Calif. Pregnancy Bias Case Shows Cos. Must Engage Workers

By **Erin Coe**

Law360, San Diego (February 26, 2013, 11:32 PM ET) -- A California appeals court held last week that an airport ground services company couldn't escape a discrimination suit by a pregnant worker it fired after she used up her state-mandated pregnancy disability leave, a ruling attorneys say highlights the importance of reaching out to workers about potential accommodations, even when their statutory leave has been exhausted.

Ruling on an issue of first impression, the Second District Court of Appeal found that former Swissport Inc. worker Ana Fuentes Sanchez could sue the company under the state's fair employment statute, which bars discrimination on the basis of sex, disability and medical condition, even though she had exhausted the four-month leave of absence allowed by California's Pregnancy Disability Leave Law. She took the leave after being diagnosed with a high-risk pregnancy, the suit said.

The appeals court determined that the PDLL remedies augment, rather than supplant, the remedies governing pregnancy, childbirth and pregnancy-related medical conditions set forth in the state's Fair Employment and Housing Act.

While the decision does not mean that employees are entitled to indefinite leave or additional leave that would cause undue hardship for companies, it underscores how critical it is for employers to take part in an interactive process to attempt to accommodate a worker or determine whether additional leave is required, attorneys say.

"It is clear from the decision here that the court will not approve an employer discharging an employee simply for exceeding four months of pregnancy disability leave without any interactive process," Wilson Turner Kosmo LLP partner Lonny Zilberman said.

Zilberman said there was no evidence in the current case that Swissport had engaged in any interactive process with the employee, and that the lesson for all employers is that they shouldn't automatically fire a worker who has used up all statutory leave.

"If someone is out on pregnancy disability leave or any leave and that leave ends, don't pull the trigger before reaching out and communicating with the worker and getting feedback on what's going on," he said. "If the employer in this case had done that and the worker had responded to say when she could come back, it might not have fired her, or if she had failed to respond, the employer would have been on better footing."

Sanchez initially filed suit in July 2011 after Swissport fired her from her cleaning agent job. In late February 2009, she was diagnosed with a high-risk pregnancy, which required that she go on bed rest, according to the ruling. She was due to give birth in mid-October 2009 and requested a

leave of absence from Swissport, which granted her about 19 weeks of leave, including vacation days and time off under the PDLL and California Family Rights Act. She was fired in mid-July 2009.

Sanchez alleged she had been fired as a result of the high-risk pregnancy and that Swissport had failed to make a reasonable accommodation for her disability, saying it would not have caused the company an undue burden to extend her leave of absence until shortly after she had delivered her baby. The trial court dismissed the case for failure to state an actionable claim under the FEHA, but the appeals court overturned the lower court's ruling on Feb. 21.

The PDLL allows for employees with pregnancy-related disabilities to take up to 16 weeks of leave, while the California Family Rights Act permits up to 12 weeks, which can add up to a lot of time away from the job, according to Hirschfeld Kraemer LLP founding partner Stephen Hirschfeld. Small businesses or companies waiting for a high-level executive to return from leave may not be able to accommodate longer absences, but they still have to engage with employees to see how long they need to be on leave, if they could work part-time or whether another option may be feasible, he said.

“When an employer has an employee who has some kind of medical, physical or emotional ailment, the law requires it to sit down and look at what can be done, if possible, to accommodate that person to see whether the worker can remain gainfully employed and the employer can continue to have the needs of the job met,” he said.

While the ruling makes clear that employers’ obligations to workers are not over just because statutory leave has been exhausted, Hirschfeld cautioned company executives not to let this ruling worry them to the point they start making questionable hiring or promotion decisions.

“Corporate executives are trying to do more with less and feel tremendous pressure to find people who meet their high expectations,” he said. “They may look at all the leaves available [based on this ruling] and automatically think that they'd better not put someone in a job for fear [that] the worker asks for all this time off. But corporate executives have to be careful that they don’t overreact to the decision.”

When considering an applicant for a job or promotion, executives should be upfront about whether a position involves major time commitments and traveling so that applicants understand the requirements of the job, but to assume a job’s demands would be tougher on a woman than a man would constitute sex discrimination, he said.

“Companies shouldn’t focus on the person, but on the needs of the job,” he said.

According to Zilberman, the ruling could also be used by plaintiffs lawyers in other types of disability cases. For example, if a worker suffering from migraine headaches was fired for missing too much work, he or she could cite the Sanchez ruling to argue that even though the employee violated the company’s attendance policy, the employer may still be required to consider whether a reasonable accommodation exists.

“If I were a plaintiffs lawyer, this decision would be another example of a case to put in my quiver,” he said.

However, the appeals court's decision may not be the last word in the case, as Swissport could still decide to submit a petition for review of the decision to the California Supreme Court. Hirschfeld said it could be a case the state’s high court would want to take.

“This whole issue over family life interfering with the job is an important enough issue that the Supreme Court may look into it,” he said. “These are the kind of cases it may want to send a message to everyone so that they know what the rules are.”

Sanchez is represented by Ebby S. Bakhtiar of Livingston Bakhtiar APC and Carney R. Shegerian of Shegerian & Associates Inc.

Swissport is represented by Patrick J. Cain of Rodi Pollock Pettker Christian & Pramov ALC.

The case is Sanchez v. Swissport Inc., B237761, in the Court of Appeal of the State of California, Second Appellate District.

--Additional reporting by Scott Flaherty. Editing by Elizabeth Bowen.

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