

**MIXED MOTIVE CASES: LIABILITY FOR DISCRIMINATION WHERE THERE IS A
LEGITIMATE REASON FOR TERMINATION
By Karen Sutherland**

Employers can be found liable for illegally discriminating against an employee in situations where there was a legitimate reason to take action against the employee, such as disciplining, demoting, or terminating the employee. These types of cases are known as “mixed motive” cases, and they arise where an employee has what the courts determine to be a legitimate discrimination or harassment complaint, but where the employer also has a legitimate motivation for taking action against the employee. The gist of the court’s reasoning is that discrimination or harassment should not go unchecked just because the employee deserved to be disciplined or terminated for some other, unrelated, legitimate reason.

The courts have been struggling for years with issues such as how much proof is needed in a mixed motive discrimination case, and with what the legal remedy should be if the employee proves discrimination or harassment and the employer has a legitimate reason for taking action against the employee. For example, in a federal case called *Costa v. Desert Palace, Inc.*, 299 F.3d 838 (9th Cir. 2002), the employer fired an employee for her disciplinary history and for fighting. The termination was upheld in a grievance hearing. The fired employee sued under Title VII of the Civil Rights Act, claiming sexual harassment. The suit claimed, among other things, that she had been discriminated against during her employment by being subjected to verbal slurs that were sex-based, and that the fight that led to her termination was caused by an employee who was sexually harassing her.

The jury in the *Costa* case found that she had been discriminated against and she was awarded damages and attorney’s fees. The jury also found that the employer failed to prove that it would have made the same decision absent consideration of the employee’s sex. In other words, the jury felt that the employee’s sex played a role in the decision to terminate her. One factor in this decision may have been that the other employee in the fight was suspended instead of being terminated. The *Costa* case is helpful for its discussion of the “same decision” analysis of the employer’s motive that is applied in mixed motive cases.

The legal standard in mixed motive cases used to be a “but for” standard, meaning that if the employee would have been terminated for other reasons unrelated to the discrimination, then the employer was not liable. But this standard has changed over the years, as the *Costa* case illustrates, and is now more pro-employee. The current test in a “mixed motive” case is that, where there is a legitimate reason for the employer’s action and there is also proof that the employee was discriminated against, then the fact that the employer would have made the same decision in the absence of any discrimination is an affirmative defense that affects the scope of the remedies only, rather than absolving the employer of liability.

If the employer does establish that the employer would have made the same decision in the absence of discriminatory conduct:

- The employer is still liable for the discriminatory conduct.

- The employee may not be entitled to damages such as lost wages, back pay, etc.
- The employer may not be ordered to re-hire the employee.
- The employer will be liable for the employee's attorney's fees and costs.
- An order may be entered providing declaratory relief, such as an order prohibiting the employer from engaging in discriminatory actions in the future.

This brief article is a broad summary only. It lacks specificity about the law and about the effects of different fact patterns, and thus shall not be applied without consulting an attorney. It also focuses on Washington State law and federal law, and the laws of other jurisdictions may vary materially. The information set forth in this article is a broad and general overview of complex topics, and is not legal advice. It also does not take into account any changes to the law or in interpretations of the law that may have occurred since it was written. For more information, contact Karen Sutherland at ksutherland@omwlaw.com