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Developments In Pregnancy Discrimination Law: Lower Court Speaks, The EEOC Pronounces And The Supreme Court Ponders

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Mark J. Sommaruga
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The obligation to accommodate pregnant employees largely comes from the intersection of three areas of the law: family and medical leave, gender and pregnancy discrimination, and disability discrimination. In all three of these realms, recent developments both affirm and question past assumptions.

The federal Family and Medical Leave Act lists the birth and first-year care for a newborn child as qualifying conditions entitling covered employees to leave. Pregnancy-related medical conditions that constitute a "serious health condition" could also entitle an employee to FMLA leave. Both state and federal gender-related discrimination statutes provide protection from discrimination based upon pregnancy and also may entitle the pregnant employee to leave and other accommodations. A component of Title VII of the 1964 Civil Rights Act (which proscribes gender discrimination) is the Pregnancy Discrimination Act, 42 U.S.C. 2000e(k). The PDA provides that illegal sex discrimination includes decisions based upon pregnancy, childbirth or related medical conditions, and requires women affected by these conditions to be treated the same for all employment-related purposes as "other persons not so affected but similar in their ability or inability to work. "

Third, the Americans with Disabilities Act is relevant, especially in light of the ADA Amendments Act of 2008, which broadens the definition of "disability." In 2014, the Equal Employment Opportunity Commission issued new guidelines attempting to clarify if, when and how employers must accommodate pregnant employees under federal law. Pregnant employees are also entitled to "reasonable" leave for a disability relating to pregnancy and reinstatement upon signifying an intent to return under state law, per Connecticut General Statutes §46a-60(a)(7).

What happens when a pregnant employee is unable to carry out her essential job functions due to a pregnancy-related condition? The employer may then force the employee to commence the use of contractual sick leave or FMLA leave prior to when planned. As a result, the employee may run out of leave at an earlier time than what was anticipated, with the employee then facing the possibility of termination following the exhaustion of leave. A recent decision of the U.S. Court of Appeals for the Second Circuit elucidates this doctrine.

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In Turner v. EASTCONN Regional Education Service Center, 2013 WL 6230092 (D.Conn. 2013), affirmed, 2014 WL 7172296 (2nd Cir. December 17, 2014), a teacher employed at a special program for students with aggressive behaviors became pregnant. Midway through the pregnancy, the teacher produced doctors' notes indicating that she could not work one-on-one with aggressive students. This restriction effectively eliminated two-thirds of the teacher's duties. The teacher further requested that she only be required to perform "administrative" duties during the remainder of her pregnancy. Due to the lack of an available position that could provide these requested accommodations, the employer placed the teacher on FMLA leave. After the birth of her child, and the subsequent expiration of her FMLA (and sick) leave, the teacher requested additional leave due to a desire to take care of her children. The employer did not agree to such additional leave, and terminated her employment.

The teacher filed suit. In December 2013, the U.S. District Court in Connecticut granted the employer's motion for summary judgment. Among other things, the court ruled: (1) the teacher's (uneventful) pregnancy did not constitute a disability under the ADA; (2) even if she was considered to be disabled, in the absence of an available position for a transfer and in light of her inability to perform the majority of her job duties, she was not entitled to the accommodations sought; (3) since the reason she needed an extension of leave had nothing to do with her own medical condition or disability, but rather was related to the care of her children, neither the ADA nor the PDA mandated that she be accommodated with an extension of her leave beyond her usual FMLA entitlement; and (4) as she was offered all the leave required by the FMLA, her FMLA claims failed.

The U.S. Court of Appeals for the Second Circuit affirmed the district 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 the essential job duties. In addition, the court noted that the employer was not required by federal law to extend a leave of absence beyond the 12-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 (especially where the need for additional leave is not linked to the pregnant employee's own disability). The Court reiterated that a "reasonable accommodation" can never involve the elimination of an essential function of a job or require bumping another employee from a position.

There is a tension in the PDA between equal treatment of pregnant employees and a possible need to provide accommodations to them. In the EEOC's new guidelines, one apparent clarification is that pregnancy-related conditions must be treated the same as disabilities under the ADA in that a reasonable accommodation must be offered so long as it does not represent an undue hardship for the employer. The EEOC guidelines may get their first real test in 2015 when the U.S. Supreme Court decides Young v. United Parcel Service. At issue in Young is whether an employer that offers light duty assignments/accommodations for employees injured on the job (but not anyone else) is required by the PDA to offer such accommodations to pregnant employees.

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The court will likely answer the question of whether, and under what circumstances, the PDA requires an employer that provides accommodations to nonpregnant female 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 with fellow employees who were not injured on the job, or all employees similarly unable to work (including employees injured on the job)? Stay tuned.

An employer's obligations with regard to the treatment of pregnant employees are highly fact-specific and must be assessed on a case-by-case basis. While pregnancy is generally not considered to be a disability under the ADA, it is possible that a particularly complicated pregnancy may entitle an employee to protections and accommodations under the ADA, including leave above and beyond FMLA leave (as the EEOC guidelines suggest). The recent and future litigation (Turner, Young and Wanamaker v. Town of Westport Board of Education, 2014 WL 1281937 (D. Conn. 2014)) will continue to provide guidance to employers as to when there may be a need to exceed FMLA (or contractual) leave when dealing with pregnant employees.

Both the ADA Amendments Act of 2008 and the EEOC guidelines further highlight that the previous legal consensus that pregnancy was not a disability is no longer an absolute. In addition, if the employer makes a presumption based upon stereotypes concerning pregnant employees, for example, a belief that the pregnant employee is disabled or unable to work that is divorced from the employee's actual medical condition, such (mis)perceptions may entitle the employee to certain protections under the ADA (for example, protection against being forced to take leave if the employee can still perform her job functions and against decisions that are based upon the employer "regarding" the pregnant employee as being disabled).

Under both state and federal gender discrimination laws, employers may be required to make accommodations for pregnant employees, including a leave of absence for disability due to pregnancy (although the requirement to accommodate a pregnant employee under these laws is not so clear-cut in current jurisprudence). While it is clearly not reasonable to eliminate the essential duties of an employee, there are circumstances where accommodations or a transfer into an available position can be made.

Connecticut law may provide an additional nebulous right to a "reasonable leave of absence" (with an almost absolute right to reinstatement) that may be even more expansive than that provided under federal law. The extent of such extra protections under state law may be resolved via ongoing litigation.

Therefore, employers should not view the expiration of the FMLA leave period as always being the absolute end of any possibility to provide further leave to the pregnant employee. While the teacher in Turner could not claim an entitlement to additional leave due to the fact that this leave was not for her own medical condition, but rather to care for others, there are circumstances where the ADA and PDA may provide an entitlement to leave beyond the FMLA, especially where other short-term disabled employees were provided such additional leave, and where the leave is related to the employee's own pregnancy-related medical condition,

in particular, when the pregnancy is complicated.

Attorney Mark J. Sommaruga is a member of the labor, employment law and employee benefits department and school law section at Pullman & Comley in Hartford. He represented the interests of the employer in the above referenced Turner case. He can be reached at msommaruga@pullcom.com.

Professionals

Mark J. Sommaruga

Practice Areas

Labor, Employment Law & Employee Benefits