SAN FRANCISCO
Daily Journal
www.dailyjournal.com
TUESDAY, JULY 29, 2014
PERSPECTIVE

# Spotlight on pregnancy discrimination

By Kirstin Muller

On July 14, as a part of the Strategic Enforcement Plan it rolled out in 2013, the Equal Employment Opportunity Commission (EEOC) issued new guidance on pregnancy discrimination and related issues. This is the first comprehensive update since 1983 (coincidentally, the same year Jane Fonda released her "Pregnancy, Birth and Recovery" workout video) and acts as a reminder that the Pregnancy Discrimination Act (PDA), which amended Title VII of the Civil Rights Act in 1978, is still relevant and has continuing applicability even in today's more family friendly workplaces. This update coincides with the U.S. Supreme Court's decision to hear a pregnancy discrimination case in which the court has the opportunity to define what accommodations employers are legally required to provide to pregnant employees.

In the guidance, the EEOC focuses on four areas: (1) Title VII's prohibition against pregnancy discrimination; (2) the Americans with Disabilities Act's (ADA) protections for employees with pregnancy-related impairments under the 2008 amendments; (3) other requirements and laws impacting pregnant workers, including the Affordable Care Act; and (4) best practices for employers.

The guidance acts as a reminder that the PDA covers not just discrimination against pregnant women, but also discrimination against women for past pregnancy, potential or intended pregnancy (i.e., based on reproductive risk, intention to become pregnant, infertility treatment, use of contraception, etc.), discrimination based on lactation and breastfeeding, and abortion. It reminds employers that "Title VII requires that individuals affected by pregnancy, childbirth, or related medical conditions be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work." So, if an employer provides light duty assignments to other employees with


Shutterstock

limitations, then it must provide those same assignments to employees disabled by pregnancy.

The guidance also reminds employers that the PDA is not just for women. While the PDA's antidiscrimination provisions relating to limitations imposed by pregnancy or childbirth protect women, its provisions relating to parental leave protect men and women equally. An employer that offers leave time to mothers for baby bonding, for instance, must offer that same amount of time to fathers.

The EEOC's interpretation of the 2008 ADA amendments confirms that while the ADA does not protect pregnancy as a disability, it will protect pregnancy-related impairments where they meet the act's requirements. The EEOC also uses this opportunity to reinforce its 2008 determination that temporary impairments (those lasting less than six months) are also protected by the ADA. In addition, the best practices section, aside from offering the standard fare of suggestions on policies, training and complaint handling, also gives employers and their attorneys insight into the EEOC's next areas for inquiry on this topic. For instance, the EEOC asks employers to consider their "restrictive leave policies" (policies that limit leave taking during introductory periods) to determine whether they disproportionately impact pregnant women and to review workplace policies that "limit employee flexibility" to determine whether they are "necessary for business operations." Among policies that limit employee flexibility are policies that call for fixed hours of work and mandatory overtime.

This guidance follows on the heels of the Supreme Court's decision to grant certiorari in the *Young v. United Parcel Service Inc.*, 12-1226, case from the 4th U.S. Circuit Court of Appeals. In the case, Peggy Young, a UPS driver, asks the Supreme Court to overturn UPS's summary judgment win on her pregnancy and disability discrimination claims.

Young, who had worked part-time for UPS since 2002, took a leave of absence in the summer of 2006 to undergo in vitro fertilization. During her leave, she submitted medical notes to UPS that would limit her ability to lift packages of more than 20 pounds once she returned. UPS policy listed the ability to "[l]ift ... packages weighing up to 70 pounds" as an essential function for all drivers. On a number of telephone calls during her leave, UPS informed Young that she could not return to UPS until her medical providers lifted the restriction. Due to UPS policy, Young remained on leave during her entire pregnancy, exhausting her Family and Medical Leave Act leave and losing her health benefits. After she gave birth in April 2007, she returned to UPS.

In July 2007, Young filed a complaint with the EEOC and proceeded with a federal court action in 2008. She filed suit alleging sex (pregnancy) and race discrimination under Title VII (the PDA) and disability discrimination under the ADA. At issue were UPS's practices under its collective bargaining agreement of giving light duty work ("temporary alternate work") to employees following on-the-job injuries or to those with permanent impairments under the ADA, as well as giving "inside" jobs to employees who had lost their Department of Transportation Certifications. Young also alleged the UPS's conduct violated the ADA because it regarded her as having an impairment.

On appeal, the 4th Circuit found that the trial court had properly granted summary judgment, holding that there was no evidence that UPS saw Young as disabled. In addition, the 4th Circuit determined there was no evidence that Young was treated any differently than other employees with temporary disabilities, such that theirs, like Young's, did not merit ADA protection and entitle them to light duty positions.

The Supreme Court granted certiorari on the following question: "whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are 'similar in their ability or inability to work.'" Simply stated, the court will have to decide whether to adopt the EEOC's view, stated in its guidance, or uphold the 4th Circuit's decision. The case is scheduled for oral argument in the court's October 2014 term.

Practically speaking, California employers have arguably more to worry about in complying with California's Fair Employment and Housing Act, which directly prohibits pregnancy discrimination, and the Pregnancy Disability Leave Act. However, understanding the direction of federal courts, to which group of impaired employees they should be comparing their pregnant employees suffering from impairments (those who qualify for workers' compensation or ADA protected status or those who do not), and, certainly, the EEOC's current enforcement position are important for employers seeking to proactively prevent these claims.


KIRSTIN MULLER
*Hirschfeld Kraemer LLP*

**Kirstin Muller** *is a partner in the Southern California office of Hirschfeld Kraemer LLP. She can be reached at KMuller@hkemploymentlaw.com or http://www.hkemploymentlaw.com*

Reprinted with permission from the ***Daily Journal***. ©2014 Daily Journal Corporation. All rights reserved. Reprinted by ReprintPros 949-702-5390.