

## Comments and Notes

# Thrown Under the Bus: Victims of Workplace Discrimination After *Harris*

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### Introduction

A JURY OF THE LOS ANGELES SUPERIOR COURT CONCLUDED that the City of Santa Monica (“City”) violated the prohibition on sex discrimination in the Fair Employment Housing Act (“FEHA”)<sup>1</sup> by discriminating against one of their bus drivers, Wynonna Harris, on the basis of sex when they fired her in May of 2005.<sup>2</sup> The court of appeal reversed the judgment,<sup>3</sup> and in *Harris v. City of Santa Monica*,<sup>4</sup> the California Supreme Court affirmed the judgment of the court of appeal.<sup>5</sup> The California Supreme Court (1) raised the standard of causation that plaintiffs alleging any form of employment discrimination must meet,<sup>6</sup> (2) established the same-decision defense for mixed-motive cases, which allows employers to significantly mitigate exposure to damages if it can show it would have made the same decision absent

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1. California Fair Employment and Housing Act, CAL. GOV'T CODE § 12940 (West 2006 & Supp. 2011).

2. *Harris v. Santa Monica (Harris II)*, 294 P.3d 49, 51 (Cal. 2013).

3. *Harris v. Santa Monica (Harris I)*, 106 Cal. Rptr. 3d 6 (Cal. Ct. App. 2010).

4. 294 P.3d 49.

5. *Id.* at 51 (modifying the remand instructions of the court of appeal).

6. *See id.* at 66 (requiring the jury to find not just the existence of an impermissible motivation for termination, but also that such motivation was “substantial”).

discrimination,<sup>7</sup> and (3) opened the door to use of the stray remarks doctrine.<sup>8</sup>

While *Harris* was a sex discrimination case, the broadly worded decision will impact all protected employees who allege disparate treatment. In the context of race, has history reached a point where discrimination is so infrequent that California should weaken the deterrence and remedial mechanisms of FEHA? Are plaintiffs in discrimination cases inappropriately taking advantage of FEHA to the extent that the standard of causation should be raised? And should courts disregard as evidence statements that clearly indicate bias merely because they were not made *at the time* of the adverse action? The research suggests that race-based discrimination is still a significant problem, and, contrary to popular belief, that discrimination plaintiffs struggle in the courts.

Americans experience race-based workplace discrimination in numbers that do not demonstrate any improvement over the past twelve years.<sup>9</sup> Most African Americans believe they are less likely than whites to get jobs in their communities.<sup>10</sup> Unconscious biases<sup>11</sup> “and perceptions about African Americans still play a significant role in employment decisions in the federal sector.”<sup>12</sup> African Americans with dark or medium skin earn ten to fifteen percent less than whites.<sup>13</sup> Light-skinned immigrants earn eight to fifteen percent more than similar immigrants with dark skin.<sup>14</sup> Minorities are overrepresented in service jobs while whites are overrepresented in managerial and exec-

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7. *Id.* at 51.

8. *See infra* Part III.B.

9. *See Race-Based Charges FY 1997 – FY 2012*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/race.cfm> (last visited Oct. 15, 2013) (showing that charges of race-based discrimination have mostly stayed the same or increased from 1997 to 2012); *Race-Based Harassment Charges FY 1997 – FY 2012*, EEOC, [http://www.eeoc.gov/eeoc/statistics/enforcement/race\\_harassment.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/race_harassment.cfm) (last visited Nov. 1, 2013) (showing that charges of race-based harassment have mostly stayed the same or increased from 1997 to 2012).

10. *Poll on Race Relations*, GALLUP 3, <http://www.gallup.com/poll/1687/race-relations.aspx> (last visited Oct. 15, 2013).

11. *See generally* Charles Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (discussing remedies for addressing unconscious racism in equal protection problems).

12. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, EEOC AFRICAN AMERICAN WORKGROUP REPORT 2 (2012), available at <http://www.eeoc.gov/federal/reports/upload/African-American-Report.pdf>.

13. Eva Paterson et al., *The Id, the Ego, and Equal Protection in the 21st Century*, 40 CONN. L. REV. 1175, 1184 (2008) (citing Travis Loller, *Study Says Skin Tone Affects Earnings*, USA TODAY (Jan. 26, 2007), [http://www.usatoday.com/money/economy/income/2007-01-26-skin-tone-study\\_x.htm](http://www.usatoday.com/money/economy/income/2007-01-26-skin-tone-study_x.htm)).

14. *Id.*

utive positions.<sup>15</sup> And if one is a firefighter who is Asian,<sup>16</sup> Latino,<sup>17</sup> or African American,<sup>18</sup> one's chances of being hired and then working without experiencing race-based discrimination is slim.

Despite the continued prevalence of discrimination in the workplace, plaintiffs in discrimination cases face difficult odds.<sup>19</sup> In federal district courts, employment discrimination plaintiffs bring fewer cases

15. 2012 *Job Patterns for Minorities and Women in Private Industry (EEO-1)*, EEOC, [http://www1.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2012/index.cfm#select\\_label](http://www1.eeoc.gov/eeoc/statistics/employment/jobpat-eeo1/2012/index.cfm#select_label) (select "National Aggregate, All Industries" and press "Go") (last visited Nov. 1, 2013) [hereinafter 2012 *Job Patterns*] (showing that—while making up 65% of private sector employees—whites comprise 79% of first- or mid-level managers and 88% of executive- or senior-level officials and managers, and that—while consisting of 35% of private sector employees—minorities comprise 21% of first- or mid-level managers, nearly 12% of executive- or senior-level officials and managers, and 51% of service workers).

16. See Chris Vogel, *Alhambra Arson Foul Play?*, L.A. WEEKLY (July 7, 2011), available at <http://www.laweekly.com/2011-07-07/news/alhambra-arson-foul-play/2/> ("As only one of two Asians in the fire department—the other being Vietnamese—Toh never felt at ease among the mostly white and Hispanic firefighters, and says he was often the butt of their jokes."); Susan Edelman, *FDNY EMS Lt. Spews Racist, Anti-Semitic Tweets, but Cried When Confronted*, N.Y. POST (Mar. 24, 2013), <http://nypost.com/2013/03/24/fdny-ems-lt-spews-racist-anti-semitic-tweets-but-cried-when-confronted/> ("[An EMS lieutenant who posted numerous racist tweets is] a symptom of a sick system. If you work in the city [of New York] for police, fire or EMS and tell me you're surprised by this, you're a liar.") (quoting a retired EMS veteran). But see AnnMarie Costella, *Asian Firefighters See No Racism in FDNY*, QUEENS CHRON. (Jan. 19, 2012), [http://www.qchron.com/editions/queenswide/asian-firefighters-see-no-racism-in-the-fdny/article\\_b00166b3-d682-5d97-bb36-30188d2ff64e.html](http://www.qchron.com/editions/queenswide/asian-firefighters-see-no-racism-in-the-fdny/article_b00166b3-d682-5d97-bb36-30188d2ff64e.html) (describing two Asian American FDNY firefighters who, despite knowing that Asian Americans make up the smallest percentage of all minority groups in the FDNY, believe there is no racism in the department).

17. See Hal Budnick, *Smoking out Racism in the FDNY: The Dwindling Use of Race-Conscious Hiring Remedies*, 77 BROOK. L. REV. 1249, 1263–64 (2012) (summarizing the history of race discrimination against African Americans and Latinos in the FDNY); Ann C. McGinley, Ricci v. DeStefano: A Masculinities Theory Analysis, 33 HARV. J.L. & GENDER 581, 588–92 (2010) (tracing the history of underrepresentation of African Americans and Latinos in the New Haven Fire Department and the FDNY); *New Allegations of Racism at HFD*, ABC LOCAL (Jan. 24, 2011), <http://abclocal.go.com/kgof/story?section=news/local&id=7915748> (reporting on a Latino firefighter's allegations that he had found his gear hanging by a noose with a sign that said "Learn your f in job Mexican. Be Glad you're not in Arizona").

18. See Budnick *supra* note 17; McGinley, *supra* note 17 (tracing the history of underrepresentation of African Americans and Latinos in the New Haven Fire Department and the FDNY); Jaxon Van Derbeken, *Tentative Settlement in Black SF Firefighter's Suit*, S.F. GATE (Sept. 7, 2013), <http://www.sfgate.com/bayarea/article/Tentative-settlement-in-black-SF-firefighter-s-4795725.php> (detailing a black firefighter's allegations that he was referred to as a house boy and relegated to hard labor instead of training for a year); Paul H.B., *Outrage over Racist Parade Queens Float Mocks Tex. Slay*, N.Y. DAILY NEWS (Sept. 10, 1998), <http://www.nydailynews.com/archives/news/outrage-racist-parade-queens-float-mocks-tex-slay-article-1.816537> (reporting on the participation of New York firefighters in a parade featuring floats depicting African Americans in an offensive manner).

19. Katie R. Eyes, *That's Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 MINN. L. REV. 1275, 1282–83 (citing Kevin M. Clermont & Stewart J.

now than in previous years.<sup>20</sup> Employment cases proceed and terminate less favorably for plaintiffs than in other civil cases.<sup>21</sup> Even in California, where employment discrimination laws are viewed as stronger than federal laws, women and minorities do not fare as well in discrimination cases as plaintiffs in other employment termination cases.<sup>22</sup> While cases tend to settle, they do not settle more often than other civil cases.<sup>23</sup> Rather than plaintiffs easily prevailing in discrimination cases, the statistics show the opposite. As opposed to the existence of runaway juries awarding high damages, “employment discrimination cases are hard to win, and usually result in rather modest verdicts.”<sup>24</sup>

The ascent of President Barack Obama to the White House has fed the widely held belief that the significance of race in America has dissipated.<sup>25</sup> There is public consensus that race no longer matters.<sup>26</sup>

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Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429, 429 (2004).

20. Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103, 117–18 (2009) (attributing the “very significant downturn in filings since 1998” to the “largely negative experiences of many plaintiffs and their lawyers” as opposed to a decrease in discrimination).

21. *See id.* at 127.

22. *See* David B. Oppenheimer, *Verdicts Matter: An Empirical Study of California Employment Discrimination and Wrongful Discharge Verdicts Reveal Low Success Rates for Women and Minorities*, 37 U.C. DAVIS L. REV. 511, 548–49 (2003).

In race discrimination cases brought by non-whites . . . the plaintiffs won only 36% of the time. In race discrimination cases brought by non-whites involving allegations other than harassment, plaintiffs won only 33% of the time. In the four race discrimination cases brought by whites, the plaintiffs won 100% of the time. . . . In termination cases generally, plaintiffs won 46% of the verdicts, but in race discrimination termination cases filed by non-whites, plaintiffs won only 16% of the time, including three of twelve (25%) for black plaintiffs. In sex discrimination termination cases filed by women, plaintiffs won only 25% of the time. . . . At the intersection of sex and race, in cases brought by black women alleging either sex discrimination and/or race discrimination, plaintiffs won only 17% of the time. . . . At the intersection of sex and age, women alleging age discrimination lost every case they tried, while men alleging age discrimination won 36% of the time.

*Id.*

23. *See* Clermont & Schwab, *supra* note 20, at 121. This demonstrates that the assertion that employees take unfair advantage of employers by suing for discrimination and then settling for large settlements is not supported by statistics on the rate of settlements. *See id.*

24. *See* Oppenheimer, *supra* note 22, at 566.

25. *See* Ian F. Haney López, *Post-Racial Racism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CAL. L. REV. 1023, 1024 (2010) (“The election of Barack Obama to the presidency has inspired many to marvel at the seeming evaporation of race as a basis for social ordering in the United States, a euphoria often expressed in proclamations that we now live in a ‘post-racial’ America.”) (citing Hua Hsu, *The End of White America?*, ATLAN-

This false notion of colorblindness, or post-racialism, further exacerbates the problems plaintiffs face in race discrimination cases. Many courts and juries start from the assumption that race discrimination is absent.<sup>27</sup>

The idea that one's perception about discrimination is influenced by one's relative position in society has been the subject of much study. For example, Professor Roy Brooks has observed, "the law legitimizes the 'perpetrator's' or 'insider's' perspective and is constructed by the dominant group to serve its own purpose."<sup>28</sup> Professor Russell K. Robinson has further developed the idea of insider and outsider perspectives into "perceptual segregation theory,"<sup>29</sup> which accounts for differences in how insiders and outsiders perceive discrimination.<sup>30</sup> Robinson defines insiders as members of the dominant class such as whites and men,<sup>31</sup> and outsiders as members of the minority class such as people of color and women.<sup>32</sup> Whites are likely to exhibit a colorblind perspective that assumes most whites are colorblind while blacks tend to adopt a "pervasive prejudice perspective" in which "racism is common and structural."<sup>33</sup> There are similar<sup>34</sup> differences between men and women in how both groups perceive gender discrimination.<sup>35</sup>

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TIC ONLINE (Jan. 1, 2009), <http://www.theatlantic.com/magazine/archive/2009/01/the-end-of-white-america/7208/>); Tim Rutton, *The Good Generation Gap*, L.A. TIMES, Feb. 6, 2008, at 31 (suggesting that Obama "personifies and articulates the post-racial America in which most of our young people now live"); Peter J. Boyer, *The Political Scene: The Color of Politics*, NEW YORKER, Feb. 4, 2008, at 38 (promoting Obama, among others, as black politicians who have transcended race).

26. See MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 11–12 (rev. ed. 2012).

27. See Theresa M. Beiner, *Shift Happens: The U.S. Supreme Court's Shifting Antidiscrimination Rhetoric*, 42 U. TOL. L. REV. 37, 38 (2010); Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1126 (2008) (defining the "colorblindness perspective" as the white person's belief that "most white people are colorblind, and deviations from this norm are unusual.").

28. See Roy L. Brooks, *Critical Race Theory: A Proposed Structure and Application to Federal Pleading*, 11 HARV. BLACKLETTER L.J. 85, 96 (1994).

29. See Robinson, *supra* note 27, at 1117.

30. See *id.*

31. See *id.*

32. See *id.*

33. *Id.* at 1126.

34. Russell Robinson explains that there are significant differences in how men and women perceive gender discrimination, especially sexual harassment, but notes that the differences appear to be more modest than racial differences. *Id.* at 1113.

35. *Id.*

The recent California Supreme Court decision in *Harris* reflects an insider perspective.<sup>36</sup> The court impaired the ability of FEHA to effectuate its purposes by (1) raising the standard of causation in mixed-motive cases to *substantial* motivating factor,<sup>37</sup> (2) permitting employers to significantly limit their liability if they can make the illusory showing that they would have made the same decision absent discrimination,<sup>38</sup> and (3) reviving the stray remarks doctrine.<sup>39</sup> *Harris* is largely premised on assumptions that ignore and minimize the experiences and perspectives of outsiders.<sup>40</sup> The court legitimizes the perspective of the insider by favoring certain doctrines, emphasizing specific facts, and minimizing the impacts of discrimination. While *Harris* is a sex discrimination case, it applies to any plaintiff claiming disparate treatment under FEHA.<sup>41</sup>

This Note argues that the California Legislature should amend FEHA to restore the motivating factor standard in mixed-motive cases, reject the same decision defense, and reject the stray remarks doctrine. These changes will ensure that FEHA is more effective in achieving its purposes. Part I examines pre-*Harris* FEHA disparate treatment jurisprudence in California. Part II looks at how the court arrived at its decision in *Harris* for mixed-motive claims. Part III evaluates *Harris* from a critical race perspective and shows how the Court improperly allowed the insider perspective to dominate over the outsider perspective by focusing on certain facts and doctrines to achieve its results, minimizing the impacts of discrimination, and favoring a policy of preventing the unjust enrichment of employees over giving a free pass to employers who discriminate. Part IV examines how *Harris* is inconsistent with our contemporary knowledge of discrimination and takes us backwards in the ability of FEHA to achieve its purposes. Part V offers recommendations to the Legislature on how to address the resulting inequities and further marginalization *Harris* will have on employees.

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36. See *Harris II*, 294 P.3d 49 (Cal. 2013).

37. See *infra* Part IV.B.

38. See *infra* Part II.C.

39. See *infra* Part III.B.

40. See *infra* Part III.A–C, IV.A.

41. E.g., *Mounts v. Cal. Dep't of Corrections and Rehabilitation*, No. F064225, 2013 WL 3815593, at \*3–4 (Cal Ct. App. July 22, 2013) (citing *Harris* in reversing and remanding for a new trial a race discrimination FEHA case because of the trial court's failure to provide a mixed-motive jury instruction).

## I. Pre-*Harris* FEHA Jurisprudence

FEHA prohibits employers from discriminating against employees “because of” protected characteristics.<sup>42</sup> The legislature has found that the denial of employment opportunities on the basis of protected characteristics “fosters domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public . . . .”<sup>43</sup> The purpose of FEHA is to eliminate discrimination by providing “effective remedies that will prevent and deter unlawful practices and redress the adverse effects of those practices on aggrieved persons.”<sup>44</sup> FEHA “shall be construed liberally for the accomplishment of [its] purposes.”<sup>45</sup>

Cases where the plaintiff alleges she suffered an adverse employment action because of a protected characteristic—disparate treatment cases<sup>46</sup>—generally fall into one of two categories: single-motive or mixed-motive cases. Single-motive cases involve one alleged motivation for the adverse employment action: either discriminatory or legitimate.<sup>47</sup> Mixed-motive cases involve potentially both discriminatory and legitimate reasons for an adverse employment action.<sup>48</sup>

On motion for summary judgment for single-motive FEHA cases, the California Supreme Court has adopted the three-stage burden-shifting framework established in *McDonnell Douglas v. Green*<sup>49</sup> by the United States Supreme Court.<sup>50</sup> Under this framework, the plaintiff has the initial burden of making a prima facie case of discrimination.<sup>51</sup> A prima facie case establishes a presumption of discrimina-

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42. CAL. GOV'T CODE § 12940 (West 2006 & Supp. 2011) (prohibiting discrimination “because of the [employee’s] race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation”).

43. § 12920.

44. § 12920.5.

45. § 12993(a).

46. *Green v. State*, 165 P.3d 118, 131 (Cal. 2007).

47. *See Harris II*, 294 P.3d 49, 53–54 (Cal. 2013).

48. *See id.* at 54.

49. 411 U.S. 792 (1973) (interpreting Title VII cases).

50. *Harris II*, 294 P.3d at 54; *see also* *Guz v. Bechtel Nat'l, Inc.*, 8 P.3d 1089, 1113 (Cal. 2000). Title VII, the federal anti-discrimination statute, makes it unlawful for an employer “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 race, color, religion, sex, or national origin.” 42 U.S.C. § 2000e-2(a)(1) (2006 & Supp. V 2012).

51. *Guz*, 8 P.3d at 1113 (“[T]he plaintiff must provide evidence that (1) he was a member of a protected class, (2) he was qualified for the position he sought or was per-

tion.<sup>52</sup> Next, if the plaintiff makes his prima facie case, the employer must rebut the presumption by producing evidence its action was taken for a legitimate, nondiscriminatory reason.<sup>53</sup> Finally, if the employer meets its burden of production,<sup>54</sup> the plaintiff must show the employer's proffered reason was pretext for discrimination, and the plaintiff may offer additional evidence of discriminatory motive.<sup>55</sup> Ultimately, the plaintiff has the burden of persuading the trier of fact of unlawful discrimination.<sup>56</sup>

In pre-*Harris* mixed-motive FEHA cases, California appellate courts have utilized different approaches. Some accounted for the possibility of mixed-motives within the *McDonnell Douglas* framework.<sup>57</sup> For example, mixed-motives for an adverse action have been analyzed as a part of the third prong—employer pretext—of the *McDonnell Douglas* burden-shifting framework.<sup>58</sup> Some courts refused to entertain the argument that there were mixed-motives by holding either

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forming competently in the position he held, (3) he suffered an adverse employment action, such as termination, demotion, or denial of an available job, and (4) some other circumstance suggests discriminatory motive.”).

52. *Harris II*, 294 P.3d at 54.

53. *Id.*

54. The plaintiff bears the ultimate burden of persuading the trier of fact that the defendant unlawfully discriminated against the plaintiff. *Guz*, 8 P.3d at 1114. The defendant's burden of *production* is met if it produces admissible evidence sufficient to raise a genuine issue of fact, which is enough to rebut the presumption that arises from the plaintiff's prima facie showing. *Id.* (italics added).

55. *Id.*

56. *Id.*

57. See, e.g., *Mixon v. Fair Emp't Hous. Comm'n*, 237 Cal. Rptr. 884, 891 (Cal. Ct. App. 1987) (stating that a plaintiff “need not prove that racial animus was the sole motivation behind the challenged action”); *Caldwell v. Paramount Unified Sch. Dist.*, 48 Cal. Rptr. 2d 448, 459 (Cal. Ct. App. 1995) (concluding that once a case gets to the jury, “the intermediate burdens set forth in *McDonnell Douglas* will fall away, and the factfinder will have only to decide the ultimate issue of whether the employer's discriminatory intent was a motivating factor in the adverse employment decision”); *Marks v. Loral*, 68 Cal. Rptr. 2d 1, 5 (Cal. Ct. App. 1997), *superseded by statute*, Act of August 2, 1999, ch. 222, § 2, 1999 Cal. Stat. 2189, 2190–91, (codified as amended at CAL GOV'T CODE § 12941 (West 2006)) (holding that it was not an error for the trial court to refuse an express mixed-motive instruction since a “portion of the instruction which the trial court *did* give to the jury told its members that plaintiff could prevail if ‘age played a motivating *part*’ (our emphasis) in a decision, so [plaintiff] can hardly complain that the court precluded him from informing the jury that if his employer had a bad reason and a good reason, he should win”).

58. See, e.g., *Clark v. Claremont Univ. Ctr.*, 8 Cal. Rptr. 2d 151 (Cal. Ct. App. 1992) (“[W]hile a complainant need not prove that racial animus was the sole motivation behind the challenged action, he must prove by a preponderance of the evidence that there was a ‘causal connection’ between the employee's protected status and the adverse employment decision.” (quoting *Mixon*, 237 Cal. Rptr. at 891)).



the facts did not warrant it,<sup>59</sup> that the case was litigated and argued as a single-motive case,<sup>60</sup> or by disposing of the case on other grounds.<sup>61</sup>

Other courts looked to the approach taken by federal courts interpreting mixed-motive cases under Title VII. Some appellate courts analyzed cases under the *Price Waterhouse v. Hopkins*<sup>62</sup> framework.<sup>63</sup> In this framework, also known as the same-decision defense, “once a plaintiff in a Title VII case shows that [membership in a protected class] played a motivating part in an employment decision,”<sup>64</sup> the employer may avoid liability by proving by a “preponderance of the evidence”<sup>65</sup> it would have made the same decision absent the discriminatory motive.<sup>66</sup> Lastly, there are cases in which courts implied in dicta they would allow employers to mitigate liability under the *Price Waterhouse* framework should they be confronted with a mixed-motive case.<sup>67</sup>

Before *Harris* there were different approaches to analyzing mixed-motive cases. While all appellate courts required that plaintiffs show discrimination was a motivating factor, they differed on whether they permitted a same-decision defense, or accounted for mixed motives as a part of the ultimate question in step three of *McDonnell Douglas*.

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59. See, e.g., *Alamo v. Practice Mgmt. Info. Corp.*, 148 Cal. Rptr. 3d 155, 165 (Cal. Ct. App. 2012); *Arteaga v. Brink’s, Inc.*, 77 Cal. Rptr. 3d 654, 678 (Cal. Ct. App. 2008) (“[B]ecause the evidence does not support [plaintiff’s] contention that [defendant] had legitimate and *illegitimate* reasons for his termination, we do not decide whether a mixed-motive analysis applies under FEHA or in this case.”).

60. See, e.g., *Huffman v. Interstate Brands Co.*, 17 Cal. Rptr. 3d 397, 416 (Cal. Ct. App. 2004).

61. *Veronese v. Lucasfilm Ltd.*, 151 Cal. Rptr. 3d 41, 55 (Cal. Ct. App. 2012) (“We deem it unnecessary to weigh in on the [mixed-motive] issue, for even if the giving of CACI 2500 is held to be proper under California law, reversal would be required due to errors in other instructions—errors, we conclude, that were prejudicial.”).

62. 490 U.S. 228 (1989).

63. See, e.g., *Cassista v. Cmty. Foods*, 10 Cal. Rptr. 2d 98 (Cal. Ct. App. 1992), *overruled on other grounds* by *Cassista v. Cmty. Foods*, 856 P.2d 1143 (Cal. 1993); *Harvey v. Sybase, Inc.*, 76 Cal. Rptr. 3d 54 (Cal. Ct. App. 2008).

64. *Price Waterhouse*, 490 U.S. at 244.

65. *Id.* at 253.

66. *Id.* at 244–45.

67. See, e.g., *Huffman v. Interstate Brands Co.*, 17 Cal. Rptr. 3d 397, 416 (Cal. Ct. App. 2004) (citing *Price Waterhouse* in its discussion regarding mixed motives); *Grant-Burton v. Covenant Care*, 122 Cal. Rptr. 2d 204, 219–20 (Cal. Ct. App. 2002) (holding there is no liability if a defendant with an improper motive for termination can show it still would have terminated an employee regardless of the improper motive); *Heard v. Lockhead Missiles & Space Co.*, 52 Cal. Rptr. 2d 620, 627 (Cal. Ct. App. 1996) (citing *Price Waterhouse* in its discussion on mixed motives, although case was ultimately decided using a *McDonnell Douglas* analysis).

## II. *Harris v. Santa Monica*

*Harris v. Santa Monica* was a gender discrimination case that provided a major opportunity for the California Supreme Court to clarify and advance the underlying goals of FEHA.<sup>68</sup> The court resolved the question of how to analyze mixed-motive cases by: (1) holding that discrimination must be a *substantial* motivating factor<sup>69</sup> and (2) adopting the same-decision defense to eliminate compensatory and punitive damages as well as reinstatement.<sup>70</sup>

### A. Court's Recitation of the Facts and Procedural History

Wynona Harris was hired by the City of Santa Monica as a bus driver trainee in October of 2004.<sup>71</sup> During her training period, she was involved in what was considered to be a preventable accident.<sup>72</sup> During her probationary period, she was involved in another accident.<sup>73</sup>

In March of 2005, Harris received a performance evaluation covering her first three months (November through February) as a probationary employee.<sup>74</sup> The overall evaluation indicated, "further development needed."<sup>75</sup>

Over the course of her probationary period, she had two miss-outs which are defined in the job performance guidelines "as a driver's failure to give her supervisor at least one hour's warning that she will not be reporting for her assigned shift."<sup>76</sup> The guidelines provide "that a miss-out would result in 25 demerit points and that '[p]ro probationary employees are allowed' " fifty points.<sup>77</sup> Of Importance, her second miss-out, on April 27, 2005, caused her to reach fifty demerit points. This miss-out was due to Harris's attendance at her daughter's juvenile court proceeding.<sup>78</sup> Distressed from the hearing, Harris forgot to notify her dispatcher she would be late.<sup>79</sup>

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68. See *infra* Part II.A.

69. See *infra* Part II.B.

70. See *infra* Part II.C.

71. *Harris II*, 294 P.3d 49, 52 (Cal. 2013).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

On May 12, 2005, Harris had an encounter with her supervisor, George Reynoso, in which he told Harris to tuck in her shirt which was hanging loose.<sup>80</sup> She responded by informing Reynoso she was pregnant.<sup>81</sup> Reynoso reacted with apparent “displeasure at her news, exclaiming: ‘Wow. Well, what are you going to do? How far along are you?’”<sup>82</sup> He then requested a doctor’s note clearing her for work.<sup>83</sup> Four days later, Harris supplied the requested doctor’s note, which permitted her to work with limited restrictions.<sup>84</sup> Two days after Harris submitted the doctor’s note, she was fired.<sup>85</sup>

Harris “alleged that she was fired by the City . . . because of her pregnancy in violation of the prohibition on sex discrimination in the” FEHA.<sup>86</sup> The City answered that Harris was fired for “one or more legitimate nondiscriminatory reasons,” none of which was a pretext for discrimination.<sup>87</sup>

Harris and the City disagreed over the appropriate mixed-motive jury instruction.<sup>88</sup> Ultimately, the trial court denied the City’s proposed BAJI No. 12.26<sup>89</sup> same-decision jury instruction,<sup>90</sup> modeled after the *Price Waterhouse* approach.<sup>91</sup> Instead, the court instructed the

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80. *Id.*

81. *Id.*

82. *Id.* at 52–53.

83. *Id.* at 53.

84. *Id.*

85. *Id.*

86. *Id.* at 51.

87. *Id.* at 71.

88. *Id.* at 53.

89. CAL. JURY INST. — CIVIL 12.26 (2010); *Harris II*, 294 P.3d at 53.

90. *Harris II*, 294 P.3d at 53 (quoting CAL. JURY INST. — CIVIL 12.26).

The instruction states: 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.

*Id.* (internal quotations omitted).

91. *Compare id.*, with *Price Waterhouse v. Hopkins*, 490 U.S. 228, 244 (1989) (“[O]nce a plaintiff in a Title VII case shows that [a protected characteristic] 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 [the protected characteristic] to play such a role.”).

jury under CACI 2500,<sup>92</sup> the standard California disparate treatment instruction,<sup>93</sup> and BAJI 12.01.1, which defines motivating factor, provided for by the 1991 amendments to Title VII, as “something that moves the will and induces action even though other matters may have contributed to the taking of the action.”<sup>94</sup> Together, the instructions provided that Harris bore the burden to prove her pregnancy “was a motivating factor/reason for the discharge.”<sup>95</sup> This instruction directed the jury to evaluate at step three of the *McDonnell Douglas* framework whether discrimination was a motivating factor. The jury found the City terminated Harris because of sex discrimination and awarded \$177,905 in damages, of which \$150,000 was for mental suffering.<sup>96</sup>

The Court of Appeal, relying on previous appellate cases and federal law interpreting Title VII, held the City’s proposed BAJI No. 12.26 instruction was a proper statement of California law and refusal by the trial court to give it was prejudicial error.<sup>97</sup> Since the court of appeals also determined there was substantial evidence from which a reasonable jury could find for Harris, the case was remanded for new trial.<sup>98</sup> The California Supreme Court granted Harris’s petition for review.<sup>99</sup>

## **B. California Supreme Court Declares that Discrimination Must be a Substantial Motivating Factor in Mixed-Motive Cases**

The California Supreme Court first needed to determine what it meant to discriminate “because of” a person’s protected class under section 12940(a) of FEHA.<sup>100</sup> Looking at the plain language of FEHA,<sup>101</sup> the court identified three possible interpretations:<sup>102</sup> First,

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92. *Harris II*, 294 P.3d at 53.

93. CAL. CIV. JURY INSTR. NO. 2500, DIRECTIONS FOR USE, at 1322 (Judicial Council of Cal. 2013), available at [http://www.courts.ca.gov/partners/documents/caci\\_2013\\_edition.pdf](http://www.courts.ca.gov/partners/documents/caci_2013_edition.pdf) (“This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual’s protected status.”).

94. CAL. JURY INST. — CIVIL 12.01.1 (2010).

95. *Harris II*, 294 P.3d at 53 (quoting CAL. JURY INST. — CIVIL 12.01.1).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. See *id.* at 54; Fair Employment and Housing Act, CAL. GOV’T CODE § 12940(a) (2011).

101. *Harris II*, 294 P.3d at 54.

102. *Id.* at 55.

the most narrow “but for” standard;<sup>103</sup> second, the intermediate “substantial motivating factor” standard;<sup>104</sup> and third, the most broad “motivating factor” standard.<sup>105</sup> This third standard is what appellate courts generally utilized before *Harris*.<sup>106</sup>

In deciding which standard to apply the court looked to FEHA’s legislative history,<sup>107</sup> judicial interpretation of “because of” as used in Title VII,<sup>108</sup> and the general history of Title VII jurisprudence.<sup>109</sup> After identifying the purposes of FEHA<sup>110</sup> the court held a plaintiff must prove that “discrimination on the basis of a protected characteristic was a *substantial factor* motivating the adverse employment action.”<sup>111</sup>

The court defended the “substantial motivating factor” standard by refuting the need for the “but for” standard in light of the purposes of FEHA.<sup>112</sup> The court concluded that a standard less than “but for” cause would more effectively achieve the goals of FEHA.<sup>113</sup> The court noted that “discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a ‘but for’ cause.”<sup>114</sup> When discrimination is shown to have played a substantial motivating factor, “even if not a ‘but for’ cause of the disputed employment action, [it] would breed discord and resentment

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103. *Id.* at 54–55 (articulating the standard used in *Gross v. FBL Fin. Servs.*, 557 U.S. 167, 176 (2009)).

104. *Id.* at 55 (using the standard adopted in *In re M.S.*, 896 P.2d 1365, 1375 (Cal. 1995) to interpret “because of” in the California anti-hate crime statute as not requiring that the “prohibited motivation be the predominant or exclusive clause of the offense.” *In re M.S.*, 896 P.2d at 1375.).

105. *Harris II*, 294 P.3d at 55 (noting that a broad reading of “because of” is supported by the Fair Employment and Housing Commission’s long-standing construction of the term “because of” and by Congress’s 1991 amendment to Title VII).

106. *See supra* text accompanying notes 57–58. *Compare* CAL. CIV. JURY INSTR. NO. 2500, (Judicial Council of Cal. June 2013 Supp.), at 171 *available at* [http://www.courts.ca.gov/partners/documents/caci\\_supp\\_2013.pdf](http://www.courts.ca.gov/partners/documents/caci_supp_2013.pdf) (listing as an essential element, in the June 2013 revision, that plaintiff’s protected status was a *substantial* motivating reason for the adverse action), *with* CAL. CIV. JURY INSTR. NO. 2500 (Judicial Council of Cal. 2013), *available at* [http://www.courts.ca.gov/partners/documents/caci\\_2013\\_edition.pdf](http://www.courts.ca.gov/partners/documents/caci_2013_edition.pdf) (listing as an essential element, in the June 2012 revision, that plaintiff’s protected status was only *a* motivating reason for the adverse action).

107. *Harris II*, 294 P.3d at 55 (noting that nothing bore on the degree of causation required by FEHA).

108. *Id.* at 56–57.

109. *Id.* at 57–60.

110. *Id.* at 61 (identifying the purposes of FEHA as remedying and deterring unlawful discrimination).

111. *Id.* (emphasis added).

112. *See id.* at 63–65.

113. *See id.*

114. *Id.* at 64.

in the workplace if allowed to be committed with impunity.”<sup>115</sup> The court could not attribute to the Legislature the “intent to deem lawful any discriminatory conduct that is not the ‘but for’ cause of an adverse employment action against a particular individual.”<sup>116</sup>

The court cited its reason for rejecting the “motivating factor” standard by cautioning that FEHA does not prohibit “discriminatory thoughts, beliefs, or stray remarks” unrelated to the employment decision, or discrimination “in the air.”<sup>117</sup> To more effectively ensure liability does not attach to “mere thoughts or passing remarks,” the court followed Justice O’Connor’s *Price Waterhouse* concurrence and held that plaintiffs should prove discrimination was a substantial motivating factor, rather than simply a motivating factor.<sup>118</sup>

### C. A Same-Decision Showing Eliminates Money Damages for Employees

After articulating the standard of causation, the court was faced with the question of whether to recognize a same-decision defense; and if so, to determine whether it is a complete or partial bar to remedies. Ultimately, the court held that an employer might mitigate, but not avoid, liability if it shows by a preponderance of the evidence that it would have made the same decision absent discrimination.<sup>119</sup>

The court first justified its decision to allow a same-decision defense by noting that some courts of appeal “have suggested in dicta and without analysis that mixed-motive cases should be analyzed under the *Price Waterhouse* framework.”<sup>120</sup> The court also cited *Department of Fair Employment Housing Commission v. Church’s Fried Chicken, Inc.*,<sup>121</sup> which held that a same-decision showing, while not a complete defense to liability, precludes certain remedies.<sup>122</sup> The court highlighted that the purposes of FEHA are “to provide effective remedies that will . . . redress the adverse effects of [discriminatory] practices on aggrieved persons”<sup>123</sup> and to deter and prevent unlawful employ-

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115. *Id.*

116. *Id.* at 65.

117. *Id.*

118. *Id.* at 65–66.

119. *Id.* at 61, 64.

120. *Id.* at 60.

121. *Church’s Fried Chicken, Inc.*, FEHC Dec. No. 90-11, 1990 WL 312878 (Cal. F.E.H.C. Aug. 16, 1990).

122. *See Harris II*, 294 P.3d at 61.

123. *Id.* (alterations in original) (citing CAL. GOV’T CODE § 12920.5 (2006)).

ment practices.<sup>124</sup> The court then concluded these purposes would be undermined if an employer could escape liability by merely proving it would have made the same decision absent its substantial discrimination.<sup>125</sup>

However, the court decided that awarding back pay or reinstatement to an employee who would have suffered the adverse action anyway would be an unjustified windfall to the employee and would unfairly limit employers' freedom of choice.<sup>126</sup> The court also decided noneconomic damages (such as emotional distress) are unjustified<sup>127</sup> because, while discrimination is harmful, the real harm employees experience is from the termination and less from the unequal treatment.<sup>128</sup> The court again emphasized its desire to prevent the unjust enrichment of aggrieved employees.<sup>129</sup>

The court decided employees who would have suffered the adverse action absent discrimination are entitled to declaratory judgment, reasonable attorney fees and costs, and injunctive relief for the employer to cease its discriminatory practices.<sup>130</sup>

In sum, the court raises the standard of causation for plaintiffs in mixed-motive cases and permits an employer to mitigate liability if it shows it would have made the same decision absent discrimination. Since the employer ostensibly would have made the same decision,

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124. *Id.* (“[This goal is] rooted in the Legislature’s express recognition that employment discrimination ‘fosters domestic strife and unrest, deprives the state of the fullest utilization of its capacities for development and advancement, and substantially and adversely affects the interests of employees, employers, and the public in general.’”).

125. *Id.* at 64.

[A]llowing a same-decision showing to immunize the employer from liability . . . would tend to defeat the purposes of the FEHA. . . . [T]he existence of facts from which a jury could find that improper bias was a substantial factor motivating the employer’s decision is sufficient to establish discriminatory conduct . . . even if not a “but for” cause of the disputed employment action, would breed discord and resentment in the workplace if allowed to be committed with impunity.

*Id.*

126. *Id.* at 66 (“Although [reinstatement and back pay] might help to ‘prevent and deter unlawful employment practices,’ they would do so only at the cost of awarding plaintiffs an unjustified windfall and unduly limiting the freedom of employers to make legitimate employment decisions.”).

127. *Id.* at 66–67.

128. *See id.* at 67 (“When an employee is fired, and when discrimination has been shown to be a substantial factor but not a ‘but for’ cause, we believe it is a fair supposition that the primary reason for the discharged employee’s emotional distress is the discharge itself.”).

129. *Id.* (“Such distress is not compensable under FEHA—indeed, compensation for such distress would be a windfall to the employee—if the employer proves it would have fired the employee anyway for lawful reasons.”).

130. *Id.* at 67–68.

even had it not discriminated, employees may not seek back pay or reinstatement. While acknowledging discrimination may be harmful to employees, employees may not seek emotional distress damages since the real harm is from the adverse action, not the discrimination.

### III. Critical Race Perspective on *Harris*

The decision reflects an insider perspective by addressing the apparent problem of an ineffective outsider employee successfully suing her employer for unlawful discrimination. The existence of this problem depends on the accuracy of the assumption that outsiders unfairly avail themselves of FEHA protections to excuse poor workplace performance. Portions of the decision pertaining to remedies imply the presence of this assumption.<sup>131</sup> Whether or not the assumption is true,<sup>132</sup> *Harris* seems to be the perfect case in which to address an outsider employee unfairly benefitting from FEHA, since the facts suggest *Harris* was a reckless bus driver who got into accidents and excessively missed work.

A closer look at the facts, however, paints a different picture of *Harris*'s performance. This examination calls into serious question whether *Harris* actually should have been analyzed as a mixed-motive case, or whether it should have been analyzed under *McDonnell Douglas*. In any event, the court's portrayal of the facts made possible a mixed-motive analysis.

The decision further reflects an insider perspective when it discusses that unlawful discrimination may not be premised on stray remarks, by assuming that since discrimination is no longer prevalent, claims of discrimination are likely to be false, unless proven by explicit discrimination. The decision neglects the real personal impacts of discrimination on outsiders, places the risk of wrong decisions on outsiders, and favors a policy of preventing the unjust enrichment of employees over giving a free pass to employers who discriminate.

#### A. To Support Its Holdings The Court Emphasized Facts Beneficial to the City

One way the insider's perspective manifested itself was in the court's emphasis of certain facts over others. The court's recitation of

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131. See discussion *infra* Part III.A.

132. The disproportionate lack of success enjoyed by plaintiffs in discrimination cases suggests the assumption is not true. See Oppenheimer, *supra* note 22, at 566; Clermont & Schwab, *supra* note 20, at 127.



the facts portrayed Harris as an unqualified and irresponsible female—maybe of color—bus-driver.

In its description of the facts, the court begins by mentioning Harris's first "preventable accident" during her forty-day training period.<sup>133</sup> The court notes that she successfully passed her training period and then shortly after had a second preventable accident in which she "sideswiped a parked car and tore off its side mirror."<sup>134</sup> The court next alerts the reader to Harris's two miss-outs<sup>135</sup> and points out the second one occurred because she took her daughter to a juvenile court hearing.<sup>136</sup> The court cites the job performance guidelines that state a probationary employee is only allowed two miss-outs.<sup>137</sup> Transit Services Manager Bob Ayer investigated the circumstances surrounding the second miss-out and recommended the miss-out not be excused.<sup>138</sup> This is the extent of the court's portrayal of the facts surrounding the quality of Harris's performance, and it suggests the termination was warranted.

The court, however, omits facts relevant to her job performance, and whether the City had a legitimate, nondiscriminatory reason for terminating her. The court omits that Harris was not reprimanded for either accident.<sup>139</sup> The court also omits that all of the employees who worked with Harris and testified at trial said they had "no issue" with her performance as a bus driver.<sup>140</sup> As a matter of fact, the City's policy was that a probationary employee must be involved in four preventable accidents to be subject to termination.<sup>141</sup> Far from being an irresponsible bus driver, the actual record suggests Harris was a better driver than others who eventually passed their probationary period.<sup>142</sup>

As to the miss-outs as justification for Harris's termination, the court failed to mention that there were three different possible sets of

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133. *Harris II*, 294 P.3d at 52.

134. *Id.*

135. *Id.* (quoting the job performance guidelines that define "a 'miss-out' as a driver's failure to give her supervisor at least one hour's warning that she will not be reporting for her assigned shift").

136. *Id.*

137. *See id.*

138. *Id.*

139. Brief for Respondent at 5, *Harris I*, 106 Cal. Rptr. 3d 6 (Cal. Ct. App. 2010) (No. B199571), 2008 WL 5545094, at \*5 [hereinafter Brief for Respondent].

140. *Id.* at 32.

141. *See id.* ("In fact, contrary to [the City's] position on appeal, Harris' [sic] supervisor Sheila Terry testified at trial that a probationary employee must be involved in 4 preventable accidents to subject to termination.").

142. *See id.*

standards that governed the permissible number of miss-outs probationary employees could have before being subject to termination. The Motor Coach Manual (distributed to all bus drivers) specified drivers were subject to termination after the equivalent of four miss-outs within a ninety-day period, or eleven miss-outs in a twelve-month period.<sup>143</sup> All city employees who testified at trial acknowledged the Motor Coach Manual did not state that probationary employees were permitted fewer miss-outs than full-time ones.<sup>144</sup> The performance guidelines, referenced by the court in its recitation of the facts, did provide that probationary employees were permitted half of the demerit points (and thus half the amount of miss-outs) as full time ones.<sup>145</sup> The final standards concerning miss-outs probative to whether Harris's termination decision was race-neutral were the Criteria for Probationary Termination created by Bob Ayer.<sup>146</sup> The Criteria provide a "probationary employee that receives 5 miss-outs" within a year is subject to termination.<sup>147</sup>

The court also failed to mention the City should have—or at least could have—excused the second miss-out,<sup>148</sup> even though Harris's supervisor conceded at a deposition.<sup>149</sup> While seemingly a minor detail, the second miss-out was the stated justification for Harris's termination<sup>150</sup> and provided additional weight to the court's image of a reckless and irresponsible bus driver undeserving of FEHA protections.

As a result of the selection of the facts included in the opinion, the reader is left with an image of an accident-prone bus driver who had two miss-outs, and these were the significant causes of her termination. On these facts, Harris's employer was already going to terminate her because of her incompetence and irresponsibility and not necessarily her pregnancy, and the court makes her successful sex discrimination claim in the lower courts appear unjust.

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143. *Id.* at 12.

144. *Id.*

145. *Id.* at 13.

146. *Id.* at 14.

147. *Id.*

148. *Id.* at 21–22. Supervisor Reynoso testified at a deposition that, with the proper documentation, the miss-out *would* have been excused, and Supervisor Gonzales testified at a deposition that, with proper documentation, he would have had cause to excuse the miss-out. *Id.* At trial, both Reynoso and Gonzales contradicted their earlier deposition testimony. *Id.*

149. *Id.* at 21 (“[D]uring his pretrial deposition, Reynoso admitted under oath that if proof of a court appearance was provided, then the miss out would have been removed.”).

150. *Id.* at 4 (“The City would later claim that Harris’ [sic] termination was justified because she had accumulated too many ‘points’ (i.e., demerits) for ‘miss outs.’”).

The overall purpose of the opinion's portrayal of the facts is to frame the discussion and the issues in the case. The problem posed is determining what should be done when "a mix of discriminatory and legitimate reasons [motivate] the employer's decision?"<sup>151</sup> For the court to be able to address this issue it needed the employer to be actually motivated by legitimate reasons. If there were not legitimate reasons (along with discriminatory ones) for the adverse decision the case would have been analyzed under *McDonnell Douglas* as a single-motive case, and the instruction used by the trial court would have been correct. While the case was not tried as one of mixed-motives,<sup>152</sup> the court emphasized specific facts and omitted others to create the impression the employer had legitimate reasons for terminating Harris. This allowed the court to address the issues within a mixed-motive framework.

The mixed-motive defense presents an appealing solution to the perceived problem that minority employees will pull the discrimination card generally—or the race card specifically—without merit to excuse their poor performance in the workplace. Professor Robinson has observed, "[t]he notion that black people in particular imagine or exaggerate instances of potential discrimination seems to have gained traction in the popular culture."<sup>153</sup> One assumption underlying this perceived problem is that minorities and women are less capable, less intelligent, and weaker than their white male counterparts. "Rather than genuinely but mistakenly perceiving discrimination as pervasive . . . those who play the race card are seen as deliberately and dishonestly using race as an excuse for their own failings. Women are at times subject to somewhat similar charges" from men.<sup>154</sup>

*Harris* presented facts that allowed the court to address the so-called problem of minorities abusing discrimination laws. That this perceived problem was a consideration of the court is implicit in its discussion about remedies available to an employee who has been discriminated against but against whom the employer made a same-deci-

151. *Harris II*, 294 P.3d 49, 54 (Cal. 2013).

152. The jury was read CACI Jury Instruction 2500, a standard disparate treatment instruction, which, in this case, only required that Harris's pregnancy be "a motivating reason/factor for [her] discharge." Transcript of Jury Instructions/Charge to the Jury at 3095–96, *Harris v. Santa Monica*, No. BC341569, 2007 WL 4762069 (Cal. Super. Ct. Feb. 23, 2007). "This instruction is intended for use when a plaintiff alleges disparate treatment discrimination under the FEHA against an employer or other covered entity. Disparate treatment occurs when an employer treats an individual less favorably than others because of the individual's protected status." CAL. CIV. JURY INSTR. NO. 2500, *supra* note 93.

153. Robinson, *supra* note 27, at 1139.

154. *Id.* at 1139–40.

sion showing. The court addressed the concern of discrimination plaintiffs unfairly and undeservedly benefiting from anti-discrimination laws by focusing on the aim of preventing an unjustified wind-fall<sup>155</sup> to aggrieved employees. Without permitting a same-decision defense, the court would not have been able to address the problem of letting employees unduly benefit from anti-discrimination laws. And without characterizing Harris as a habitually late and dangerous bus driver, the case would not have presented a same-decision question.

### B. The Court Opens the Door to a Broader Rejection of Strays in the Future

Some jurisdictions have adopted the “stray remarks” doctrine to discount or ignore proffered evidence of discrimination.<sup>156</sup> Some courts conclude that a stray remark is insufficiently related to the employment decision because it is either too isolated to be part of a broader pattern of comments,<sup>157</sup> insufficient in temporal proximity to the adverse action,<sup>158</sup> too ambiguous,<sup>159</sup> or too contextually attenuated<sup>160</sup> from the adverse action. As a result, many courts categorically “dismiss a remark offered as evidence of discriminatory intent as ‘stray’ before” holding at summary judgment that, as a matter of law, no reasonable juror could find for the plaintiff.<sup>161</sup>

Merely two-and-a-half years earlier in *Reid v. Google*,<sup>162</sup> the California Supreme Court addressed the applicability of the stray remarks doctrine at summary judgment. There, the court engaged in a thor-

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155. *Harris II*, 294 P.3d at 67.

156. Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 MO. L. REV. 149, 159 (quoting Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161, 1222 (1995)).

157. *Id.* (comparing *Hunter v. Sec’y of U.S. Army*, 565 F.3d 986, 997 (6th Cir. 2009) (“[The] single, isolated remark, insulting as it may be, simply does not rise to the level of a materially adverse employment action.”) with *Hasham v. Cal. State Bd. of Equalization*, 200 F.3d 1035, 1050 (7th Cir. 2000) (“The remark is only but a part of a pattern of falsehoods, contradictions, and discriminatory statements by [the decision maker] that, as a whole, convincingly demonstrate intentional discrimination.”)).

158. *Id.* (citing *Petts v. Rockledge Furniture L.L.C.*, 534 F.3d 715, 721 (7th Cir. 2008)).

159. *Id.* (citing *Douglas v. J.C. Penney Co.*, 474 F.3d 10, 15 (1st Cir. 2007)).

160. *Id.* (citing *Fjelsta v. Zogg Dermatology, P.L.C.*, 488 F.3d 804, 809–10 (8th Cir. 2007)).

161. *Id.* (citing Sandra F. Sperino, *A Modern Theory of Direct Corporate Liability for Title VII*, 61 ALA. L. REV. 773, 791 (2010)).

162. *Reid v. Google, Inc.*, 235 P.3d 988 (Cal. 2010).

ough discussion of the doctrine and for a multitude of reasons, soundly rejected it.<sup>163</sup>

*Harris* does not involve remarks that could be considered stray, and the court does not engage in any such analysis. Despite this, it says at three different points that stray remarks alone will not be sufficient to show actionable discrimination under FEHA.<sup>164</sup> Despite its mention of stray remarks, the court fails to cite *Reid*.

The passing mention of stray remarks serves as a policy justification for choosing the heightened standard of “substantial motivating factor.”<sup>165</sup> The mention of stray remarks might also establish the principle that liability for discrimination will not be imposed based on evidence of mere thoughts or passing statements unrelated to the decision.<sup>166</sup> This is a different principle than what was acknowledged in *Reid*.

In *Reid*, the court acknowledged, even while rejecting the doctrine, that “a stray remark” or “a slur,” *alone* would be insufficient to create a triable issue of fact at summary judgment.<sup>167</sup> The fact that the word “remark” is plural in *Harris*, yet singular in *Reid*, may be significant. Whereas *Reid* seemed to clearly reject the notion that multiple statements could be categorically excluded at summary judgment,<sup>168</sup> *Harris* seems to breathe some life into this idea. Prior to *Harris*, a court could not find two distant remarks insufficient to create a material dispute of fact during its totality of the circumstances analysis<sup>169</sup> at summary judgment. Now, *Harris* has granted courts the authority to

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163. *Id.* at 1008–11. The court rejected the doctrine because: (1) the task of weighing ambiguous evidence is for the jury at trial, not the judge at summary judgment; (2) strict application of the doctrine is contrary to procedural rules codified by statute at the summary judgment phase; (3) the doctrine does not add much more to the analysis since a “slur, in and of itself, does not prove actionable discrimination;” (4) federal courts have disagreed over how to define a “stray remark” and how close in time to the decision a remark must be so that it is relevant; (5) federal courts have treated “identical remarks inconsistently;” and (6) “the stray remarks doctrine contains a major flaw because discriminatory remarks by a non-decision making employee *can* influence a decision maker.” *Id.*

164. See, e.g., *Harris II*, 294 P.3d 49, 61, 65 (Cal. 2013).

165. *Id.* at 66 (emphasis omitted) (“[The heightened standard] more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision.”).

166. *Id.*

167. *Reid*, 235 P.3d at 1008 (emphasis added).

168. See, e.g., MING W. CHIN ET AL., CALIFORNIA PRACTICE GUIDE: EMPLOYMENT LITIGATION § 7:372 (Rutter Group 2012).

169. The totality of the circumstances analysis asks trial courts to “review and base its summary judgment determination on the totality of evidence in the record, including any relevant discriminatory remarks.” *Reid*, 235 P.3d at 1005. The *Reid* court rejected Google’s argument that the stray remarks doctrine winnows out weak cases and concluded that the

find even multiple remarks insufficient as a matter of law to find discrimination.

Some courts may conclude the applicability of the stray remarks doctrine to summary judgment is unchanged because *Reid* is not discussed in *Harris*, and *Harris*'s discussion pertained to a jury instruction at trial.<sup>170</sup> But even courts that do not believe *Reid* has been implicitly modified and who continue to utilize the totality of the circumstances test at summary judgment may use the principles in *Harris* to find, for example, a statement that African Americans are “‘lazy, worthless, and just [at work] to get paid’”<sup>171</sup> was a mere passing remark. As such, no reasonable juror could find the statement sufficient to show discrimination was a “substantial motivating factor” in the adverse employment decision because it was “unrelated to the . . . decision.”<sup>172</sup> This demonstrates the cumulative effect of the heightened causation standard and the principle that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the decision.

Even if courts continued to use *Reid* to limit the applicability of the doctrine at summary judgment, there is the real possibility courts could permit the doctrine's influence of a jury instruction at trial.<sup>173</sup>

The stray remarks doctrine itself is premised on the concept that discrimination is absent in the workplace. To exclude a racist, sexist, homophobic, or other derogatory slur as irrelevant or insufficient as a matter of law to raise even an inference of discrimination is to assume there is no discrimination in the first place. The use of the derogatory term is an aberration and the exception to a normally nondiscriminatory workplace. The doctrine reflects a perception of a colorblind and post-racial society as opposed to one still battling with discrimination and unequal opportunity.

The revival of stray remarks serves the function of further limiting outsider employees' ability to seek redress from the justice system. The doctrine reflects a post-racial or colorblindness perspective, which assumes race discrimination does not exist absent compelling

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totality of the circumstances test is sufficient to weed out cases too weak to raise an inference of discrimination. *Id.* at 1008.

170. *Harris II*, 294 P.3d at 53.

171. *See, e.g.*, Stone, *supra* note 156, at 162.

172. *Harris II*, 294 P.3d at 66.

173. *See* *Veronese v. Lucasfilm Ltd.*, 151 Cal. Rptr. 3d 41, 59 (Cal. Ct. App. 2012) (citing *LeMons v. Regents of the Univ. of Cal.*, 582 P.2d 946, 949 (Cal. 1978)) (stating that an instruction is correct if it is a correct statement of law, within the issues developed by the evidence, and not likely to mislead a jury).

evidence to the contrary.<sup>174</sup> Again this aspect of the decision reflects an insider's perspective and assumes that since discrimination is not prevalent, claims of discrimination are likely to be exaggerated or false, unless proven by explicit discrimination.

### C. The Court Places the Risk of Erroneous Judgments onto Outsiders Instead of Employers

The court certainly engaged in a thorough examination of the purposes of FEHA to reject the but-for causation standard. The court did not consider the same reasoning when deciding whether to adopt either the substantial motivating factor or motivating factor standard.

The court concluded that a standard less than but for cause would more effectively achieve the goals of FEHA.<sup>175</sup> The court noted that "discrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause."<sup>176</sup> When discrimination is shown to have played a substantial motivating factor, "even if not a 'but for' cause of the disputed employment action, [it] would breed discord and resentment in the workplace if allowed to be committed with impunity."<sup>177</sup> The court could not attribute to the Legislature the "intent to deem lawful any discriminatory conduct that is not the 'but for' cause of an adverse employment action against a particular individual."<sup>178</sup>

The court then rejected the motivating factor standard because a substantial motivating factor standard "more effectively ensures that liability will not be imposed based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision."<sup>179</sup> The court does not subject the substantial motivating factor standard to the same careful analysis as it did to the but-for standard but errs on the side of caution against allowing finding discrimination based on passing statements or thoughts.<sup>180</sup> In doing so, the court reflects the perspective of the insider by placing the risk of an erroneous decision by a jury (or a court at summary judgment) on outsider employees rather than employers. The court is more comfortable with

174. See Robinson, *supra* note 27, at 1117 ("[The colorblindness perspective] views discrimination as an aberration from a colorblind norm . . .").

175. See *Harris II*, 294 P.3d at 61-62.

176. *Id.* at 64.

177. *Id.*

178. *Id.* at 65.

179. *Id.* at 66.

180. See *id.*

a meritorious case of discrimination being thrown out than a finding of discrimination based on mere thoughts or passing statements.

Placing the risk on employees may not be bad policy if there was a widespread problem of runaway jury verdicts or highly disproportionate success by discrimination plaintiffs. But this is not the reality for plaintiffs in discrimination cases.<sup>181</sup> And exercising caution by rejecting a motivating factor standard would be acceptable if the standard required almost nothing of plaintiffs. But the motivating factor standard requires a showing that discrimination “move[d] the will and induce[d] action even though other matters may have contributed to the taking of the action.”<sup>182</sup> The relatively low success by plaintiffs in FEHA discrimination cases<sup>183</sup> applying the motivating factor standard further supports the proposition that the motivating factor standard was not leading to problematic outcomes for employers and did not require judicial change.

#### D. Some Outsiders Will Just Have to Accept Discrimination

The court used the term “unjustified windfall”<sup>184</sup> to describe any monetary compensation to plaintiffs when there is a finding the employer would have made the same decision absent discrimination.<sup>185</sup> Since a same-decision showing is likely to be illusory,<sup>186</sup> the term may not accurately apply to economic damages. This is so even if a jury finds the plaintiff would have been fired anyways and would have suffered no lost income or other monetary loss *because of* discrimination. As it applies to noneconomic damages, which can be ordered for pain and suffering, the term especially lacks real applicability. Any conclusion that awarding noneconomic damages would be an unjustified windfall relies on two erroneous assumptions.

The first is that discrimination has an insignificant impact on outsiders. The court ostensibly recognizes that discrimination has an im-

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181. See Oppenheimer, *supra* note 22, at 566.

182. *Harris II*, 294 P.3d at 53 (internal quotations omitted).

183. See Oppenheimer, *supra* note 22, at 548–49.

184. *Harris II*, 294 P.3d at 66.

185. *Id.*

186. See *infra* Part IV.B. Since discrimination can impair an employee’s performance, and because an employer’s perception and memory about that employee’s performance will be influenced by his own biases and prejudices, the employer’s performance-based justification for the adverse action cannot be separated from the effects of discrimination. See *infra* text accompanying notes 226–229. Therefore, it is unlikely a finding that an adverse action would have occurred absent discrimination is reflective of reality. See *id.*



pact on victims,<sup>187</sup> but then states, “the primary reason for the discharged employee’s emotional distress is the discharge itself.”<sup>188</sup> And because the employee’s distress is not caused by the discrimination, but is caused primarily by the adverse action, such harm is not compensable.<sup>189</sup>

This assumption ignores the pervasive nature and effects of discrimination. For example, recent studies demonstrate African Americans continue to experience high levels of discrimination in multiple aspects of life.<sup>190</sup> High levels of exposure to racial discrimination are also experienced by over one-third of workers of color.<sup>191</sup> Discrimination has negative impacts on physical and mental health. Research indicates discrimination can lead to high blood pressure, elevated heart rate, and increased cortisol excretion, resulting in health problems.<sup>192</sup> “Empirical studies have also found significant links between self-reported experiences of racial discrimination and negative mood, depressive symptoms, feelings of hopelessness, anxiety, and psychological distress.”<sup>193</sup> Additionally, a recent study shows that among Asian Americans, discrimination is associated with psychologi-

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187. *Harris II*, 294 P.3d at 66 (“There is no question that an employment decision motivated in substantial part by discrimination inflicts dignitary harm on the affected individual, even if the employer would have made the same decision in the absence of discrimination.”).

188. *Id.* at 67.

189. *Id.*

190. Robert T. Carter & Thomas D. Scheuermann, *Legal and Policy Standards for Addressing Workplace Racism: Employer Liability and Shared Responsibility for Race-Based Traumatic Stress*, 12 U. MD. L.J. RACE, RELIGION, GENDER, CLASS 1, 7 (2012) (discussing a fifteen-year longitudinal study finding that 89% of African Americans experience racial discrimination in one of several life domains like school, work, housing, or medical care, and 34% in at least three of those domains) (citing Luisa N. Borrell et al., *Self-reported Racial Discrimination and Substance Use in the Coronary Artery Risk Development in Adults (CARDIA) Study*, 166 AM. J. EPIDEMIOLOGY 1068 (2007)).

191. *Id.* at 7–8 (“[H]igh levels of exposure to racial discrimination was reported by 37% of the workers of Color, as compared to 10% of White workers. Among the workers of Color, Black Americans reported the highest level of exposure at 44%.”) (citing Nancy Krieger et al., *Social Hazards on the Job: Workplace Abuse, Sexual Harassment, and Racial Discrimination—A Study of Black, Latino and White Low-Income Women and Men Workers in the United States*, 36 INT’L J. HEALTH SERV. 51 (2006)).

192. *Id.* at 9 (“Researchers studying the physiological effects of discrimination have explored these relationships within the context of stress, such that racial discrimination is viewed as a form of stress that triggers physiological responses (e.g., elevated blood pressure, heart rate, cortisol secretions), resulting in health-related problems.”) (citing Elizabeth A. Pascoe & Laura S. Richman, *Perceived Discrimination and Health: A Meta-Analytic Review*, 135 PSYCHOL. BULLETIN 531 (2009)).

193. *Id.* at 11 (citing Yin Paradies, *A Systematic Review of Empirical Research on Self-reported Racism and Health*, 35 INT’L J. EPIDEMIOLOGY 888, 894 (2006)).

cal distress.<sup>194</sup> The assumption that racial discrimination has only insignificant effects is thus not supported by research.

The second assumption is that juries will be unable to distinguish between the plaintiff's emotional harm caused by discrimination and the emotional harm caused by the adverse action.<sup>195</sup> Yet, the court ignores that it has permitted such parsing of a plaintiff's mental state in prior FEHA cases.<sup>196</sup> Additionally, the Court does not doubt a jury's ability to parse the decision-making process of the defendant in determining whether it would have made the same decision absent discrimination. While evaluating one's emotional state is not necessarily the same as evaluating one's decision-making processes, both involve drawing inferences about one's mental state based on available evidence. The court seems willing to give juries discretion to parse a party's mental state for the benefit of employers but not for employees.

Even if awarding noneconomic damages to a plaintiff who would have suffered the same adverse action absent discrimination constitutes unjust enrichment, courts again adopt the perspective of the insider. By favoring the policy of preventing unjust enrichment over the policy of preventing unjust lack of accountability by the employer to the employee, the court is implicitly favoring the perspective of—usually insider<sup>197</sup>—employers over outsider employees. While reasonable attorney fees and costs may be awarded to the plaintiff's attorneys,<sup>198</sup> the actual employee receives no redress for emotional damage caused by the wrongful discrimination because the employee was going to be fired anyway.

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194. Press Release, American Psych. Ass'n, Racial Discrimination Has Different Mental Health Effects on Asians Depending on Ethnic Identity, Age and Birthplace, Study Shows (May 8, 2008).

195. See *Harris II*, 294 P.3d 49, 67 (Cal. 2013) (“[I]t is unrealistic to ask the trier of fact to parse the plaintiff's past mental state so finely and to award *only* the quantum of damages that corresponds to the emotional distress resulting specifically from discrimination rather than the termination itself if the employer makes a same-decision showing.”).

196. See *Roby v. McKesson Corp.*, 219 P.3d 749, 759 (Cal. 2009) (“[T]he jury might have reasonably found that each individual act of discrimination leading up to Roby's termination inflicted a separate emotional injury, and it might have found likewise with respect to each failure to accommodate her disability.”).

197. 2012 *Job Patterns*, *supra* note 15 (showing that—while making up 65% of private sector employees—whites comprise 79% of first- or mid-level managers and 88% of executive- or senior-level officials and managers, and—while consisting of 35% of private sector employees—minorities comprise of 21% of first- or mid-level managers and nearly 12% of executive- or senior-level officials and managers).

198. *Harris II*, 294 P.3d at 68.

*Harris* exhibits an insider's perspective by emphasizing certain facts over others, reintroducing the stray remarks doctrine, ignoring the impacts of discrimination on outsiders, and favoring a policy of preventing the unjust enrichment of employees over giving a free pass to employers who discriminate.

#### **IV. *Harris* Conflicts with Our Knowledge of Discrimination and Impairs the Ability of FEHA to Achieve Its Goals**

The court was very careful to emphasize that an employer may not avail itself of a same-decision defense by simply articulating a legitimate, nondiscriminatory reason for the adverse action; the court, therefore, crafted a decision that it felt would best reflect the intent of the legislature. However, the decision is inconsistent with our knowledge of discrimination and unintended consequences will flow from *Harris*.

##### **A. The Nature of Implicit Bias and Microaggressions Makes the Same Decision Defense and the Stray Remarks Doctrine Legal Fictions**

The legitimacy of the same-decision defense depends on the accuracy of two assumptions. The first is that the employer's perception of the employee's performance is not impacted by the employer's discrimination. This is completely contrary to research that indicates a discriminating employer's perceptions about the quality of the employee's work will be tainted by his own stereotypes and bias.<sup>199</sup> For example, a discriminating employer is more likely to recall<sup>200</sup> specific incidents that confirm stereotypes about the employee being lazy rather than incidents in which the employee was productive. And when the discriminating employer's decision is not an obvious one, but is instead based upon ambiguous information, "bias is expected."<sup>201</sup> Studies show some people adjust their decision-making criteria to justify status-based discrimination; often without conscious awareness they have deployed ostensibly legitimate criteria differently

199. Natalie Bucciarelli Pedersen, *A Legal Framework for Uncovering Implicit Bias*, 79 U. CIN. L. REV. 97, 105 (2010).

200. *Id.*

201. Ivan E. Bodensteiner, *The Implications of Psychological Research Related to Unconscious Discrimination and Implicit Bias in Proving Intentional Discrimination*, 73 MO. L. REV. 83, 101 (2008).

for members of one status group than for members of another.<sup>202</sup> The employee's performance itself was not influenced by the employer's discrimination. This assumption is quickly refuted by research suggesting that when a decision maker has discriminated against an employee (a necessary prerequisite to a same-decision finding), the discrimination is likely to affect the employee's performance.<sup>203</sup>

The second assumption is the employee's performance itself was not influenced by the employer's discrimination. This assumption is seriously challenged by research suggesting that when a decision maker has discriminated against an employee (a necessary prerequisite to a same-decision finding), the discrimination is likely to affect the employee's performance.<sup>204</sup>

Employee performance may additionally be impacted by the presence of microaggressions. These are "brief and commonplace daily verbal, behavioral, or environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults toward the target person or group."<sup>205</sup> One form of microaggression includes microinsults.<sup>206</sup> These include behaviors that are insensitive, rude, or inconsiderate of another's identity,<sup>207</sup> and "tend to be subtle and may be unconscious and unintentional, but nonetheless demean the target or their group."<sup>208</sup>

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202. Stephen M. Rich, *Against Prejudice*, 80 GEO. WASH. L. REV. 1, 21 (2011).

203. See Robinson, *supra* note 27, at 1103 n.30 (describing the phenomenon of stereotype threat in which "implicit cognitive processes can lead members of disadvantaged groups to underperform when cues remind them of their group identity") (internal quotations omitted); Qaisar Abbas et al., *Gender Discrimination & Its Effect on Employee Performance/Productivity*, 1 INT'L J. HUMANITIES & SOC. SCI. 170, 175 (2011), available at [http://www.ijhssnet.com/journals/Vol\\_1\\_No\\_15\\_Special\\_Issue\\_October\\_2011/20.pdf](http://www.ijhssnet.com/journals/Vol_1_No_15_Special_Issue_October_2011/20.pdf) ("The human resource managers should be careful while hiring & promotion of the employees and providing facilities to employees in order to avoid any gender [sic] discrimination because it has a direct relationship on employee productivity and which will reduce organizational productivity.").

204. See Robinson, *supra* note 27, at 1130 n.30 (describing the phenomenon of stereotype threat in which "implicit cognitive processes can lead members of disadvantaged groups to underperform when cues remind them of their group identity") (internal quotations omitted); Abbas et al., *supra* note 203, at 175.

205. Eden B. King et al., *Discrimination in the 21st Century: Are Science and the Law Aligned?*, 17 PSYCHOL. PUB. POL'Y. & LAW 54, 56 (2011) (internal quotations omitted).

206. The more severe "microassault" is the traditional overt discrimination such as the use of racial epithets. See *id.* The less severe "microinvalidation" is characterized by behavior that minimizes the psychological thoughts, feelings, or experiences of victims. See *id.* ("An example of an MV might involve assuming that a woman wearing a hijab (headscarf) is not an American and would need a visa to obtain a job, or to suggest that women claiming gender discrimination are overreacting.").

207. *Id.* at 56.

208. *Id.*

For instance, one might tell a member of a “racial minority that [he is] a ‘credit to [his] race’ or to mistake a person of color for a service worker.”<sup>209</sup> Microinsults are the most common form of microaggressions in the workplace and are interpreted by employees as discrimination.<sup>210</sup> While the study of microaggressions is a more recent development in discrimination law, the available research suggests that the presence of microaggressions impairs relationships between individuals, and in the employment context can lead to exhaustion and stress,<sup>211</sup> which is likely to impair performance.

It has become clear that even good-faith job-related reasons given by a discriminating employer for an adverse action will be inextricably intertwined with, and caused by, bias.<sup>212</sup> In short, discrimination impairs employees’ performance. Since a discriminating employer’s application of criteria, as well as his perceptions and memory of the employee’s performance will be influenced by his own biases and prejudices, the discriminating employer’s legitimate, nondiscriminatory justification for the adverse action cannot itself be separated from the effects of discrimination. Absent discrimination, the employee’s performance would not have suffered from the discrimination, and the employer would not have viewed the employee’s performance as negatively.

The facts of *Harris* demonstrate how a same-decision defense makes little sense in light of the nature of implicit bias. Wynonna Harris is an African American woman; supervisor Bob Ayer is a Caucasian man; and supervisor George Reynoso is a Hispanic man.<sup>213</sup> Reynoso was confronted with a situation in which the circumstances surrounding the decision of whether to excuse the miss-out were somewhat ambiguous.<sup>214</sup> Because of the ambiguous nature of the information with which Reynoso was operating, it is more likely implicit bias would operate.<sup>215</sup> Reynoso’s comment,<sup>216</sup> upon hearing the news that Harris

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209. *Id.*

210. *Id.* at 66.

211. *See id.* at 57.

212. Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 96 (2011) (“In some cases, the employer may be telling the truth about the reason for its actions, but that truth may result from embedded discrimination.”).

213. Telephone Interview with Michael Nourmand, Attorney for Wynonna Harris, Nourmand Law Firm (Apr. 5, 2013).

214. Brief for Respondent, *supra* note 139, at 21–22 (demonstrating that testimony at trial was contradictory about whether a miss-out could be excused for attending a court appearance).

215. Research indicates that when a decision maker must rely on ambiguous information in its decision, bias is more likely. Bodensteiner, *supra* note 201, at 101.

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was pregnant, qualifies as either a microinsult or microinvalidation since the comment at least minimized Harris's experience and at most was insensitive, rude, or inconsiderate of a her identity.<sup>217</sup> Despite having the discretion to excuse Harris's absence, Reynoso decided not to do so.<sup>218</sup> The City then made the decision to fire her.

It is possible that Harris would not have had the second miss-out if her supervisors were not prone to discriminate based on sex. The fact that Reynoso was found to have discriminated based on sex at trial suggests that he operates based on biased information processing and could have certainly engaged in discriminatory behavior before.<sup>219</sup> The idea of Harris missing work to accompany her daughter to a juvenile court hearing could have conjured up ideas of her traditional mothering responsibilities interfering with her work responsibilities.<sup>220</sup> While it cannot be proven, it is possible that if Harris had been a heterosexual man who attended his own divorce hearing but was so distressed by the ruling—since his greedy ex-wife got everything<sup>221</sup>—that he failed to call in, Reynoso would have been more sympathetic and used his discretion to excuse the miss-out. Even if the decision to terminate Harris was technically justifiable (at least according to one set of workplace guidelines), we cannot say whether her record would have contained the second-miss out absent discrimination based on sex (and possibly race).

The argument that Reynoso and Ayers did not know about Harris's pregnancy at the moment of the decision to keep her miss-out in her file, and therefore they did not discriminate against her based on sex, misses the point. The sex discrimination found by the jury is at-

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216. *Harris II*, 294 P.3d 49, 53 (Cal. 2013) (“Wow. Well, what are you going to do? How far along are you?”).

217. See King et al., *supra* note 205, at 56.

218. See Brief for Respondent, *supra* note 139, at 21 (highlighting Reynoso's inconsistent testimony between trial and deposition regarding his discretion to excuse a miss out).

219. See Rich, *supra* note 202, at 13–14, 16 (stating that the origins of discriminatory behavior are grounded in biased information processing characterized by automatic, category-based processes that operate without the individual's conscious awareness); Bodensteiner, *supra* note 201, at 100 (“[Biases] corrupt decision-making not at the moment of decision, but long before it, by distorting the interpretive framework through which decisions are made.”).

220. See Rich, *supra* note 202, at 13 (“Once social categories such as race- and sex-based groups are assigned, individuals may be presumed to rely on group identification as a source of information about individuals, causing the behavior of group members to be perceived in stereotyped terms.”) (citations omitted).

221. See e.g., *id.*; Doulas Cooney, *Why Do Divorce Laws Marginalize Men?*, ASKMEN, [http://www.askmen.com/daily/austin\\_60/92\\_fashion\\_style.html](http://www.askmen.com/daily/austin_60/92_fashion_style.html) (last visited Nov. 14, 2013) (discussing phenomenon where women are more likely to win custody battles).

tributable to express or implicit bias on the part of the decision makers. Since they had the propensity to interpret and make decisions with bias, the decision to not excuse the miss-out, while having the discretion to do so, could very well have been motivated by sex.<sup>222</sup>

Reynoso and Ayer at least had the discretion to—and may have even been required to—excuse Harris’s absence.<sup>223</sup> And maybe they would have if Harris were not an African American woman. As demonstrated, there was ambiguity surrounding whether Harris’s miss-out should have been excused. As such, given that discrimination was prone to occur,<sup>224</sup> bias was more likely.<sup>225</sup> Under these circumstances, we cannot conclude that she would have been terminated absent discrimination; such a conclusion is illusory.

The stray-remarks doctrine is similarly nonsensical in light of the research on discrimination. The categorical exclusion of an incriminating statement by an employer because it is too temporally removed from the decision fails to recognize such a statement in the past may evince stereotypes or biases which influences decision-making<sup>226</sup> in the future. The origins of discriminatory behavior are in biased information processing.<sup>227</sup> Biases “corrupt decision-making not at the moment of decision, but long before it, by distorting the interpretive framework through which decisions are made.”<sup>228</sup> For example, a manager with the authority to hire and fire used a racist slur in front of, but not directly at, an employee who was a member of the racial group that the slur targets. Can we really say that the manager’s deci-

222. See Rich, *supra* note 202, at 13–14, 16 (stating that the origins of discriminatory behavior are grounded in biased information processing characterized by automatic, category-based processes that operate without the individual’s conscious awareness); Bodensteiner, *supra* note 201, at 100 (“[Biases] corrupt decision-making not at the moment of decision, but long before it, by distorting the interpretive framework through which decisions are made.”).

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223. Rich, *supra* note 202, at 21–22; Brief for Respondent, *supra* note 139, at 21. Supervisor Reynoso testified at a deposition that, with the proper documentation, the miss-out would have been excused. Brief for Respondent, *supra* note 139, at 17. Supervisor Gonzales testified at a deposition that, with proper documentation, he would have had cause to excuse the miss-out. *Id.* At trial, both Reynoso and Gonzales contradicted their earlier deposition testimony. *Id.*

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224. As discussed, research suggests the origins of discriminatory behavior are grounded in biased information processing. See *supra* text accompanying notes 216–219. If discrimination occurred later, it is likely that it also occurred before. See Rich, *supra* note 202, at 16.

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225. Bodensteiner, *supra* note 201, at 101 (summarizing research indicating that when a decision maker must rely on ambiguous information in its decision, bias is more likely).

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226. See Pedersen, *supra* note 199, at 105.

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227. Rich, *supra* note 202, at 16.

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228. See Bodensteiner, *supra* note 201, at 100.

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sion to fire that employee a year later could not have been based on race because the comment occurred a year before the decision? That “an otherwise revealing comment was made outside the particularized timeframe or context does not necessarily weaken its probative value, and even if it does, it [should] not necessarily cause the evidence to be wholly discounted and prevented—along with the case—from ever reaching a jury.”<sup>229</sup>

When a court decides a comment is stray because it was not made by the decision maker, the court assumes the comment is not probative of the presence of a work environment that fosters discrimination. The idea that “a single decision maker, or even a discrete group of decision makers, is separable from the environment in which he, she, or it operates, works, and forms opinions, is simplistic and one-dimensional.”<sup>230</sup> Certainly, a workplace culture that tolerates bigotry, abuse, or prejudice may foster discrimination.<sup>231</sup>

## B. *Harris* Takes Us Backwards In the Ability of FEHA to Achieve Its Purposes

The most obvious consequence of *Harris* is that plaintiffs will have a more difficult time proving discrimination because of the heightened evidentiary burden they now face at trial. Not surprisingly, employment attorneys from the defense bar are praising the decision as one that will make it harder for employees to prove discrimination.<sup>232</sup> This heightened standard will further disadvantage outsider employees.<sup>233</sup> People of color and women, who fare even worse in race and sex discrimination cases,<sup>234</sup> will be especially affected.

229. Stone, *supra* note 156, at 183.

230. *Id.* at 187.

231. *Id.* at 188.

232. See, e.g., Casandra Secord, *Ruling in Harris v. City of Santa Monica Raises Bar for Employees to Prove Discrimination Under FEHA*, LABOR & EMP'T LAW BLOG (Feb. 22, 2013), <http://www.aalremploymentlaw.com/ruling-in-harris-v-city-of-santa-monica-raises-bar-for-employees-to-prove-discrimination-under-feha/>; *The California Supreme Court's Opinion in Harris v. City of Santa Monica on "Mixed Motive" Discrimination Cases is a Mixed Bag for Employers and Employees*, MILLER LAW GROUP (Feb. 8, 2013), <http://www.millerlawgroup.com/publications/alerts/Harris-v-City-of-Santa-Monica.html>.

233. See Kaitlin Picco, Comment, *The Mixed-Motive Mess: Defining and Applying a Mixed-Motive Framework*, 26 A.B.A. J. LAB. & EMP. L. 461, 477 (2011) (citing Vivian Berger et al., *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 4 (2005)) (“Courts often use summary judgment to dispose of employment discrimination cases before the parties get before a jury. One study found that only thirty-two to fifty-five percent of employment discrimination claims survive summary judgment. Even the upper end of this range is disconcertingly low.”).

234. Oppenheimer, *supra* note 22, at 548–49.



As a result of the higher burden, the goals of deterrence and remediation of discrimination will be less served. Since it will be more difficult for plaintiffs to prevail, fewer discrimination cases will be filed. Many more victims of workplace discrimination will have to live with the trauma and very real problems caused by discrimination<sup>235</sup> without the benefit of legal recourse.

There will be less motivation for employers to address discrimination in the workplace. This decrease in motivation will make it less likely discrimination will be effectively addressed in the workplace. Much discrimination is caused in part by automatic information processing and stereotypes over which we have little control.<sup>236</sup> One of the “practical lessons from the research on intent and ordinary bias [is] that policymakers and managers need to facilitate . . . motivation, to encourage decision-makers’ least biased evaluations of other people.”<sup>237</sup> With less motivation to address discrimination in the workplace, employers will be less likely to do so.

Additionally, if courts decide to apply the mixed-motive framework and heightened standard at summary judgment,<sup>238</sup> there will be more outcomes in favor of employers. Requiring sufficient evidence to find a *substantial* motivating factor, instead of merely a motivating factor, gives trial judges too much discretion to take the decision from the jury and grant summary judgment to employers.<sup>239</sup>

## V. California Legislature Should Amend FEHA

The Legislature should amend FEHA to explicitly state the motivating factor standard of causation. This will more adequately serve

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235. *See id.*

236. *See supra* Part IV.A.

237. Bodensteiner, *supra* note 201, at 105.

238. *See* Lynne Bernabei & Lauren Mendonsa, *Age Discrimination: The New Frontier for Aging Boomers*, A.L.I.-A.B.A. 485, 493–94 (2013) (noting a circuit split in interpreting *Gross v. FBL Financial Services* as to whether plaintiffs must show that there exists a genuine issue of material fact as to whether age was the but for cause of the adverse action instead of only showing a material dispute over whether the employer’s purported reason was pretext for improper discrimination).

239. It should be noted that although the Supreme Court heightened the standard of causation in ADEA cases in *Gross v. FBL Fin. Servs.*, 557 U.S. 167 (2009), state courts continue to interpret state discrimination law and ADEA to preserve age discrimination claims. Nancy L. Zisk, *What is Old is New Again: Understanding Gross v. FBL Financial Services, Inc. and the Case Law that Has Saved Age Discrimination Law*, 58 LOY. L. REV. 795, 810 (2012). However, there is no guarantee that such a response will result in California appellate courts. Even if appellate courts do similarly find ways to preserve discrimination claims under FEHA, it makes little sense from a policy perspective to have a Supreme Court standard that is not followed by lower courts.

the purposes of FEHA to remedy and prevent discrimination in the workplace and will incentivize employers to work at eliminating discrimination.<sup>240</sup> It will also shift the focus of a disparate treatment inquiry to causation rather than on conscious motivation.<sup>241</sup>

The Legislature should also amend FEHA to reject the same-decision defense for the reasons mentioned previously.<sup>242</sup> Under this framework, courts could analyze the issue of multiple motivations for a decision under the third prong of the *McDonnell Douglas* test and simply ask whether discrimination was *a* motivating factor for the adverse action.

Eliminating the availability of the same-decision defense will not prevent entities from terminating, demoting, or otherwise taking necessary actions against ineffective or problematic employees. FEHA does not prohibit entities from taking adverse actions against incompetent or ineffective employees. Instead, FEHA aims to prevent<sup>243</sup> and remedy<sup>244</sup> unlawful discrimination in the workplace. Preventing employers from relying on a same-decision defense will motivate employers to take measures to prevent discrimination in their own workplaces. Employers will be more likely to implement research-based policies which will more accurately assess employees' performance. Ultimately, better evaluative tools will improve the productivity and effectiveness of an entity. Employers' decision-making will be less constrained by biases, prejudices, and discrimination. As opposed to, "unduly limiting the freedom of employers to make legitimate employment decisions,"<sup>245</sup> employers' freedom to make legitimate employment decisions will be less limited, constrained, and restricted by discrimination.

Lastly, the amendments should reject the stray remarks doctrine. The Legislature should codify the principle that discriminatory statements are always relevant evidence to the issue of discrimination re-

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240. See Pedersen, *supra* note 199, at 149–50 (“[N]ot only will the motivating factor framework potentially result in more short-term victories for plaintiffs by allowing potentially meritorious cases to surmount a summary judgment challenge, it will also have a more lasting effect as it could prevent decision-makers from unwittingly basing their decisions on unconscious bias by forcing them to examine their reasons *ex ante*.”).

241. See Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L. L. REV. 91, 127 (2003) (citing Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995)).

242. See *supra* Part III–IV.

243. *Harris II*, 294 P.3d 49, 61 (Cal. 2013).

244. *Id.*

245. *Id.* at 66.

ardless of whether the decision maker made the statement and how distant in time the statement was made. The probative value of such evidence should be for the trier of fact and not dismissed at summary judgment. This could be added to the evidence code, or simply added to the Government Code with the rest of the amendments.

### **Conclusion**

Racial discrimination continues to persist in the American workplace. Yet, plaintiffs prevail less often in employment discrimination cases than in other kinds of employment cases. The widespread notion of colorblindness reflects and exacerbates the difficulty in proving discrimination cases. *Harris* exhibits assumptions common to insiders and clashes with research on modern forms of discrimination. The decision takes us backwards in our ability to effectively prevent and remedy workplace discrimination and is inconsistent with our knowledge of discrimination. Therefore, the California Legislature should account for our knowledge about discrimination by amending FEHA to restore the motivating factor standard, reject the stray remarks doctrine, and reject the same-decision defense. While such amendments may not ultimately help Wynonna Harris prove sex discrimination in her case, they would help courts more effectively prevent and remedy employment discrimination, while incentivizing employers to work harder to eliminate unlawful discrimination in the workplace.

