Appellate Reports

The California Supreme Court addresses the impact of the "same decision" defense in FEHA cases; notes discrimination must be "substantial factor" in termination

By Jeffrey Isaac Ehrlich

Harris v. City of Santa Monica

(2013) _ Cal.4th _ (Cal. Supreme)

Who needs to know about this case: Lawyers handling FEHA cases

Why it's important: The Supreme Court addresses the impact of the so-called "same decision" defense in FEHA cases – that is, what happens if the employee proves that unlawful discrimination was a substantial factor motivating the termination of their employment, but the employer proves that it would have made the same decision absent such discrimination? This case decides issues concerning the standard of proof, the burden of proof, and the remedies available in mixed-motive FEHA cases.

Synopsis: Harris was a probationary bus driver for the City, which made her an at-will employee. She had several preventable accidents and "miss-outs" (failure to call in ahead of time to report that the employee will not be reporting for an assigned shift). She became pregnant and was terminated. She sued the City under the FEHA, claiming she was fired because she was pregnant, a form of sex discrimination. The City claimed that it had legitimate, non-discriminatory reasons to terminate her, as an at-will probationary employee. The case went to trial, and the City requested an instruction stating that the City would not be liable if the jury found that the termination was based on both legitimate and discriminatory reasons, but that the legitimate reasons standing alone would have induced it to make the same decision. The trial court refused the instruction. The jury awarded Harris $177,905 in damages, and the trial court later awarded her $401,000 in attorney's fees. The Court of Appeal reversed, finding that the requested instruction accurately stated California law, and it was prejudicial error for the trial court to refuse it. The Supreme Court granted review, and affirmed in part.

Government Code section 12940(a) prohibits employers from discriminating against employees and job applicants "because of" their race, religious creed, color, national origin, ancestry, physical or mental disability, medical condition . . . marital status, sex, . . . age, or sexual orientation. The core issue in the case is the meaning of "because" under the FEHA.

The Court noted that there are at least three plausible meanings of the phrase "because of" in the FEHA – (1) discrimination was a 'but for' cause of the employment decision; (2) discrimination was a 'substantial factor' in the decision; or (3) discrimination was simply a 'motivating' factor in the decision. The Court found that the text of the statute did not shed light on which approach was correct, nor did the Legislative history. After examining the treatment of similar language under federal law, the Court resolved to attempt to construe the phrase in the manner that best gave effect to the Legislature's purpose in enacting the FEHA, and discerned both a private purpose (compensating individual victims of discrimination) and a public purpose (deterring and remedying discrimination.)

Ultimately, the Court summarized its holding in these terms:

> When a plaintiff has shown by a preponderance of the evidence that discrimination was a substantial factor motivating his or her termination, the employer is entitled to demonstrate that legitimate, nondiscriminatory reasons would have led it to make the same decision at the time. If the employer proves by a preponderance of the evidence that it would have made the same decision for lawful reasons, then the plaintiff cannot be awarded damages, backpay, or an order of reinstatement. However, where appropriate, the plaintiff may be entitled to declaratory or injunctive relief. The plaintiff also may be eligible for an award of reasonable attorney's fees and costs under section 12965, subdivision (b).

Aryeh v. Canon Business Systems

(2013) __ Cal.4th __ (Cal. Supreme)

Who needs to know about this case: Attorneys handling UCL claims

Why it's important: Holds that the statute of limitations on UCL claims is subject to common-law accrual principles, including the principle of continuous accrual. Hence, a UCL claim may accrue each time a recurring wrong is committed.

Synopsis: Aryeh leased copiers from Canon. The leases had a monthly copy allowance, which required Aryeh to pay an additional charge if the monthly allowance was exceeded. Aryeh determined that Canon employees were running test copies – over 5,000 in 17 service visits between February 2002 and November 2004. These copies caused Aryeh to exceed his monthly allowance, resulting in higher costs and late fees. Aryeh sued

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Canon in 2008 seeking restitution for violating the UCL (Business & Professions Code section 17200, et seq.) Canon demurred, arguing that the claim was time barred under the UCL's four-year statute of limitations. The trial court agreed and dismissed the case, finding that the UCL claim accrued when the first violation occurred, in 2002. A divided Court of Appeal affirmed. The majority agreed with the trial court, and found that the statute of limitations could not be extended by the delayed-discovery or continuing-violation doctrines. The dissent would have reversed based on the theory of continuous accrual.

In a unanimous opinion the Supreme Court reversed, finding that the doctrine of continuous accrual applied. The Court explained that common-law equitable doctrines concerning the statute of limitations include the continuing violation doctrine, and the doctrine of continuous accrual. The former aggregates a series of wrongs or injuries for limitations purposes, and treats the limitations period as accruing on for all of them on the commission or sufferance of the last of them. The continuous-accrual theory allows a series of wrongs or injuries to be viewed as each triggering its own limitations period, such that relief may be partially time-barred as to older events, but timely as to those within the limitations period.

The Court held that accrual of UCL claims was subject to common-law doctrines. The Court noted that the UCL was a "chameleon," which borrows violations of other rules and makes them independently actionable. "Given the widely varying nature of the right invoked, it makes sense to acknowledge that a UCL claim in some circumstances might support the potential application of one or another [common-law] exceptions and in others may not. That a cause of action is labeled as a UCL claim is not dispositive; instead, the court must examine the nature of the underlying right sued on and the circumstances attending its invocation, to determine the point of accrual of the claim.

The Court then determined that the factors that warrant application of the continuing-violation doctrine were not alleged in the complaint. The complaint alleged a series of discrete, independently actionable wrongs. The conduct did not become apparent only through the accumulation of a series of harms. The plaintiff conceded he was aware of the wrongful conduct and recognized it as wrongful, in 2002.

The theory of continuous accrual, however, would apply to the claim as it was alleged. The Court has long held that separate recurring invasions of the same right can each trigger their own limitations period. "Generally speaking, continuous accrual applies whenever there is a continuing or recurring obligation." Because each new breach of the allegation provides all the elements of a claim – wrongdoing, harm, and causation – each may be treated as an independently actionable wrong with its own time limit for discovery.

But unlike the continuing-violation doctrine, which renders the entire course of conduct actionable, the theory of continuous accrual supports recovery only for damages for those breaches occurring within the limitations period. Aryeh's complaint alleged a continuing duty on Canon not to impose unfair or fraudulent charges on Aryeh's recurring monthly billings. Under the theory of continuous accrual, he could recover for wrongs occurring within four years of the date he filed his complaint.

Short(er) takes

Contracts; parol evidence rule; fraud exception to rule: *Riverisland Cold Storage v. Fresno-Madera Production Credit Ass'n* (2013) __ Cal.4th __ (Cal. Supreme).

An established common-law and statutory exception to the parol evidence rule allows a party to present extrinsic evidence to show that an agreement was tainted by fraud. In *Bank of America etc. Assn. v. Pendergrass* (1935) 4 Cal.2d 258, 263, the Court limited this exception, holding that evidence offered to prove fraud "must tend to establish some independent fact or representation, some fraud in the procurement of the instrument or some breach of confidence concerning its use, and not a promise directly at variance with the promise of the writing."

The Court held that "[T]he *Pendergrass* limitation finds no support in the language of the statute codifying the parol evidence rule and the exception for evidence of fraud. It is difficult to apply. It conflicts with the doctrine of the Restatements, most treatises, and the majority of our sister-state jurisdictions. Furthermore, while intended to prevent fraud, the rule established in *Pendergrass* may actually provide a shield for fraudulent conduct. Finally, *Pendergrass* departed from established California law at the time it was decided, and neither acknowledged nor justified the abrogation. We now conclude that *Pendergrass* was ill-considered, and should be overruled."

Arbitration; enforcement of arbitration clause by non-signatory: *Kramer v. Toyota Motor Corp*. (9th Cir. 2013) __ F.3d __ .

Plaintiffs purchased 2010 Toyota Prius automobiles from Toyota dealerships. They brought a class action against Toyota Motor Corporation ("Toyota"), the manufacturer, alleging the cars had braking defects. Toyota moved to compel arbitration, based on arbitration agreements between the plaintiffs and the Toyota dealerships where they purchased their cars. The district court denied the petition to compel arbitration, finding that Toyota could not compel arbitration because it was not a signatory to the arbitration agreements between the plaintiffs and the dealers. Affirmed. Toyota first argued that the issues of the scope, interpretation, and applicability of the arbitration provision were to be decided by the arbitrator not the court. The court held that, where the dispute at issue concerns contract formation, it is generally for the court to decide. The Purchase

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Contracts that contain the arbitration agreements evidence an agreement between plaintiffs and the dealerships to arbitrate the issue of arbitrability. Given the absence of clear, unmistakable evidence that the plaintiffs agreed to arbitrate the issue of arbitrability with non-signatories to the Purchase Agreements, the district court had the authority to decide whether the dispute was arbitrable.

Toyota argued that the plaintiffs should be equitably estopped from avoiding arbitration with it because the plaintiffs' claims were intimately founded in and intertwined with the underlying contract obligations. The court examined each of the plaintiffs' claims – for violation of California consumer-protection laws, for violations of the UCL, for violations of the False Advertising Law, and for violating the implied warranty of merchantablity – and found that they were not interwined with the Purchase Agreement. The court reached the same conclusion concerning plaintiffs' claim for breach of contract, which was pleaded as an alternative to the claim for breach of implied warranty, and was founded on the same actions underlying that claim.

Beverly-Song Credit Card Act; on-line retailers; customer information: *Apple, Inc. v. Superior Court* (2013) __ Cal.4th __ (Cal. Supreme).

The Beverly-Song Credit Card Act forbids retailers in California from requiring, as a condition of accepting a credit card for payment, that the cardholder write their personal information on the transaction form. It also forbids retailers from recording the required personal information. The plaintiff, David Krescent, sued Apple for violating the Act. He alleged he had downloaded songs from Apple's iTunes site, and was required to provide his telephone number and address to complete his credit-card purchases. Apple demurred, arguing that the Act did not apply to on-line transactions. The trial court overruled the demurrer, and the Court of Appeal denied Apple's writ petition. Reversed. The Court held that the statute's text, structure, and purpose showed that it was not intended to apply to on-line purchases.

Insurance; law-or-ordinance exclusion; concurrent causation: *Reichert v. State Farm Gen. Ins. Co.* (2013) __ Cal.App.4th __ (4th Dist., Div. 3.)

The Reicherts purchased a house in Huntington Beach and sought to remodel it before moving in. The house was located in a flood plain. Their original plans would have increased the value by more than 50 percent, which triggered a FEMA requirement to raise the ground floor by nine feet. To avoid this, they submitted a second set of plans, which would have used more of the existing walls, and which kept the increased value to 49.93 percent. But the existing walls supported eight-foot ceilings, and the new plans called for 10-foot ceilings. After the walls were demolished, the discrepancy was noted, a stop-work order was issued, and the City ultimately ordered that the house be demolished. The Reichert's claim against their homeowner's policy was denied, so they sued State Farm for breach of contract and bad faith. The trial court granted summary judgment for State Farm. Affirmed.

The policy included a standard exclusion for "loss which is caused by . . . (a) Ordinance or Law, meaning the enforcement of any ordinance or law regulating the construction, repair, or demolition of a building or other structure." Here, the record shows that the house was demolished as the result of the City's enforcement of FEMA flood-plain regulations. The Ordinance or Law exclusion therefore applies.

The Reicherts argued that they had purchased "Option OL," which provides additional coverage to compensate for additional costs necessitated by changes in building codes or ordinances. The court held that Option OL would have given the Reicherts additional coverage if there had been a covered loss, but that the provision did not cancel out the Ordinance of Law exclusion. Since there was no covered loss, the option did not apply.

The court also rejected the Reicherts' attempt to rely on the concurrent-causation doctrine to obtain coverage, which sought to define the cause of the loss as the negligence of their builder or architect. The policy contained a provision stating that the policy did not cover losses caused by the listed excluded causes, and further stating that the exclusion applied "regardless of whether one or more of the following, directly or indirectly cause, contribute to or aggravate the loss: . . . 'defect, weakness, inadequacy, fault, or unsoundness in planning . . . or design, specifications, of any property." The court held that this provision eliminated coverage for the contractor's negligence.

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