

What's My Motivation? Terminating the Protected Employee in a "Mixed Motive" Situation

By Karen L. Gabler, Esq.

One of the most difficult circumstances for employers to face is a "mixed motive" discrimination case. An employee is terminated for what is clearly a substandard performance – but, that employee is pregnant...or elderly...or has been injured in a workplace accident. Was the employer thinking about the pregnant employee's upcoming maternity leave, or whether the elderly employee is "slowing down" a bit? Was the employer worried that the employee returning from worker's compensation leave might reinjure himself? Or, was the employer legitimately concerned about performance deficiencies?

Given human nature, it is challenging for employers to clear their minds of an employee's obviously protected characteristics. Yet, is it fair to subject the employer to liability for wrongful termination merely because the employee falls into a protected class if the employee was, in fact, a poor performer? And if that protected characteristic is at least a small factor in the decision, is the employer forever barred from making a good-faith business decision to remove an under performing employee?

Until recently, if an employee could show merely that the discriminatory issue was a "motivating factor" in the employer's termination decision or other adverse employment action, the employer could be held liable for any damages arising out of that action. Fortunately for employers, however, a groundbreaking decision recently reversed that troublesome trend.

In *Harris v. City of Santa Monica*, the California Supreme Court held that employers may invoke a "mixed motive" defense to avoid liability in discrimination cases. This means that where the employer can establish that its termination or other adverse employment action was based upon a *combination* of discriminatory and legitimate motives, the employer may escape liability by proving that the legitimate motive alone would have led to the same adverse employment action, with or without an element of discrimination.

In *Harris*, a new bus driver was involved in several accidents and failed to show up for work during her introductory period. She was given a performance review noting the improvements needed, but failed to appear at work once again the following month. Her supervisor decided to terminate her, and while that decision was in process, she announced that she was pregnant. Four days after she submitted a doctor's note regarding her pregnancy, she was terminated for poor performance. She then sued for pregnancy discrimination.

At trial, the city asked the trial court to instruct the jury that if it found a mix of discriminatory and legitimate motives, the city could avoid liability by proving that a legitimate motive alone would have led it to fire the employee, notwithstanding her pregnancy status. The trial court refused to give the instruction, and the jury returned a substantial verdict for the employee. The Court of Appeal reversed,

holding that the instruction was correct and the city should prevail if the poor performance, standing alone, was sufficient to warrant termination.

On appeal, the California Supreme Court agreed with the Court of Appeal, holding that an employer may escape liability for wrongful termination under the Fair Employment and Housing Act, even where unlawful discrimination was a motivating factor in an employment termination, if the employer proves it would have made the same decision in the absence of any discrimination. To establish liability on the part of the employer, the employee would have to show that discrimination was the "substantial factor" motivating the termination or other adverse employment action. As long as the employer has legitimate good faith reasons to terminate an employee regardless of that employee's protected status, a court may not award damages, back pay, or an order of reinstatement to the employee in a subsequent wrongful termination action.

The Court did not entirely excuse employers from all liability, however. As the Court pointed out, given that the Fair Employment and Housing Act is designed to prevent and deter unlawful discrimination in the workplace, a terminated employee could still be granted injunctive or declaratory relief to stop an employer's discriminatory practices. The employee also could recover reasonable attorneys' fees and costs if discrimination took

place, despite the legitimate basis for termination or other adverse employment action.

The decision was a tremendous relief for employers, providing some escape from liability by establishing that management had legitimate good-faith business reasons to terminate an underperforming employee, notwithstanding the employee's protected status. That said, however, employers should not throw caution to the winds: employees in protected classes mandate a higher level of consideration, even in the face of substandard performance. The *Harris* decision also compels employers to pay even greater attention to documentation and proactive disciplinary action. To establish that a termination or other adverse action was based upon legitimate, lawful and compelling business reasons, it will be critical for employers to present documented evidence of those reasons – ideally, written memos, notes and evaluations (dated and signed by management) describing the performance deficiencies and the business reasons to take action on those deficiencies.

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