A Timely Analysis of Legal Developments

ASAP®

February 26, 2013

Are We There Yet? California Appellate Court Rules There Is No Statutory Cap for Pregnancy-Disability Leave

By Margaret Gillespie

The interplay among state and federal employment leave requirements can be confusing and often becomes a trap for the unwary, as occurred in the recent case of *Sanchez v. Swissport, Inc.*, No. B237761 (Cal. Ct. App. Feb. 21, 2013).

In a case of first impression, the court in *Sanchez* concluded that an employee who has exhausted all permissible leave under California's Pregnancy Disability Leave statute (PDL) and the California Family Rights Act (CFRA) nevertheless may sue her employer for refusing to give her additional leave under separate provisions of California's Fair Employment and Housing Act (FEHA).

The plaintiff was employed by defendant Swissport, Inc. when she became pregnant. A few weeks into her pregnancy she was diagnosed with a high-risk pregnancy, requiring bed rest for the remainder of her pregnancy. She requested leave from work, which Swissport initially granted. After 19 weeks of leave—with three months left to go on her pregnancy—the plaintiff's employment was terminated because she had exhausted all available PDL and CFRA leave and was unable to return to work. The plaintiff then filed suit, asserting that Swissport was liable for failing to grant her additional leave under the FEHA.

Swissport filed a demurrer (*i.e.*, a motion to dismiss) to the complaint and argued that, because it had provided the plaintiff with the four months of disability leave mandated by the PDL and CFRA, it necessarily had satisfied all of its obligations under the FEHA. The plaintiff opposed the motion by contending that she was also entitled to reasonable accommodation for her pregnancy-related disability under the FEHA, separate and apart from her leave rights under the PDL and CFRA. On reply, Swissport's position was summed up as follows: "The pregnancy disability statutes and regulations are clear: pregnancy disability leave is capped at four months. [The plaintiff] was permitted all of the pregnancy leave to which she was entitled, and her employment was terminated only when that leave expired and she was not able to return to work."

The trial court agreed with Swissport. In granting the motion to dismiss, the trial court concluded that Swissport's conduct in terminating the plaintiff "after her statutorily authorized pregnancy leave expired and . . . she was unable to return to work [was] expressly permitted under the Government Code."

The appellate court, however, disagreed. After analyzing the leave requirements of the PDL, CFRA, and FEHA, the appellate court concluded that the PDL was meant "to *augment* rather than

supplant" the leave rights otherwise afforded by the FEHA. Thus, where an employee is disabled by pregnancy, she is entitled not only to 4 months of leave under the PDL, but also to a reasonable accommodation for her disability (including a longer leave of absence) absent an undue hardship to the employer. The appellate court in *Sanchez* also held that employers must engage in the interactive process with employees disabled by pregnancy and pregnancy-related conditions just as they must do with employees disabled by other conditions.

What does this case mean for employers? In short, it means there is no statutory cap on pregnancy disability leave for employers with five or more employees. An employee disabled by pregnancy or pregnancy-related conditions may take up to 4 months of pregnancy-disability leave under the PDL and then also may be entitled to take additional open-ended leave as a reasonable accommodation for any continued pregnancy-related disability under the FEHA. Once the baby is born, and assuming the employee is eligible for CFRA leave, the employee may also be entitled to take another 12 weeks of CFRA leave for "baby bonding."[1] In other words, an employee's pregnancy-related leave may last far longer than the pregnancy itself.

In the context of the *Sanchez* opinion, California employers also should be mindful of the new pregnancy disability leave regulations that went into effect on December 30, 2012. The new regulations expand the circumstances under which a woman may be viewed as "disabled by pregnancy," including severe morning sickness, gestational diabetes, pregnancy-induced hypertension, preeclampsia, and post-partum depression. The new regulations also clarify that a woman may be disabled by pregnancy if she needs time off for prenatal or postnatal care, bed rest, childbirth, loss or end of pregnancy, or recovery from childbirth or loss or end of pregnancy.[2]

With these recent developments in the laws surrounding pregnancy-disability leaves, California employers should review their leave of absence policies to ensure that they are compliant with current requirements. Employers also should review their policies and practices regarding disability accommodations to reflect the requirements for engaging in the interactive process and reasonably accommodating pregnancy, childbirth, and related medical conditions.

Margaret Gillespie is a Shareholder in Littler Mendelson's Los Angeles (Century City) office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, or Ms. Gillespie at mgillespie@littler.com.

1 *But see* Cal. Code Regs. tit. 2, § 7297.6(c)(1) (allowing an employer to apply the CFRA to an employee's pregnancy-disability leave when PDL is exhausted, but the child has not yet been born).

2 For a more detailed discussion of these new regulations, *see* Michelle Barrett, *Lost in Translation: California's New Pregnancy Disability Leave Regulations and Their New, Contradictory Obligations*, Littler ASAP (Jan. 4, 2013).