

California – Substantial Motiving Reasons for Discrimination

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Practices: Employment, Labor & Benefits

On August 21, 2013, California's Second District Appellate Court ruled that the proper standard of causation is whether discrimination or retaliation is a "substantial motivating reason" for an employment decision and not whether the discrimination or retaliation is a "motivating reason." See *Alamo v. Practice Management Information Corp.*, Case No. B230909 (2d Dist. Aug. 21, 2013). This is an important distinction, because the current or former employee now has to meet a higher standard. A company's testimony and documentation may well assist the company in prevailing under this heightened standard.

In the case, Lorena Alamo alleged that Practice Management discriminated against her due to her pregnancy. Prior to going on leave, Alamo's supervisor had concerns about her performance but did not discipline her. While on leave, Practice Management hired a part-time temporary replacement and became aware of other performance problems. The replacement told Alamo that she was going to be fired during an altercation between Alamo and the replacement. On her first day back from pregnancy leave, Alamo's supervisor called her into the office and terminated her employment. During this meeting, the supervisor did not mention the pregnancy but did mention one example of poor performance the supervisor discovered during the leave of absence.

The judge instructed the jury to determine if Alamo's pregnancy was a motivating reason for her termination. The judge explained that a "motivating reason is a reason that contributed to the decision," even if other reasons also contributed to the decision to terminate her. However, the Appellate Court reversed, quoting from the California Supreme Court's decision in *Harris v. City of Santa Monica*, 56 Cal.4th 203 (2013). A two-step process applies. First, the former employee must show by a preponderance of the evidence that discrimination was a *substantial* factor motivating the termination. Second, if discrimination is a substantial factor, the company may demonstrate that legitimate, nondiscriminatory reasons would have led it to make the same decision.

The Appellate Court in *Alamo* explained the difference between a *substantial* motivating factor and a motivating factor. By having to prove that discrimination was a substantial factor, juries will not find companies liable "based on evidence of mere thoughts or passing statements unrelated to the disputed employment decision." The implications for documentation and oral explanations discussed by management and given to employees are obvious. By focusing on specific behaviors as the reason for an employment decision and documenting those reasons, a company may argue that it has no liability. Accordingly, a due diligence consultation with legal counsel is vital to reduce or eliminate risk.