

Discrimination ruling could limit lawsuits

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pregnancy was a "motivating factor" in her firing and awarded her \$177,905 in damages.

An appeals court overturned the verdict. Although it found substantial evidence of pregnancy discrimination, it said the trial-court judge should have instructed the jury that if there were both legitimate and discriminatory reasons for her firing, the city could have escaped liability if it could prove — with a preponderance of evidence — that it would have fired her for the legitimate reasons alone.

The Supreme Court agreed that the trial judge erred in jury instructions and overturned the damages. However, it also said that if a plaintiff can prove that discrimination was a substantial motivating factor, the plaintiff could get attorneys fees and costs, even if no damages are awarded.

Although the decision will make it harder for plaintiffs to win damages, it's not a slam dunk for employers, says Noah Lebowitz, an attorney with Duckworth Peters Lebowitz Olivier who represents employees.

Burden of proof

He explains: Before the Harris decision, plaintiffs could win damages and attorney fees if they could prove discrimination was a motivating factor in an adverse employment decision. If the employer offered another reason for the action, the plaintiff had to prove this was a pretext or sham.

Since the Harris deci-

sion, a plaintiff must prove discrimination was not just a factor but a substantial factor to win damages and/or attorneys fees.

But if the employer can prove it would have made the same decision for legitimate reasons, even if there was substantial evidence of discrimination, it won't have to pay damages, although it could have to pay attorney fees. To avoid damages, however, the burden of proof is on the employer.

"There is no question that (the Harris decision) appears to create a higher standard for plaintiffs to meet to establish a claim for back pay," says David Lowe, an attorney with Rudy, Exelrod, Zieff & Lowe who represents employees. Whether it will make lawyers more reluctant to take on cases depends on how it plays out in the lower courts.

One question is how the word "substantial" will be interpreted.

"At least in the short term, (the decision) might make cases more difficult to settle because the management lawyers are going to do what they are already doing ... jumping up and down, saying this is a huge standard, you'll never get any money, so take a lowball offer and go away," Lebowitz says.

Attorney Steven Hirschfeld, who represents employers, says, "What this decision is really doing is weeding out the unusually weak, the frivolous cases, where there is no evidence of discrimination or it's pretty darn clear the employer had a pretty good reason for the

employment decision."

Rodriguez case

In the Rodriguez case, the jury determined that her former employer — Valley Vista Services and its parent company Zerep Management — failed to make reasonable accommodations for her mental illness, including panic attacks, Kokozyan says.

Rodriguez worked in customer service for the waste-disposal company. The company said she was fired for failing to call her supervisors and explain an absence that lasted longer than three days. Her lawyers said she was on leave when she was fired.

After being instructed about the Harris decision, the Los Angeles Superior Court jury decided that "her disability was a substantial motivating factor" for her termination, Kokozyan says. Its \$21.8 million award included almost \$16.6 million in punitive damages.

Zerep's attorney Steven Joffe called the verdict "shocking and outrageous. We will seek a new trial."

Pursuing a case

As a worker, how do you know if you have a discrimination case?

In California, unless you have an employment contract, employers generally can hire and fire at will as long as they don't break discrimination or certain other laws, such as those that prohibit retaliation against whistle-blowers.

The California Fair Housing and Employment Act outlaws discrimination based on