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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

LORENA ALAMO,

Plaintiff and Respondent,

v.

PRACTICE MANAGEMENT  
INFORMATION CORPORATION,

Defendant and Appellant.

B230909

(Los Angeles County  
Super. Ct. No. BC416196)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Rex Heeseman, Judge. Affirmed.

Neufeld, Marks & Gralnek and Paul S. Marks for Defendant and Appellant.

Employment Lawyers Group and Karl Gerber for Plaintiff and Respondent.

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Appellant Practice Management Information Corporation (PMIC) appeals from a judgment in favor of its former employee, respondent Lorena Alamo, following a jury trial on Alamo's causes of action for pregnancy discrimination and retaliation in violation of the California Fair Employment and Housing Act (FEHA) and wrongful termination in violation of public policy. On appeal, PMIC argues that the trial court committed prejudicial error in (1) instructing the jury pursuant to CACI Nos. 2430, 2500, 2505, and 2507 that Alamo had to prove her pregnancy-related leave was "a motivating reason" for her discharge, and (2) refusing to instruct the jury pursuant to BAJI No. 12.26 that PMIC could avoid liability under a mixed motive defense by proving it would have made the same discharge decision in the absence of any discriminatory or retaliatory motive. PMIC also argues that the trial court erred in awarding attorney's fees to Alamo as the prevailing plaintiff under FEHA where the general verdict form failed to specify whether the jury's verdict was based on the statutory FEHA claim or the common law wrongful discharge claim. For the reasons set forth below, we affirm.

## **FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

### **I. Civil Action**

Following the termination of her employment, Alamo filed a civil action against her former employer, PMIC. In her complaint, Alamo alleged three causes of action for pregnancy discrimination in violation of FEHA and the California Constitution, wrongful termination in violation of public policy, and intentional infliction of emotional distress. After the trial court partially granted and partially denied PMIC's motion for summary adjudication, the case was tried before a jury on Alamo's statutory FEHA claim and common law wrongful discharge claim.

### **II. Trial Evidence**

PMIC is a small company that publishes medical coding and compliance books. Alamo began her employment with PMIC in July 2006 where she worked as a clerk in the collections department. She was later promoted to the position of lead collections clerk and was primarily responsible for billing and collecting payments from PMIC's

largest customers. Alamo received regular pay raises during her employment, and as of January 2009, her base rate of pay was \$18 per hour. Alamo's direct supervisor was Michelle Cuevas, the Operations Manager. Cuevas in turn reported to Gregory Trupiano, PMIC's Executive Vice-President, and to James Davis, PMIC's founder and President.

On January 15, 2009, Alamo began a pregnancy-related leave of absence. Her baby was born approximately two weeks later on January 27, 2009. On February 18, 2009, Alamo requested an additional six weeks of maternity leave to bond with her baby, which was granted by PMIC. Alamo was scheduled to return to work on April 22, 2009.

While Alamo was on leave from PMIC, Marcell Moran was hired on a part-time temporary basis to fill Alamo's position. Alamo had recommended that Moran fill in for her during her leave because Moran previously had worked at PMIC and remained good friends with Alamo. Moran began working in Alamo's position in February 2009 and was paid \$14 per hour for her part-time work. At that time, Moran was also pregnant with a due date in September 2009. Moran was planning on moving out of the Los Angeles area before the birth of her baby and only intended to work at PMIC on a temporary basis while Alamo was on leave.

Prior to Alamo's leave of absence, Cuevas had some concerns about Alamo's performance, but did not consider any of these problems to be serious enough to warrant formal discipline. Cuevas testified that there were times when Alamo failed to timely contact customers about invoices that were past due and Cuevas had to remind Alamo to follow up on those accounts. Cuevas also testified that Alamo at times had poor working relationships with other employees, some of whom complained that Alamo treated them rudely. In addition to orally counseling Alamo about improving her interpersonal skills, Cuevas sent an email to her subordinates in January 2007 reminding them to treat all PMIC employees in a professional manner. However, Cuevas never felt that it was necessary to issue Alamo any written warnings about her performance prior to her leave.

During Alamo's leave of absence, Cuevas became aware of other performance problems that caused her more concern. Cuevas specifically testified that she learned Alamo had not taken any action on certain customer accounts with large unpaid invoices

even though Cuevas had requested that Alamo resolve those accounts before her leave. Cuevas also testified that Alamo had told her that PMIC could not collect on two outstanding accounts because the customers were no longer in business, which Cuevas later learned was untrue. According to Cuevas, PMIC had to take a loss on some of Alamo's accounts because too much time had passed to collect payment from the customer. Cuevas intended to discuss these recently-discovered performance issues with Alamo once she returned from her leave in April 2009. To that end, Cuevas advised Alamo not to return to work until April 22, 2009, when Cuevas would be back in the office from vacation.

Alamo denied that she had any performance problems at PMIC. She testified that the customer accounts that PMIC was claiming Alamo had neglected were actually assigned to Cuevas and that Cuevas merely had asked Alamo to assist her by following up on certain unpaid invoices, which Alamo did. Alamo also testified that she was never counseled by Cuevas, either orally or in writing, about her interpersonal skills in working with other employees.

In mid-April 2009, approximately one week before her scheduled return date, Alamo requested and received permission from Trupiano to come into the office to have lunch with a coworker, Maria Alcocer. Alamo did not ask Cuevas for permission to visit the office at that time because it was her understanding that Cuevas was on vacation. On April 17, 2009, Alamo had lunch with Alcocer in PMIC's break room. As Alamo was leaving, she had a verbal altercation with Moran, the person filling in for her, in the hallway outside the office. The argument began because Moran wanted to know why Alamo had not given Moran her new cell phone number. According to Moran, Alamo said that she was having a lot of personal problems and did not want to talk to anyone. Alamo also said that she felt Moran was being mean to their coworker, Alcocer. According to Alamo, Moran initiated the argument, yelled at her in an angry manner, and then told Alamo, "Well, that's good, you're going to get fired anyways." Later that day, Alamo contacted both Trupiano and Cuevas by telephone and asked them about Moran's

statement that Alamo was going to be fired. Cuevas told Alamo that they would discuss the matter when Alamo returned to work the following week.

Shortly after Alamo left the office, Moran had a separate verbal altercation with Alcocer. Alcocer and Moran had been having a personality conflict for several months that escalated into an argument that day. As described by Alcocer, Moran approached her desk and began yelling at her because Alcocer recently had complained to Cuevas that Moran was being rude to her. Moran told Alcocer that she should talk to Moran directly about any problems between them instead of complaining to Cuevas. After the argument with Moran, Alcocer decided to take a stress-related leave of absence because she felt that Moran and another employee named Elaine Rodriguez were being verbally abusive to her. Alcocer began her leave on April 20, 2009, and she did not return to work until four months later in August 2009.

On April 22, 2009, Alamo returned to work from her maternity leave. After working for about three hours, Alamo was called into a meeting with Cuevas and Trupiano and told that her employment was being terminated. According to Alamo, Cuevas said during the meeting that she felt Alamo was not doing her job and specifically mentioned one unpaid account. There was no mention of Alamo's recent visit to the office for lunch with Alcocer or to her verbal altercation with Moran. There was also no mention of Alamo's pregnancy or maternity leave. At the end of the meeting, Cuevas explained that if Alamo signed a release waiving any claims she might have against PMIC, Cuevas would be able to provide Alamo with a positive employment reference. Alamo, however, refused to sign the release.

Cuevas testified that, as of April 22, 2009, she believed PMIC should terminate the employment of both Alamo and Moran, and she made that recommendation to her superiors, Trupiano and Davis. Cuevas explained that she did not feel that Alamo's prior performance problems, standing alone, were serious enough to warrant termination. However, when Alamo's history of poor performance was considered with her recent act of insubordination in visiting the office without Cuevas' permission and then having a verbal altercation with a coworker, Cuevas felt that termination was warranted. Cuevas

admitted that she did not talk to Alamo about what happened during the altercation before deciding that Alamo should be discharged. Cuevas further admitted that Alamo had received permission to visit the office from Trupiano, but testified that Alamo nevertheless was insubordinate in ignoring Cuevas' instruction that Alamo not return to work until the following week. Cuevas also stated that she believed Alamo knew that Cuevas would not have allowed her to come into the office when Cuevas was not there given the ongoing conflict between Alcocer and Moran. Cuevas testified that her recommendation to discharge Alamo had nothing to do with her pregnancy or maternity leave, but rather was based solely on Alamo's performance and insubordination issues.

Trupiano and Davis were both involved in the final decision to terminate Alamo's employment. Trupiano testified that he agreed with Cuevas that Alamo should be discharged based on her poor work performance and insubordination, but decided to defer to Davis as to whether Moran also should be discharged given that she had no other disciplinary issues. Davis testified that he made the decision to terminate Alamo's employment based solely on her performance issues in neglecting her assigned customer accounts, her act of insubordination in visiting the office without Cuevas's permission, and then engaging in a verbal altercation with a coworker. Davis testified that he decided not to discharge Moran for her involvement in the altercation because it was her first incident of inappropriate conduct. At trial, both Davis and Trupiano denied that Alamo was terminated for any reason related to her pregnancy or maternity leave. Following Alamo's discharge, PMIC decided to provide her with one month of severance pay not conditioned upon the signing of any release.

### **III. Jury Verdict and Attorney's Fees Award**

At the conclusion of the trial, the jury returned a general verdict in favor of Alamo and awarded her damages in the amount of \$10,000. With respect to Alamo's request for punitive damages, however, the jury found that she failed to prove by clear and convincing evidence that PMIC acted with malice, oppression, or fraud. Following the verdict, the trial court granted Alamo's motion for attorney's fees and costs as the

prevailing plaintiff under FEHA and awarded her counsel attorney's fees in the amount of \$50,858.44. PMIC thereafter filed a timely notice of appeal.

## **DISCUSSION**

PMIC raises two arguments on appeal. First, PMIC contends that the trial court committed prejudicial error in instructing the jury on the proper standard of causation in Alamo's claims for pregnancy discrimination and retaliation in violation of FEHA and wrongful termination in violation of public policy. Second, PMIC claims that the trial court erred in awarding attorney's fees to Alamo as the prevailing plaintiff under FEHA based on a general verdict that failed to identify the specific cause of action on which Alamo had prevailed.

### **I. Alleged Instructional Error**

PMIC first asserts that the trial court prejudicially erred in failing to properly instruct the jury on the standard of causation in a FEHA claim. PMIC specifically argues that the trial court erred in instructing the jury pursuant to CACI Nos. 2430, 2500, 2505, and 2507 that Alamo had to prove her pregnancy-related leave was "a motivating reason" for her discharge, rather than the "but for" cause of her discharge. PMIC also contends that the trial court erred in refusing to instruct the jury pursuant to BAJI No. 12.26 that PMIC could avoid liability under a mixed motive defense by proving it would have made the same decision even in the absence of a discriminatory or retaliatory motive. As the parties acknowledge, the question of the proper standard of causation in a FEHA claim, including the availability of a mixed motive defense, is currently pending before the California Supreme Court in *Harris v. City of Santa Monica*, review granted April 22, 2010, S181004 (*Harris*). Pending further guidance on this issue by the Supreme Court, we conclude that the trial court did not commit any instructional error in this case.

#### **A. Relevant Jury Instructions**

The trial court instructed the jury on the essential elements of Alamo's causes of action with CACI No. 2430 (wrongful discharge in violation of public policy), CACI No. 2500 (disparate treatment under FEHA), CACI No. 2505 (retaliation under FEHA), and

CACI No. 2527 (failure to prevent discrimination or retaliation under FEHA). With respect to CACI Nos. 2430, 2500, and 2505, the trial court instructed the jury that Alamo had to prove, among other elements, that her pregnancy or taking of a pregnancy-related leave was “a motivating reason” or “a motivating factor” for her discharge. With respect to CACI No. 2527, the trial court instructed the jury that Alamo had to prove, among other elements, that she was subject to discrimination or retaliation “because” she took a pregnancy-related leave. The trial court also instructed the jury on the definition of “a motivating reason” with CACI No. 2507, stating that “[a] motivating reason is a reason that contributed to the decision to take certain actions even though other reasons also would have contributed to the decision.”

The trial court refused PMIC’s request that CACI Nos. 2430, 2500, and 2505 be modified to state that Alamo must prove her pregnancy or taking of a pregnancy-related leave was “a substantial motivating reason,” as opposed to “a motivating reason,” for her discharge. The trial court also refused PMIC’s request that CACI No. 2507 be modified to state that if the same decision would have been made in the absence of any discriminatory or retaliatory motive, then the discrimination or retaliation was not a substantial motivating reason for the decision. Finally, the trial court refused PMIC’s request that the jury be instructed on the mixed motive defense with BAJI No. 12.26, which states, in pertinent part, as follows: “If you find that the employer’s action, which is the subject of the 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.”<sup>1</sup>

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<sup>1</sup> PMIC requested that the jury be instructed with BAJI 12.26 in a motion in limine filed prior to trial. Although the record on appeal does not include the trial court’s ruling on the motion, it appears from the court’s discussion with counsel at a pretrial hearing on jury instructions that the court denied PMIC’s request.



## **B. Standard of Review**

“A party is entitled upon request to correct, nonargumentative instructions on every theory of the case advanced by him or her which is supported by substantial evidence.” (*Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 572.) A court may refuse a proposed instruction that incorrectly states the law or is argumentative, misleading, or incomplete. (*Shaw v. Pacific Greyhound Lines* (1958) 50 Cal.2d 153, 158; see also *Harris v. Oaks Shopping Center* (1999) 70 Cal.App.4th 206, 209 “[i]rrelevant, confusing, incomplete or misleading instructions need not be given”].) A court also may refuse an instruction requested by a party when the legal point is adequately covered by other instructions given. (*Arato v. Avedon* (1993) 5 Cal.4th 1172, 1189, fn. 11.)

“The propriety of jury instructions is a question of law that we review de novo. [Citation.]” (*Cristler v. Express Messenger Systems* (2009) 171 Cal.App.4th 72, 82.) When the contention on appeal is that the trial court failed to give a requested instruction, we review the record in the light most favorable to the party proposing the instruction to determine whether it was warranted by substantial evidence. (*Ayala v. Arroyo Vista Family Health Center* (2008) 160 Cal.App.4th 1350, 1358.) In the event the trial court erred, “[a] judgment may not be reversed for instructional error in a civil case ‘unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.’ [Citation.]” (*Soule v. General Motors Corp.*, *supra*, 8 Cal.4th at p. 580.) “A ‘miscarriage of justice’ exists when, after examining all the evidence, we conclude “‘it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of error.’” [Citation.]” (*Weaver v. Chavez* (2005) 133 Cal.App.4th 1350, 1356.)

## **C. The trial court did not err in instructing the jury on the standard of causation with CACI Nos. 2430, 2500, 2505, 2507, and 2527.**

PMIC contends that the trial court erred in instructing the jury on the element of causation in a FEHA claim because the CACI instructions given to the jury did not express the “but for” standard of causation required under FEHA. According to PMIC,

FEHA requires an employee alleging a discriminatory or retaliatory discharge to prove that his or her protected status or activity was the “but for” cause of the discharge rather than “a motivating factor” in the discharge. A review of the language and legislative purpose of FEHA, as well as the relevant case law, does not support PMIC’s position.

FEHA makes it an unlawful employment practice “[f]or an employer, because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition . . . , marital status, sex, . . . age, or sexual orientation of any person, . . . to discharge the person from employment . . . .” (Gov. Code, § 12940, subd. (a).) FEHA also makes it an unlawful employment practice for an employer “to refuse to allow a female employee disabled by pregnancy, childbirth, or a related medical condition to take a leave for a reasonable period of time not to exceed four months and thereafter return to work,” or “to refuse to grant a request by any [qualifying] employee . . . to take up to a total of 12 workweeks in any 12-month period for family care and medical leave.” (Gov. Code, §§ 12945, subd. (a)(1), 12945.2, subd. (a).)

The express purposes of FEHA are “to provide effective remedies that will both prevent and deter unlawful employment practices and redress the adverse effects of those practices on aggrieved persons.” (Gov. Code, § 12920.5.) The Legislature accordingly has mandated that the provisions of statute “shall be construed liberally” to accomplish its purposes. (Gov. Code, § 12993, subd. (a).) As our Supreme Court has recognized, “[b]ecause the FEHA is remedial legislation, which declares ‘[t]he opportunity to seek, obtain and hold employment without discrimination’ to be a civil right [citation], and expresses a legislative policy that it is necessary to protect and safeguard that right [citation], the court must construe the FEHA broadly, not . . . restrictively.” (*Robinson v. Fair Employment & Housing Com.* (1992) 2 Cal.4th 226, 243.)

The California Supreme Court has not addressed whether the CACI instructions’ use of the phrase “a motivating reason” accurately describes the standard of causation in a FEHA claim, although this issue ultimately may be decided by the court in *Harris*. The Supreme Court has suggested in dicta, however, that “a motivating reason” or “a motivating factor” is the proper causation standard under FEHA. Specifically, in

*Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, the Supreme Court considered whether a defendant employer was entitled to summary judgment in a FEHA discrimination claim based on evidence that it terminated the plaintiff's employment due to downsizing. In rejecting the employer's argument that downsizing alone was a sufficient non-discriminatory reason for the discharge, the court noted that "[i]nvo[n]cation of a right to downsize does not resolve whether the employer had *a discriminatory motive* for cutting back its work force, or engaged in intentional discrimination when deciding which individual workers to retain and release." (*Id.* at p. 358, italics added.) As the court further explained, in a FEHA discrimination case, "the ultimate issue is simply whether the employer acted with *a motive to discriminate illegally.*" (*Ibid.*)

Over the years, the California appellate courts likewise have used the phrase "a motivating factor" or "a motivating reason" in describing the standard of causation in a FEHA discrimination or retaliation claim. (See, e.g., *Green v. Laibco, LLC* (2011) 192 Cal.App.4th 441, 443 [concluding that "there was substantial evidence supporting the jury's finding that plaintiff's complaint of sexual harassment of a colleague was a motivating reason for her discharge"]; *West v. Bechtel Corp.* (2002) 96 Cal.App.4th 966, 978 [noting that "[a] discharge is not 'on the ground of age' within the meaning of [FEHA's] prohibition unless age is a 'motivating factor' in the decision"]; *Caldwell v. Paramount Unified School Dist.* (1995) 41 Cal.App.4th 189, 205 [stating that once a FEHA discrimination case is submitted to the trier of fact, it "will have only to decide the ultimate issue of whether the employer's discriminatory intent was a motivating factor in the adverse employment decision"].) As the Court of Appeal explained in *Mixon v. Fair Employment & Housing Com.* (1987) 192 Cal.App.3d 1306, an employee alleging race discrimination under FEHA "need not prove that racial animus was the sole motivation behind the challenged action," but rather "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." (*Id.* at p. 1319; see also *Clark v. Claremont University Center* (1992) 6 Cal.App.4th 639, 665 ["The employee need not show 'he would have in any event been rejected or discharged solely on the basis of his race, without regard to

the alleged deficiencies . . . .”].) The language of the challenged CACI instructions incorporates this element of a “causal connection” by requiring the employee to prove that his or her protected status was “a motivating reason” for the adverse decision.

In support of its argument that FEHA requires the plaintiff to prove “but for” causation, PMIC primarily relies on *Gross v. FBL Financial Services, Inc.* (2009) 557 U.S. 167 (*Gross*), a case arising under the federal Age Discrimination in Employment Act (ADEA) (29 U.S.C. § 621 et seq.). In *Gross*, the United States Supreme Court held in a 5-4 decision that a plaintiff alleging discrimination under the ADEA must prove that age was the “but for” cause of the challenged action. (*Gross, supra*, at p. 176.) However, the majority in *Gross* based its decision on the distinct legislative history of the ADEA as compared to that of Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. § 2000e et seq.). Specifically, in 1991, Congress amended Title VII to provide that “an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” (42 U.S.C. § 2000e-2(m).) Because Congress did not make a parallel amendment to the ADEA at that time, the *Gross* majority reasoned that Congress must have rejected the “motivating factor” standard for claims alleged under the ADEA. (*Gross, supra*, at pp. 174-175.) Therefore, while both Title VII and the ADEA prohibit discrimination “because of” a person’s membership in a protected class,<sup>2</sup> a plaintiff in an ADEA case must prove that discriminatory animus was the “but for” cause of the adverse

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<sup>2</sup> Title VII specifically states that “[i]t shall be an unlawful employment practice 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), italics added.) The ADEA similarly provides that “[i]t shall be unlawful for an employer . . . [¶] to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual’s age . . . .” (29 U.S.C. § 623(a), italics added.)

employment action, whereas a plaintiff in a Title VII case merely must establish that discriminatory animus was “a motivating factor” in the challenged decision. Given these conflicting standards of causation that now apply under the federal anti-discrimination statutes, we decline to follow *Gross* in considering the proper standard of causation under FEHA.

PMIC also relies on a handful of California cases to support its claim that FEHA requires a “but for” standard of causation, but only two of PMIC’s cited cases -- *Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264 (*Lyle*) and *Reeves v. Safeway Stores, Inc.* (2004) 121 Cal.App.4th 95 (*Reeves*) -- involved claims arising under FEHA. In *Lyle*, the California Supreme Court noted in dicta that “[t]o plead a cause of action for [hostile work environment] sexual harassment, it is “only necessary to show that gender is a substantial factor in the discrimination, and that if the plaintiff ‘had been a man she would not have been treated in the same manner.’” [Citation.]” (*Lyle, supra*, at p. 280.) However, *Lyle* did not address the proper standard of causation in a FEHA discrimination or retaliation claim, nor did it state that a plaintiff in a FEHA harassment claim must prove that gender was the sole motivating factor for the hostile work environment. In *Reeves*, the California Court of Appeal considered whether an employer may be liable for retaliatory discharge under FEHA when the supervisor who initiated disciplinary proceedings that led to the discharge acted with a retaliatory animus, but the ultimate decision-maker had no knowledge of the plaintiff’s protected activity. (*Reeves, supra*, at p. 100.) The *Reeves* court held that “so long as the supervisor’s retaliatory motive was an actuating, but-for cause of the dismissal, the employer may be liable for retaliatory discharge.” (*Ibid.*) Yet elsewhere in the opinion, the *Reeves* court suggested that an employer may be liable for retaliation under FEHA if the employee presents “sufficient proof to establish that retaliatory animus on the part of one or more contributors to the decision was *a substantial contributing factor* in bringing about his dismissal.” (*Id.* at p. 113, italics added.) Thus, when read in their entirety, neither *Lyle* nor *Reeves* supports a conclusion that the “because of” language in FEHA means “solely because of” the employee’s protected status or activity.

PMIC further asserts that FEHA's use of "a motivating factor" causation standard in its housing discrimination provisions but not its employment discrimination provisions must mean that a different standard applies in an employment case. However, a review of the relevant provisions of FEHA shows that both the employment and housing sections of the statute use the same terminology -- "because of" - in defining the prohibited acts of discrimination.<sup>3</sup> In the housing section, FEHA further provides that "[a] person intends to discriminate if [the protected trait] is a motivating factor in committing a discriminatory housing practice even though other factors may have also motivated the practice." (Gov. Code, § 12955.8, subd. (a).) That same language is not included in FEHA's employment section. But given that both the employment and housing provisions expressly prohibit discrimination "because of" a person's membership in a protected class, we reject PMIC's argument that the Legislature must have intended for a different standard of causation to apply to FEHA's employment provisions.

PMIC suggests that the CACI instructions' use of "a motivating reason" standard permits a jury to find in favor of the plaintiff if the challenged employment decision was motivated in the slightest possible way by discrimination without considering whether the employer actually acted upon such motivation. We disagree. The jury was instructed, pursuant to CACI Nos. 2430, 2500, and 2505, that it could only find in favor of Alamo if

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<sup>3</sup> In the employment section, FEHA provides that "[i]t is an unlawful employment practice . . . [¶] (a) For an employer, *because of* the 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 of any person, . . . to discriminate against the person in compensation or in terms, conditions, or privileges of employment." (Gov. Code, § 12940, subd. (a), italics added.) In the housing section, FEHA similarly states that "[i]t shall be unlawful: [¶] (a) For the owner of any housing accommodation to discriminate against or harass any person *because of* the race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, or genetic information of that person." (Gov. Code, § 12955, subd. (a), italics added.)

she proved by a preponderance of the evidence that her pregnancy or pregnancy-related leave was “a motivating reason” for her discharge.<sup>4</sup> The jury further was instructed, pursuant to CACI No. 2507, that “[a] motivating reason is a reason that contributed to the decision to take certain actions even though other reasons also would have contributed to the decision.” Accordingly, the instructions required Alamo to establish that there was a causal connection between her protected status and the adverse employment decision. The trial court did not err in instructing the jury with CACI Nos. 2430, 2500, 2505, 2507, and 2527.

**D. The trial court did not err in refusing to instruct the jury on the mixed motive defense with BAJI No. 12.26.**

Alternatively, PMIC contends that the trial court erred in refusing its request to instruct the jury on the mixed motive defense with BAJI No. 12.26. PMIC reasons that had the jury been instructed on the availability of the mixed motive defense under FEHA, it could have found in favor of PMIC based on evidence that PMIC would have made the same decision to terminate Alamo’s employment even in the absence of a discriminatory or retaliatory motive. As discussed, the question of whether a mixed motive defense is available under FEHA is currently pending before the California Supreme Court in *Harris*. However, we need not decide that issue here. Even if we assume for purposes of this appeal that the mixed motive defense applies to FEHA claims, the trial court did not err in refusing to instruct the jury with BAJI No. 12.26 because this case was tried by both parties as a single motive, not a mixed motive, case.

The mixed motive defense was first articulated by the United States Supreme Court in *Price Waterhouse v. Hopkins* (1989) 490 U.S. 228 (*Price Waterhouse*). The

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<sup>4</sup> CACI No. 2527, which sets forth the essential elements of a claim for failure to prevent discrimination or retaliation, does not use the phrase “a motivating reason” or “a motivating factor.” Rather, the instruction required Alamo to prove she was subject to discrimination or retaliation “because” she took a pregnancy-related leave. This phrase actually mirrors the language of FEHA’s anti-discrimination provision which prohibits discrimination “because of” a person’s protected status. (Gov. Code, § 12940, subd. (a).)

plaintiff in *Price Waterhouse* filed a Title VII sex discrimination action against her employer after she was refused admission as a partner. The evidence at trial established that the plaintiff was denied partnership based on both permissible factors (her lack of interpersonal skills) and impermissible factors (sexual stereotypes about her lack of femininity). (*Id.* at pp. 250-252.) In a plurality decision, the Supreme Court rejected the argument that Title VII’s prohibition of discrimination “because of” sex required the plaintiff to prove that her gender was the “but for” cause of the adverse action. (*Id.* at pp. 240-242.) Rather, the Supreme Court held that the plaintiff had to prove that “her gender played a motivating part in an employment decision.” (*Id.* at p. 258.) The Supreme Court further held that, where the employment decision was the product of a mixture of legitimate and illegitimate motives, the employer could avoid a finding of liability “only by proving by a preponderance of the evidence that it would have made the same decision even if it had not taken the plaintiff’s gender into account.” (*Ibid.*)<sup>5</sup>

Citing *Price Waterhouse*, several California Court of Appeal cases have assumed without deciding that the mixed motive defense is also available under FEHA. (See *Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 703 (*Huffman*) [mixed motive defense “limits the employer’s liability, once a plaintiff has established an unlawful motive, if the employer can show that it would have taken the same action absent the unlawful motive”]; *Reeves, supra*, 121 Cal.App.4th at p. 111, fn. 11 [under a mixed motive analysis, “a case goes to the jury if there is evidence that an impermissible criterion ““was a motivating factor for any employment practice”””]; *Heard v. Lockheed Missiles & Space Co.* (1996) 44 Cal.App.4th 1735, 1748 (*Heard*) [“In some cases, the evidence will establish that the employer had ‘mixed motives’ for its employment

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<sup>5</sup> In its 1991 amendments to Title VII, Congress partially ratified the *Price Waterhouse* holding by adopting the “a motivating factor” standard of causation, and partially overruled the decision by providing that the mixed motive defense does not defeat a finding of liability, but merely limits available remedies. (42 U.S.C. § § 2000e-2(m), 2000e-5(g)(2)(B).) Thus, the mixed motive defense has been codified into Title VII, but only as a limitation on remedies rather than a complete defense to liability.



decision. [Citation] In a mixed motive case, both legitimate and illegitimate factors contribute to the employment decision”].) None of these California cases, however, actually applied the mixed motive defense to a FEHA claim. Moreover, in referencing the mixed motive defense, the cases have recognized that there is a critical distinction between a true mixed motive case and a single motive pretext case.

In *Reeves*, for instance, the Court of Appeal noted that both parties had treated the plaintiff’s FEHA retaliation claim as a pretext case to “be analyzed within the three-step analytical framework adopted by the United States Supreme Court in *McDonnell Douglas Corp. v. Green* (1973) 411 U.S. 792, 802-804,” and that the plaintiff “ha[d] not invoked the competing model of “‘mixed motive’” analysis.” (*Reeves, supra*, 121 Cal.App.4th at p. 111, fn. 11.) Similarly, in *Huffman*, the Court of Appeal rejected the plaintiff’s argument that the employer in a FEHA discrimination claim had the burden of proof because it was a mixed motive case. (*Huffman, supra*, 121 Cal.App.4th at p. 702.) As the *Huffman* court reasoned, “[t]his case was pled and tried as a pretext case, that is, [the employer’s] decision was a pretext for age discrimination. [The employer] never raised mixed-motive as an affirmative defense and it was never presented to the jury as a mixed-motive case. Rather, [the plaintiff] succeeded at trial in convincing the jury that [the employer’s] stated reasons for its decision were not legitimate and the real reason [the plaintiff] was demoted was because of his age . . . . Had this been a true mixed-motive case, the employment decision at issue would have resulted from a mixture of illegitimate and legitimate considerations.” (*Ibid.*)

The *Price Waterhouse* decision itself noted the distinction between a mixed motives case and a single motive pretext case. As Justice White explained in his concurrence, “‘mixed-motives’ cases . . . are different from pretext cases . . . . In pretext cases, ‘the issue is whether either illegal or legal motives, but not both, were the “true” motives behind the decision.’ [Citation.] In mixed-motives cases, however, there is no one ‘true’ motive behind the decision. Instead, the decision is a result of multiple factors, at least one of which is legitimate.” (*Price Waterhouse, supra*, 490 U.S. at p. 260 (conc. opn. of White, J.)) While a case need not “be correctly labeled as either a ‘pretext’ case

or a ‘mixed-motives’ case from the beginning . . . , [a]t some point in the proceedings, of course, the District Court must decide whether a particular case involves mixed motives,” and instruct the jury accordingly. (*Id.* at p. 247, fn. 12 (plur. opn. of Brennan, J.)) This distinction is consistent with the Use Note to BAJI No. 12.26 which cautions that the instruction “should only be used in a true mixed-motive situation,” and “does not apply to the circumstances where it is claimed that a legitimate reason was in fact a pretext for unlawful action.”

Here, the record reflects that neither Alamo nor PMIC presented the case to the jury as a mixed motive case. Instead, both parties defined the issue before the jury solely as one of pretext. PMIC consistently argued that its decision to terminate Alamo’s employment was based entirely on her performance and insubordination issues, whereas Alamo maintained that PMIC’s proffered reasons were a mere pretext for pregnancy discrimination. Indeed, in its motion in limine requesting a mixed motive instruction, PMIC asserted as follows: “Let us be crystal clear about one thing: *defendant PMIC did not have mixed motives*. PMIC did not for a moment take into account plaintiff’s status as a recently-pregnant woman returning from maternity leave, in deciding to terminate her employment. Therefore, this case is in fact a ‘single motive’ case, where the motive was lawful and non-discriminatory. . . . Nonetheless, because plaintiff claims discrimination, and because the case survived summary judgment, BAJI’s ‘mixed-motive’ instruction is appropriate.” During trial, PMIC continued to take the position that Alamo’s pregnancy-related leave had nothing to do with her discharge. PMIC’s counsel thus argued to the jury that “Ms. Alamo did not lose her job because of pregnancy discrimination, because of going out on maternity leave, because of anything having to do with the fact that she got pregnant.” Alamo’s counsel, on the other hand, urged the jury to find that the decision-makers were not credible and that PMIC had offered only “false and pretextual reasons” for its discharge decision.

After hearing the evidence presented by both parties, the trial court had to decide what legal theories were reasonably supported by the evidence and to instruct the jury accordingly. To the extent that a mixed motive defense is available under FEHA, the

trial court was not required to instruct the jury on the defense where the only logical findings supported by the evidence were that ““either illegal or legal motives, but not both, were the “true” motives behind the decision.”” (*Price Waterhouse, supra*, 490 U.S. at p. 260 (conc. opn. of White, J.).) The trial court reached such a determination in this case, reasonably concluding as follows: “[H]ere’s what this case comes down to. . . . Plaintiff’s arguing she was terminated because of her pregnancy condition. Defendants are arguing no, we terminated her for what I’ll call performance and personality reasons. I mean, it’s an either/or. Both sides are litigating this case on that basis.” Given that both parties consistently treated the case as a single motive pretext case, the trial court did not err in refusing to instruct the jury on the mixed motive defense.<sup>6</sup>

## **II. Alleged Error In Attorney’s Fees Award**

On appeal, PMIC also challenges the trial court’s order awarding attorney’s fees to Alamo as the prevailing plaintiff under FEHA. PMIC contends that the general verdict rendered by the jury cannot support an attorney’s fees award under FEHA because the verdict form failed to specify whether Alamo prevailed on the statutory cause of action for violation of FEHA or the common law cause of action for wrongful termination in violation of public policy. We conclude that this claim likewise lacks merit.

First, PMIC’s assertion of error in the attorney’s fees award is barred by the doctrine of invited error. “The ‘doctrine of invited error’ is an ‘application of the estoppel principle’: ‘Where a party by his conduct induces the commission of error, he is estopped from asserting it as a ground for reversal’ on appeal. [Citation.]” (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 403.) The purpose of the doctrine is to “prevent a party from misleading the trial court and then profiting therefrom in the appellate court.” (*Ibid.*) The doctrine “requires affirmative conduct demonstrating a deliberate tactical

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<sup>6</sup> In light of this conclusion, we need not address Alamo’s argument that PMIC forfeited its right to assert a mixed motive defense at trial by failing to raise it as an affirmative defense in its answer.

choice on the part of the challenging party.” (*Huffman, supra*, 121 Cal.App.4th at p. 706.) “[W]here a deliberate trial strategy results in an outcome disappointing to the advocate, the lawyer may not use that tactical decision as the basis to claim prejudicial error.” (*Mesecher v. County of San Diego* (1992) 9 Cal.App.4th 1677, 1686.)

In this case, it is clear that PMIC invited the purported error as a matter of trial strategy. The record reflects that, after waiting until the end of trial to decide whether it wanted a general or special verdict, PMIC ultimately agreed to a general verdict which its counsel prepared. In opposing Alamo’s posttrial motion for attorney’s fees, PMIC then raised the same argument that it is asserting here, i.e., that the use of a general verdict form precluded the trial court from determining whether Alamo was a prevailing plaintiff under FEHA. At the hearing on the motion for attorney’s fees, PMIC’s counsel elaborated on the basis for this argument, explaining on the record as follows: “There were good reasons for me to do a special verdict, it would make the jury think about things, but I knew about this argument that, you know, maybe you couldn’t intuit a FEHA verdict if there was a wrongful termination result. So that was a tactical reason for me as well.” Therefore, by its counsel’s own admission, PMIC agreed to a general verdict form as a deliberate tactical choice so that it could later challenge any attorney’s fees ordered by the trial court on the basis of an alleged ambiguity in the verdict form itself. Under these circumstances, PMIC has forfeited its claim of error on appeal.

Second, even assuming the claim has not been forfeited, PMIC’s argument fails on the merits. FEHA provides that, “[i]n actions brought under this section, the court, in its discretion, may award to the prevailing party reasonable attorney’s fees and costs . . . .” (Gov. Code, § 12965, subd. (b).) “The basic, underlying purpose of FEHA is to safeguard the right of Californians to seek, obtain, and hold employment without experiencing discrimination on account” of their membership in a protected class. (*Flannery v. Prentice* (2001) 26 Cal.4th 572, 582-583.) An award of reasonable attorney’s fees accomplishes “the Legislature’s expressly stated purpose of FEHA ‘to provide effective remedies that will eliminate these discriminatory practices.’” (*Id.* at p. 583.) “Generally, the trial court’s determination of the prevailing party for purposes of

awarding attorney fees is an exercise of discretion, which should not be disturbed on appeal absent a clear showing of abuse of discretion. [Citation.]” (*Kim v. Euromotors West/The Auto Gallery* (2007) 149 Cal.App.4th 170, 176.) However, “[t]he determination of the legal basis for an award of attorney fees is a question of law that we review de novo.” (*Corbett v. Hayward Dodge, Inc.* (2004) 119 Cal.App.4th 915, 921.)

The instant case was tried before the jury on two separate, but related causes of action: (1) pregnancy discrimination or retaliation in violation of FEHA; and (2) wrongful termination in violation of the public policy embodied in FEHA. It is well-established that “‘FEHA’s provisions prohibiting discrimination may provide the policy basis for a claim for wrongful discharge in violation of public policy.’” (*Estes v. Monroe* (2004) 120 Cal.App.4th 1347, 1355; see also *Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 897 [“FEHA’s policy against . . . discrimination in employment is sufficiently substantial and fundamental to support a tort claim for wrongful discharge”].) Moreover, “when a plaintiff relies upon a statutory prohibition to support a common law cause of action for wrongful termination in violation of public policy, the common law claim is subject to statutory limitations affecting the nature and scope of the statutory prohibition . . . .” (*Stevenson v. Superior Court, supra*, at p. 904.) “In other words, the viability of [the] plaintiff’s tort claim is tethered to the meaning of the FEHA.” (*Estes v. Monroe, supra*, at p. 1355.)

Because Alamo’s common law claim for wrongful termination in violation of public policy was derivative of her statutory claim for violation of FEHA, the public policy claim would either rise or fall with the FEHA claim. (See *Hanson v. Lucky Stores, Inc.* (1999) 74 Cal.App.4th 215, 229 [where plaintiff’s “FEHA claim fails, his claim for wrongful termination in violation of public policy fails”].) This means that Alamo could not have prevailed on either cause of action at trial unless she proved by a preponderance of the evidence that PMIC discriminated or retaliated against her in violation of the statutory prohibitions set forth in FEHA. Consequently, if the jury found in favor of Alamo in her claim for wrongful termination in violation of public policy, then it must have found that PMIC’s termination of her employment was in violation of FEHA.

For these reasons, PMIC's reliance on the decision in *McKenzie v. Kaiser-Aetna* (1976) 55 Cal.App.3d 84 (*McKenzie*) is misplaced. In *McKenzie*, the jury returned a general verdict in favor of the plaintiff in a case that alleged multiple causes of action for breach of contract, breach of implied warranty, negligent misrepresentation, and restitution. (*Id.* at p. 87.) The plaintiff thereafter moved for an attorney's fees award based on a provision in a written contract that allowed for the recovery of such fees in an action on the contract. (*Id.* at pp. 86-87.) The Court of Appeal held that the plaintiff was not entitled to attorney's fees under the contract because there was "no way to ascertain, in the absence of special jury findings, on which of the theories of recovery (breach of contract, negligent misrepresentation, or breach of implied warranty) the jury mainly based its award to [the plaintiff]." (*Id.* at pp. 88-89.) As the Court of Appeal further noted, "[t]hose theories do not all call for identical determinations of fact," nor do they all constitute "an action to enforce the provisions of a contract." (*Id.* at p. 89.)

In this case, however, both the statutory FEHA claim and the common law wrongful discharge claim were based on the same factual and legal theory. To prevail on either cause of action at trial, Alamo had to prove that PMIC terminated her employment in violation of FEHA because of her pregnancy or taking of a pregnancy-related leave. By returning a general verdict in favor of Alamo and against PMIC on this issue of liability, the jury found a violation of FEHA. The trial court accordingly did not abuse its discretion in awarding attorney's fees to Alamo as the prevailing plaintiff under FEHA.

#### **DISPOSITION**

The judgment is affirmed. Alamo shall recover her costs on appeal.

ZELON, J.

We concur:

PERLUSS, P.J.

WOODS, J.