



# THE STATE BAR OF CALIFORNIA

## – LITIGATION SECTION, JURY INSTRUCTIONS COMMITTEE

180 Howard Street  
San Francisco, CA 94105-1639  
Telephone: (415) 538-2306  
Fax: (415) 538-2305

April 5, 2013

Via E-mail: [civiljuryinstructions@jud.ca.gov](mailto:civiljuryinstructions@jud.ca.gov).

Ms. Geraldine Dungo  
Advisory Committee on Civil Jury Instructions  
Judicial Council of California  
455 Golden Gate Avenue  
San Francisco, CA 94102

re: Invitation to Comment—CACI 13-02

Dear Ms. Dungo:

The Jury Instructions Committee of the State Bar of California's Litigation Section (the committee) has reviewed the proposed revisions to civil jury instructions and verdict forms (CACI 13-02) and appreciates the opportunity to submit these comments.

### **1. CACI No. 2507. “Substantial Motivating Reason” Explained**

Agree.

### **2. Cross-references to CACI No. 2507**

The Invitation to Comment revises references to CACI No. 2507 in the Directions for Use for several other instructions to reflect its new title, “Substantial Motivating Reason” Explained. We note, however, that the title has not been revised in references to the instruction in the Directions for Use for CACI Nos. 2500, 2505, 2511, 2527, 2540, 2560 and 2570, but should be revised in this regard.

### **3. CACI No. 2730. Whistleblower Protection—Essential Factual Elements**

a. We agree with the proposed revision to the instruction, which is consistent with Labor Code section 1102.6.

b. We believe that the “substantial motivating reason” standard applicable in FEHA cases may differ from the “contributing factor” standard applicable to a claim under Labor Code section 1102.5. We therefore believe that the statement in the first sentence of the second

paragraph of the Directions for Use that retaliation under Labor Code section 1102.5 is viewed the same as under FEHA may be inaccurate and is overbroad, and the reference to CACI No. 2505, Retaliation, which states the “substantial motivating reason” standard, may be problematic. We would modify the Directions for Use by striking this sentence.

#### **4. Same-decision Instructions and Verdict Forms**

The Invitation to Comment states that only existing instructions and verdict forms are being revised and that new instructions and verdict forms based on *Harris v. City of Santa Monica* (2013) 56 Cal.4th 203 (*Harris*) may be included in the next release. We suggest that new instructions and verdict forms should be drafted on the same-decision issue.

*Harris* holds that the plaintiff in a FEHA action alleging unlawful discrimination under Government Code section 12940, subdivision (a) must prove that unlawful discrimination was “a substantial motivating factor/reason” in the adverse employment decision, rather than only a “motivating factor/reason.” (*Harris, supra*, at p. 232.) *Harris* also holds that in a mixed-motive case under FEHA, if the employer proves that it would have made the same decision at the time in the absence of any discrimination (a “same-decision” showing), the plaintiff is not entitled to reinstatement, backpay or noneconomic damages. (*Id.* at pp. 232-234.) A same-decision showing is only a partial defense, however. A finding that unlawful discrimination was a substantial motivating factor constitutes a finding of unlawful discrimination and can justify declarative relief, injunctive relief and a discretionary award of attorney fees. (*Id.* at pp. 234-235.)

*Harris* states that a same-decision instruction is appropriate in cases involving mixed motives: “In light of today’s decision, a jury in a mixed-motive case alleging unlawful termination should be instructed that it must find the employer’s action was substantially motivated by discrimination . . . and that a same-decision showing precludes an award of reinstatement, backpay, or damages.” (*Harris, supra*, 56 Cal.4th at p. 241.)

#### **DISCLAIMER**

**This position is only that of the Jury Instructions Committee of the State Bar of California’s Litigation Section. This position has not been adopted by the State Bar’s Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California. Membership in the Jury Instructions Committee and in the Litigation Section is voluntary, and funding for their activities, including all legislative activities, is obtained entirely from voluntary sources.**

Very truly yours,

Reuben A. Ginsburg  
Chair, Jury Instructions Committee of the  
State Bar of California’s Litigation Section