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Virus Layoffs May Be A Damages Defense In Calif. Bias Cases

By **Chris Moores** (August 11, 2020)

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Since March, the unemployment rate has risen to the worst level since the Great Depression. Faced with the prospect of drastically reduced business and receivables for the foreseeable future, many employers have laid off significant portions of their workforces or even been forced to shutter the business entirely.

Because of this, many employers will have an argument available to them in litigation that even if the plaintiff's termination was discriminatory, the plaintiff would have been laid off anyways due to the pandemic. Thus relieving the employer of the need to pay a plaintiff's damages, even if found liable for discrimination.

The Same-Decision Defense

Under the California Fair Employment and Housing Act, or FEHA, even if a jury finds that an employer discriminated against a plaintiff, if the employer proves that it would have made the same decision based on legitimate, nondiscriminatory reasons, despite any discrimination, a court may not award back pay, reinstatement or even emotional distress damages.[1]

Instead, the plaintiff's remedies are limited to declaratory or injunctive relief and reasonable attorney fees and costs.[2] This is known as the same-decision or mixed-motive defense, and although it is not a complete defense to liability for allegations of discrimination, it can be an effective means of cutting off a plaintiff's damages.

In 2013, the California Supreme Court in Harris v. City of Santa Monica held that an employee suing for discrimination under the FEHA has the burden to demonstrate that discrimination was a substantial factor that motivated the adverse employment action.[3] Once the plaintiff has made that showing, the employer can then demonstrate, by a preponderance of the evidence, that it would have made the same employment decision based on legitimate, nondiscriminatory reasons.[4]

The court also reasoned that to award reinstatement, back pay and front pay to the plaintiff in a situation where he or she would have been terminated for a legitimate reason anyway would result in the plaintiff receiving a windfall.[5]

In normal times, this argument is raised by an employer when there is an argument that poor performance alone would have led it to make the decision to terminate the plaintiff at the same time the actual termination took place. The employer in Harris made the argument that the plaintiff's poor performance was sufficient to justify her termination alone, even absent any unlawful discrimination.[6]

The argument could also be available where, at the time of the discriminatory firing of the plaintiff the employer also implemented layoffs which would have resulted in the plaintiff's termination.[7] Because of this, in the context of the current pandemic, the same-decision defense will likely achieve newfound relevance.

With the large numbers of employees being laid off due to the recent economic downturn, if any of those employees file FEHA claims based on their termination, it is easy to imagine that many employers will soon be relying on the same-decision defense in litigation much more often.

COVID-19 Is a Legitimate, Nondiscriminatory Layoff Reason

A legitimate nondiscriminatory reason for an adverse employment action is a reason that is factually unrelated to discrimination or unlawful bias.[8] Here, because a layoff due to declining business during the pandemic is unrelated to most instances of discrimination, layoffs due to the pandemic or related issues will usually qualify as a legitimate, nondiscriminatory reason for a termination under Harris.

Defense Side Practice Tips

In order to rely on this argument, employers must have actually instituted layoffs due to the pandemic. Employers who did not lay off employees, or who eventually rehired employees during the pandemic will be unable to satisfy the requirements of the same-decision defense.

Employers should also be able to point to some nondiscriminatory evidence or methodology for determining which employees were laid off. For example, if layoffs were based on seniority, or demonstrable lack of work.

Employers should also be careful not to implement layoffs in a discriminatory manner, for example laying off employees who, because of preexisting health conditions, refuse to return to work in person. If successfully proven, the same-decision defense could shield employers from damages in cases brought during the pandemic.

Plaintiff Side Practice Tips

Plaintiffs might defeat an employer's same-decision argument by showing that similarly poor performing employees were not laid off, or were quickly returned to work. To accomplish this, plaintiffs might need to request information or data regarding employees with similar poor performance issues during discovery.

Plaintiffs might also defeat a same-decision argument by showing that the layoffs were exercised in a discriminatory manner.[9] For example, if the layoffs were a pretext to terminate employees over the age of 40.

Another argument available to plaintiffs is to show that the employer would not have made the decision to terminate the plaintiff for a nondiscriminatory reason at the same time he or she was discriminatorily terminated.

This is because the same-decision defense is only available where the employer, in the absence of any discrimination, would have made the same decision to terminate the plaintiff at the same time it made its actual decision;[10] for example, if the layoffs the employer relies on for the same-decision defense occurred after the plaintiff's actual termination.

Conclusion

With no end in sight to this pandemic, the same-decision defense is an important arrow in the employer's quiver to attack a plaintiff employee's alleged damages in FEHA litigation.

However plaintiff employees should also be skeptical of any same-decision argument raised, and should request evidence related to such a contention in discovery.

Similarly, employers should not become overly confident because even though the same-decision defense reduces the damages available for a plaintiff to recover, it does not preclude the recovery of significant attorney fees where the plaintiff is considered to have prevailed in the litigation for having received declaratory or injunctive relief.

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[1] Harris v. City of Santa Monica, 56 Cal.4th 203, 232-33 (2013).

[2] Id.

[3] Id.

[4] Id. at 241.

[5] Id. at 233.

[6] Harris v. City of Santa Monica, 56 Cal.4th at 242.

[7] See Bustos v. Global P.E.T., Inc., 19 Cal.App.5th 558 (2017).

[8] Guz v. Bechtel Nat. Inc., 24 Cal.4th 317, 358 (2000).

[9] This is a phenomenon called "recessionary discrimination," where companies choose to lay off employees for illegitimate or discriminatory reasons, using poor economic conditions to conceal their discriminatory decision-making. See D. Wigdor, Recessionary Discrimination May Be On The Horizon, Forbes, April 27, 2020, available at https://www.forbes.com/sites/douglaswigdor/2020/04/27/recessionary-discrimination-may-be-on-the-horizon/#2a3e61f118e6.

[10] Harris v. City of Santa Monica, 56 Cal.4th at 224.