ERVIN COHEN & JESSUP LLP
It's not a common practice.®

ECJ

1992-2012: 20 YEARS OF EMPLOYMENT LAW REPORTING

March 2013

Reporter

Employment Law

by Karina B. Sterman, Esq.

Pregnant With Practical Possibilities

California state courts see an average of ten to twenty employment lawsuits filed every day. Discrimination and wrongful termination claims are still quite prevalent in those filings. The recent California Supreme Court case *Harris v. City of Santa Monica* may be singly responsible for curbing such lawsuits in the future.

Wynona Harris was hired as a bus driver by the City of Santa Monica. During her introductory 40-day training period she had a "preventable" accident. Although Harris survived her introductory period and became a probationary part-time bus driver, she had a second preventable accident during her three-month probationary period. These accidents as well as an attendance issue led to a "needs further development" rating by the end of Harris' probationary period. A couple weeks after another attendance issue, Harris disclosed to her supervisor that she was pregnant. A few days after this, Harris' supervisor attended a meeting where he received a list of drivers who were not meeting standards for continued employment, and Harris was on that list. She was terminated two days later.

Harris sued the City of Santa Monica for pregnancy discrimination and the case was tried before a jury. At trial, a dispute arose between Harris and the City as to the appropriate jury instruction on the law pertaining to Harris' firing. Harris asked the court to instruct the jury with a "motivating reason" instruction, which states that if the jury finds that Harris' pregnancy was a motivating reason for her termination, then the termination was unlawful and discriminatory. The City, however, argued that the court should instruct the jury with a "mixed motive" instruction, which states that if the employer's termination was motivated by both discriminatory and nondiscriminatory legitimate reasons, then the employer is not liable if it established that its nondiscriminatory reason, standing alone, would have resulted in the termination. Harris won the jury instruction battle and then went on to win the case.

The City appealed the jury verdict and the lower court's

refusal to give the jury the "mixed motive" instruction and convinced the Court of Appeal that it was right! The case was therefore remanded back for a new trial. Harris appealed this decision to the California Supreme Court and tried to preserve her win and the lower court's "motivating reason" jury instruction. The Supreme Court, however, found in favor of the City and issued a ruling that is both edifying and incredibly understanding of the typical employer's predicament:

"When a plaintiff has shown by a preponderance of the evidence that discrimination was a substantial factor motivating his or her termination, the employer is entitled to demonstrate that legitimate, nondiscriminatory reasons would have led it to make the same decision at the time. If the employer proved by a preponderance of the evidence that it would have made the same decision for lawful reasons, then the plaintiff cannot be awarded damages, back pay, or an order of reinstatement. However, where appropriate, the plaintiff may be entitled to declaratory or injunctive relief. The plaintiff also may be eligible for an award of reasonable attorney's fees and costs…"

While the *Harris v. City of Santa Monica* decision is not crystal clear about its implication for all future discrimination cases, it is pregnant with practical possibilities for employers who no longer have to be paralyzed into inaction in response to legitimate poor performance by the mere possibility of being sued for discrimination.

Did you know…

That an employer's obligation to accommodate an employee's pregnancy related disability does not begin and end with providing her with the maximum required pregnancy disability leave? Indeed, as employers were recently reminded in a California Court of Appeal case (Sanchez v. Swissport), employers must continue to engage in the interactive process under the FEHA even if the employee has exhausted her pregnancy disability leave. Because pregnancy is a covered disability under FEHA, an employer must consider and offer reasonable accommodations for it, which may include permitting more time off than statutory pregnancy disability leave requires. A big confusing circle? You bet! A reminder to be careful before firing an employee who has exhausted a leave? Yup. That too.

Well, now you know!

If you have any questions regarding this bulletin, please contact Karina B. Sterman, Esq. at (310) 281-6395 or ksterman@ecjlaw.com or Kelly O. Scott, Esq., Editor of this publication and Head of ECJ's Employment Law Department, at (310) 281-6348 or kscott@ecjlaw.com. If one of your colleagues would like to be a part of the Employment Law Reporter mailing list, or if you would like to receive copies electronically, please contact Brandi Franzman at (310) 281-6328 or bfranzman@ecjlaw.com.