MEMORANDUM OF LAW

DATE: January 29, 1990

TO: Dan Teague, Long Term Disability Administrator

FROM: City Attorney

SUBJECT: Pregnancy Benefits

Recently you asked this office to review the City's Long Term Disability (LTD) benefits for pregnancy in light of the recent Sixth Circuit opinion Harness v. Hartz Mountain Corp., 877 F.2d 1307 (6th Cir. 1989). Specifically, you want to know if pregnant women applying for LTD benefits may apply for the benefits thirty days prior to their due dates and thereby begin accruing benefits the day their leave begins. Such a procedure would eliminate the thirty day waiting period that is currently required as a prerequisite to receiving LTD benefits.

42 U.S.C. section 2000e(k) reads:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title ┌42 USCS Section 2000e-2(h)σ shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications
>
> have arisen from an abortion: Provided, ┌tσhat nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion (emphasis added).

The court in Hartz Mountain states that the provisions of 42

U.S.C. section 2000e(k) reflect the minimum amount of benefits that women must receive when they request leave due to a pregnancy. It also indicates that the benefits provided by the Pregnancy Discrimination Act (PDA), 42 U.S.C. 2000e(k) and its Kentucky counterpart, are a "floor beneath which pregnancy disability benefits may not drop, not a ceiling above which they may not rise." Id. at 1307, 1310. The California counterpart to the PDA is, like the Kentucky statute discussed in Hartz Mountain, almost identical to the PDA.

To date, cases defining the rights of pregnant women protected by the PDA and its state counterparts deal with unpaid leaves of absence and rights to reinstatement at the end of the leave. They do not address the issue of paid leaves of absence. However, in California Federal S. & L. Assn. v. Guerra, 479 U.S. 272 (1987), the U.S. Supreme Court, when addressing the parameters of the California statute, said: "The statute does not compel employers to provide paid leave to pregnant employees. Accordingly, the only benefit pregnant workers actually derive from Section 12945(b)(2) is a qualified right to reinstatement."

Although the Court has indicated some preferential treatment may be accorded pregnant women, there is no indication that the preferential treatment extends to monetary compensation not offered to other disabled employees. In fact the statute indicates that pregnant women are to be treated the same as other persons similarly disabled in their ability or inability to work. Wages and benefits such as LTD from employment constitute a property interest of an employee. Under the guidelines of the anti-discrimination statutes, both federal and state, employment rights are to be accorded equally to all employees. Therefore, although allowing pregnant women to apply for LTD benefits prior to the time they actually begin their leave may seem reasonable under the Court's allowance for some preferential treatment for pregnant women, such action would have a decidedly discriminatory effect on other employees. Any employee who has a date certain for medical treatment should arguably be accorded the same opportunity to pre-apply for benefits and thereby avoid the mandatory waiting period. To disallow other employees the right to pre-apply for LTD benefits would discriminatorily deprive those employees of a property interest, and clearly violate the nondiscriminatory intent of the statute. It is therefore our opinion that pregnant women may not apply for LTD benefits prior to the date their leave actually begins.

JOHN W. WITT, City Attorney

By

Sharon A. Marshall
Deputy City Attorney

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