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Developments in Pregnancy Discrimination Law: UPS, EEOC, and I

Education Law Notes

02.09.2015
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Readers of this blog have seen several posts on the topic of pregnancy discrimination. In the last couple of weeks, the following additional developments concerning the topic have occurred:

1. In our sister blog, *Working Together*, you previously read about the issue of "forced leave," which arises when a pregnant employee is unable to carry out essential job functions due to a pregnancy-related condition, and the employer then "forces" the employee to commence the use of contractual sick leave and/or Family and Medical Leave Act ["FMLA"] leave prior to when planned. As noted in the prior post, in Turner v. EASTCONN, 2013 WL 6230092 (D. Conn. December 2, 2013), a federal court judge threw out a case of pregnancy discrimination based upon a "forced leave" claim. On appeal, the Second Circuit of the U.S. Court of Appeal issued a decision on December 17, 2014 in which it affirmed the trial court's decision.

The Second Circuit agreed that it was not discriminatory for the employer to place the employee on FMLA leave when the employee's own doctors asserted that she was unable to perform her essential job duties as a teacher assigned to a special educational program involving aggressive students. In addition, the court noted that the employer was not required by federal law to extend a leave of absence beyond the twelve-week FMLA period, and it was not illegal to dismiss the employee when she was unable to return to work following the expiration of her leave of absence (especially where the need for additional leave is not linked to the pregnant employee's own disability). The court confirmed that a "reasonable accommodation" under federal anti-discrimination laws can never involve the elimination of an essential function of a job or require bumping another employee from a position. Parenthetically, I (along with **Zachary D. Schurin**) represented the employer in all phases of this case, including successfully arguing the case before the Second Circuit.

2. You have also read in *Working Together* about the EEOC's new pregnancy guidelines. These guidelines are now getting an initial test drive. On December 3, 2014, oral argument took place before the U.S. Supreme Court in Young v. UPS. At issue in that case is whether an employer that offers light-duty assignments/accommodations for employees injured on the job (but not anyone else) is required by the **Pregnancy Discrimination Act ["PDA"], 42 U.S.C. §2000e(k),** to offer such accommodations to pregnant employees. The issue presented is whether, and under what circumstances, the PDA requires an employer that provides work accommodations to certain non-pregnant employees with work limitations to provide these same accommodations to pregnant employees who are "similar in their ability or inability to work." In determining

the existence of discrimination, does one compare the treatment of pregnant employees 1) with fellow employees who were not injured on the job, or 2) all employees similarly unable to work, including employees injured on the job?

WHAT DOES THIS ALL MEAN? The litigation that has been percolating through the courts (Turner, Young v. UPS and Wanamaker v. Town of Westport Bd. of Educ., 2014 WL 1281937 (D. Conn. March 27, 2014)) will provide further guidance to employers as to when there may be a need to exceed FMLA (or contractual) leave when dealing with pregnant employees. While pregnancy may not be a disability under the ADA, reasonable accommodations may still be required by the PDA (including leaves of absence in excess of FMLA leave) for a disability linked to pregnancy. While Turner taught us that it was clearly not reasonable for an employer to have to eliminate the essential duties of an employee -- for example, all teaching duties for a teacher -- there may be circumstances when accommodations or a transfer into an available position can be made. In addition, the contours of Connecticut's own pregnancy discrimination statute, and the extent that it provides a more generous right than federal law, may be shaped by ongoing litigation. Stay tuned.

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