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, Case No. B199571
Los Angeles Superior Court Case No. BC 341569

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY

Contrary to the claims by Petitioner Wynona Harris ("Harris"), the Court of Appeal decision establishes no new law. The decision creates no conflict with decisions rendered by this Court, other California courts or with other courts across the country. If anything, through its decision the Court of Appeal applies to this litigation what has been the law for several decades in California and elsewhere in the country. It is surprising that Harris believes otherwise. This Court should decline granting the Petition for Review.

Harris, a novice and still probationary bus driver for the City of Santa Monica's Big Blue Bus ("BBB"), a mass transit bus system operating in the County of Los Angeles, announced her pregnancy after the BBB initiated an investigation into her past accidents and failures to report to work ("miss-outs"), and after the BBB interviewed her about her poor performance. The BBB decided to terminate her probationary employment based on her job performance. Harris claimed that because she was terminated so close in time to disclosing her pregnancy, her rights under the California Fair Employment and Housing Act ("FEHA") were violated, and that she fell victim to pregnancy based discrimination.

The law allows a reasonable jury to infer pregnancy discrimination based simply on the timing of an adverse employment action. According to the trial

court, according to CACI jury instruction 2500, and according to Harris, this is the end of the inquiry. Based solely on the circumstantial evidence of the timing of her dismissal, the trial court instructed the jury, and Harris argued to it, that the jury may infer pregnancy discrimination, and that the City of Santa Monica's BBB, can be liable for damages and if so, also attorney's fees under FEHA.

The Court of Appeal corrected the trial court not on the jury's prerogative to find discrimination, but on the need to properly instruct the jury, when requested by an employer, about a "mixed-motive" defense. The Court of Appeal simply decided that the BBB was entitled to have the jury instructed on a "mixed-motive" defense, as the BBB had requested before the matter was submitted to the jury. In doing so the Court of Appeal merely instructed the trial court to utilize the two decades long "mixed-motive" jury instruction derived from the United States Supreme Court decision in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228 ("*Price Waterhouse*"). As the Court of Appeal recognized, where there is evidence, however weak, of improper consideration being given to pregnancy (here inferred by the timing of Harris's pregnancy announcement with the decision to terminate her a few days later), but where there is also evidence of lawful motives (an unsatisfactory and poor work performance record and an investigation into that, which was initiated prior to the pregnancy announcement, but concluded just afterwards), a mixed-motive defense can be raised and when it is, the jury

needs to be properly instructed about it. This does not break new ground, does not place California out of the mainstream, and does not reflect a division in various California Courts of Appeal. To the contrary, this is well settled law. Anything less would set California apart and would be inherently unfair.

In disagreeing with the Court of Appeal Harris demonstrates just how far from the norm she wishes California to go. To this Court Harris claims that before an employer-defendant can offer the jury a mixed-motive instruction, the employer must admit that it had mixed motives in making its employment decision. In other words, Harris argues that an employer must actually state that it discriminated in order to avail itself of the settled mixed-motive defense. Nothing less than an affirmative confirmation that unlawful considerations influenced its decision making allows the employer to assert by way of defense that it would have made the same employment decision anyway. This is not the law in California nor anywhere else in employment discrimination litigation. Nor is it the law in negligence or other types of actions. While the Court of Appeal did not break new ground in its decision, Harris would have this Court do just that.

Poor job performance by an at-will and probationary mass transit bus driver lies at the core of this dispute. So too does the unremarkable principle that an employer, here Respondent and Appellant below the City of Santa Monica ("City"), must be able to defend itself from claims of pregnancy based

discrimination without being burdened by misleading or erroneous jury instructions, which is all the Court of Appeal recognized.

STATEMENT OF FACTS

Harris began working for the City as a bus driver trainee on October 4, 2004. (AA 174). On her first day, Harris and her classmates received instruction regarding the BBB rules and employee expectations (AA 176-177), including safe driving obligations and the requirements on reporting to work. (AA 177, 183).

Harris completed the initial training program and on November 14, 2004, she was promoted to Motor Coach Operator Part Time, still a probationary position; however, Harris' probationary period did not get off to a good start. During her first evaluation period, November 14, 2004 through February 14, 2005, Harris was involved in two preventable bus accidents. (RT 975:8-14; AA 195).

The accidents were but the start. On February 18, 2005, Harris received her first "miss-out," or failure to report to work. (AA 192). On April 27, 2005, Harris committed her second "miss-out." (RT 2413:18-2414:25; 2415:7-10; 2416:13-21; 2450:24-2451:5; 2414:13 - 2415:10). The following day, her supervisor advised Harris that within the preceding ninety (90) day period her employment record contained a total of two miss-outs, one on February 18, 2005 and a second on April 27, 2005. (RT 1026:20-1027:1; 1032:16-1033:21; AA 203).

Also on April 28, 2005, the BBB's Assistant Director asked the BBB's Transit Services Manager to investigate Harris' job performance with respect to the April 27th "miss-out". (RT 1610:27-1611:17; 1612:4-10; AA 202). He did so and among other things he interviewed Harris on May 3, 2005. (RT 3017:4-5; AA 251; RT 1613:1-1614:16). Shortly thereafter, on May 4 or 5, the Transit Services Manager communicated his recommendation to the Assistant Director, which was to sustain as improper Harris' last miss-out of April 27, 2005. (RT 1809:4-12). A fuller review of Harris' entire employment performance record was then ordered and began. (RT 1823:2-5).

According to Harris, a week later, and nearly 10 days after she was interviewed by the Transit Services Manager about her performance, on either May 11 or 12, 2005 she informed her immediate supervisor of her pregnancy. (RT 2424:5-14; 2426:1-20; AA 209). This came about after he asked Harris to tuck in her uniform shirt. Harris asked him to step aside and then she told him that she was pregnant. (RT 1527:13-1528:10; 2425:6-13). According to Harris' trial testimony, her supervisor then asked her, "What are you going to do?" (RT 2424:15-26), which he denies asking. (RT 1528:11-22).

On May 16, 2005 the BBB decided to terminate the employment of several trainees and probationary employees who were not meeting the bus system's expectations, which included Harris and two other probationary employees (RT

1567: 9-23), and the BBB's officials informed various supervisors and others, including the City's Human Resources Department. (RT 1567:21-27; 1569:13; AA 248).

On May 18, 2005 the BBB told Harris that she was not meeting probationary standards and that her employment would be terminated effective May 19, 2005. (RT 1833: 3-5; 1838:14-18; 1834:10-16; 1836:15-1837:3; 2113:5-18; AA 211, 215). That same day the City's Assistant Human Resources Director advised the City Manager via email that Harris, amongst other employees, would be separated while on probation. (AA 213). The City Manager acknowledged receipt of the email and supported the Department's decision. (AA 213). In a follow up letter to Harris dated May 24, 2005, the City confirmed that her separation on probation was effective as of May 19, 2005. (AA 227). In none of these communications was any mention, written or oral, made of the pregnancy.

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ARGUMENT

I. The City is entitled to a Full Defense and the Timing of an Announcement of Pregnancy Cannot Conclusively Trump Legitimate Employer Decisions by Pre-Determining the Outcome of a Pregnancy Discrimination Claim.

As this dispute reveals yet again, timing is everything, but it also can be a deliberate distraction. Every pregnant employee makes her own decision about whether and when and to whom to voluntarily disclose her pregnancy. But those she tells have no comparable choice. Whether you are a friend or an employer, you are told when you are told. You don't get to pick the day or the time. That afterwards the employer can decide to end an employment relationship may have nothing to do with a pregnancy announcement. Everything that happens after a pregnancy announcement necessarily happens with that announcement being known by at least some. Nothing can take back news of the announcement. But this is far different than everything that happens afterwards occurring *because of* the pregnancy announcement.

So what does this have to do with Harris' Petition for Review? Here, everything. Harris announced her pregnancy to her immediate work supervisor George Reynoso. Her statement came weeks after her more senior supervisors started their review of Harris' poor job performance, which included multiple bus

accidents and failures to report to work. Harris' pregnancy announcement came nearly two weeks after she was interviewed about her failure to report to work on April 27, 2005. But for Harris everything the City did after her announcement, including continuing its review of her overall probationary period work performance, must be viewed through the lens of presumptive pregnancy based discrimination. For why else did the City do what it did after her announcement? Since by definition everything the City did after she announced her pregnancy happened after the announcement, it all must be because she told Reynoso she was pregnant, or so Harris claims.

In contrast to what happened after her pregnancy announcement, for Harris everything she did before her announcement – her bus driving accidents and failures to report to work - lack consequence and become all but meaningless. Each is mere prologue. They are transgressions, but Harris has excuses for each. Any contrary view is just more evidence of discrimination. For Harris it makes no difference that the City terminated every other at-will and probationary bus driver, male or female, who had the same disciplinary history as she. It makes no difference that she was let go along with other probationary employees. No, for her the City cannot even present evidence of how it treated other pregnant employees. Regardless of her prior work performance history, regardless of her status as an at-will and probationary employee, regardless that she had no

entitlement to continued public employment, she was terminated after she informed her employer that she was pregnant. Therefore, she presumptively suffered pregnancy-based discrimination.

The City did not choose the time for Harris to disclose her pregnancy. But the telling did not rob the City of its ability and responsibility to decide that Harris' multiple bus accidents and failures to report to work made her a chancy candidate for the full responsibilities of a permanent bus driver. No one has a right to public employment - most especially an unpredictable, at-will and probationary mass transit bus driver. At all times the City, as a governmental mass transit operator, owed its customers strict common carrier duties for safety and reliability, qualities Harris lacked, as her performance repeatedly revealed. Her pregnancy does not change any of this.

Once informed of Harris' pregnancy in the midst of conducting her probationary performance review, the City understandably paused and pondered whether her disclosure should change the outcome. It decided it shouldn't and acted accordingly. None of that is the stuff of pregnancy discrimination, particularly where nothing linked Harris' pregnancy to her unreliable job performance.

The Court of Appeal recognized that the trial court erred in not applying established law regarding the City's motivations for terminating Harris. The Court

of Appeal recognized that the inference of pregnancy discrimination based on timing is not the end of the inquiry and that the inference cannot become a presumptive conclusion with no meaningful opportunity for rebuttal. The Court of Appeal recognized that the City had the right to tell the jury, by appropriate instructions, to weigh what the City did, and why: to answer the question of whether, pregnant or not, the City would have made the same decision to terminate Harris' probationary employment. The Court of Appeal decided that existing law allows the City a legitimate and fair defense to Harris' charge of pregnancy discrimination. In doing so the Court of Appeal upheld the obvious - jury instructions must be legally correct and clear. As FEHA requires, the jury must conclude that Harris was fired *because of* her pregnancy.

II. Denying Wrongful Discrimination Does Not Create a Case of Pure "Pretext", and Does Not Deprive an Employer of Available Defenses and Appropriate Jury Instructions.

Before this Court Harris makes a great fuss about pretext in the employment law context, and whether an employer's denial that its adverse employment actions were a pretext for unlawful discrimination prohibits the employer from invoking the balancing test set forth in *Price Waterhouse*. It does not. Like any other defendant in any other dispute, an employer may defend itself against a claim of

pregnancy discrimination through evidence that it did not discriminate on the basis of pregnancy. But if the jury somehow believes it did, presumptively or otherwise, the employer may ask the jury to decide whether the employer would have made the same decision in any event. If the evidence shows that an employer **may** have harbored impermissible motives in reaching an employment decision, but also had legitimate considerations, a mixed-motive jury instruction is appropriate. This is not new law. This is not a jurisprudential revolution. It is simply a restatement of existing law.

This legal principle is in harmony with other areas of the law. For instance, in a negligence context, a defendant may invoke the defense of comparative negligence while denying he or she was negligent at all. *Li v. Yellow Cab* (1975) 13 Cal.3d 804. These rules of pleading and practice are well established, and do not require Supreme Court review of this decision for clarification.

III. The Court Should Deny the Petition for Review Because the Court of Appeal Decision Simply Applied Existing Decisional Law.

In her Petition, Harris takes issue with the jury instruction the Court of Appeal recognized as appropriate here, the so-called "mixed-motive" defense to a claim of pregnancy discrimination. In doing so, Harris takes issue not just with the Court of Appeal but with over two decades of settled law.

In 1989, the U.S. Supreme Court decided *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228 ("*Price Waterhouse*"), which applied the "mixed-motive" defense to claims of Title VII discrimination.[1] "Mixed motives" mean just that: that an employer considered both permissible and impermissible factors in making a decision. If so, the burden of persuasion shifts to the defense to show that it would have made the same decision in the absence of discrimination. 490 U.S. at 249.

In *Price Waterhouse*, Ann Hopkins was refused partnership in her accounting firm. Ms. Hopkins sued Price Waterhouse under 42 U.S.C. section 2000e, which prohibits discrimination on the basis of sex.[2] The court's plurality found that Title VII prohibits employers from making an employment decision "because of" sex, unless sex is a bona fide occupational qualification (BFOQ). 490 U.S. at 242.

Accordingly, the *Price Waterhouse* plurality reasoned, a decision is made "because of" sex if sex (or pregnancy, as in Harris's case) was **a** factor in the

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[1] *See* exposition in Note, "Mixed Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric" 59 Albany Law Review 1 (1995).

[2] 42 USC 2000e -2 (a)(1) It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or to discriminate against any individual with respect to his compensation, terms conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . .

decision. The sex (or pregnancy) need not be an outcome determinative factor, and a plaintiff could prove discrimination merely by showing that an illegal characteristic was one factor among others considered in reaching an employment decision. 490 U.S. at 241-242. That, however, is not the end of the analysis.

Next, the *Price Waterhouse* court surveyed the legislative history of Title VII to conclude that Congress intended to preserve an employer's remaining discretion and freedom of choice; therefore, *Price Waterhouse* held that an employer can avoid liability under Title VII if it can prove that, even had it not taken sex into account, it would have come to the same decision regarding a particular person. "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 244-245. This has become known as the mixed-motive defense to discrimination.

The California Fair Employment and Housing Act ("FEHA") contains nearly identical language to Title VII, including the "because of" qualifier. Cal. Govt. Code § 12940 states:

> It shall be an unlawful employment practice, unless based upon a bona fide occupational qualification. . . (a) for an

> employer, ***because of*** the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation of any person, to refuse to hire or employ the person . . . or to discriminate against the person in compensation or in terms, conditions, or privileges of employment. (emphasis added)

Notwithstanding Harris's argument that FEHA and Title VII serve different goals, it is well established that Title VII and FEHA are similar statutes, enacted to further similar public policies. The language of these two statutes is identical in prohibiting employment discrimination on the basis of sex or pregnancy. California courts look to pertinent federal precedent to interpret similar state statutes. *Guz v. Bechtal* (2000) 24 Cal. 4th 317, 355. Thus, the mixed-motive affirmative defense adopted by the U.S. Supreme Court provides precedent for analyzing employment discrimination cases brought under FEHA, Harris's arguments to the contrary notwithstanding.

Two years after *Price Waterhouse*, in 1991, Congress amended Title VII and adopted 42 U.S.C. section 2000e-5(g)(2)(B), limiting the remedies available under the employer's affirmative defense. Thus, Congress ratified the mixed-motive defense articulated in *Price Waterhouse*, but limited it to the extent it provided a complete affirmative defense to discrimination in a mixed-motive case, and limited

relief to extraordinary injunctive relief and attorney's fees. The California legislature has not followed suit by limiting remedies available under FEHA.

The Court of Appeal has gone no farther. Like it, other California courts have recognized the mixed-motive defense to FEHA employment liability. *See*, e.g., *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1748 ("In some cases, the evidence will establish that the employer had "mixed motives" for its employment decision. . .[citing *Price Waterhouse*] In a mixed motive case, both legitimate and illegitimate factors contribute to the employment decision."); *Reeves v. Safeway* (2004) 121 Cal.App.4th 95, 112 (where the mixed motive analysis is discussed in footnote 11, though not applied); and *O'Mary v. Mitsubishi Electronics* (1997) 59 Cal.App.4th 563, 584. *See also*, *Arteaga v. Brinks* (2008) 163 Cal.App.4th 327, 357, which declined to decide whether a mixed motive defense applied, as the facts did not support that theory; and *Sada v. Robert F. Kennedy Medical Center* (1997) 56 Cal.App.4th 138 ("We do not suggest that *McDonnell Douglas* provides the only method for evaluating the merits of SADA's FEHA claims." Citing to *Heard*, *supra*, and the mixed motive analysis). Finally, *see Huffman v. Interstate Brands* (2004) 121 Cal.App.4th 679, 702 (holding that neither plaintiff nor defendant had offered a mixed-motive jury instruction, in declining to apply that defense).

While obviously it is free to do so, unlike Congress the California legislature has not amended the Fair Employment and Housing Act to incorporate the limitations on the remedies available to an employer who proves a mixed motive affirmative defense. While California courts look to federal decisional law for guidance when interpreting FEHA provisions which are parallel to those in Title VII (*Reno v. Baird* (1998) 18 Cal.4th 640), California courts cannot incorporate federal amendments to Title VII into FEHA if the California legislature has not adopted them.[3] Thus, while the 1991 Title VII amendments partially limit the mixed motive affirmative defense as to remedies available to an employer in a Title VII case, there is no such limitation under FEHA. *Price Waterhouse* is still good law in California with respect to the mixed-motives analysis, and arguably provides a complete defense to employer liability. [4] Therefore, as recognized by

[3] C.f. *Munson v. Del Taco, Inc.* (2009) 46 Cal.4th 661, importing the federal burden of proof to a California statute (where California Legislature specifically added subdivision (f) to California Civil Code section 51 specifying that a violation of the federal Americans with Disabilities Act (ADA) shall also constitute a violation of the Unruh Civil Rights Act, thus, plaintiff seeking damages for ADA violations under Unruh Civil Rights Act is not required to prove intentional discrimination).

[4] The U.S. Supreme Court recently addressed mixed-motive jury instructions in *Gross v. FBL Financial Services* (June 18, 2009) 129 S.Ct. 2343, declining to extend the mixed-motive analysis to the Age Discrimination in Employment Act ("ADEA"). The court held that to establish age discrimination under the ADEA, a plaintiff must prove that age was the "but for" cause of the employer's adverse decision, i.e., that consideration of the plaintiff's age had a determinative influence on the outcome of the employment decision. 129 S.Ct. at 2350. *Gross* places a heavier burden on plaintiffs under the ADEA than does Title VII.

the Court of Appeal, it was reversible error for the trial court to refuse the City's proffered BAJI jury instruction 12:26. (RT 2755:25– 2756:4; 2758:4–2758:19).

It would be manifestly unfair to impose liability on an employer for an adverse employment action if a protected characteristic is but **one** factor among many that the employer might have considered, without giving the employer an opportunity to assert through affirmative defense that the other factors were so important that they outweighed any reliance, presumptive or otherwise, on the protected characteristic. Here the Court of Appeal recognized that the jury should have been directed to consider whether Harris's poor performance on the job, including her accidents and failures to show up for work on time, were a legitimate employer concern that would have led to her termination regardless of her pregnancy and the inference that arose because of when she announced it. To be fair to the City (and to the public at large who relies on dependable transit service), the Court of Appeal held the jury must be accurately instructed on whether the City would have terminated Harris in any event for her failure to meet probationary standards.[5] That is merely a restatement of the holding of *Price Waterhouse,* the cases following it and frankly of sound policy and common sense.

[5] A public employer need not meet a "just cause" standard to terminate a probationary employee; it is free to decide that the employee has not performed well enough to merit civil service protections.

The CACI jury instruction 2500 given by the trial court asked the jury whether Harris's pregnancy was **a** motivating reason for her discharge (RT:3021:3-5); in other words, one reason among several. And that was the end of the analysis. CACI instruction 2500 did not require the jurors to answer the question of whether Harris's pregnancy **had a determinative influence** on the City's decision to terminate her employment. It did not ask the jury to answer the question of whether, "but for" her pregnancy, Ms. Harris would have lost her job, which is what is required before a violation of FEHA can be found.[6]

In the end Harris had the benefit of a lower, mixed-motive burden of proof (i.e. was there some evidence of any kind of discrimination however weak or strong), without giving the City the opportunity to assert a mixed-motive affirmative defense that even if so, it made no difference. Harris sought and received CACI instruction 2500. (RT:3021:3-5) But that instruction does not adequately set forth the burden of proof that Harris must carry to prove entitlement to damages in a FEHA claim. Harris cannot have it both ways.

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[6] The different theories of discrimination and burdens of proof are discussed in *Washington v. Garrett* (9th Cir. 1994) 10 F.3d 1421, fn 15. A plaintiff can establish discrimination by demonstrating that a protected characteristic was a motivating factor for an employment decision, even though other factors played a role. The burden then shifts to the defendant to demonstrate it would have taken the same action in the absence of the illegitimate motive.

The CACI jury instructions given by the trial court do not accurately state the law in FEHA claims. The Court of Appeal provided a solution to the defects in CACI jury instruction 2500. It vacated and remanded for the jury to consider whether the City would have terminated Harris in any case for two miss-outs and for poor performance.

CONCLUSION

For these reasons, this Court should deny the Petition for Review.

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(California Rule of Court 8.520(c)(1).)

Pursuant to California Rules of Court Rule 8.520(c)(1), the text of Answer to Petition for Review contains 4,664 words.

I certify under penalty of perjury that the foregoing is true and correct.

Executed this 2nd day of April, 2010, in Santa Monica, California.

MARSHA JONES MOUTRIE
City Attorney

By: _____
BARBARA GREENSTEIN
Deputy City Attorney

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CITY OF SANTA MONICA

PROOF OF SERVICE

I, Bradley C. Michaud, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 1685 Main Street, Santa Monica, California 90401. On April 2, 2010, I served the document(s) described as **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

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☒ BY MAIL: I am "readily familiar" with this firm's practice for the collection and the processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, the correspondence would be deposited with the United States Postal Service at 1685 Main Street, Santa Monica, California 90401, with postage thereon fully prepaid the same day on which the correspondence was placed for collection and mailing at the firm. Following ordinary business practices, I placed for collection and mailing with the United States Postal Service such envelope at 1685 Main Street, Santa Monica, California 90401.

☒ [State] I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 2, 2010, at Santa Monica, California.

BRADLEY C. MICHAUD