PRESENTATION

Baby Bump Blunders! Avoiding Pregnancy Discrimination in the Workplace

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EXPAND YOUR EXPECTATIONS℠

Agenda

- What the pregnancy discrimination law does and does not require from employers;
- When family care issues can lead to claims of pregnancy or gender discrimination;
- How to use a checklist for analyzing granting light duty to or making other adjustments for pregnant employees.

How We Got Where We Are

- In 1964, Congress passed Title VII of the 1964 Civil Rights Act which prohibits sex discrimination.

- In 1976, the Supreme Court ruled in *General Electric Company v. Gilbert* that discrimination on the basis of pregnancy was not sex discrimination, but rather discrimination between pregnant and non-pregnant persons which was not covered by Title VII.

- In 1978, Congress passed the Pregnancy Discrimination Act to amend Title VII to make it clear that the prohibition on sex discrimination includes *"because of or on the basis of pregnancy, childbirth or related medical conditions."*

How We Got Where We Are (continued)

The PDA also states, “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.”

What About Protecting the Baby-to-be?

- In 1991, the Supreme Court granted certiorari to resolve a conflict between the Fourth, Seventh and Eleventh Circuits as to the legality of fetal protection policies, and to address "whether an employer, seeking to protect potential fetuses, may discriminate against women just because of their ability to become pregnant."

- The Court held that Title VII forbids sex-specific fetal protection policies even where the employer's motives are to help the female employees.

- *United Automobile, Aerospace & Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.*, 111 S. Ct. 1196, 55 EPD 40,605 (1991)

What About Protecting the Baby-to-be? (continued)

- Johnson Controls raised concerns about tort liability if an unborn fetus was harmed by exposure to lead on-the-job.

- According to the Court, the basis for holding an employer liable "seems remote at best" if, "under general tort principles, Title VII bans sex-specific fetal protection policies, the employer fully informs the woman of the risk, and the employer has not acted negligently…"

Quick Statistics

- 1997 – 3,900 PDA charges filed with the EEOC
- 2013 – 5,342 PDA charges
- From 1996 to 2005, PDA charges by women of color increased by 76% while PDA claims overall increased 25% during the same time period.
- The majority of the charges are allegations of termination because of pregnancy.
- Other claims – closer scrutiny, harsher discipline, suspensions pending medical releases, medical examinations not job-related or consistent with business necessity, and forced leave.

In 2012, the EEOC announced that part of its strategic enforcement plan would be a renewed focus on pregnancy discrimination and accommodations for pregnant workers.

Pregnancy Discrimination Lawsuits

- *EEOC v. Reed Pierce's Sportsman' Grille*: In the first pregnancy discrimination lawsuit of 2013, the employer allegedly terminated Melody McKinley, who was four months pregnant with her first child.

- When firing McKinley, the defendant allegedly said, "The baby is taking its toll on you."

- The EEOC subsequently filed suit in the U.S. District Court for the Southern District of Mississippi.

- After the defendant lost two motions to dismiss the case, it agreed to a $20,000 settlement.

Pregnancy Discrimination Lawsuits

- *EEOC v. Adventures in Learning Aurora, Inc*. The employer allegedly forced a pregnant employee to quit after refusing to allow her to work after her fourth month of pregnancy.

- The EEOC filed suit in the U.S. District Court for the Northern District of Illinois, charging the defendant with pregnancy discrimination.

- Shortly after the suit was filed, the defendant settled the case for $31,000.

Pregnancy Discrimination Lawsuits

- *EEOC v. Ramin, Inc.* The EEOC filed suit against Ramin Inc., the owner of a Comfort Inn & Suites, asserting it fired a housekeeper after she reported her pregnancy.

- The EEOC claimed that the employer would not allow the woman to continue to work as a housekeeper because of the potential harm that her job could cause the baby.

- The employer agreed to pay $2,500 in back pay and $25,000 in compensatory and punitive damages.

Pregnancy Discrimination Lawsuits

- *EEOC v. Landau Uniforms, Inc*. The EEOC asserted that the defendant treated its employee, Tara Smith, unequally because of her pregnancy.
- The EEOC also claimed that the employer disciplined and discharged Smith because of her pregnancy.
- The EEOC filed suit in the U.S. District Court for the Northern District of Mississippi.
- Subsequently, the parties settled the suit for $80,000.

Pregnancy Discrimination Lawsuits

- *EEOC v. Engineering Documentation Systems, Inc*. The EEOC claimed that a management official allegedly made derogatory remarks about the pregnant employee.

- The employer also allegedly refused to move the woman's office closer to the restroom to accommodate her nausea.

- While the pregnant employee was out on leave, the employer changed her job description and subsequently terminated her while she was out on leave.

- After the EEOC filed suit in the U.S. District Court for the District of Nevada, the parties reached a settlement agreement for $70,000.

Pregnancy Discrimination Lawsuits

- *EEOC v. James E. Brown & Associates, PLLC*: A Washington-based law firm allegedly rescinded a job offer for an associate attorney position after discovering the applicant was six months pregnant.
- The EEOC filed suit in the U.S. District Court for the District of Columbia.
- In June 2013, the parties settled the lawsuit for $18,000.
- The firm also signed a two-year consent decree, agreeing to implement a policy that prohibits discrimination and provides for mandatory training to the firm's personnel.

Pregnancy Discrimination Lawsuits

- *EEOC v. Platinum P.T.S. Inc. D/B/A/ Platinum Production Testing Services*. A clerk requested time off for medical treatment to address a miscarriage.

- The woman missed several days of work and anticipated staying home to deal with her medical situation. After she took five days off, the employer terminated her position.

- The EEOC's San Antonio office found reasonable cause to believe the employer violated the PDA, and settlement discussions ensued.

- The employer agreed to pay $100,000 to settle the pregnancy discrimination suit.

The PDA Litigation to Watch:

Young v. UPS, Inc.

UPS has a policy of giving light-duty assignments to various categories of employees who are physically unable to do their usual jobs.

Young v. UPS, Inc. *(continued)*

Under the policy, these categories of employees are entitled to light-duty assignments:

- ✓ employees who have been injured on the job;
- ✓ employees who have a qualifying disability under the ADA; and
- ✓ employees who have temporarily lost their DOT certifications.

The Facts . . .

- Ms. Young gives her supervisor a doctor's note stating she should not lift more than 20 pounds for the first 20 weeks of her pregnancy and not more than ten pounds thereafter.
- The supervisor gives the note to HR.
- HR informs Ms. Young that she is not among the categories of employees that are entitled to light duty.
- Ms. Young takes unpaid leave for the duration of her pregnancy, losing income as well as her medical coverage months before the birth of her child.
- Ms. Young sues UPS for pregnancy discrimination under Title VII of the 1964 Civil Rights Act.

Remember

The PDA states, “women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work.”

Ms. Young argued

- When employers give a benefit to some employees who are similar to a pregnant employee in their limitations on working, employers must give that same benefit to the pregnant employee.

- So if UPS gives light-duty assignments to an employee injured on the job who has temporary lifting restrictions, they should also give light-duty assignments to pregnant employees who have temporary lifting restrictions.

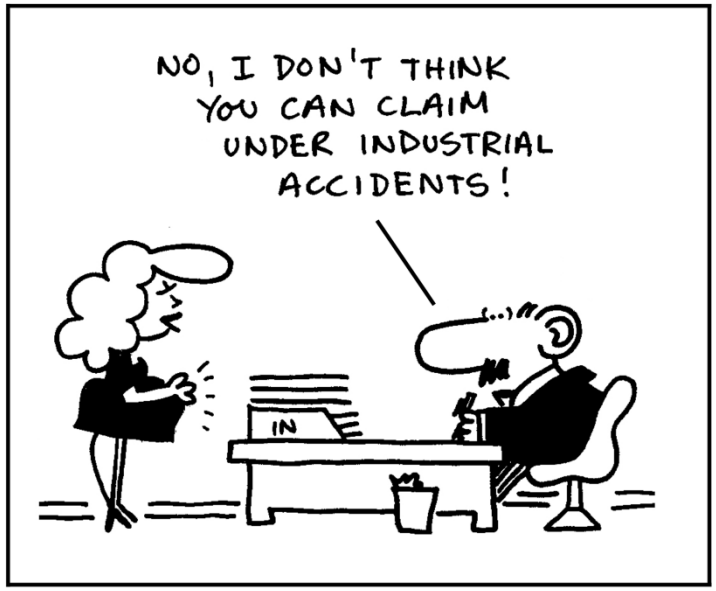
UPS Argued

- The policy is a pregnancy-blind policy and that to win her case Young needed to prove she was denied the accommodation because of bias against her as a pregnant woman.

UPS Argued (continued)

- Many non-pregnant employees were also denied light duty.

- In other words, UPS argued that its policy is not biased against pregnant workers, it's just that pregnant workers don't fit into any of its categories of workers entitled to accommodations.



What did the Fourth Circuit Court of Appeals say about the arguments of the parties?

The Pregnancy Discrimination Act does not, despite the urgings of feminist scholars…, require employers to offer maternity leave or take other steps to make it easier for pregnant women to work. Employers can treat pregnant women as badly as they treat similarly affected but non-pregnant employees…" *Troupe v. May Dep't Stores Co.,* 20 F.3d 734, 738 (7th Cir. 1994)

The Bottom Line

- According to the Court of Appeals, as long as an employer's policy can be described without reference to pregnancy—by identifying in pregnancy-neutral terms the preferred classes of conditions that are entitled to light-duty accommodations—the policy does not discriminate on the basis of pregnancy.

The Bottom Line (continued)

- Under the Fourth Circuit's analysis, the pregnant employee cannot even make out a *prima facie* case of discrimination if all she has for proof is a consistently applied policy like the one used by UPS.

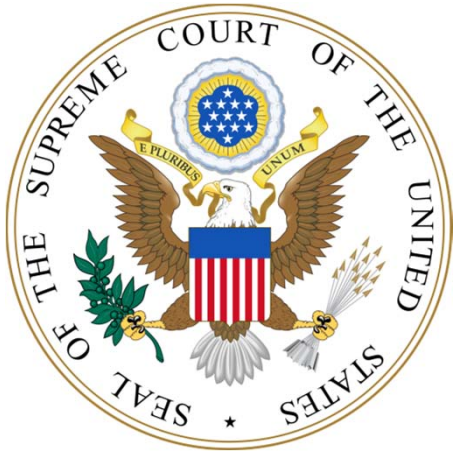
Split of Authority

- Three other appellate courts have also upheld light-duty policies that accommodate some categories of temporarily disabled employees, but not pregnant employees. (5th, 7th, 11th)

- The 6th and 10th Circuits recognize a pregnant female makes out at least a *prima facie* case of discrimination where she can show some employees are accommodated and pregnant women are not.

The “Supremes” Take The Stage

- April 2013 – Ms. Young asked the Supreme Court to hear the case.
- May 2013 – Amicus (Friend of the Court) briefs filed by law professors and women’s rights organizations
- October 2013 – The Supreme Court asked the Solicitor General to weigh in on whether to take the case or not.



The “Supremes” Take The Stage (continued)

- May 19, 2014 – Solicitor General filed brief as requested.
- June 2, 2014 – Ms. Young filed a supplemental brief.
- June 3, 2014 – Matter in conference with the Justices.
- June 4, 2014 – UPS filed a supplemental brief.
- July 1, 2014 – Petition granted; currently being briefed.
- December 3, 2014 – Set for Oral Argument.

What did the Solicitor General tell the Supremes?

- First, the Fourth Circuit Court of Appeals who heard Ms. Young's case and all the other Circuits who side with the Fourth Circuit are WRONG.
- The ***source*** of the employee's temporary lifting restrictions (on or off the job) is not relevant at the *prima facie* case stage of litigation.
- Pregnant employees and employees injured on the job who have lifting restrictions are similar in their ability to work and are proper comparators.
- But, the Fourth Circuit may have been right that an ADA disabled employee is not a proper comparator.

What did the Solicitor General tell the Supremes?
(continued)

- Second, the “question presented does not warrant review at this time.”
- Why?
- Because the ADA amendments expanded the definition of disability to include temporary conditions and made it clear an individual's ability to lift, stand or bend are major life activities under the law.
- An employer must now look at each pregnant employee’s medical condition and limitations to determine if the employee qualifies as a person with a disability entitled to a reasonable accommodation absent undue hardship.

What did the Solicitor General tell the Supremes?
(continued)

- Plus, the EEOC was then considering the adoption of new enforcement guidance on pregnancy discrimination that would address a range of issues related to pregnancy under the PDA and the ADA.

- According to the SG, this guidance would clarify the issues raised by facts like those in the *Young* case "diminishing the need for this Court's review of the question presented at this time."

EEOC Guidance on Pregnancy Discrimination

- Issued July 14, 2014
- “While pregnancy itself is not a disability, pregnant workers and job applicants are not excluded from the protections of the ADA.”
- With the expanded definition of the ADAAA of 2008, the employee may have a pregnancy-related impairment to demonstrate that they have disabilities.
- “An employer is obligated to treat a pregnant employee temporarily unable to perform the functions of her job the same as it treats other employees similarly unable to perform their jobs, whether by providing modified tasks, alternative assignments, leave or fringe benefits.”

EEOC Guidance on Pregnancy Discrimination

- However, an "employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job)."

- 21 examples of what is and what is not pregnancy discrimination.

- Two pages of "Best Practices."

EEOC Continues to Bring Lawsuits

- September 15, 2014 - EEOC sues Tomeldon Co. Inc. d/b/a Pharmacy Solutions in Arlington, Texas: two female employees, Arian Lemon and Emilee Stephens

- Lemon, a pharmacist, notified company's owner and president of her pregnancy in June 2012. In November 2012, he made derogatory comments as her doctor visits increased. Maternity leave in January 2013 and terminated three months later.

- Stephens, a pharmacy tech, requested a change in her work schedule to accommodate doctor's appointments. Met with "negative comments." She was also fired in March 2013.

- EEOC is seeking back pay, compensatory damages, punitive damages, and injunctive relief.

Legislative Action

Pregnant Workers Fairness Act – H.R. 5647

(Died in Committee)

Pregnant Workers Fairness Act – S. 942

(Referred to Committee on Health, Education, Labor and Pensions on 5/4/2013)

The bill requires employers to make the same sorts of accommodations for pregnancy, childbirth, and related medical conditions that they do for disabilities.

Go To Checklist

- If the employee has a healthy pregnancy and is just placed on restrictions for the health of the fetus, assess the following:
  - Where is the employee located and what state/local laws may apply? Do you have a duty to reasonably accommodate just "pregnancy" under a state or local law?
  - Ten states and two cities have passed laws requiring some employers to provide reasonable accommodations to pregnant workers: Alaska, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, New Jersey, Texas, West Virginia, New York City, and Philadelphia.

Go To Checklist (continued)

- If no state/local law, look to the Pregnancy Discrimination Act: Do you have a light-duty/accommodation policy that applies to temporary conditions that are not disabling?
- Who is covered by the policy?
- Currently in the Fifth Circuit you can have a policy that says you provide light duty to employees injured on the job and not employees who are injured or ill for other reasons like pregnancy.
- The policy must be “pregnancy blind” and consistently applied.
- To be lawful, there can be no evidence of pregnancy bias.

Go To Checklist (continued)

- If you do not have a light-duty policy, do you have a past practice of granting light duty to employees who have temporary restrictions that limit their ability to perform certain job duties?

- In the absence of a lawful light-duty policy, you must treat the pregnant employee the same as you treat other employees who have temporary restrictions. What is your customary practice? Follow it with regard to a pregnant employee.

Go To Checklist (continued)

- Make sure you comply with all applicable federal and state leave laws related to pregnancy-related leaves.
- Remember, you cannot force a pregnant employee to take a leave of absence simply because you are concerned about her health or the health of the unborn fetus.
- If the pregnant employee develops a medical condition during or after pregnancy that is covered the ADAAA, you must go through reasonable accommodation process.

Potential Legal Claims Based on Family Responsibilities

- FMLA implications
- EEOC Guidelines on caregiver discrimination.
- Nursing mothers have rights to express milk in the workplace under the FLSA, ACA, and many state laws.
- But the law still does not require preferential or favored treatment of those who choose to have children. *EEOC v. Bloomberg*

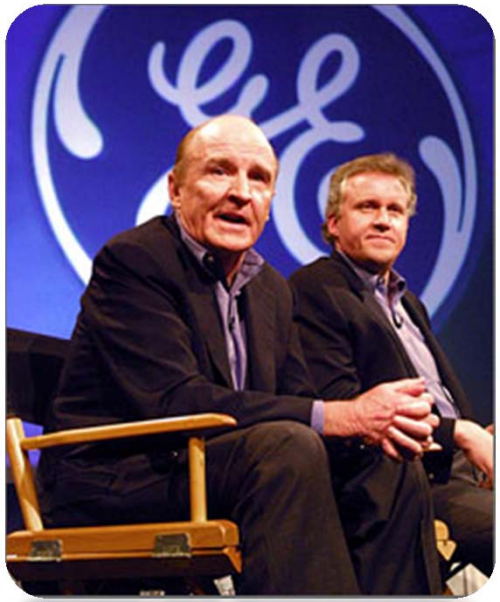
EEOC v. Bloomberg (2011)

- EEOC alleged that Bloomberg reduced pay for pregnant women or women who had just returned from maternity leave, demoted them, excluded them from management or subjected them to stereotypes about female caregivers.

- “In a company like Bloomberg, which explicitly makes all-out dedication its expectation, making a decision that preferences family over work comes with consequences,” the judge said, “But those consequences occur for anyone who takes significant time away from Bloomberg, not just for pregnant women and mothers.”

EEOC v. Bloomberg (2011)

- Judge Preska quoted former General Electric CEO Jack Welch, “There’s no such thing as work-life balance. There are work-life choices, and you make them, and they have consequences.”



Keep in mind you can always be more generous than just meeting minimum legal requirements.

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