Robert Joyce
Public Employment Law Update
May 11, 2018

Pregnancy: Beyond Title VII to the FMLA and ADA

Is pregnancy "because of sex"?

Title VII of the Civil Rights Act of 1964 has, from the inception of the statute, forbidden an employer to "discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex." That is, it has, for more than 50 years prohibited discrimination in employment "because of sex."

When Title VII was enacted, there existed the most blatant—unapologetically blatant—forms of discrimination against women in employment. For example, newspaper want-ads[1] were often divided into two parts: *help wanted male* and *help wanted female*. It was common knowledge—not universally agreed to but commonly known—that there were men's jobs and there were women's jobs. Title VII from the first dealt with that kind of discrimination. It was clear that reserving a category of jobs for men amounted to discrimination "because of sex."

The Evolving Meaning of "Because of Sex"

Over time, the courts came to face situations not as straightforward as *help wanted male.* What about sexual harassment in employment? Can that constitute discrimination "because of sex"? For the first 12 years of Title VII, no court had so found. It was only in 1976, in the case of *Williams v. Saxbe*, 413 F. Supp. 1093 (D.D.C.), that a court first decided that sexual harassment could be unlawful under Title VII. The plaintiff claimed that her working conditions deteriorated, and she was subsequently terminated, because she turned down her supervisor's sexual advances. If she was telling the truth, had she stated a case for unlawful discrimination because of sex? The court thought so, saying that the case

> "presents the issue of whether the retaliatory actions of a male supervisor, taken because a female employee declined his sexual advances, constitutes sex discrimination within the definitional parameters of Title VII of the Civil Rights Act of 1964, as amended. This Court finds that it does. Defendants, however, make a cogent and almost persuasive argument to the contrary."

"A cogent and almost persuasive argument to the contrary," the court said. That is, the court was finding that the claim did fall within the "because of sex" requirement of Title VII, but it was a close question. In 2018, no longer is it considered a close question.

[1] Young people may have to google the term "newspaper want-ads" to figure out what it means.

Today, the courts face a similar set of issues around workplace discrimination alleged to be based on sexual orientation or gender identity. In a decision in February of this year, the federal Second Circuit Court of Appeals, *Zarda v. Altitude Express Inc*., 883 F.3d 100 (2nd Cir. 2018) said this:

> "We have previously held that sexual orientation discrimination claims . . . are not cognizable under Title VII."

That is, from the time that sexual orientation discrimination claims first arose under Title VII, this appeals court, like all the others, held that such discrimination was not "because of sex." But now, the court said, it was changing its mind:

> "We now hold that Title VII prohibits discrimination on the basis of sexual orientation as discrimination 'because of ... sex.' To the extent that our prior precedents held otherwise, they are overruled."

A similar progression has happened under Title VII with respect to discrimination based on pregnancy, aided by two significant act of Congress.

1976: Pregnancy Discrimination is not Sex Discrimination

In *General Electric v. Gilbert*, 429 U.S. 125 (1976), the United State Supreme Court heard for the first time a Title VII claim of pregnancy discrimination. The employer had in place a disability plan that paid nonoccupational sickness and accident benefits. It explicitly excluded disabilities arising from pregnancy. Did the exclusion of pregnancy coverage amount to discrimination "because of sex"?

No, the Court said. The employer could have decided to have no disability plan at all. It instead chose to have a plan that is equal in its treatment of men and women. The fact that it does not cover a condition unique to women does not mean it is discriminatory against women.

> "The program divides potential recipients into two groups: pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes."[2]

The Court noted that the Equal Employment Opportunity Commission had released guidelines in 1972 under which the disability plan would have been found to be in violation of Title VII. The EEOC went too far, the Court said. Congress knew what it meant when it enacted Title VII, and the courts should not get too far ahead of it:

[2] Relying on its previous decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974), a case decided under the Equal Protection Clause, not Title VII.

> "When Congress makes it unlawful for an employer to 'discriminate . . . because of . . . sex . . .,' without further explanation of its meaning, we should not readily infer that it meant something different from what the concept of discrimination has traditionally meant. There is surely no reason for any such inference here."

1978: The Pregnancy Discrimination Act

So, with respect to pregnancy discrimination, the Supreme Court said that there was no good reason to assume that Congress, when it prohibited discrimination "because of sex," meant to prohibit discrimination because of pregnancy. After all, at any given time there are plenty of women are not pregnant. If Congress had meant to cover pregnancy, it could have said so.

In 1978, two years after the *Gilbert* decision, Congress did just that, in passing the Pregnancy Discrimination Act, as an amendment to Title VII. The PDA is very short, composed of just two clauses.

The first clause deals explicitly with the issue of whether discrimination on account of pregnancy is discrimination "because of sex." It provides that Title VII's "ter[m] 'because of sex' . . . include[s] . . . because of or on the basis of pregnancy, childbirth, or related medical conditions." So Congress, with respect to pregnancy, took the step that the courts themselves took with respect to sexual harassment—and are now taking with respect to sexual orientation and gender identity discrimination—making it clear that the phrase "because of sex" is broader than it may have originally been thought.

The second clause says that:

> "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 . . ."

Interpreting the Second Clause of the PDA

Courts found it immediately easy to interpret the first clause: discrimination on account of pregnancy is discrimination on account of sex. The first clause *prohibits* that kind of discrimination. But the second clause is different. It does not *prohibit* something—rather, it *requires* something. Employers "shall" treat their pregnant employees the same as non-pregnant employees who are similar in their ability or inability to work.

The federal Seventh Circuit Court of Appeals took up the task of interpreting the second clause in 1994 in the case of *Troupe v. May Department Stores, Co*., 20 F.3d 734 (7th Cir. 1994). Kimberly Troupe worked in a clothing store. She became pregnant and, because of morning sickness, was often tardy. She received a written warning that her tardiness was excessive. The

day before her maternity leave was to begin, she was fired, and the given reason was her tardiness.

Did her termination constitute discrimination because of her pregnancy, and thus "because of sex," and thus unlawful under Title VII? She said it did. She said that the real reason she was fired was that her supervisor believed that she would not return to work after maternity leave. The firing could not be based on her tardiness, she said, because she clearly would not be tardy while on maternity leave (because she would not be working) and she would not be tardy when she returned from maternity leave (because she would not be suffering morning sickness). They fired her after the last moment that tardiness could be an issue.

The court rejected this argument, because of its understanding of the second clause of the PDA. Even if they fired her because they thought she would not come back after maternity leave, there is no violation of the PDA:

> "We must decide whether a termination so motivated is discrimination within the meaning of the pregnancy amendment to Title VII.
>
> "Standing alone, it is not. . . . Suppose that Lord & Taylor had an employee named Jones, a black employee scheduled to take a three-month paid sick leave for a kidney transplant; and whether thinking that he would not return to work when his leave was up or not wanting to incur the expense of paying him while he was on sick leave, the company fired him. . . . [T]he company could not be found guilty of racial discrimination unless . . . there was evidence that it failed to exhibit comparable rapacity toward similarly situated employees of the white race. We must imagine a hypothetical Mr. Troupe, who is as tardy as Ms. Troupe was, also because of health problems, and who is about to take a protracted sick leave growing out of those problems at an expense to Lord & Taylor equal to that of Ms. Troupe's maternity leave. If Lord & Taylor would have fired our hypothetical Mr. Troupe, this implies that it fired Ms. Troupe not because she was pregnant but because she cost the company more than she was worth to it."

That is, Troupe failed to present any evidence that the employer treated her any worse than it would have treated a similarly situated non-pregnant employee who was similar in his ability to work.

> "Troupe would be halfway home if she could find one nonpregnant employee of Lord & Taylor who had *not* been fired when about to begin a leave similar in length to hers. She either did not look, or did not find."

In the absence of such evidence, the court said, her case is doomed. The lesson under the PDA:

> "Employers can treat pregnant women as badly as they treat similarly affected but non-pregnant employees."

Similarly, in *Ahmad v. Loyal American Insurance Co*., 767 F. Supp. 1114 (S.D. Ala. 1991), a federal district court found no PDA violation when the employer withdrew an employment offer after discovering that the applicant was pregnant. The employer demonstrated to the court that it had an immediate need to relieve a burden in a particular department. The applicant would not have had time to learn her job sufficiently before going out on maternity leave to be valuable when she got back. The whole thing would take too long. A non-pregnant applicant similarly disabled would have been rejected, the court found.

1993: Congress Enacts the Family and Medical Leave Act

The Family and Medical Leave Act, enacted by Congress in 1993, provides protections for pregnant employees beyond the protections of the PDA.

The FMLA allows eligible employees[3] of covered employers[4] to take up to 12 weeks of unpaid leave (or to substitute accrued vacation and sick leave) for a defined set of reasons, and to have their jobs waiting for them when they return.[5]

In the most common case, the right to FMLA leave arises as a result of the need to provide care for a "serious health condition" of the employee, or of the employee's parent, spouse, or child. The regulations under the FMLA attempt to put meat on the FMLA's "serious health condition" bones by setting out the conditions under which a mental or physical impairment arises to the level of a serious health condition. There are two principal ways in which an employee (or the parent, spouse, or child) may qualify as having a serious health condition. First, the employee (or the parent, spouse, or child) has incurred over-night inpatient care in a health care facility—that is, stayed in the hospital overnight—and had subsequent treatment. No particular length of incapacity is required. Second, the employee (or the parent, spouse, or child), while not staying in the hospital overnight, has seen a health care provider and incurred a continuing regimen of treatment. This second kind is more common, of course, as it does not require an in-hospital stay. But it does require a period of incapacity lasting more than three days.

The FMLA has two special provisions regarding pregnancy and childbirth.

[3] An eligible employee is one who has worked for the employer for at least 12 months and has worked at least 1,250 hours in the past 12 months.
[4] All public agencies are covered employers, regardless of the number of employees employed. Private employers are covered employers if they employ 50 or more employees.
[5] Or a "substantially similar" job.

The first special FMLA pregnancy provision

The first FMLA pregnancy provision specifies that a pregnant employee is entitled to FMLA leave—that is, time away from work with the guarantee of not being fired—for any period of incapacity. It does not have to be as long as three days. It does not require an in-hospital stay or even treatment by a health care provider. Here is what the relevant regulation says, 29 CFR 825.120(a)(4):

> "An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. The expectant mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days."

Further, the pregnant employee is entitled to take FMLA leave on an intermittent, as-needed basis. Here is what 29 CFR 825.202(b)(1) says:

> "A pregnant employee may take leave intermittently for prenatal examinations or for her own condition, such as for periods of severe morning sickness."

So under the FMLA, a pregnant employee is entitled to job-protected time off for periods of when she is unable to work, irrespective of whether in any particular such period she has received a doctor's care. And she is entitled to intermittent FMLA leave for short-term periods when she is unable to work.

The second special FMLA pregnancy provision

The second FMLA provision allows the new mother to take FMLA job-protected leave to bond with her new baby, even if there is no incapacity involved—that is, even if the mother and the baby are both healthy, still FMLA leave is available for up to 12 weeks (less any amounts that have been used during the pregnancy) after the birth of the child.

This FMLA provision applies fully to employees who are new fathers. If both the new mother and the new father are employees of the same employer, their total FMLA bonding time is not 24 weeks, but 12 between them.

The relationship of the PDA to the FMLA

As the earlier discussion indicates, the PDA does not require employers to treat pregnant employees more favorably that other employees who are "similar in their ability or inability to

work." As far as the PDA is concerned, for example, if an employer refuses to allow an employee to return to work after taking maternity leave, the possibility exists that no violation of law has occurred. In *McLaughlin v. W&T Offshore Inc*, 78 Fed. Appx. 334 (5th Cir. 2003), for example, the employer refused to allow the new-mother employee Rosa McLaughlin to return following maternity leave. The federal Fifth Circuit Court of Appeals held that the employer proved that its desire that McLaughlin not return was not related to her pregnancy. Instead:

> "[I]t was discovered that other employees could perform both their duties and McLaughlin's better and with fewer errors than McLaughlin could alone."

But the FMLA provides specific protections that the PDA does not. Under the FMLA, McLaughlin would have been entitled to return to her job.

2008: The Americans With Disabilities Act Amendments Act

The Americans With Disabilities Act has since 1990 prohibited discrimination in employment on account of an individual's disability, as long as the individual was a "qualified individual"—that is, someone who, without or without an accommodation, could perform the essential functions of the job.

From the first, courts held that pregnancy is in itself is not a disability.

Take, for example, *Gorman v. Wells Manufacturing Corp*., 209 F. Supp. 2d 970 (S.D. Iowa 2002), aff'd 340 F.3d 543 (8th Cir. 2003). In one month, pregnant employee Leelyn Gorman missed eight days of work, was 25 minutes late for work one day and four hours late another. Pursuant to her employer's policy, she presented a disability certificate from her doctor for the absence. The doctor who signed the disability certificate later informed the employer that he had not asked Gorman to stay home; he did not know of any disability complications during the days in question; and that Gorman had been warned by his office about malingering. Gorman was then fired. She sued, alleging a violation of the ADA. The court ruled in favor of the employer. It noted the status of the regulations under the ADA as they then stood:

> "Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments" 29 C.F.R. 1630.2(h). Moreover, "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities" 29 C.F.R. § 1630.2(j)

The court said that it would join most other courts in saying that the normal kinds of conditions that accompany pregnancy, being temporary and short-term, are not disabilities protected by the ADA. Only when a disability rises far above the normal range of pregnancy problems, the court said, does a question of ADA-protected disability arise.

But in 2008 Congress, reacting to court decisions reading the ADA narrowly, enacted the Americans With Disabilities Amendments Act, providing, among other things, that there is no requirement that an impairment last a particular length of time to be considered a disability within the meaning of the ADA. With this change, conditions related to pregnancy have a much greater chance of being considered "disabilities." Further, the ADAAA provided that difficulties affecting major bodily functions (neurological, musculoskeletal, endocrine, and reproductive systems) can be, in themselves, covered "disabilities" without adversely affecting other major life activities.

Not many courts have had occasion to apply the ADAAA changes in pregnancy cases, but several have noted the possibility. See, for example, *Heatherly v. Portillo's Hot Dogs, Inc*. 2013 WL 3790909 (N.D. Ill. 2013), where the court (though holding for the defendant), noted the plaintiff's argument:

> She argues that this condition rendered her disabled under the ADAAA. Specifically, she argues that the recent amendments to the ADAAA support this conclusion because the Americans with Disabilities Act Amendments Act of 2008 (the "ADAAA") relaxed the duration and severity requirements for qualified disabilities.

In an Enforcement Guidance: Pregnancy Discrimination and Related Issues, https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm the EEOC sets out its interpretation that the ADA, after enactment of the ADAAA, applies more fully to pregnancy-related conditions.

2015 Supreme Court Pronouncement

The U.S. Supreme Court turned its attention to the PDA most recently in *Young v. United Parcel Service*, 135 S. Ct. 1338 (2015). Peggy Young was a UPS driver. Drivers must be able to lift packages of up to 70 pounds. Her doctor put her on lifting restriction of 20 pounds. UPS said she could not work while under the restriction.

Young said, Hey, you have previously granted accommodations to drivers who could not do their driver job because they

- were injured on the job
- had ADA disabilities
- lost their Department of Transportation certificates.

I can't do my driver job because of my pregnancy-related lifting restriction. By not accommodating me, you are engaged in disparate treatment against me because of my pregnancy. You are violating the PDA.

UPS said, Yeah we have granted accommodations in those limited categories: injured on the job, ADA disabilities, and lost certificates. But Young fits none of those categories. Instead, she is like everybody else, pregnant or not, and we have not accommodated them. Therefore, she is being treated "the same . . . as other persons," just not on-job, ADA, and lost-certificate people.

Young says, No. If you grant accommodations to anyone who is unable to regularly work, then you must grant similar accommodations to all pregnant employees not able to regularly work.

UPS says, No, all the PDA says is that pregnancy discrimination is a part of sex discrimination.

So, under the second clause of the PDA (as discussed above), who is right? The U.S. Supreme Court said both Young and UPS were wrong.

Young is wrong, the Court said, because pregnancy is not in "a most-favored-nation status." That is, it's not sufficient to find a PDA violation that Young can point to a set of employees who in fact were accommodated and say, "If you did it for them, you must do at least as well for pregnant employees." If an employer has legitimate, non-pretextual, nondiscriminatory reasons, it may implement policies that harm a class of employees, so long as it is not motivated by an intent to harm that class.

So, how can you as a pregnant employee who is not accommodated as well as some other employees have been, demonstrate that the employer was motivated by an intent to harm you? You follow the traditional Title VII *McDonnell Douglas* "burden shifting framework," the Court said. You make out a *prima facie* case by showing that

- you belong to protected class
- you sought accommodation
- the employer did not accommodate
- the employer did accommodate others "similar in their ability or inability to work."

If you show those things, then the employer may justify its refusal to accommodate by legitimate, nondiscriminatory reasons" [other than it's more expensive or less convenient to add pregnant women to list who will be accommodated.]

Then the burden shifts back to you to show pretext. You do that by showing that you are burdened and that the burden is sufficiently strong to, in light of the reasons offered by the employer, give rise to an inference of intentional discrimination. That could come by showing that the employer accommodates a large percentage of nonpregnant employees while failing to accommodate a large percentage of pregnant employees.

In this case, the Supreme Court applies a very traditional Title VII proof scheme to the question of accommodations under the PDA.

Recent Cases

Here is a look at a couple of recent pregnancy-discrimination cases.

Failure to Hire Because of Pregnancy

The PDA's second clause can come into play in cases in which an applicant claims that she was not hired because of her pregnancy.

As discussed on page 5, in *Ahmad v. Loyal American Insurance Co*., 767 F. Supp. 1114 (S.D. Ala. 1991), a federal district court found no PDA violation when the employer withdrew an employment offer after discovering that the applicant was pregnant. The employer demonstrated to the court that it had an immediate need to relieve a burden in a particular department. The applicant would not have had time to learn her job sufficiently before going out on maternity leave to be valuable when she got back. The whole thing would take too long. A non-pregnant applicant similarly disabled would have been rejected, the court found.

There is a problem in applying this analysis to failure-to-hire cases, despite the fact that the analysis was applied in *Ahmad*. Simply asking applicants about whether they are pregnant or plan to start a family has itself been found to be sex discrimination, since it is asked of women and not men. See, for example, *Nelson v. Wittern Group, Inc,* 140 F. Supp. 2d 1001 (S.D. Iowa 2001)

The analysis is still occasionally used, however. A recent example is *Thomas v. Monroe County Sheriff's Department*, 2016 WL 5390860 (E.D. Mich. 2016). Christine Thomas had been a sheriff's deputy. She was laid off as a deputy, along with others, in a budget crunch, but she was put into the lower position of corrections officer. When rehiring of deputies started up, she was pregnant and on light duty in her corrections officer position. She applied for deputy but was not hired. She was the most senior laid off former deputy not hired back. The sheriff said, when considering her, "What good is she going to do us?"

The court reasoned that what the sheriff said can mean either of two things: (1) "She is no good to us because she is pregnant" or (2) "She is no good to us because she is on light duty and we need a deputy on the road right now." If it is the first one, it is a PDA violation. If it is the second one, it is not a PDA violation if the sheriff would not have hired anyone who was currently incapable of road duty. It's up to the jury to decide which one is the real meaning, the court said.

Failure of accommodation

In *Hicks v. City of Tuscaloosa*, 870 F.3d 1253 (11th Cir. 2017), Stephanie Hicks was a detective in the police department. When she became pregnant, she was allowed to work on cases that would avoid night and weekend work. Her lieutenant admitted that that arrangement bothered the lieutenant.

Hicks went on FMLA leave. Eight days after returning, she was demoted to patrol officer. She presented a letter from her doctor saying that the ballistic vest that patrol officers must wear would interfere with her lactation needs. She was told that the department would accommodate her needs by allowing two lactation breaks a day and by allowing her to not wear the vest. She said that not wearing the vest while on patrol would be dangerous and she resigned.

She sued alleging retaliation for taking FMLA leave and violation of the PDA. The jury awarded her $374,000. The city appealed.

The federal Eleventh Circuit Court of Appeals said:

> "The evidence taken in the light most favorable to Hickes provides ample evidence that Hicks was both discriminated against on the basis of her pregnancy and that she was retaliated against for taking her FMLA leave."

There is no requirement under the PDA that special accommodations be made for breastfeeding, the court said. But Hicks merely requested accommodations of the kind that other employees have had, and the failure to make those accommodations, the jury could find, amounted to a PDA violation. ("The line between discrimination and accommodation is a fine one. Taking adverse actions based on a woman's breastfeeding is prohibited by the PDA but employers are not required to give special accommodations to breastfeeding mothers."). Given that there was sufficient evidence to support the jury verdict, it stands.