the broad remedial purposes of the FEHA demands liberal construction with respect to liability is misguided. This Court has rejected such a shortcut approach to statutory construction: "[a] mandate to construe a statute liberally in light of its underlying remedial purpose does not mean that courts can impose on the statute a construction not reasonably supported by the statutory language." (*Meyer v. Sprint Spectrum, L.P.* (2009) 45 Cal.4th 634, 645.) Harris's position would require this Court to do just that, to read into the statute that any iota of workplace discrimination suffices to impose liability no matter what else is also occurring. This Court already has rejected such an approach. (*Lyle v. Warner Bros. Television, supra*; *State Dept. of Health Services v. Superior Court*, *supra*.)

In doing so, Harris confuses the distinct concepts of liability and relief in an attempt to diminish causation. (*State Dept. of Health Services v. Superior Court*, *supra*.) They are separate questions, and relief flows only after proof of causation and liability. (*Lyle v. Warner Bros. Television, supra*; *Green v. State of California, supra*; see also, *Johnson v. City of Loma Linda* (2000) 24 Cal.4th 61 [holding that where the plaintiff failed to have an adverse administrative finding set aside through judicial review procedures, the finding that he was discharged for an economic, not discriminatory, reason was binding on his FEHA claim].)

Even the language and structure of the FEHA creates this distinction; well before the law mentions any relief, it unequivocally sets forth what constitutes an unlawful employment practice under a "because of" standard. (Compare, §§12940 and 12945.) The consistent and clear separation between liability and relief in both case law and the statute cannot be ignored. (*Dyna-Med, Inc. v. FEHC, supra.*)

Precisely because of its wide opportunities for relief, the FEHA has to be understood not just as broadly remedial, but also circumspect. To do otherwise, and to interpret the FEHA as Harris suggests, opens the door to what the U.S. Supreme Court in *Mt. Healthy* and what this Court in *Martori Bros. Dist. v. AG Lab. Rel Bd., supra*, warned against--that wielding protected status as a sword, no matter how insignificant the claimed discrimination, gives rise to the danger of an unjust windfall to the employee; here, essentially absolving Harris from the consequences of her poor job performance, all to the detriment of the public, the City, and all other City employees. Nothing in the language nor logic of the FEHA suggests that such an outcome was desired or intended, or that because of ample remedies, liability should be so easily found.

C. The City Did Not Change Its Articulated Basis For Terminating Harris.

Throughout pre-trial discovery, and throughout trial, the City consistently maintained that it terminated Ms. Harris because she failed to meet probationary standards for a Motor Coach Operator, namely her accidents, her failures to report to work, and her subpar evaluation. At any point in her probationary period, whether alone or in any combination, any of these provided more than a sufficient reason to fire Harris. Nonetheless, Harris argues that that the City's explanations prove a shifting rationale unworthy of credence.

Harris's burden is to show that the City's proffered reasons for her probationary separation are "unworthy of credence." (*Guz v. Bechtel National, supra*, 24 Cal.4th 317, 360-361; *St. Mary's Honor Center v. Hicks* (1993) 509 U.S. 502, 521; accord, *Horn v. Cushman and Wakefield Western Inc.* (1999) 72 Cal.App.4th 798, 807.) It is not sufficient to show that the City's "decision was wrong or mistaken." (*Hersant v. Department of Social Services, supra*, 57 Cal App.4th at 1005.) The issue is whether the employer was motivated by animus, not whether its decision was "wise, shrewd, prudent or competent." (*Ibid.*) As a public employer, the City had to review Harris. It also had to operate a bus system safely and reliably. Harris was a probationary employee. The City did not have to prioritize among her performance failures. It is immaterial whether any particular City employee might have thought one reason was more important than another. Whether singularly or in combination, Harris gave the City more than enough reason for it to doubt that she would be either a safe or reliable permanent employee.

D. Federal Preemption Does Not Bar A Mixed-Motive Defense.

If nothing else, Harris's federal preemption argument under 42 U.S.C. §2000e-7, also raised for the first time before this Court, is creative. It also should be rejected. As a policy matter, this Court "will not consider an issue that the petitioner failed to timely raise in the Court of Appeal." (Cal. Rule of Court, Rule 8.500(c)(1); see *Jimenez v. Superior Court* (2002) 29 Cal.4th 473, 481.) Harris never previously raised her Title VII preemption claim. This Court should apply its customary policy and not consider Harris's untimely preemption claim.

But Harris's preemption argument should be rejected for other reasons as well. Her position demonstrates in stark terms just how

willingly Harris wants this Court to cherry pick law that she believes beneficial to her cause while rejecting what is not.

In 1991, in response to the Supreme Court's decision in *Price Waterhouse,* Congress amended Title VII, codifying a form of a mixed-motive defense, but coupling it with limited federal court remedies. From these 1991 Title VII amendments, Harris argues the novel proposition that any mixed-motive defense or form of analysis now adopted in California is barred because state "law" would then "purport to require or permit the doing of any act which would be an unlawful employment practice." (42 U.S.C. §2000e-7.) Nothing of the sort is the case.

First, if Harris wished, she could have filed a Title VII claim in state court. (*Yellow Freight System, Inc. v. Donnelly* (1990) 494 U.S. 820, 821.) If her fears are genuine about the possibility of not securing relief, they are entirely self-created and were avoidable.

Second, if Harris is correct, then most of the other states that have adopted the mixed-motive defense after 1991 have it wrong. As noted above, across the country, states have adopted mixed-motive analysis without apparent concern that they have run afoul of federal preemption principles.

Third, on its face 42 U.S.C. §2000e-7 is not implicated if this Court adopts mixed-motive defense as a means to help a jury analyze whether any discrimination occurred "because of" a protected status. As with the language of the FEHA, Title VII must be interpreted with attention paid to its terms. (*Desert Palace, supra.*) Looking to the words of 42 U.S.C. §2000e-7, it is difficult to determine why on its face this section applies to courts giving jury instructions, or how an analytical legal construct, such as the mixed-motive defense, amounts to a "law" that, in the language of 42 U.S.C. §2000e-7, "requires or permits the doing of any act which would be an unlawful employment practice" under Title VII.

Also, by its terms, 42 U.S.C. §2000e-7 is directed to "any person," who may be subjected to "any liability, duty, penalty, or punishment." With respect to such a person, it makes unenforceable any law "which purports to require or permit the doing of any act which would be an unlawful practice under" Title VII. A trial judge would not seem to be such a "person."

Mixed-motive defense does not *purport* to tell an employer or any other person, to which the FEHA applies, "to do any act" "requir[ing] or permit[ting]" anything, let alone something which might be improper under Title VII. Mixed-motive has a much more targeted purpose. It is directed at judges and juries – triers of fact. Its purpose is to explain what "because of" might mean in a particular factual setting, something left untouched by the 1991 amendments to Title VII. It is a judicial aide devised to assist in understanding causation and liability where multiple issues are in play. It does not "purport [ ] to require or permit" an employer to do anything.

In *Price Waterhouse,* and in the many decisions that came after it, the Supreme Court, as well as the federal and state courts, was grappling with intentional discrimination when, nonetheless, the employer also had other, permissible reasons for its actions. In response, Congress was concerned with what remedies, if any, should flow from such a situation under Title VII, which as noted has fewer remedies than the FEHA. Congress chose a middle ground. If an individual proves a violation of Title VII, and if an employer demonstrates it would have taken the same action in the absence of the impermissible motivating factor, the 1991 amendments limit relief. (42 U.S.C. §2000e-5(2)(B).)

In so doing, Congress did not address one of the fundamental issues in discrimination law: the meaning, under federal law, of discrimination "because of" a protected attribute. Congress left it to the courts to determine how much of an impermissible "motivating factor" must be

present before any Title VII liability is tripped. Congress left intact the plethora of interpretive standards from Justice O'Connor's "substantial motivating factor" to numerous other formulations.

In California, as Harris painstakingly demonstrates, relief under the FEHA is much broader than under Title VII. But the complex issue of proving liability "because of" discrimination remains, particularly in situations such as here, where protected status is introduced only after an employee's review is well underway and where an employee's behavior would have disqualified her from public employment. (*Hersant v. Department of Social Services, supra*; *Arteaga v. Brink's, supra; O'Mary v. Mitsubishi Electronics, supra.*) Mixed-motive defense is central to that understanding.

Lastly, West Virginia's jurisprudence, which Harris relies on, does not help her as much as she thinks. In 1996, the West Virginia Supreme Court interpreted the West Virginia Human Rights Act, W.Va. Code 5-11-9, which bars discrimination "because of" sex and disability, among other reasons. In *Skaggs v. Elk Run Coal Co., supra*, a claim of disability discrimination under state law, the Court not only discussed but adopted mixed-motive jury instructions. (198 W.Va at 70-78.) And, although it left the question for "another day," the court recognized the differences between the state's anti-discrimination law and Title VII and indicated some unwillingness to incorporate into state law Title VII's 1991 amendments. (*Id.* at 78, fn. 32.)

As for *Cutright v. Metropolitan Life Ins. Co.* (1997) 201 W.Va. 50, relied on by Harris, it involved a claim of tortious discharge, among other things, under West Virginia law by an insurance agent. Relying on a West Virginia law that granted "just cause" termination protection to an insurance agent with at least five years work experience, an insurance agent sued when he was dismissed. The employer insurance company claimed

that the dismissal occurred because the insurance agent maintained a hostile work environment for female co-workers. He claimed the termination was pretext and therefore not "just cause."

Relying on 42 U.S.C. §2000e-7, the insurance company also argued that West Virginia's law requiring "just cause" violated the Supremacy Clause. At trial, the insurance agent prevailed and was awarded more than one-million dollars in damages, plus attorney fees and costs. The insurance company appealed.

In language reminiscent of *Price Waterhouse,* the West Virginia Supreme Court stated that the company "'demonstrated a legitimate, non-pretextual and non-retaliatory reason for Plaintiff's discharge'" (*Id.* at 56.) Turning to just cause under West Virginia law, the court stated that it ran afoul of 42 U.S.C. §2000e-7 because "an employer must have the ability to discipline employees who are creating a discriminatorily hostile work environment, through termination and the credible threat of termination." (*Id.* at 59.)

The City does not know if this Court or many others would automatically agree that "just cause" employment protections violate Title VII. The West Virginia court might have interpreted its state law to overcome any perceived preemption problems between state law and Title VII. Regardless, what was at issue in West Virginia certainly was a "law," and there was a "person" who was subjected to "liability, duty, penalty, or punishment." As interpreted, the law "purport[edly]" allowed an employee to skirt the commands of the West Virginia Human Rights Act and Title VII. Nothing like that exists here.

In so ruling, the court also recognized that "legitimate, non-pretextual and non-retaliatory" reasons for an employer to act were enough to overcome any claim of tortious breach of contract (*id.* at 56), which gets

West Virginia, Harris and the City back into the language of mixed-motive and other employment theory.

By applying a mixed-motive analysis to the FEHA, this Court would not be condoning discrimination by "requir[ing] or permitt[ing]" some express improper act in violation of 42 U.S.C. §2000e-7. The jury instruction represents the judiciary's best efforts to explain the meaning of "because of" under state law, a unique prerogative of any state court, but not necessarily of Congress. This is not at all similar to what occurred in West Virginia or in any of the other cases cited by Harris.

In the end, to paraphrase Harris, she cannot be only a "little bit" in love with Title VII. If she is correct that federal preemption applies and that this Court must adhere to Title VII's 1991 amendments, then so too do those amendments' attendant limited remedies apply to her, none of which she sought. Instead, while claiming that adopting the mixed-motive defense amounts to an impermissible judicial rewrite of the FEHA, she asks this Court to wholesale rewrite the FEHA, adopting those elements of the 1991 amendments that Harris considers favorable to her but none of the others. She offers no authority for the Court to be able to do any such thing. If Harris wishes for the FEHA to be rewritten along the lines of Title VII's 1991 amendments, she needs to ask the appropriate branch of government to act, not this Court.

E. The City Had A Statutory Right To Ask For Medical Clearance To Drive A Bus, And In Any Event The Request Does Not Establish Improper Motive And Is Irrelevant.

Section 12940(f)(2) expressly allows an employer to require medical exams or make medical inquiries that are job related and consistent with business necessity. (*Loder v. City of Glendale* (1997) 14 Cal. 4th 846, 899.) Harris made no showing that as applied to her, the request was not

job related and consistent with business necessity. Indeed, Harris's doctor restricted her job duties to "no lifting or strenuous physical labor." The request was proper.

F. No Legislative Enactment Or Decisional Law Supports Imposing A Clear And Convincing Burden Of Proof If The Mixed-Motive Instruction Is Adopted.

Neither the FEHA nor case law supports requiring an employer to prove any defense by clear and convincing evidence. To suggest otherwise also essentially asks that this court rewrite the FEHA, rather than interpret it.

Before asserting this argument in her Opening Brief on the Merits, Harris never made any "clear and convincing" argument. This Court should not consider it. (Cal. Rules of Court, Rule 8.500(c)(1); see *Jimenez v. Superior Court, supra.*)

Even if considered, Harris's argument fails. Civil Code §115 states, "except as provided by law, the burden of proof requires proof by a preponderance of the evidence." This is the default standard of proof in all civil cases. (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 323.) Generally, facts are subject to a higher burden of proof only where particularly important individual interests or rights are at stake. (*In re Marriage of Peters* (1997) 52 Cal.App.4th 1487.) In most all other instances, the burden of a preponderance of the evidence is required in civil cases. (See, e.g., *Pierce v. Harrold* (1982) 138 Cal.App.3d 415, 427 [crime]; *Liodas v. Sahadi* (1977) 19 Cal.3d 278, 291[fraud]; *In re Cheryl H.* (1984) 153 Cal.App.3d 1098 [ward of court]; *People ex rel. Brown v. Tri-Union Seafoods* (2009) 171 Cal.App.4th 1549 [Safe Drinking Water and Toxic Enforcement Act warnings]; *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131 [implied easement].)

The types of proceedings that adopt a clear and convincing burden of proof generally involve deprivations of liberty. None of them applies solely to defenses in a civil lawsuit seeking damages. (See, e.g., civil commitment proceedings, *Addington v. Texas* (1970) 44 U.S. 418; to prove a conservatee's lack of capacity to give informed consent, *Lillian F. v. Superior Court* (1984) 160 Cal.App.3d 314, 323-324; to prove malice in public official defamation, *Bindrim v. Mitchell* (1979) 92 Cal.App.3d 61,72; in a deportation proceeding, *Woodby v. Immigration and Naturalization Service* (1966) 385 U.S. 276; to prove an oral agreement to make a will, *Lynch v. Lichtenthaler* (1948) 85 Cal.App.2d 437, 441; to overcome the rebuttable presumption of paternity, Family Code §7612; to establish a probate conservatorship, *Conservatorship of Sanderson* (1980) 106 Cal.App.3d 611; to prove oppression, fraud, or malice sufficient for punitive damages, Civil Code §3294a; to terminate parental rights, *In re Angelia P.* (1981) 28 Cal.3d 908, 919; and to prove a waiver of a known right, *DRG/Beverly Hills v. Chopstix Dim Sum Café* (1994) 30 Cal.App.4th 54, 60-61.)

The FEHA contains no language supporting Harris's suggestion that an employer must prove its non-discriminatory motivation for an adverse employment action by clear and convincing evidence. (*Reid v. Google, supra,* citing *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 387-388.) For its part, the Supreme Court in *Mt. Healthy* tacitly rejected the clear and convincing standard as necessary in civil actions claiming violation of federal constitutional rights. (*Mt. Healthy, supra,* 429 U.S. at 287; *Price Waterhouse, supra* (White, J. concurring).)

Church's Fried Chicken, Inc. (Cal.F.E.H.C.), 1990 WL 312878 changes nothing. In *Church's*, the FEHC found overwhelming proof of discrimination because of race in the form of direct evidence. The Commission, in discussing whether the remedy of reinstatement was

appropriate, considered Church's defense that even if it discriminated because of race, it would have still terminated the employee, and therefore should not have to reinstate him. The FEHC held that to avoid the remedy of reinstatement, Church's would have to prove by clear and convincing evidence that it would have terminated Jackson solely because of his performance. This Church's could not do, because of the overwhelming direct evidence of racism.

First, the FEHC utilized the very same mixed-motive defense that Harris opposes, at least in terms of imposing an equitable remedy. Second, the FEHC held that "had race not played *the substantial* role that it did here, Jackson would not have been terminated at all." (1990 WL 312878 at 15 [emphasis added].) Thus, clear and convincing evidence was required because of the weight of the unambiguous evidence in the employee's favor. Third, the precedential value of FEHC decisions is limited for judicial enforcement. (Compare *Trujillo v. North County Transit District* (1998) 63 Cal.App.4th 280, 288, to *Kelly v. Methodist Hospital of Southern California* (2000) 22 Cal.4th 1108, 1118.)

The FEHC has no pretrial motions and no jury. That is why, in *Church's*, the FEHC declined to adopt even the *McDonnell Douglas* prima facie case formulation as unnecessary. (*Id.* at 9-10.) Thus, a FEHC decision is particularly ill-suited to illuminate a question of appropriate jury instructions, an issue that will never arise before the Commission. (Cal.Code of Regs. Title II, §7459.1.)

Perhaps more importantly, it is no understatement to say that, if an administrative agency so much as attempted (as the FEHC did not, but Harris wants) to determine what are proper components of jury instructions for California courts to provide, serious separation of powers issues would come into play. (Cal. Const., art. III, § 3; Cal. Const., art. VI, § 1; *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 472; see also *In*

re S.H. (2003) 111 Cal.App.4th 310, 318.) In no way can FEHC rulings usurp this Court's judicial function.

Moreover, if the legislature desires to impose a clear and convincing burden of proof on any aspect of FEHA, it knows how to do it. (Cf. Labor Code §§1102.5 and 1102.6.) It has not done so here. Harris would have the Court interpret the FEHA to allow for liability on a mere scintilla of discrimination, and prohibit an employer's defense of a legitimate, non-discriminatory explanation except upon "clear and convincing" evidence - a striking imbalance.

G. No Legislative Enactment Or Decisional Law Supports Harris's Claim That An Employer Must Admit Discrimination In Order To Require An Employee To Prove Intentional Discrimination.

This Court need not give much consideration to Harris's argument that "equitable principles" require the City to admit discrimination occurred before it could raise the mixed-motive defense. If nothing else, Harris enjoys a cramped and inverted sense of equity. She ignores its guiding principle: "'One who seeks equity must do equity" is a fundamental maxim of equity jurisprudence.'" (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 445.) While Harris claims discrimination, she would have this Court overlook her own wrongs—during her brief employ as a probationary bus operator, she had a poor accident history and record of unexcused absences. Without her claim of discrimination lurking, no court would have intruded upon the City's decision-making.

Harris cites no authority in support of her equity argument; and her assertions run contrary to both logic and California practice. There should be no doubt that a defendant can both deny liability and raise even contradictory defenses at the same time. (*Adams v. Paul*, *supra*,11 Cal.4th

at 593 [finding that "a party may plead in the alternative and may make inconsistent allegations"].)

H. The City Never Waived Mixed-Motive By Not Using That Phrase As An Affirmative Defense.

The City did not waive its defense of mixed-motive. The answer generally denied all of Harris's claims and pleaded several affirmative defenses, including the existence of legitimate non-discriminatory reasons.18 The City's defenses disputed Harris's FEHA claims of pregnancy discrimination and asserted the City's legitimate, nondiscriminatory reasons for her termination.

Code of Civil Procedure §431.30, subd.(b)(2) requires answers to contain "[a] statement of any new matter constituting a defense." What constitutes "new matter" was settled by this Court nearly 150 years ago in *Goddard v. Fulton* (1863) 21 Cal. 430, 435: "[I]f what is claimed as new matter is in effect only a denial of the allegations of the claimant, it is not new matter . . . ." (See also, 5 Witkin, Cal.Proc. (5th ed.) Pleading, §1081.) What is not "new matter" therefore is not an affirmative defense.

Harris raised the same waiver argument in the trial court, but that court never ruled on the issue. (RT 2755:25-28) Had the trial court sustained Harris's objection, the City would have moved to amend its answer to conform to proof.19

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[18] The Affirmative Defense was captioned "Defendant Had Legitimate, Nondiscriminatory Reasons to Terminate Plaintiff" and read: [¶] The termination of plaintiff was not based on the alleged gender and/or sex and/or pregnancy discrimination of which plaintiff complains, but instead, was based on one or more legitimate, nondiscriminatory reasons. Nor was the termination of plaintiff taken under pretext. [AA 28]

[19] California courts have been extremely liberal in allowing amendments to conform to proof. (*Glaser v. Meyers* (1982) 137 Cal.App.3d 770, 776-77; *City of Stanton v. Cox* (1989) 207 Cal.App.3d. 1557, 1563; *Union Bank v. Wendland* (1976) 54 Cal.App.3d 393, 401.)

Moreover, Harris at all times had both the burden of proof and burden of producing evidence that her pregnancy motivated the City's termination decision; motivation "because of" pregnancy is an element of her statutory claim. (§12940, subd.(a).) The City's evidence disputing that causal connection directly refuted Harris's claim that her termination was "because of" her pregnancy. Since motive was already part of Harris's case, the issue of a "mixed-motive" constitutes nothing more than a "traverse." (See *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658, 1669 [someone claiming a violation of statute and the party denying the violation present merely "opposite sides of the same coin"].)

Harris also incorrectly asserts that mixed-motive is a defense in the nature of a "confession and avoidance" because motive arises "only if the essential charging allegation of the complaint . . . is proven." Instead, mixed-motive helps to give meaning to "because of" and cannot be separated from causation. The City's motivation was put in issue when the complaint was filed, and the City never "confessed" to discrimination.

This Court should adopt Justice Rubin's logic, when he concluded:

> The city's motive for firing Harris was not a new matter; to the contrary, its motive was the central disputed issue in the lawsuit. And in any case, the city's answer asserted the city had legitimate reasons for discharging Harris, an assertion that by implication raises poor job

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Here, the mixed-motive instruction was requested before trial commenced. (AA 95, Instruction 2.26 sought on 2/2/07) And the facts supporting this instruction were generally the same as those supporting a complete defense to the claim.

performance as a reason for her discharge.

[Opinion, p. 12]

CONCLUSION

While it is obvious, it nonetheless merits restatement. The FEHA is a vital and necessary expression of California's desire to weed out improper intentional discrimination. Its elegance and enduring vitality reside in its appreciation for the complexities of the modern work place. The FEHA and anti-discrimination law in general are not served by short cuts that seek to mask these difficult issues.

So understood, the FEHA should create no liability for the City. As a public employer responsible for the safe and reliable operation of a bus system, the City, by the end of April 2005, could ill afford to worry whether Harris remained a suitable bus driver candidate. As each month passed, as accidents morphed into not showing up for work, any employer would pause and wonder about the risks in retaining someone like Harris. Through her conduct, Harris spotlighted her shortcomings and jeopardized her employment, which she should have understood. And most certainly as an at-will and probationary employee, Harris was never guaranteed continued public employment. Her performance mattered. She knew that.

So after Harris had raised enough doubts both about her safety and her reliability - and yes, after Harris told of her pregnancy - it was time for the City to make a decision regardless of Harris's recent pregnancy announcement. The City would have been irresponsible to avoid the issue. The City justifiably concluded that it lost confidence in her. Thus, if it is true of anyone, it is certainly true of Harris: Harris all but fired herself. The FEHA was never intended to do anything about that.

Without question, far too many employees - probationary or not - still continue to face impermissible pregnancy discrimination. This is as

true in California as anywhere else. Yet pregnancy is not a license for anyone, employee or employer, to rewrite employment history. Poor performance, just like good performance, remains just that even after someone discloses her pregnancy or other protected status. Accordingly, what would be a proper employment decision based on actual performance one moment does not become improper once a pregnancy becomes known.

In sorting through all of this, juries need to be guided by common sense equity grounded in the law. Even with inferences of discrimination in the air, if months of prior poor performance are also present and are likely equally or more significant, juries need to be told that they may properly find no violation of the Fair Employment and Housing Act.

In so resolving this or any other similar dispute, some simple truths will be reconfirmed - that understating the FEHA's or any other law's requirements serves no one, and that the complexities inherent in most claims of employment discrimination need to be confronted with an even hand. So, while it may seem trite, it is also true - accurate and complete jury instructions are a must if justice, whether it be in the finding of discrimination or in the finding of no discrimination, is to have a hope of prevailing. When all is stripped away, this then is the timeless proposition that confronts the Court – guaranteeing that in an employment discrimination trial, just as in all other trials, juries are properly guided so that each side is fairly treated in accordance with the requirements of the law.

The City of Santa Monica requests that this Court, like the Court of Appeal, reverse the trial court's judgment.

Respectfully submitted,

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Certificate of Word Count

(California Rule of Court 8.204(c)(1).)

Pursuant to California Rules of Court Rule 8.204(c)(1), the text of Answer Brief on the Merits contains 15,707 words.

I certify under penalty of perjury that the foregoing is true and correct. Executed this 8th day of September, 2010, in Santa Monica, California.

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PROOF OF SERVICE

Case Name: Wynona Harris v. City of Santa Monica
Supreme Court Case No.: S181004
Los Angeles County Superior Court Case No.: BC 341269
Court of Appeal Case No.: B199571

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. My business address is 1685 Main Street, Santa Monica, California 90401. I am over the age of eighteen years and not a party to the action in which this service is made. On **September 8, 2010** I served the document(s) described as **ANSWER BRIEF ON THE MERITS** on the interested parties in this action by enclosing the document(s) in a sealed envelope addressed as follows:

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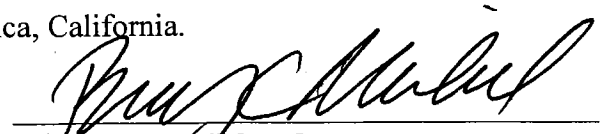

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