No. S181004

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

WYNONA HARRIS,
Plaintiff and Respondent,

vs.

CITY OF SANTA MONICA,
Defendant and Appellant.

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

REPLY BRIEF ON THE MERITS

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ARGUMENT

I. WRITING AS IF THE JURY'S DISCRIMINATION FINDING IS IRRELEVANT, THE CITY REPEATEDLY VIOLATES MOST TENETS OF APPELLATE REVIEW.

Our analysis cannot begin without noting that the City's Answer Brief is written with indifference to basic principles of appellate practice. We highlight just a handful of examples to put the City's legal arguments into context:

- Ignoring the jury's express finding that Harris' pregnancy induced the termination, the City treats as fact its *contention* that it "concluded [Harris] did not merit advancing to the status of a permanent public employee" because "[t]hey believed that she simply could not be entrusted with the responsibilities of the job." (ABM, 3; *see also* ABM, 54-55.) These assertions of the City's *alleged* intent directly contradict everything that occurred below: (1) the jury found the termination was *motivated by* pregnancy animus; (2) the trial court agreed; and (3) the appellate court affirmed the trial court's denial of JNOV.

- Likewise, the City pejoratively mocks the legally established fact that it discriminated. It derisively refers to "discrimination *as Harris sees it.*" (ABM, 30; italics added.)

- The City asserts that Harris' discrimination case was based on nothing more than "the timing of her dismissal" being "close to her pregnancy disclosure." (ABM, 19 & 31.) The appellate court (like the trial court) easily dispatched this bogus claim, noting that much other evidence supported the jury's discrimination finding. (Opinion, 13-14.)

- The City repeatedly suggests it comes to this Court with some moral high ground because it is public entity that had to carefully scrutinize Harris' qualifications. Consider this rhetorical burst: "[A] public employer has to have the ability to establish work rules and standards and to hold an employee accountable. ... 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 should be retained." (ABM, 28-29.)

Had the jury agreed that the City was seriously discharging its solemn duty – rather than discriminating against a pregnant employee – we would not be here.

- The City urges a de facto public employer exception to the FEHA, asserting that "the City alone, using its expertise and discretion, gets to determine whether someone is suited to be a bus driver working in [Los Angeles'] congested streets." (ABM, 31; *see also* ABM, 27.) This is doubly-offensive. First, the Legislature mandated that FEHA's anti-discrimination provisions apply identically to public and private employers alike. Second, the City again seeks to nullify the jury. Had the City actually exercised "its expertise" – rather than acted upon an illegal factor (pregnancy) – we would not be here.

II. THE CITY PROVIDES NO COMPELLING JUSTIFICATION FOR CREATING A NON-STATUTORY "MIXED-MOTIVE" DEFENSE.

A. Contrary to the City's rhetoric, the instructions given did not permit the jury to find liability based on "any iota of workplace discrimination" "no matter how slight or even relevant."

The City begins with a lengthy discussion of "causation" – *i.e.*, the "causal nexus" or "causal connection" requirement. (ABM, 11-19.) It repeatedly claims the jury was allowed to find liability without proof that Harris' termination was caused "at all" by her pregnancy. (ABM, 11-19.)

To make this argument, the City re-writes the jury instructions to render them absurd. It then attacks the absurdity of the instructions it has re-written.

To illustrate, consider the following incessant statements permeating the Answer Brief:

- The jury could find discrimination based on any improper animus "no matter how slight or even relevant" or based on "[a]ny degree of discrimination, even so slight that it would not have made a difference in the outcome" (ABM, 12);

- "[T]he jury need only find whether *any* improper discrimination was present *no matter how slight or even relevant....*" (ABM, 20; italics added);

- Harris suggests "that the FEHA tolerates nothing more than hair trigger liability" (ABM, 40);

- Harris seeks to impose liability for "*any iota* of workplace discrimination ... no matter what else is also occurring" (ABM, 40; italics added); and

- Liability follows "no matter how insignificant the claimed discrimination" (ABM, 41).

The City's distorted re-write of the jury instructions ignores decades of California law defining the causal nexus requirement. We established that FEHA jurisprudence has always recognized causal nexus is governed by either the "a motivating reason" or "a motivating factor" test. (OBM, 25-27.) Moreover, while the Legislature has repeatedly amended the

FEHA, it has *never* overruled this test. (*Ibid.*; *see also Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734.)

This Court, itself, has recognized that "the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally*." (*Guz v. Bechtel Nat. Inc.* (2000) 24 Cal.4th 317, 358; original italics.) This is simply another way of asking whether the protected trait was "a motivating reason" for the challenged action.

Consistent with the universal recognition of the "a motivating reason" standard, both parties proposed virtually identical causal nexus instructions. Under the instructions given, Harris had the burden to prove that her pregnancy was "a motivating reason/factor" in her termination. (AA, 282-283.) The City's proposed instruction demanded exactly the same. (AA, 88 [BAJI 12.01.1] & 98 [CACI 2500].) The only difference is that the City also requested a "mixed-motive" instruction. (AA, 88 [BAJI 12.26].)

Because both parties proposed identical causal nexus instructions, the City's lengthy discussion of what precisely constitutes a legally-sufficient causal nexus is confusing and besides the point.

It is beside the point because, if by this discussion the City intends to challenge the "a motivating" standard, this challenge is clearly waived as invited error.

Waiver aside, the City offers no compelling reason to overrule decades of authority applying the "a motivating" causal nexus standard. Instead of addressing the wealth of authority we cited (OBM, 27-27), the City selectively picks snippets of phrases from cases discussing analytically distinct areas of employment law. For example, the City repeatedly cites *Lyle v. Warner Bros. Television* (2006) 38 Cal.4th 264 for the proposition that Harris' "pregnancy must have been 'a substantial factor' in the determination." (ABM, 13.) But *Lyle*, a hostile work environment sexual harassment case, has nothing to do with the causal nexus standard for a *discrimination* case.

Nor did anything stated in *Yanowitz v. L'Oreal USA* (2005) 36 Cal.4th 1028 [refining tests for "protected activity" and "adverse employment action"], *Green v. State of California* (2007) 42 Cal.4th 254 ["qualified individual" is element of disability claim] or *Reid v. Google* (2010) 50 Cal.4th 510 [rejecting "stray remarks" doctrine] suggest that anything other than the long-recognized "a motivating reason" standard governs.

After going around in circles discussing the "because of" statutory language, the City ultimately offers the unremarkable insight that "because of" must mean something. (ABM, 13-17.) It then concludes that "because of" means that the protected trait "must, at the very least, be a 'substantial factor' in the outcome." (ABM, 13.) The City then proves our point, noting that *Mt. Healthy City Bd. of Educ. v. Doyle* (1977) 429 U.S. 274 construed the "substantial factor" test as *synonymous* with the "a motivating factor" test. (*Id.* at 287 [plaintiff must prove protected conduct "was a 'substantial factor' or to put it in other words, that it was a 'motivating factor'" in challenged decision].) Thus, the City's own authority confirms the correctness of the "a motivating" causal nexus standard.

In any event, in light of the instructions actually given, the City's "sky is falling" claim that liability was imposed regardless of how "slight" or "irrelevant" the motivation was is exposed as false. The jury was instructed that it could only find discrimination if "Harris's pregnancy was a motivating reason/factor for the discharge." (AA, 283.) It was further instructed that "[a] motivating factor is something that *moves the will and induces action* even though other matters may have contributed to the taking of the action." (AA, 282; italics added.)

These instructions did *not* allow a finding of discrimination based on some inconsequential animus "no matter how slight or even relevant," nor based on "any iota of workplace discrimination." Instead, the jury could hold the City liable *only if* it found that Harris' pregnancy moved the will *and* induced the termination. Something simply cannot "move the will and induce action," while simultaneously bearing no more than an "irrelevant" connection to the decision. Thus, this instruction required that the jury find actual cause-in-fact – that Harris pregnancy did "induce" her termination.[1]

The jury instructions given also crush the City's recurring theme that the instructions deprived the jury of the ability to evaluate the "totality of circumstances." To determine if something "move[d] the will and induce[d] action," the jury was required to evaluate all relevant facts and evidence bearing on that question. No instruction suggested otherwise.

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[1] This fact answers the City's suggestion that *In re M.S.* (1995) 10 Cal.4th 443 supports its position. (ABM, 15-16.) The *In re M.S.* majority interpreted "because of" in a *criminal statute* as indicating the crime was "caused in fact by something." (*In re M.S.*, 10 Cal.4th at 716 & 719.) Here, the instruction's requirement that pregnancy animus did "move the will and induce action" satisfies this requirement. This same point answers Justice Kennard's concerns expressed in her concurring opinion – namely, that too lenient a definition of the "because of" requirement "would come perilously close to punishing improper thoughts or beliefs." (*Id.* at 733-734.) Finally, we note that *In re M.S.* assessed a criminal statute's causality requirement, which obviously requires a greater showing of culpable conduct than a civil statute.

B. The City's repeated resort to law outside of FEHA confirms that FEHA, itself, does not recognize a "mixed-motive" defense.

Our Opening Brief established both that: (1) nothing in the FEHA's text creates (or supports the judicial creation of) a "mixed-motive" defense; and (2) the defense is inconsistent with many key FEHA policies. (OBM, 18-31.) The City offers no response to either of the following points we made – effectively conceding both of them:

- The FEHA's text does not contain a "mixed-motive" defense; and,

- No existing FEHA case authority supports a judicial creation of this non-statutory defense.

Our Opening Brief also established that the Legislature's creation of enumerated complete liability defenses precludes the judicial creation of others. (OBM, 20-22.) The City therefore is reduced to arguing against a basic rule of statutory construction. It states: "[T]he FEHA nowhere suggests that they [the statutory liability defenses] are the exhaustive list of

what may defeat a claim for discrimination." (ABM, 39.) This misses the point.

The general rule of statutory construction is that the inclusion of enumerated statutory exceptions or defenses excludes, "by necessary implication," the judicial creation of others. (*Rojas v. Superior Court* (2004) 33 Cal.4th 407, 424.) This general rule governs the FEHA – like any other statute – unless "its operation would contradict a discernable and contrary legislative intent" – something the City does not prove here. (*Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 195.)

Lacking any textual statutory support (or legislative history), the City instead tries to create a policy justification for this non-statutory defense by claiming it "gives effect to 'because of' as used in the FEHA." (ABM, 21.) This argument fails for two reasons.

- A "mixed-motive" defense is not needed to "give[] effect to the statutory phrase "because of." The existing causal nexus standard ("a motivating reason") already does exactly that by

requiring that the illegal consideration (pregnancy) "induc[ed] action and move[d] the will."[2]

- In any event, even the most compelling policy justification cannot contradict the plain language of a statute.

Without any FEHA statutory or decisional law supporting it, the City's argument reduces to a plea that this Court simply mimic federal law or apply non-FEHA law to the FEHA. (ABM, 22-38.) The very fact that the City must seek refuge *outside* the FEHA proves that the result it seeks has no basis in FEHA jurisprudence.

The City also notes that the FEHA and Title VII both use the phrase "because of" in defining discrimination. (ABM, 22-23.) But this hardly means the FEHA recognizes a "mixed-motive" defense. Rather, "because of" simply requires that a causal nexus exist, which the "a motivating reason" standard fully ensures.

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[2] Parenthetically, we note that while the BAJI "motivating factor" instruction was used in this case, the current CACI instruction captures the same point yet with different language. It states that a "motivating reasons" is something that "contributed to the decision to take certain action, even though other reasons also have contributed to the decision." (*Judicial Counsel of California Civil Jury Instructions* (2011), Instr. 2507.)

Next, the City analogizes to First Amendment or National Labor Relations Act retaliation cases. (ABM, 24.) For instance, the City notes that the *Mt. Healthy* Court decided (as a policy matter) that First Amendment retaliation claims should have a "mixed-motive" defense. (*Ibid. citing Mt. Healthy*, 429 U.S. at 285-287.) But whatever policy reasons motivated the *Mt. Healthy* decision have no bearing on the proper construction of the FEHA – a state statute, not a fundamental constitutional clause. In construing the FEHA, the legislative intent of the FEHA, not other statutes or constitutional provisions, is controlling.[3]

Unlike standard FEHA claims, constitutional free speech claims uniquely require a balancing of competing interests – a characteristic that lends support to use of a "mixed-motive" defense. (*Mt. Healthy*, 429 U.S. at 284.) As *Mt. Healthy* observed, its decision required "striking 'a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency" of its public services.

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[3] For this same reason, *Bekiaris v. Board of Education* (1972) 6 Cal.3d 575 – also a free speech retaliation case – provides no support for a FEHA "mixed-motive" defense. Nor does *Miller v. Chico Unified School Dist.* (1979) 24 Cal.3d 704. Citing *Mt. Healthy* and *Bekiaris*, *Miller* simply required "but for" causation for a claim under a particular Education Code – again, not the FEHA. (*Miller*, 24 Cal.3d at 715.)

In contrast, nothing in the FEHA requires striking such a balance. Instead, by legislative design, the balance in the FEHA tips decidedly in favor of liberal construction. (Gov. Code §12993(a); *Robinson v. Fair Employment & Housing Commission* (1992) 2 Cal.4th 226, 243 ["the court must construe the FEHA broadly, not ... restrictively"].)

The City also cites *Martori Bros. Dist. v. Agric. Labor Relations Bd.* (1981) 29 Cal.3d 721, which applied a "but for" test for a "dual motive" union-activity retaliation case. (ABM, 33-34.) But, *Martori Bros.* adopted that test in that specific context only because: (1) the National Labor Relations Board (NLRB) had recently adopted the same test; and (2) a specific statute (Labor Code section 1148) demanded that California courts follow NLRB decisions in construing those claims. (*Martori Bros.*, 29 Cal.3d at 730.)

The City's discussion is also filled with abstract pleas that employers have the right to decide when or why to terminate employees. (ABM, 28-31.) Barring unlawful discrimination, we agree. Thus, it mischaracterizes our position to assert that we contend "an employer's interests are all but irrelevant." (ABM, 28-29.) Our point is simple: employers cannot rely on pregnancy or any other protected trait in making employment decisions. Once pregnancy (or any other protected-trait) "move[s] the will and

induce[s] action" (AA, 282), or "contribute[s] to the decision to take certain action, even though other reasons also have contributed to the decision" (CACI, Instr. No. 2507), the FEHA has been violated and a remedy is required.[4]

C. The City's purported rebuttals to our policy arguments fall flat or actually backfire.

Our Opening Brief provided a series of public policy reasons to reject a "mixed-motive" defense. (OBM, 22-31.) We observed that the FEHA demands liberal construction, aggressive prevention of discrimination and is much more remedy-focused than is Title VII. (OBM, 24-30.)

In response:

- The City acknowledges "that the FEHA authorizes broad relief that is more expansive than that provided under Title VII." (ABM, 40.) It then asserts that these principles do not

[4] Finally, the City offers its own survey of foreign law, observing that some states have codified "mixed-motive," others judicially-adopted it and still others rejected it outright. (ABM, 35-38.) Because the City makes no effort to compare the statutes or legislative history of these other states' anti-discrimination laws to the FEHA, nor to identify which states have adopted a remedy-limit only version, its discussion is really useless. Besides, this nationwide inconsistency in approaches provides little help in answering what our Legislature intended.

justify what it calls "hair trigger liability." (*Ibid.*) But that "hair trigger" liability myth is disposed of by the actual requirement of the "motivating reason" test discussed in section II(A) above.

- The City asserts that liberal construction cannot justify construing a statute in a way that is "not reasonably supported by the statutory language." (ABM, 40.) This is ironic. After all, it is the City who seeks a determination that the FEHA provides for a "mixed-motive" defense when the statute itself never suggests any such thing.

- Flailing about, the City directly disputes that which it had *already* conceded: that the FEHA demands liberal construction to accomplish its remedial purposes. (ABM, 40.) The City inscrutably writes that "[p]recisely because of its wide opportunities for relief, the FEHA has to be understood not just as broadly remedial, but also circumspect." (AB, 41.) Asking this Court to construe the FEHA in a "circumspect" way runs directly afoul of the express legislative mandate of

broad construction (Gov. Code §12993(a)) and this Court's prior pronouncements. (*See e.g.*, *Robinson*, 2 Cal.4th at 243.)

III. IN STILL DENYING THAT IT ACTED FOR *BOTH* LEGITIMATE *AND* ILLEGITIMATE REASONS, THE CITY AGAIN CONFIRMS THAT THIS CASE IS NOT A "MIXED-MOTIVE" CASE.

Our Opening Brief established that, even according to the "use note" of the BAJI instruction on which the City bases its appeal, this case did not warrant a "mixed-motive" instruction. This is because the City consistently contended that it acted out of a "single motive" (performance) – never a "mixed-motive" (performance *and* pregnancy).[5] (OBM, 36-38.) The "use note" expressly cautions that the instruction "should only be used in a true mixed-motive situation" and "does not apply to the circumstances where it is claimed that a legitimate reason was in fact a pretext for unlawful action." (BAJI, Instr. No. 12.26 "Use Note".)

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[5] At trial, the City went so far as to assert that there was "no evidence" that anything other than performance caused the termination: "It is defendant's position that there is NO evidence that any other matter, other than Plaintiff's failure to meet probationary standards, contributed to the separation of plaintiff on probation." (AA 107.) Based on this, the City sought a modification of the "motivating factor" instruction to remove the portion stating that something can be a "motivating factor" even if "other matters [than discrimination] may have contributed to the" termination. (*Ibid.*)

The City's brief confirms it still steadfastly maintains it acted out of a single, non-discriminatory motive (performance). It still "expressly denies" that it acted with any discriminatory motive (ABM, 19) and it defiantly asserts that "[t]hroughout pre-trial discovery, and throughout trial, the City *consistently maintained that it terminated Ms. Harris because she failed to meet probationary standards....*" (ABM, 41; italics added.)

Given the City's consistent position that it acted out of a single motive (performance), the failure to give a "mixed-motive" instruction cannot be error.

IV. ASSUMING *ARGUENDO* THAT THIS COURT ADOPTS SOME FORM OF "MIXED-MOTIVE" DEFENSE, IT SHOULD ALSO APPROPRIATELY LIMIT THE DEFENSE.

A. Any form of "mixed-motive" defense should be conditioned the employer acknowledging the impermissible motive.

The City wants it both ways. While steadfastly denying that it considered Harris' pregnancy *at all*, it insists that – if the jury rejected its denial – it had the right to have the jury determine whether it would have reached the same decision anyway apart from having relied on Harris' pregnancy. This double-speak illustrates some of the analytic problems that scholars have long-expressed about "mixed-motive" cases. (*See* ABM, 14.)

- Where the employer alleges it acted for a single wholly proper motive, courts are confronted with the analytic difficulty of determining whether a "mixed-motive" instruction should be given at all.

- Juries in such cases are faced with a truly convoluted exercise. They must determine whether an employer who insists it had a single, pure motive would have fired the employee for wholly legitimate reasons, despite the fact that the employer had a "mixed-motive" and also fired the employee (in part) due to an illegal motive.

Given these practical difficulties inherent in a "mixed-motive" approach, we offered a workable and logical solution which would permit an employer to present a "mixed-motive" defense while avoiding the judicial and juror confusion inherent in the approach the City advocates. We proposed that, if this Court was inclined to adopt any form of "mixed-motive" FEHA defense, "it should require the employer to make an election to present this defense – *after* adequate discovery – by acknowledging that it acted upon mixed-motives." (OBM, 38.)

Our proposal finds support in the "use note" of BAJI instruction 12.26. It provides that a "mixed-motive" defense *only* applies where the employer "was actually motivated by both discriminatory and non-discriminatory reasons." Further support arises from the equitable principle

that a party seeking equitable relief must provide for and recognize the transactionally-related rights of the other party. (*Dickson, Carlson & Campillo v. Pole* (2000) 83 Cal.App.4th 436, 445-446.)

Again, the City can find no real response.

First, it falsely claims that "Harris cites no authority in support of her equity argument." (ABM, 51.) Not true. Our Opening Brief discussed how this principle – taken directly from *Dickson, Carlson & Campillo* – applies to our facts. (OBM, 39-41.) We then noted that in a FEHA context, this Court expressly conditioned recognition of an affirmative defense on the employer taking certain action (*State Department of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1044) and we analogized to other areas of law where courts have required a party to make precisely this type of election. (OBM, 42-43.)

Second, the City introduces a non-sequitor. It asserts that Harris ignores the maxim that "one who seeks equity must do equity" because Harris allegedly asks "this Court to overlook her own wrongs" (*i.e.*, her alleged performance issues). (ABM, 51.) Nonsense. This portion of our argument is predicated on the assumption that this Court adopts some form of "mixed-motive" defense – *i.e.*, that the City may try to prove that *both* discrimination and legitimate performance concerns played a role.

Third, the City cites the general rule that a party can plead contradictory defenses or claims. (ABM, 51-52.) So what? The corollary principle is that a party must make an election at the appropriate time. (*Walton v. Walton* (1995) 31 Cal.App.4th 277, 292-293.) Our proposal does not preclude *initial* pleading of contradictory positions. Instead, it assumes after "mixed-motive" has been pled and after adequate discovery undertaken, the employer will then have to elect whether to assert "mixed-motive" at trial (thereby admitting that "mixed-motives" were in fact at play) or to try the case as a "pretext" case where the parties dispute whether or not an impermissible consideration was "a motivating reason" for the adverse action rather than the alleged legitimate reasons the employer offers. (*See* OBM, 42-43.)

Finally, the City found no response to a major policy reason supporting our proposal: it would eliminate the perverse incentive that allows an employer who unquestionably *did* discriminate to nonetheless deny discrimination in hopes that it can receive the windfall of a complete defense verdict and, if that fails, still resort to the fall-back plan of a "we would have done it anyway" defense. (OBM, 44-45.)

B. Any "mixed-motive" defense should require clear and convincing proof.[6]

Our Opening Brief demonstrated that, if this Court were to adopt a "mixed-motive" defense, it should require the employer to meet a "clear and convincing" proof standard. (OBM, 46-50.)

The City retorts that this would be asking "that this court rewrite the FEHA, rather than interpret it." (ABM, 48.) But that very accusation is better leveled at the City given that the FEHA's text does not provide for any "mixed-motive" defense. If this Court does create a non-statutory defense, it must then decide the appropriate standard of proof to govern it.

Our Opening Brief pointed out that "the determination of proof to be applied in a particular situation is the kind of question which as traditionally been left to the judiciary to resolve." (*In re Marriage of Peters* (1997) 52 Cal.App.4th 1487, 1491.)

We previously articulated four key reasons why the "clear and convincing" standard should apply: (1) the FEHA involves "important

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[6] The City makes the throw-away claim that the standard of proof for a "mixed-motive" defense is not preserved for review by this Court. (ABM, 48.) But our petition for review raised the question of whether the "mixed-motive" defense applied to the FEHA and, if so, under what circumstances. Moreover, this Court could also decide this issue because "the case presents the issue and the court has given the parties reasonable notice and opportunity to brief and argue it." (Cal. Rules of Court, Rule 8.516(b)(2).)

rights"; (2) the employer whose discrimination created the difficult-to-assess same-decision defense should bear the risk of an erroneous result; (3) the fact that the defense requires proof of the employer's state of mind supports imposing a higher standard of proof; and (4) the FEHC requires "clear and convincing" proof for the defense. (OBM, 46-50.)

The City entirely ignores two of these points (items (2) and (3)) and for the items it does not ignore (items (1) and (4)), its response is not much stronger.

In purporting to rebut our item (1), the City claims that "[t]he types of proceedings that adopt a clear and convincing burden of proof generally involve deprivations of liberty" and that "[n]one of them applies solely to defenses in a civil lawsuit seeking damages." The City is doubly-wrong. First, two pages later, citing the fact that Labor Code section 1102.6 imposes a "clear and convincing" proof standard on a same-decision defense to Labor Code section 1102.5 whistleblower claims, the City proves its own prior statement false. (ABM, 51.) Second, the "clear and convincing" standard is undeniably not limited to "deprivations of liberty." Instead, it is properly applied "when necessary to protect *important rights*." (*Conservatorship of Wendland* (2001) 26 Cal.4th 519, 546; italics added.)

The rights the FEHA protects are "fundamental" public policies and inalienable rights. (Gov. Code §§ 12920, 12920.5 & 12921(a).)

In purporting to rebut our item (4), the City concedes that the FEHC requires "clear and convincing" proof of its same-decision (*i.e.*, "mixed-motive") defense, but it then tries to undermine this acknowledgment by manufacturing a series of artificial ways to distinguish the key FEHC decision. (ABM, 49-50.)

First, the City tries to water-down the weight of the FEHC's adoption of the "clear and convincing" standard in *DFEH v. Church's Fried Chicken, Inc.* (Cal. F.E.H.C.) FEHC Dec. No. 90-11, 1990 WL 312878, by claiming that the FEHC only applied this higher proof standard because of "the weight of the unambiguous evidence in the employee's favor." (ABM, 50.) But nothing in the decision supports this conclusion. In fact, the decision's conclusion is broad and not fact-specific at all: "[W]e hold, as we have previously, that the employer must establish the existence of a wholly independent cause for termination by clear and convincing evidence...." (*Church's Fried Chicken*, 1990 WL 312878, at *15.)

Next, the City points to procedural differences between FEHC and court proceedings, concluding that an "FEHC decision is particularly ill-suited to illuminate a question of appropriate jury instructions, an issue that

will never arise before the Commission." (ABM, 50.) This distinction is a red-herring. The appropriate standard of proof for a "mixed-motive" defense is not an issue of jury instruction language, but a policy question of law which both the court and the Commission are suited to decide.

Finally, the City downplays the significance of FEHC authority. But this ignores this Court's prior holdings that the FEHC's construction of the FEHA is entitled to "great weight" or "substantial weight" unless "clearly erroneous." (*See e.g., Colmenares v. Braemar Country Club* (2003) 29 Cal.4th 1019, 1029-1030.)

C. Federal preemption precludes any form of "mixed-motive" defense to FEHA claims that provides a complete liability defense and key FEHA policies demand a narrower limit on remedies under FEHA than Title VII.[7]

In the appellate court, the City conceded that "mixed-motive" is *not* a complete defense: "In a mixed-motive case, ... a plaintiff's remedies are limited to declaratory or injunctive relief, attorneys' fees and costs...." (Appellant's Opening Brief, 33; *see also Id.* at 36.)

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[7] Like with the "clear and convincing" proof standard, the City makes a throw-away claim that our preemption arguments are not properly preserved. Legally, the City is wrong for the reasons discussed in footnote 6 above. Factually, the City is wrong because this issue was raised at the review stage – both by an amicus and by Harris' reply to the City's answer.

Now, the City contradicts its previous concession, reverses direction and asserts that any "mixed-motive" defense must be a complete liability defense.

Besides pointing out the City's earlier admissions, our Opening Brief made four points to illustrate why recognition of a *complete* liability defense under the FEHA would violate Title VII's preemption clause:

(1) Title VII's 1991 amendments make it "unlawful" for an employer to take employment action if a protected trait was "a motivating factor" in the challenged decision. (OBM, 52.)

(2) Once this Title VII "unlawful employment practice" is established, the employer has a *partial* remedy defense if it can prove it would have made the same decision without any reliance on the protected trait. (OBM, 52-53.)

(3) Title VII's preemption clause preempts any state law that "permit[]s the doing of any act which would be an unlawful employment practice" under Title VII. (OBM, 55, citing 42 U.S.C. §2000e-7.)

(4) Therefore, adopting "mixed-motive" as a *complete* liability defense would produce the following indefensible anomaly: the very same conduct which would constitute an "unlawful employment practice" under Title VII would simultaneously be fully lawful under the FEHA.

These four simple points lead to the irrefutable conclusion that the starting point for adopting any "mixed-motive" defense must be that California's version cannot provide a complete liability defense. Because of Title VII's "broad and explicit preemptive provision," federal law sets the floor beneath which California law cannot fall. (*Spirt v. Teachers Ins. & Annuity Ass'n.* (2nd Cir. 1982) 691 F.2d 1054, 1065.) Otherwise, California law would expressly permit the "doing of an[] act which would be an unlawful employment practice" under Title VII. (42 U.S.C. §2000e-7.)

The City rebuts none of our four key points. Instead, it offers more red-herrings.

Two of the City's rejoinders are easily dispatched. First, the fact that Harris could have filed Title VII claims is irrelevant to whether a complete liability defense under the FEHA is preempted by Title VII. Second, the

City notes that other states have adopted "mixed-motive" without finding preemption. So what? The City never suggests that preemption was actually raised and litigated in those cases.

The City's main response is that preemption is not implicated because a "mixed-motive" defense would simply be "a means to help a jury analyze whether any discrimination occurred 'because of' a protected status." (ABM, 43.) The City asserts, ipse dixit, this "would not be condoning discrimination by 'requir[ing] or permitt[ing]" discrimination that would be unlawful under Title VII. (ABM, 47.) Wrong.

The City's response simply ignores the *actual effect* of a complete liability defense. If a valid defense is proven, the employer's conduct is expressly deemed "lawful." (2 Cal. Code Regs. §7286.7 ["If employment discrimination is established, this employment discrimination *is nonetheless lawful* where a proper, relevant affirmative defense is proved...."].)

Thus, recognition of a complete liability defense would produce the very anomaly we identified: the same conduct that constitutes an "unlawful employment practice" under Title VII would be "lawful" under the FEHA.

The City also ignores all-but-one of the preemption cases we cited. (OBM, 54-60.)

Moreover, its musings about the one case it does discuss, *Cutright v. Metropolitan Life Ins. Co.* (W. Va. 1997) 201 W.Va. 50 (ABM, 45-47), overlook the very purpose for which we cited it. Those musings have nothing to do with *Cutright*'s pertinent holding – that courts must strike down a state law if the state law would "permit unlawful conduct which is prohibited by Title VII." (*Cutright*, 201 W. Va. at 57; *see also Church's Fried Chicken*, FEHC Dec. No. 90-11 at *8 [preemption imposes a "substantive rule that the [FEHA may] not 'require or permit' any conduct that is unlawful under Title VII.].)

We conclude by noting that the City does not – and cannot – offer any response to the extensive, fourteen page discussion in our Opening Brief that established two additional key points:

- A complete liability defense would be inconsistent with the FEHA's core policies (OBM, 60-63); and

- Given the FEHA's broad remedial focus (compared to Title VII), and other key FEHA policies, any "mixed-motive" defense should merely limit economic damages flowing from the challenged decision and reinstatement (64-73).

V. REGARDLESS OF HOW THIS COURT DECIDES THE "MIXED-MOTIVE" ISSUES, THE JUDGMENT MUST BE AFFIRMED OR, AT MOST, A LIMITED RE-TRIAL ORDERED.

A. The City's failure to plead "mixed-motive" as an affirmative defense bars reversal of the judgment.

The City asserts that it did not waive a "mixed-motive" defense because it pled that it had legitimate, non-discriminatory reasons to terminate Harris. (ABM, 52 & fn. 18.) But what the City actually pled is the *opposite* of a "mixed-motive" defense. It denied its actions were motivated at all by pregnancy bias, pleading in particular that "the termination was not based on the alleged gender and/or sex and/or pregnancy ... but instead, was based on one or more legitimate, nondiscriminatory reasons." (AA 28.) Thus, it pled that it acted with only a single (legitimate) motive, not a "mixed-motive" of both legitimate and illegitimate considerations.

The City next alleges that "mixed-motive" is not "new matter constituting a defense" which must be pled. (ABM, 52-53.) This assertion:

- Ignores its previous concession that "mixed-motive" is an "affirmative defense" (Answer to Petition for Review, 17);

- Ignores the fact that the genesis of "mixed-motive" and the very authority the City wholeheartedly embraces (*Price Waterhouse v. Hopkins* (1989) 490 U.S. 282) expressly declared that "the employer's burden is most appropriately deemed an *affirmative defense*." (*Id.* at 246; italics added); and,

- Ignores the wealth of federal authority we cited which holds that "mixed-motive" is an affirmative defense. (OBM, 75.)

The City's purported reliance on *Sargent Fletcher, Inc. v. Able Corp.* (2003) 110 Cal.App.4th 1658 actually backfires. There, the court held that independent derivation or reverse engineering are not affirmative defenses to trade secret misappropriation because "the defendant does not have the burden of proof to make that showing." (*Id.* at 1669-1670.) *Sargent* thus confirms that "mixed-motive" *is* an affirmative defense because the City's requested instruction (BAJI 12.26) places the burden of proof on the employer to establish the defense's requirements.

B. The City's failure to proffer a legally correct instruction bars reversal of the judgment.

We pointed out that the City's proposed "mixed-motive" instruction misstated the law and, therefore, the trial court acted within its discretion in denying it. (OBM, 78-79.) The City offers no response, and two simple points establish this waiver. First, the City conceded that "mixed-motive" merely limits remedies and does not provide a complete defense to liability. (AOB, 33 & 36.) Second, despite its concessions, the City proposed an instruction erroneously stating that "the employer *is not liable* if it can establish" the defense. (AA, 88 [BAJI 12.26].)

C. Strong public policy demands that any re-trial be limited to only those determinations affected by this Court's decision.

Our concluding point was that even if this Court were to adopt a "mixed-motive" defense, any re-trial must be limited solely to that defense, while the jury's predicate liability and damage findings must be preserved. (OBM, 79-81.) The City offers no response. Thus, if any re-trial is ordered, it should be so limited.

CONCLUSION

We respectfully urge that this Court reject any "mixed-motive" defense. However, if this Court were inclined to adopt such a defense, it should be carefully limited in the ways discussed herein and in our Opening Brief.

DATED: January 7, 2011

Respectfully submitted,

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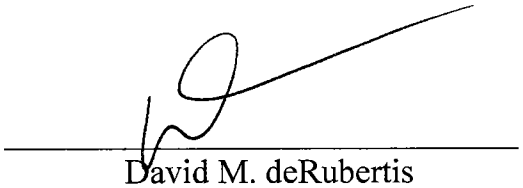
CERTIFICATE OF COMPLIANCE PURSUANT TO

CALIFORNIA RULES OF COURT, RULE 8.520

Pursuant to California Rules of Court, Rule 8.520(c)(1), and in reliance on the word count feature of the Word Perfect software used to prepare this document, I certify that this Reply Brief on the Merits contains 5,990 words, excluding those items identified in Rule 8.520(c)(3).

DATED: January 7, 2011



David M. deRubertis

PROOF OF SERVICE

Case Name: Harris vs. City of Santa Monica
Supreme Court Case Number: S181004
Los Angeles County Superior Court Case Number: BC341269
Court of Appeals Case Number: B199571

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 4219 Coldwater Canyon Avenue, Studio City, CA 91604. On the below executed date, I served upon the interested parties in this action the following described document(s): **REPLY BRIEF ON THE MERITS.**

/_____/ MAIL: by placing a true copy thereof enclosed in a sealed envelope with First Class prepaid postage thereon in the United States mail at Studio City, California address(es) as set forth below, pursuant to Code of Civil Procedure Section 1013a(1):

/**XXX**/ OVERNIGHT DELIVERY: by causing it to be mailed by a method of overnight delivery with instructions for delivery the next business day with delivery fees paid or provided for in the United States mail at Studio City, California address(es) as set forth below, pursuant to Code of Civil Procedure Section 1013(c):

/_____/ PERSONAL SERVICE: by delivering a true copy thereof by hand to the person or office, indicated, at the address(es) set forth below:

/_____/ FAX & ELECTRONIC TRANSMISSION: by transmitting a true copy thereof by hand to the person or office, as indicated, at the address(es) telefax number(s) & email(s) set forth below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct. Executed on January 7, 2011 at Studio City, California.

Kari deRubertis

PROOF OF SERVICE (CONT.)

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