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In The Voice

Pregnancy Discrimination and the Right to Work Guidance

by Diane S. Davis

With more than 70 percent of women with children currently in the workforce, pregnancy discrimination is the fastest growing area of discrimination cases in the United States. The U.S. Equal Employment Opportunity Commission (EEOC) asserts that over the last 10 years pregnancy discrimination charges filed with the EEOC have increased over 35 percent. While many pregnant workers are able to continue working throughout their pregnancy, fully understanding the legal rights afforded to pregnant workers under the applicable laws, including the Pregnancy Discrimination Act (PDA) and the Americans with Disability Act (ADA), is necessary for the full protection of our pregnant workers, especially those workers who experience pregnancy-related complications.

Case Law Before Enactment of the PDA

Before the PDA was enacted in 1978, many women were terminated after their employers realized that they were pregnant. However, in 1974, in *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974), the United States Supreme Court held that the Cleveland Board of Education's maternity leave policies that terminated the employment of pregnant teachers four to six months before their due dates violated due process. Two subsequent United States Supreme Court decisions, however, concluded that treatment based on pregnancy was not s*x-based discrimination. In *Geduldig v. Aiello*, 417 U.S. 474 (1974), the Supreme Court ruled that California was permitted to exclude pregnancy-related disability from its temporary disability benefits program under the Equal Protection Clause. Moreover, in *General Electric Co. v. Gilbert,* 429 U.S. 125 (1976), the Supreme Court also held that denying disability benefits to pregnant workers was not prohibited s*x discrimination under Title VII.

General Protections Under the PDA

With the enactment of Title VII of the Civil Rights Act in 1964, women were afforded protection against gender discrimination. This simply meant that an employer could prevail against a Title VII gender discrimination claim by establishing that it treated all of its employees the same. Although Title VII protected a woman from gender discrimination, Title VII did not protect a working mother from her employer's discriminatory acts. The PDA was enacted as a solution to this loophole. The PDA is applicable to employers with 15 or more employees and recognizes that discrimination on the basis of pregnancy, childbirth, or a related medical condition is unlawful s*x discrimination under Title VII. The PDA also prohibits an employer from refusing to hire a woman because of her pregnancy-related condition as long as she is able to perform the primary functions or responsibilities of the job. 42 U.S.C, § 2000 e(k). Moreover, the PDA prohibits additional discriminatory acts related to a pregnant worker's employment, including salary, job assignments, promotion, layoffs, training, fringe benefits, firing, and other terms or conditions of employment.

Expanding the Reach: EEOC's Latest Guidance Addressing the Scope of the PDA

On July 14, 2014, the Equal Employment Commission issued guidance regarding pregnancy discrimination. *See* EEOC Enforcement on Pregnancy Discrimination and Related Issues § I.A.5 (July 14, 2014). This was the first significant guidance regarding the PDA since 1983 and superseded the 1983 guidance. The 2014 guidance stated that an employee does not need to be pregnant to be afforded protection under the PDA. *Id.*; *See International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America v, Johnson Controls,* 499 U.S. 187 (1991). This latest guidance also reiterated that pregnancy alone is not a disability under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et*

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seq. However, a pregnant worker who experiences pregnancy-related impairments is likely to be protected under the ADA, requiring an employer to provide reasonable accommodations to pregnant workers. The EEOC guidance further states that an employer has an obligation to provide light duty for pregnant workers on the same terms and conditions that light duty is provided to employees who are injured on the job with a resulting ability or inability to work similar to the pregnant worker's. Moreover, the guidance provides that an employer is prohibited from taking any adverse actions based on perceptions, assumptions, or stereotypes associated with pregnant workers even if the employer believes that it is acting in the best interest of a pregnant worker. Although the guidance is simply advisory, it includes several controversial positions that have resulted in additional commentary from various parties including EEOC Commissioner Constance Barker, who opined that the guidance was flawed. *See* Public Statement of EEOC Comm'r Constance S. Barker, Issuance of EEOC Enforcement guidance on Pregnancy Discrimination and Related Issues (July 14, 2014).

The Latest Supreme Court Opportunity to Analyze the PDA

The EEOC opposes the interpretation of some courts that an employer, under the PDA, is not required to provide light duty for a pregnant worker if the employer has a policy or practice limiting light duty to workers injured on the job and/or employees with disabilities under the ADA. In *Young v. United Parcel Serv., Inc.,* 707 F.3d 437 (4th Cir. 2013), the United States Court of Appeals for the Fourth Circuit held that a workplace policy limiting light duty to employees injured on the job, employees who have disabilities within the meaning of the ADA, and employees who have lost their certification to drive commercial motor vehicles does not violate the PDA because the policy is not direct evidence of pregnancy discrimination nor does it create an inference of discrimination. On July 1, 2014, the United States Supreme Court agreed to review the *Young* decision to determine whether an employer is obligated under the PDA to provide pregnant employees with workplace accommodations under the PDA. 81 U.S.L.W. 3602 (U.S. July 1, 2014) (No. 12-1226). On December 3, 2014, the United States Supreme Court will hear oral arguments in the matter.

Conclusion

Pregnancy should not be considered an obstacle to a woman's right to work, but it could be a condition that affects her ability to perform certain conditions of the work. The PDA not only addresses hiring tactics but also applies to all other aspects of employment, including firing, promotion, and salaries, to protect against discrimination based on current, past, and even potential pregnancies. All employers should pay close attention now that the United States Supreme Court is poised to provide clear guidance regarding the scope of reasonable accommodations to be provided by an employer to a pregnant worker in *Young v. United Parcel Serv. Inc.*

Diane S. Davis is a senior associate with **Funderburk Funderburk Courtois LLP**, a defense firm in Houston, Texas. She is licensed to practice law in Texas and Louisiana. Ms. Davis' practices areas include product liability, premises liability, commercial litigation, construction litigation, and various employment related matters. Ms. Davis is a member of the DRI Women in the Law Committee.

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