Overcoming the *Harris* Defense

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Issues before Cal. Supreme Court

- Does FEHA recognize a “mixed-motive” or “same decision” defense?
  - If so, what are the defense’s parameters:
    - What required to prove it?
    - What impact if proven?
- Interjected by amicus: Do FEHA claims require “but for” causal nexus instead of “a motivating factor/reason”?

Background

- Bus driver for City of Santa Monica
- Pregnancy vs. Performance issues?
  - Harris: it was my pregnancy
  - City: it was your performance
- City did not plead "mixed-motive" defense
  - City pleaded in its answer that "[a]ny alleged adverse employment actions . . . Were not based on plaintiff's gender and/or sex, pregnancy. . . but . . . were based on . . . legitimate nondiscriminatory reasons."

Procedural Background

- Trial court:
  - Denied “mixed-motive” instruction
  - Affirmed jury’s verdict denying post-trial motions
- Appellate court:
  - Recognized “mixed-motive” defense and held trial court erred by not giving instruction
  - “Mixed-motive” is a complete defense to liability

Legal Background: Plaintiff's Perspective

- Damage control
  - "But for" causal nexus not the test
  - Any "mixed-motive" same-decision defense cannot be "complete liability defense"

Court's Opinion

- Rejects "a motivating" and "but for"
  - Adopts "substantial factor" or "substantial motivating factor" instead
- Adopts "same decision" defense
  - But partial defense only; "unlawful employment practice" is established even if defense is proven
- D need not admit discrimination to invoke defense

Court's Opinion

- P need not introduce direct evidence in a "mixed-motive" case
- Standard of proof on the defense is "preponderance," not "clear and convincing"
- D must plead defense in answer (enough to put P on notice)
  - *See Alamo v. Practice Management Information Corp.* (2013) 219 Cal.App.4th 466, 482 (affirming refusal to give mixed-motive instruction where D did not plead defense in its answer).

Court's Opinion

- To establish the defense, the defendant must prove it actually would have taken same action *at that same time* even had it not considered the prohibited trait

Court's Opinion

- If defense is proven, while "unlawful employment practice" is established, remedies are limited:
  - Reinstatement, back/front pay, and noneconomic damages are out
  - But:
    - Statutory attorney's fees are available
      - But court can exercise discretion; to what extent?
    - Declaratory relief is available "where appropriate"
    - Injunctive relief is available"where appropriate"

Unanswered questions

What does “substantial factor” mean?

- *Rutherford v. Owens-Illinois* (1997) 16 Cal.4th 953:
  - “[A] force which plays only an ‘infinitesimal’ or ‘theoretical’ part in bringing about injury, damage, or loss is not a substantial factor.” (at 970)
  - “Undue emphasis should not be placed on the term ‘substantial.’” (at 970)
  - “The substantial factor standard is a relatively broad one, requiring only that the contribution of the individual cause be more than negligible or theoretical.” (at 978)

What does “substantial motivating factor/reason” mean?

- Judicial Council’s revised CACI 2507:

  “A ‘substantial motivating reason’ is a reason that actually contributed to the [adverse employment action]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [adverse employment action].”

When doesn't *Harris* apply?

- Non-intent based claims
  - Failure to accommodate
  - Failure to engage in good faith IAP
  - CFRA claims for failure to grant leave or reinstate

When doesn't *Harris* apply?

- Wrongful termination in violation of public policy?
  - If based on FEHA, *Harris* applies:
    - *Alamo v. Practice Management Information Corporation* (2013) 219 Cal.App.4th 466, 479 (applying "substantial motivating reason" to WTVPP claim premised on FEHA pregnancy discrimination).
    - *Mendoza v. Western Medical Center Santa Ana* (2014) 222 Cal.App.4th 1334, 1341 ("It would be nonsensical to provide a different standard of causation in FEHA cases and common law tort cases based on public policies encompassed by FEHA.").

Declaratory and injunctive relief?

- Both available in "an appropriate case" even if "mixed-motive" defense proven. But:
  - *Travers v. Louden* (1967) 254 Cal. App. 2d 926 (declaratory relief improper where the complaining party's claim has "crystallized into a cause of action for past wrongs")
  - Former employees may lack standing to seek injunctive relief
  - Does *Harris* create exception to these general rules?

Harris and *Chavez*

- What is the interplay between *Harris* and *Chavez v. City of Los Angeles* (2010) 47 Cal.4th 970 on the issue of attorney's fees?

Discovery: *Harris* and "comparators"

- Impact on admissibility and discoverability of comparator evidence—i.e., others terminated or not terminated for similar reasons?

998 offers?

- *Harris* mixed-motive/same-decision defense proven and defense beats 998 offer?
- Although we don't know what will happen in the appellate courts, consider pleading and praying for declaratory/injunctive relief in the alternative and upon the jury first returning a same-decision defense.

Few trial results turning on *Harris*?

- Anecdotally, very few trials are won or lost solely on a same-decision defense.

Strategies & Approaches

Approach each case assuming the *Harris* defense will be raised

- You must assume that the defendant will raise a *Harris* defense in nearly every disputed-intent case.
- This should be on your mind during intake.
- Particularly susceptible to a *Harris* defense:
  - Cases involving documented or provable serious problems with an employee leading up to time of termination where the employee claims discrimination after the serious concerns are raised.

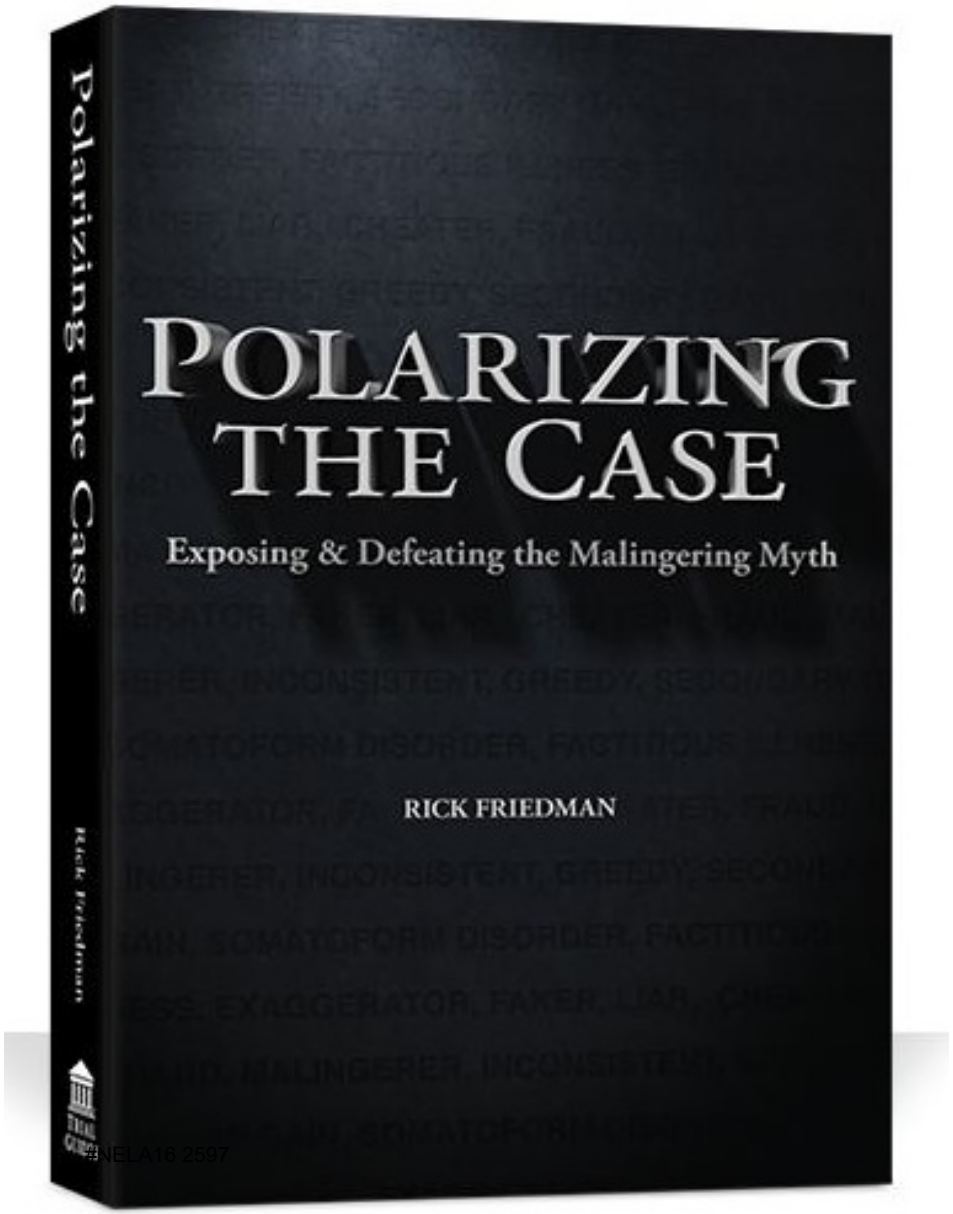
Approach each case assuming the *Harris* defense will be raised

- You must identify preexisting, documented performance problems before taking the case if possible.
  - Personnel file
  - Witnesses, including coworkers, friends, and family
  - Medical records
  - Look for indicators of problem client (especially important for newer plaintiffs' lawyers)

Plan and execute discovery to attack the *Harris* defense

- If you haven't begun employing mindful frameworks for how you will present proof and argument at trial, you need to start right now, before you start taking discovery.

Polarizing the Case



Polarizing the Case

- Force the defense and the defense witnesses to take a concrete position: is the plaintiff a liar? Was the plaintiff a terrible employee?

- At trial, this allows you to present two very different stories for the jury to consider: the defense's, and your client's.

- Then you will destroy the defense's story.

Polarizing the Case

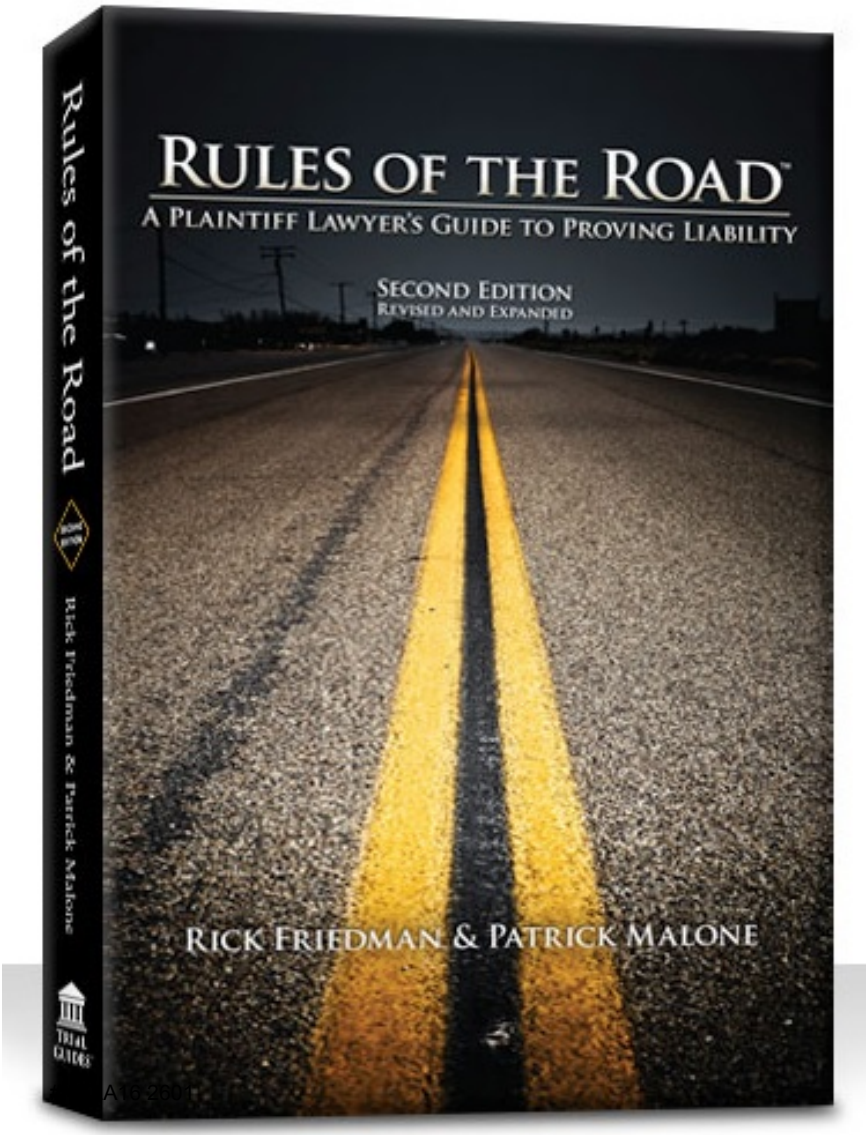
- Same-decision defense: the jury has to believe the employer's version of what it *would have done at that time* absent the discrimination.

- This makes it all about credibility, credibility, credibility.

Polarizing the Case

- Force the decision-makers to give a concrete answer: did they consider the protected characteristic/activity or not?

Rules of the Road



Rules of the Road

- Establish the basic rules and framework in which the employer operates (or should operate and knows it should operate).
- Establish that the employer broke those rules.
- Often fits perfectly with polarizing.

Rules of the Road

- Rules of the Road is uniquely suited to employment cases
- You should ask basic rules questions in your depositions, especially of the managers and HR personnel involved.
- In cases where a senior HR manager was involved, that person's deposition will be one of your key *Rules* depositions

Rules of the Road

- Identify the policies in the employee handbook or written policies
- Nail down that the employer agrees that the bad conduct alleged by your client violates the rules (both company and law)
- Tie the alleged bad conduct to a violation of the company's policies, the law, or both.

Rules of the Road

- Basic examples of *Rules* questioning:
  - Overall rule-based questioning
  - Application of rule to the particular conduct alleged in the case

Brush Up & Expand Your *Pretext Playbook*™

Pretext is:

> [W]eaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action [so] that a reasonable factfinder could rationally find [the employer's reasons] unworthy of credence and … infer that the employer did not act for the [the asserted] non-discriminatory reasons.

Hersant v. Dep't of Social Servs. (1997) 57 Cal.App.4th 997, 1004 (internal quotation marks and citations omitted).

Brush Up & Expand Your *Pretext Playbook*™

Examples of ways to show pretext:

- Shifting reasons. *Dominguez-Cruze v. Suttle Caribe, Inc.* (1st Cir. 2000) 202 F.3d 424, 432.
- Sham or inadequate investigation. *Duchon v. Cajon Co.* (6th Cir. 1986) 791 F.2d 43, 46-47.
- False exculpatory denials. *Donchin v. Guerrero* (1995) 34 Cal.App.4th 1832, 1839 (false statement demonstrates knowledge that declarant knew he has committed a wrong).
- Deviations from policy. *Kotla v. Regents of the Univ. of Cal.* (2004)115 Cal.App.4th 283, 294 n.6.

The Whole Point is…

The Whole Point

- The employer's position isn't the reality of what happened.
- What really happened is that the employer *did* discriminate.
- Hypothetical construct of "what if they didn't" is really just the employer making up an argument after-the-fact to try to avoid responsibility for breaking the law.

The Whole Point

- Important to stress that it is still illegal for an employer to retaliate/discriminate.
- The defense is 100% based on taking the word of the employer's lying witnesses to avoid responsibility.
- The burden of proof is on the employer, so how can the jury conclude that the employer proved its defense when it is based on the lying witnesses?

The Whole Point

- You will be able to put yourself in the best position to succeed!

What, Me Worry?

And you shouldn't either about Harris v. Santa Monica

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Two main holdings in Harris, and only two

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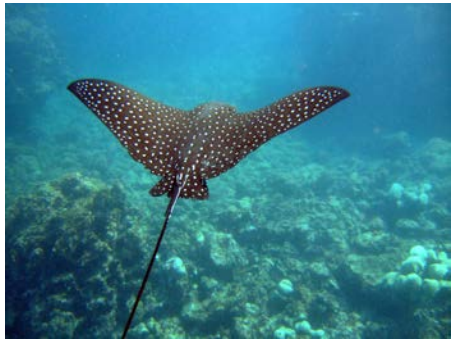


- 1. Substantial Motivating Reason

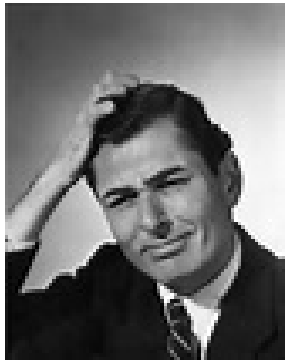
- 2. Mixed Motivation Instruction

How to Deal with the issue of Substantial Motivating Reason

- 1. If you didn't have it to begin with, why did you take the case?

- 2. Approach is the same as it was before this decision:
  - a. Show that their story doesn't make sense, and that yours is more credible
  - b. "Burden shifting" for SJ hasn't changed
  - c. Emphasize that "but for" is not necessary
    - Harris v. City of Santa Monica, 56 Cal.4th 203, 229 (2013) ("[D]iscrimination can be serious, consequential, and even by itself determinative of an employment decision without also being a 'but for' cause.")
  - REMEMBER: It could have been a lot worse. The whole point of Harris was to eliminate "but for" causation, and that got accomplished
  - So use it!

So what does "substantial motivating reason" mean?



Harris v. City of Santa Monica, 56 Cal.4th 203, 229 (2013) (describing it as a factor that "may permit the jury to conclude that improper discrimination was a sufficient factor by itself to bring about an employment decision . . . . ")

CACI 2507: "A 'substantial motivating reason' is a reason that actually contributed to the [adverse employment action]. It must be more than a remote or trivial reason. It does not have to be the only reason motivating the [adverse employment action.]"

COMPARE BAJI12.01: "A 'motivating reason' is something that moves the will and induces action even though other matters may have contributed to the taking of the action."

SO: What are we worried about?

So, for Sum-Ray Judge-Mint:

- • Emphasize that Harris points out that "substantial motivating reason" need not be the only reason
  - It can't be remote or trivial, but need only have actually contributed to the decision

  - Examples: Price Waterhouse v. Hopkins, 490 US 228 (1989): "abrasiveness" was a reason for termination, but supervisors disliked "abrasiveness" because she was "overcompensating" as a woman
    - SJ Denied
    - Rowland v. American General Finance, Inc., 340 F.3d 187 (4th Cir. 2003): "people skills" was a reason for termination, but comment equating her to another abrasive female employee precluded SJ; cited in Harris
    - McGinest v. GTE Service Corp., 360 F.3d 1103, 1117 (9th Cir. 2004): reference to African-American employee as "drug dealer," even without explicit reference to race, was a "code word"

A little more concerning: Same decision defense

- (But still not that concerning)

- Remember: It's an affirmative defense, Harris at 240, and therefore THEIR BURDEN

Remember how tough it's supposed to be to get SJ on issues of intent

- SJ must be denied if "the evidence would allow a reasonable trier of fact" to find in plaintiff's favor – Nadaf-Rahrov v. Neiman Marcus Group, Inc., 166 Cal.App.4th 952, 961 (2008)
- In other words, Defendant must prove that no reasonable jury could believe that Defendant would have fired Plaintiff even if discrimination wasn't taken into account. "[S]ummary judgment should not be granted unless the evidence cannot support any reasonable inference for plaintiff." Nazir v. United Airlines, Inc., 178 Cal.App.4th 243, 283 (2009).
  - Also in Nazir: "[M]any employment cases present issues of intent, and motive, and hostile working environment, issues not determinable on paper. Such cases, we caution, are rarely appropriate for disposition on summary judgment . . . . "

Using *Harris* To Your Advantage

BARBARA E. FIGARI, ESQ.

THE FIGARI LAW FIRM

Don’t Be Afraid of Harris – Embrace It!

Think of *Harris* as an unexpected gift – if the discriminatory reason was not a substantial factor, would a jury really return a favorable verdict anyways?

Harris makes sure that YOU vet your case well.

Employers Make *Harris* Out to Be a Horrendous and Intimidating Decision Which Guts All Discrimination Cases

BUT REMEMBER…


SCOOBY-DOO TEACHES KIDS THAT EVERYTHING
SUPERNATURAL OR OTHERWORLDLY
IS JUST SOME ASSHOLE TRYING TO SCARE YOU
SO THEY CAN MAKE SOME MONEY

Actual Lessons From *Harris*

- Substantial motivating reason
- Be ready for a mixed motive defense

Set The Stage From The Beginning

- ***Be ready to encounter and defeat the mixed motive defense, even if the employer "wins"***
- ***Always*** request declaratory and injunctive relief as part of your pleading – and do so in detail!
- If the employer is successful in proving a mixed motive defense, the plaintiff may still obtain declaratory and injunctive relief, along with attorney's fees and costs
  - "We have held 'that, in a civil action under the FEHA, all relief generally available in noncontractual actions . . . may be obtained.' This includes injunctive relief." (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 132).

Types of Injunctive Relief

- "a person subjected to employment discrimination is entitled to an injunction against future discrimination, unless the employer proves it is unlikely to repeat the practice." *Aguilar v. Avis Rent a Car System, Inc.*(1999) 21 Cal.4th 212, 133.

Declaratory Relief

- If an employer is "successful" in proving a mixed motive was at play, they have *proven that discriminatory animus played a role in your client's termination*
- In these cases, declaratory and injunctive relief is available – and must be requested by you!
- Declaratory relief may "reaffirm the plaintiff's equal standing among her coworkers and community" (*Harris* at 234).
- Code of Civil Procedure section 1060 specifically authorizes this such relief (a Court may make a binding declaration of contested rights and duties.")
- This also establishes an employer *did discriminate and can be used in future cases as evidence of other victims*.

Types of Injunctive Relief

- Bar against future discrimination
  - "a person subjected to employment discrimination is entitled to an injunction against future discrimination, unless the employer proves it is unlikely to repeat the practice." *Aguilar v. Avis Rent a Car System, Inc.*(1999) 21 Cal.4th 212, 133.

Types of Injunctive Relief Under Government Code § 12926(a)

- Reinstatement
- Backpay
- Out of pocket expenses
- Hiring
- Transfers
- Reassignments
- Grants of Tenure
- Promotions
- Cease and desist orders
- Posting of Notices
- Training
- Testing
- Expungement of Records
- *And any other similar relief that is intended to correct unlawful practices*

Hold Employers Accountable From the Beginning

- Since *Harris*, employers are on notice that they must plead a mixed motive defense if they want to use it at trial
- Bring a demurrer to the Answer if the employer did not put any facts about this "defense"
- Oppose any jury instructions based upon this affirmative defense if its not in the pleadings

Use Discovery To Either Preclude or Explore a Mixed Motive Defense

- Contention Interrogatories
  - "Do you contend that Plaintiff's employment was terminated, at least in part, due to his/her [age, sex, race, religion, etc.]
  - If the Answer is no, you can preclude any instructions on a mixed motive defense
  - If the Answer is yes…frame that and pass out laminated copies to all jurors.
- Person Most Knowledgeable Deposition (FRCP 30(b)(6)) on the *discriminatory* reason for the termination

Mixed Motives and Summary Judgment

It is *only* a limitation on *remedies* -- make sure to educate the Court on this fact!!

A mixed motive defense cannot be used to grant summary judgment – if anything, it underscores that a triable issue of fact exists

HOLD THE EMPLOYER ACCOUNTABLE FOR PROVING A MIXED MOTIVE DEFENSE

NO PARTY GETS A JURY INSTRUCTION OR QUESTION ON A VERDICT FORM WHICH IS NOT SUPPORTED BY THE EVIDENCE

Make Defendants *Earn* Their Jury Instructions

- The employer only gets a "mixed motive" or "same decision" instruction (and corresponding question on the verdict form) if (1) they request it ***and*** **(2) it is supported by the evidence at trial.**
  - *Galdamez v. Potter*, 415 F.3d 1015, 1021 (9th Cir. 2005)
- If the employer has not admitted that discrimination played a role in the decision, they cannot request the instruction
  - Always have a pocket brief ready on this issue – make your record!

“Was the employer’s [stated legitimate reason] also a substantial motivating reason for the employee’s termination?”

CACI Verdict Form 2515

Use the employer’s arguments against them – they *also* must prove a “substantial” motivating *legitimate* reason for the termination. Use their own case law and arguments to show why they have not!

Remember – This Is What a Mixed Motive Looks Like….