PRESENTATION

Baby Bump Blunders! Avoiding Pregnancy Discrimination in the Workplace

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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…"

EEOC TURNS FOCUS TO PREGNANCY DISCRIMINATION

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 it 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*. EEOC claimed 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 the firm discovered 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.
- Likewise, the consent decree 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.

Split of Authority – Light Duty Policies

- Several appellate courts have upheld light-duty policies that accommodate some categories of temporarily disabled employees, but not pregnant employees. (4th, 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.

- When there is a split – this is where you see the U.S. Supreme Court, Congress, and/or EEOC step in… stay tuned…

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.”

Urbano v. Continental Airlines – 5th Circuit (Texas)

Continental has a policy of giving light duty assignments only to employees who suffer an occupational (on-the-job) injury

The Facts…

- Ms. Urbano's position as a Ticketing Sales Agent often required lifting loads in excess of twenty pounds.
- Doctor ordered her to refrain from lifting anything over twenty pounds for the balance of her pregnancy after she began to suffer low-back discomfort
- Requested reassignment to Sales Center Agent position which does not require employees to lift heavy loads
- Continental denies the request because light duty assignments are only given to employees who suffer an occupational injury.
- Employees who suffer a nonoccupational injury or illness who want a less physically demanding position must go through Continental's normal bid process where positions are awarded based upon seniority

Facts continued…

- Ms. Urbano was unable to return to work and comply with her doctor's restrictions
- Ms. Urbano was forced to use her accrued sick days, followed by a ninety-day family leave and then unpaid medical leave
- Ms. Urbano sued Continental for pregnancy discrimination under Title VII of the 1964 Civil Rights Act

Ms. Urbano argued

- She was physically and mentally qualified to perform the duties required for light-duty assignment
- Continental's policy of granting light duty only to employees who are injured on the job deprived her of an employment opportunity on the basis of her pregnancy
- Employees who are unable to perform their regular duties because of their pregnancy will never be able to enjoy the same benefits as employees who suffer occupational injuries, even though these two groups are no different in their ability or inability to work

Continental argued

- The policy is a pregnancy-blind policy and it treated Ms. Urbano the same as it treats any other worker who suffered an injury off duty.
- Ms. Urbano failed to offer any evidence that she was treated differently under Continental's policy than other employees with non-occupational injuries
- Without a showing that Continental adhered to the requirements of the light-duty policy only in cases involving its pregnant workers, Ms. Urbano cannot maintain that she was a victim of discrimination under the PDA

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

- The Pregnancy Discrimination Act does not impose an affirmative obligation on employers to grant preferential treatment to pregnant women
- As long as pregnant employees are treated the same as other employees injured off duty, the PDA does not entitle pregnant employees with non-work related infirmities to be treated the same under Continental's light-duty policy as employees with occupational injuries
- "Urbano's claim is thus not a request for relief from discrimination, but rather a demand for preferential treatment; it is a demand not satisfied by the PDA"

Footnote “exclamation point”

- Indeed it could be argued that granting pregnant employees a benefit men are ineligible to receive is not only not required under the PDA, but it is also not permissible under Title VII, for such a policy would treat a male employee in a manner which but for that person’s sex would be different.

- The PDA merely specifies that under Title VII an employer must not discriminate on the basis of a women’s pregnancy; it does not erase the original prohibition against discrimination on the basis of an employee’s sex.

- *Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 103 S.Ct. 2622, 77 L.Ed.2d 89 (1983).*

Young v. UPS, Inc. – 4th Circuit

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

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 twenty pounds for the first twenty 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.

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.

- 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 5th and 4th 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.

Ensley-Gaines v. Runyon - 6thCircuit

- Has recognized a *prima facie* case can be established when a pregnant female shows her employer offered light-duty accommodations to employees whose temporary limitations result from on-the-job injuries but the same accommodations are not offered to pregnant employees.

- But that just gets the pregnant employee past the first hurdle. Must ultimately prove pretext.

Ensley-Gaines v. Runyon (continued)

- Pregnancy-blind policies of course can be tools of discrimination. But challenging them as tools of discrimination requires evidence and inference beyond such policies' express terms.

- A pregnant employee did not need to make a showing that a worker who received better treatment was similarly situated in every way. The pregnant employee just needs to show that a non-pregnant employee with a similar ability (or inability) to work was receiving more favorable treatment.

- PDA provides added protection to pregnant employees by requiring employer to provide them with same accommodation as non-pregnant employees with similar ability to work.

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.

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 is currently 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 will 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."

2014 EEOC Guidelines

- July 14, 2014 EEOC did issue new EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues

- 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. 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 only to workers injured on the job.)

Notes expanded definition of disability under ADAAA

- Disability includes employees with conditions requiring work-related restrictions similar to those needed by pregnant woman.

- For example, someone who, because of a back impairment, has a 20-pound lifting restriction that lasts for several months would be an individual with a disability under the ADA entitled to reasonable accommodation, absent undue hardship.

Pregnant Workers Fairness Act (PWFA) H.R. 5647 -- S. 3565

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

Nursing Mother's Act

- Part of the Patient Protection and Affordable Care Act which amended section 7 of the Fair Labor Standards Act of 1938. Found at 29 U.S.C. 207(r)(1).
- Employer shall provide –
- (A) reasonable break time for an employee to express breast milk for nursing child for one year; and
- (B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and public

- An employer is not required to compensate an employee receiving reasonable break time spent

- An employer that employs less than 50 employees is not subject to the requirements if the requirements would impose an undue hardship

Texas State Law

- Texas Labor Code sections 21.051 and .21.106

  "a woman affected by pregnancy, childbirth, or a related medical condition shall be treated for all purposes related to employment, including receipt of a benefit under a fringe benefit program, in the same manner as another individual not affected by similar in the individual's ability or inability to work."

- Prohibits discrimination on the basis of pregnancy, childbirth, or a related medical condition.

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.

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