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OUTSIDE COUNSEL

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Charges of Pregnancy Discrimination: The Net of Statutory Safeguards

THE $5 million judgment recently awarded by a Los Angeles jury to actress Hunter Tylo against the producers of "Melrose Place" put the spotlight on pregnancy discrimination. Needless to say, Ms. Tylo's claim that she was entitled to play a husband-stealing vixen even though she was pregnant bears little resemblance to the nearly 4,000 pregnancy discrimination charges received by the Equal Employment Opportunity Commission (EEOC) in fiscal 1997. Nonetheless, the Hunter Tylo case serves to underscore the panoply of statutes that exist to protect pregnant employees against discrimination in the workplace.

The principal protection for pregnant employees in the workplace arises from the Pregnancy Discrimination Act (PDA),[1] which Congress passed in 1978 as an amendment to Title VII of the Civil Rights Act of 1964. It protects women against discrimination on the basis of pregnancy, childbirth or related medical conditions.

A violation of the PDA can occur either when an employer treats pregnant employees less favorably than similarly situated non-pregnant employees, or when an employer institutes a facially neutral policy that disproportionately affects a pregnant woman. To avoid unlawful behavior, employers must apply any policies relating to issues including leave, availability of extensions, accrual of seniority and payment of benefits to pregnant employees on the same terms as they are applied to other disabilities.[2] Moreover, a pregnant employee "usually cannot be forced to go on leave as long as she can still work."[3]

Under the PDA, the burden is on the pregnant employee to establish a prima facie case of discrimination. In *Quaratino v. Tiffany & Co.*,[4] the Sec-

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ond Circuit explained that in the absence of direct evidence of discrimination, the plaintiff must demonstrate, by a preponderance of the evidence, that she (1) is a member of a protected class (i.e., pregnant or suffering from a pregnancy-related disability); (2) was performing her job according to her employer's legitimate expectations; (3) was terminated; and (4) that similarly situated employees not in a protected class were treated more favorably or that there is sufficient evidence to infer that the termination arose from discrimination.[5]

In *Quaratino*, the court overturned a finding of summary judgment for Tiffany, which had terminated a pregnant employee during a corporate restructuring. The court found that a supervisor's questions to the plaintiff before he knew she was pregnant, asking whether she was "really serious" about her career or if she was "just going to go home and get pregnant," combined with the same supervisor's use of an expletive in response to being informed of the pregnancy and his subsequent avoidance of the plaintiff, evinced a discriminatory animus. These incidents permitted the inference that plaintiff was terminated because of unlawful pregnancy discrimination.[6]

On the other hand, mere reference to pregnancy and the demands of motherhood will not necessarily create an inference of discrimination. For example, in *Ilhardt v. Sara Lee Corp.*,[7] the plaintiff proffered as evidence of discrimination her supervisor's comments to the effect that he was sure she would not return to work full-time after having her third child because his daughters were extremely busy with just two children.

In addition, he told plaintiff that he thought it was better for the mothers of young children to stay at home. The Seventh Circuit, however, deemed this evidence insufficient, finding that the comments did not suggest that the supervisor disapproved of her getting pregnant or that he considered plaintiff's third pregnancy to be her "third strike."[8] The court noted that "statements expressing doubt that a woman will return to work full-time after having a baby do not constitute direct evidence of pregnancy discrimination."[9]

Additionally, neither the EEOC nor courts generally condone adverse treatment of employees because of the appearance of pregnancy. The EEOC recently filed a complaint against a Las Vegas casino challenging its policy of removing pregnant female employees from the position of cocktail server once they no longer fit into their uniforms.[10] Similarly, in *Tamimi v. Howard Johnson Co.*,[11] the court found a motel unlawfully fired a pregnant desk clerk who refused her supervisor's direction to wear makeup when her complexion broke out because of her pregnancy.

The protection of pregnant employees under the civil rights statutes may implicate broad social policy issues. In the recent decision of *Ganzy v. Allen Christian School*,[12] Judge Weinstein grappled with the issue of whether a parochial school that had a rule against pre-marital sex, could terminate an unmarried, pregnant teacher. Judge Weinstein held, in permitting the school teacher's claim to go to trial before a jury, that "the history and wide variations in public attitudes toward chastity and employment of women outside the home may give rise to varying inferences on whether pregnancy rather than pre-marital intercourse is the cause for a particular dismissal."[13]

In *Turic v. Holland Hospitality Inc.*,[14] the Sixth Circuit upheld a judgment against a hotel that fired a waitress because she discussed having an abortion with co-workers. Although the plain language of the PDA does not specify abortion, the court observed that EEOC guidelines and the legislative history of the act provide that the act covers women who choose to terminate their pregnancies.[15]

Additionally, the court found that while this plaintiff never actually had an abortion, implicit within the right to an abortion is the right to contemplate exercising that right.[16] As a result, the PDA was found to protect the waitress against the employer's behavior, which was deemed discriminatory under the act.

Although wide-reaching, the PDA does not necessarily extend to protect women from discrimination after childbirth. In *Piantanida v. Wyman Center, Inc.*,[17] the Eighth Circuit held that plaintiff's claim of discrimination because she was a "new mom" was outside the purview of the PDA.[18] The court noted that one's status as a new parent is gender-neutral, as it includes men and even those women who cannot become pregnant but nevertheless become new parents as a result of adoption.[19]

Because the acceptance of parental responsibilities creates a social role, rather than a pregnancy-related medical condition, such a claim is "not cognizable under the PDA."[20] Similarly, in *Fejes v. Gilpin Ventures Inc.*,[21] the court declined to extend the PDA to a full-time casino blackjack dealer who requested a part-time schedule to enable her to continue breast-feeding her newborn child. The court concluded that the PDA only provides protection based on the condition of the mother, not the condition of the child, and that breast-feeding and child-rearing concerns after pregnancy did not constitute "pregnancy-related medical conditions" within the meaning of the PDA.[22]

Under the PDA, an employer must hold open the job of a woman absent because of pregnancy "on the same basis as jobs are held open for employees sick on disability leave for other reasons."[23] The PDA, however, does not require a specific duration of leave nor does it allow an employer to require an employee to remain on leave for a predetermined length of time following childbirth.[24]

Notably, the Family Medical Leave Act of 1993[25] provides important job protections to pregnant employees who work for an employer with 50 or more employees. Under the FMLA, up to 12 weeks of unpaid leave may be taken by an employee during a 12-month period for any one, or for a combination of, the following reasons:

(a) the birth of the employee's child or to care for the newborn child;

(b) the placement of a child with the employee for adoption or foster care or to care for the newly placed child;

(c) the employee's own "serious health condition" that makes the employee unable to perform one or more of the essential functions of his/her job; and/or

(d) to care for the employee's spouse, child or parent (but not in-law) with a "serious health condition."[26]

The Department of Labor's regulations provide that "continuing treatment by a health care provider" includes any period of incapacity due to pregnancy or for a prenatal care.[27]

Pregnant employees who suffer complications may also find protection from the Americans with Disabilities Act. The ADA protects "qualified individuals with a disability" from employment discrimination on the basis of that disability.[28] An employee is disabled under the ADA if she or he

(1) has a physical or mental impairment that substantially limits one or more major life activities;

(2) has a record of such an impairment; or

(3) is regarded as having such an impairment.[29] Under the ADA, pregnancy itself is not a per se disability, since it is not a result of a physiological disorder.[30] A pregnancy-related disorder such as hypertension, however, is an impairment that could rise to the level of a disability if it substantially limits or is regarded as substantially limiting a major life activity.[31] For example, in *Cerrato v. Durham*,[32] Judge Preska found that pregnancy related conditions such as "spotting, leaking, cramping, dizziness and nausea can qualify as disabilities under the ADA."[33]

Similarly, the risk of premature labor has also been found to create a physical impairment for purposes of the ADA.[34]

In contrast to the ADA, the New York City Human Rights Law, which contains a more liberal definition of disability,[35] treats pregnancy as a per se disability. Employers must therefore provide a reasonable accommodation upon request of a pregnant employee. According to the City Commission on Human Rights,

> when a woman seeks a reasonable accommodation during pregnancy, the employer is required to be responsive to the particular physical limitation which the employee brings forward. Further, because of the intermittent nature of this condition, an employer is obligated to have procedures by which a female employee could seek such accommodation.[36]

Employers in New York City must take special note of this broad protection provided to pregnant employees, particularly since the City law's threshold for coverage is only four employees rather than the 15 employee minimum provided in the ADA.[37]

The PDA, ADA, FMLA and state and local anti-discrimination statutes provide employees with powerful support for claims of workplace discrimination due to pregnancy. In today's litigious atmosphere, employers would be well-advised to review their workplace practices and policies to ensure that their pregnant employees receive all the protections afforded under these laws.

(1) 42 USC §2000e(k) (1997).
(2) Guidelines on Discrimination Because of Sex, 29 CFR §1604.10(b)(1997).
(3) 29 CFR pt. 1604 App. Intro. See also 29 CFR pt. 1604 App. Quest. 8; NYS Exec. Law §296(1)(g) (Consol. 1997).
(4) 71 F3d 58 (2d Cir. 1995).
(5) See id. at 64 (citations omitted). In response, the defendant must "articulate a legitimate, clear, specific and non-discriminatory reason for discharging the employee." Id. Once this burden is satisfied, to prevail the plaintiff must then prove that the proffered reason is a mere pretext. See id.
(6) See Quaratino, 71 F.3d at 65.
(7) 118 F3d 1151, 1156 (7th Cir. 1997).
(8) Id.
(9) Id.
(10) *EEOC v. Imperial Palace Inc.*, 97 Civ. 1361 (D. Nev. 1997).
(11) 807 F2d 1550, 1554 (11th Cir. 1987).
(12) 1997 U.S. Dist. Lexis 20938 (EDNY 1997).
(13) Id. at 3-4.
(14) 85 F3d 1211 (6th Cir. 1996).
(15) See Id. at 1214.
(16) See Id.
(17) 116 F3d 340 (8th Cir. 1997).
(18) See Id. at 342.
(19) See Id.
(20) Id.
(21) 960 F. Supp. 1487 (D. Colo. 1997).
(22) Id. at 1492.
(23) 29 CFR pt. 1604 App. Quest. 9 (1997).
(24) 29 CFR pt. 1604 App. Quest. 7 (1997).
(25) 29 USC §2601 (1997).
(26) 29 USC §2612(a)(1) (1997); 29 CFR §825.112 (1997).
(27) 29 CFR §825.114(a)(2)(ii) (1997).
(28) 42 USC §12112(a) (1997).
(29) 42 USC §12102(2) (1997).
(30) 29 CFR pt. 1630 App. §1630.2(h) (1997).
(31) EEOC Compl. Man §902.2(c)(3).
(32) 941 F. Supp. 388 (SDNY 1996).
(33) Id. at 393.
(34) See *Hernandez v. Hartford*, 959 F. Supp. 125, 130 (D. Conn. 1997).
(35) Section 8-102(16) of the New York City Human Rights Law defines "disability" as "any physical, medical, mental or psychological impairment, or a history or record of such impairment." NYC Admin. Code §8-102(16).
(36) *Willis v. N.Y.C. Police Dept.*, Amended Decision and Order (July 31, 1992).
(37) NYC Admin. Code §8-102(5).