Breakout Sessions – Series 2

BUNDLES OF JOY

PARENTING, PREGNANCY, AND THE WORKPLACE

James M. Paul (Moderator) – Ogletree Deakins (St. Louis)

Heather J. Casagrande – Global Imaging Systems, Inc.

Tiffany Cox Stacy – Ogletree Deakins (San Antonio)

Michael N. Westheimer – Ogletree Deakins (San Francisco)
I. INTRODUCTION

The most significant pregnancy-related federal legislation is the Pregnancy Discrimination Act (PDA). The PDA is a 1978 amendment to Title VII of the Civil Rights Act of 1964 which expanded the prohibition of discrimination “because of sex” to include discrimination on the basis of pregnancy, childbirth or related medical conditions. The PDA requires employers to treat women who are pregnant or who have medical conditions related to pregnancy in the same manner as other employees or applicants with comparable abilities and limitations. The PDA does not specifically require employers to accommodate pregnancy, but rather requires only that employers provide accommodations to pregnant employees on the same basis that it provides accommodations to non-pregnant employees.

The Americans with Disabilities Act of 1990 (ADA) and the Family and Medical Leave Act of 1993 (FMLA) may also require that employers accommodate certain pregnancy-related conditions. While pregnancy itself is not a disability under the ADA, if an employee is substantially limited in a major life activity as the result of a pregnancy, the employer must provide a reasonable accommodation. Similarly, the FMLA provides that any period of incapacity due to pregnancy or prenatal care qualifies as a serious health condition entitling a qualified employee to protected leave. Employees who qualify for protection under the FMLA also are entitled to unpaid leave for the birth of a child. In addition, the Fair Labor Standards Act (“FLSA”) provides certain rights to breastfeeding mothers.

In addition to these federal protections for pregnant employees, several states have statutes addressing pregnancy accommodations in the workplace, some of which are more expansive than federal law. Lastly, while employers are not legally required to accommodate pregnant employees in all circumstances, it may be in the best interest of employers to offer reasonable accommodations in some situations. The purpose of this paper is to describe the federal laws that may require an employer to accommodate an employee’s pregnancy or related medical conditions and to provide a framework for employers to determine their obligations in providing such accommodations.

II. LEGAL PROTECTION FOR PREGNANT EMPLOYEES

A. The Pregnancy Discrimination Act and Title VII

The PDA amended Title VII to prohibit employers from discriminating against employees because of pregnancy, childbirth and related medical conditions. However, the PDA “is a shield against discrimination, not a sword in the hands of a pregnant employee.” The PDA specifically provides 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…” This means that the PDA does not require that pregnant applicants or employees be provided with an accommodation or more favorable treatment vis-à-vis other employees. For example, the PDA does not require employers to offer maternity leave, reinstate an employee after maternity leave, or take other steps to make it easier for pregnant women to work. However, employers may not treat pregnant applicants or employees any worse than other employees with similar abilities. Nor may employers base an adverse employment decision on stereotypical assumptions about the effect of pregnancy on an employee’s job performance, regardless of whether the employer is acting out of hostility or a belief that the employer is acting in the employee’s best interest. When an employer engages in prohibited, discriminatory conduct, a pregnant employee may have a claim under the PDA.
Notably, the PDA’s protections against pregnancy discrimination also extend to discrimination against men. Under the PDA and Title VII an employer cannot discriminate against a man based on the pregnancy of his spouse.\(^7\)

**Theories of Pregnancy Discrimination: Disparate Impact and Disparate Treatment.** The PDA encompasses a range of discriminatory acts related to pregnancy and childbirth. It prohibits discrimination against an individual employee based on her pregnancy, as well as discrimination against pregnant employees as a class. An employee can demonstrate disparate treatment under the PDA “by either using direct evidence of intent to discriminate or using indirect evidence from which a court could infer intent to discriminate.”\(^8\) When the proof of discrimination is from indirect evidence, courts will use the *McDonnell Douglas* burden-shifting framework.\(^9\) In a pregnancy discrimination case, this means that the employee must show: (1) the employer had actual knowledge of the pregnancy; (2) the employee was qualified for the job; (3) the employee suffered an adverse employment action; and (4) there was a nexus between the pregnancy and the adverse employment action.\(^10\) The nexus raises the inference of discrimination. Following the *McDonnell Douglas* framework, the employer must then demonstrate a legitimate non-discriminatory reason for the adverse employment action. If the employer is able to make this showing, then the employee must prove that the employer’s reasoning was a pretext for discrimination.\(^11\)

Under a disparate impact theory of pregnancy discrimination, employees must demonstrate that a facially neutral employment practice is nevertheless discriminatory against pregnant women.\(^12\)

**Pregnancy Discrimination During the Hiring Process.** The PDA applies to discrimination at all stages of employment. An employer may not refuse to hire a pregnant woman because of her pregnancy, a pregnancy related condition, or the prejudices of co-workers, clients, or customers.\(^13\) The PDA forbids pre-employment inquiries to female applicants only, related to pregnancy and childbearing, absent justification based on a bona fide occupational qualification.\(^14\) The EEOC will generally regard a pregnancy related inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.

**Discriminatory Application of Leave Policies and Light-Duty Assignments.** Nor may an employer discriminatorily apply disability or leave policies based on pregnancy. Again, the PDA requires that employers treat women who are pregnant or who have medical conditions related to pregnancy in the same manner as other employees with similar circumstances. Therefore, if an employer requires all employees to obtain a doctor’s statement before granting leave or sick pay, then the employer may require employees with pregnancy-related conditions to follow the same procedure.\(^15\) If an employer holds open an employee’s job while he or she is on short term leave, then the employer must also hold open the job of an employee who is on pregnancy-related leave.\(^16\) If an employer allows employees to accrue seniority during absences for medical conditions, then the employer must allow employees on pregnancy-related leave to accrue seniority.\(^17\) If an employer credits employees for vacation time and pay raises while on leave, then an employer must do the same for employees on pregnancy-related leave.\(^18\) Employers that allow employees who temporarily cannot perform the functions of their jobs to perform modified tasks, or “light-duty” assignments, must also allow employees with pregnancy-related conditions requiring modified job duties the same accommodation.\(^19\)

On March 25, 2015, in *Young v. United States Parcel Service, Inc.*, the Supreme Court settled a controversy surrounding an employer’s policy that provided light-duty work for certain
employees (including some disabled employees) but not for pregnant workers. The case was brought by a worker who tried to show—through indirect evidence—that the policy resulted in the disparate treatment of pregnant workers. In an opinion delivered by Justice Breyer, the Court held that an individual pregnant worker may show disparate treatment via indirect evidence through application of the *McDonnell Douglas* framework. The Court also provided a new standard detailing how a pregnant worker who seeks to show disparate treatment may make out a prima facie case under the *McDonnell Douglas* framework.\(^{20}\)

Specifically, a worker alleging that an employer’s denial of an accommodation constitutes disparate treatment under the PDA may establish a prima facie case by showing that (1) she belongs to the protected class, (2) she sought accommodation, (3) the employer did not accommodate her, and (4) the employer did accommodate others “similar in their ability or inability to work.”\(^{21}\) The Court also created a new “significant burden” standard.\(^{22}\) According to the Court, if an employer presents a legitimate, nondiscriminatory reason for its actions, a worker may reach a jury on the issue of whether the reason is pretextual by providing sufficient evidence that the employer’s policies impose a significant burden on pregnant workers, and that the employer’s “legitimate, nondiscriminatory” reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.\(^{23}\) Moreover, the Court explained that a worker can “create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers.”

**Demotion and Termination of Pregnant Employees.** An employer may not demote or terminate an employee based solely on the employee’s pregnancy or pregnancy-related condition. However, an employer may terminate an employee while she is pregnant for reasons unrelated to the employee’s pregnancy.\(^{24}\) For example, in *Troupe v. May Department Stores Company*, an employee sued after she was terminated during her pregnancy. While pregnant, the employee experienced severe morning sickness and was absent and late to work on several occasions. The employee was placed on 60-day probation, and was then late 11 more days during the probation period. Despite the fact that the employee was fired just one day before she was scheduled to begin maternity leave, the court held that the employee’s termination was not motivated by pregnancy discrimination, but rather the employee was legitimately fired because of her excessive absences and tardiness. The court explained that the PDA does not require an employer to make it easier for a pregnant woman to work and “[i]f an employee who...does not have an employment contract cannot work because of illness, nothing in Title VII requires the employer to keep the employee on the payroll.”\(^{25}\)

Likewise, an employer that terminates an employee as the result of a reduction in force while the employee is on a pregnancy-related leave is not in violation of the PDA.\(^{25}\) In *In re Carnegie Center Associates*, an employee who was terminated as the result of a reduction in force while she was on maternity leave sued for pregnancy discrimination. The court held that the employer could properly consider the employee’s absence due to her maternity leave in making its determination to eliminate her position. The employer was, therefore, able to demonstrate a legitimate nondiscriminatory reason for terminating the employee.\(^{26}\)

However, the PDA prohibits employers from making employment decisions based on “stereotypes” and “assumptions” about pregnancy such as that an employee will need to take a certain amount of time off or will not want to return to work at the conclusion of the pregnancy. In *Maldonado v. U.S. Bank*, an employee sued following her termination one day after she told her supervisor that she was pregnant.\(^ {27}\) The court clarified that while an employer can dismiss
an employee for an excessive amount of absences, even if the absences are a result of pregnancy, an employer may not dismiss an employee on the assumption that the employee will be absent in the future. An employer cannot terminate an employee “simply because it ‘anticipate[s]’ that [the employee will] be unable to fulfill its job expectations....This is the exact sort of employment action that the PDA was designed to prevent.” The court noted, however, that there might be some limited circumstances where an employer will be able to prove that an anticipatory adverse action against a pregnant employee is necessary.

**Health Insurance and Benefits for Pregnant Employees.** Under both Title VII and the Equal Pay Act, health insurance and other benefits must be applied to pregnant employees on the same terms and conditions that they are offered to employees with other disabilities. If a health insurance program provides coverage for other conditions, coverage must be provided for pregnancy-related conditions. If an employer offers its employees a choice of several health plans, it must offer the same choice for the coverage of a pregnancy-related condition. Pregnancy-related expenses must be reimbursed to the employee in the same manner as expenses are incurred for other medical conditions. If an employer’s health insurance plan offers coverage for the medical conditions of its’ employees’ spouses, then it must cover the medical expenses of an employee’s spouse’s pregnancy-related condition.

**B. Pregnancy and the Americans with Disabilities Act**

The Americans with Disabilities Act (ADA) was passed by Congress in 1990 to provide protection for employees with disabilities. Under the ADA, a covered employer may not discriminate against a qualified employee on the basis of a disability. However, pregnancy is not a *per se* disability within the meaning of the ADA. Therefore, employers are not required to provide accommodations for the normal conditions of pregnancy as an ADA disability. While a majority of courts have reached this conclusion with respect to pregnancy itself, courts have distinguished that some complications that may arise in a pregnancy may be considered an “impairment” or disability within the meaning of the ADA so as to require some accommodation.

Infertility has been treated by courts as a physical impairment under the ADA. In *Pacourek v. Inland Steel Co.*, the Northern District of Illinois found that an employee’s infertility, caused by esophageal reflux, was a disability under the ADA analysis. The court found that plaintiff’s condition substantially limited the major life activity of reproduction. However, because infertility is a fundamentally different condition than pregnancy, in that pregnancy is the result of the normal functioning of the reproductive system whereas infertility is the result of an improper functioning, courts are not likely to apply the same ADA standard to most pregnancy-related conditions.

Some courts have allowed employees with pregnancy-related conditions to proceed with discrimination claims under the ADA based on those conditions. In *Cerrato v. Durham*, the Southern District of New York refused to dismiss plaintiff’s discrimination claim where she alleged that “pregnancy-related conditions including spotting, leaking, cramping, dizziness, and nausea” was an impairment under the ADA. The court found that the plaintiff “alleged facts from which it might be concluded that she has suffered an impairment of a bodily system – the reproductive system – that substantially restricts her capacity to engage in work, a major life activity.” Thus, depending on the level of impairment, pregnancy-related conditions may qualify as a disability under the ADA.
C. Pregnancy and the Family and Medical Leave Act

While the PDA does not require that employers provide employees with pregnancy-related leave, employees may be entitled to pregnancy leave under the Family and Medical Leave Act (FMLA). The FMLA requires that covered employers grant 12 weeks leave to eligible employees “because of the birth of a son or daughter” or because of a “serious health condition that makes the employee unable to perform the functions of the employee’s job,” among other reasons. The FMLA also provides for the reinstatement of the employee and prohibits interference with or discrimination due to the employee’s exercising of these rights. The Guidelines issued by the Department of Labor provide that “any period of incapacity due to pregnancy, or for prenatal care” is an impairment or illness that constitutes a “serious health condition”. In addition, the Guidelines provide that absences attributable to incapacity for pregnancy qualify for FMLA leave even though the employee may not be receiving treatment from a health care provider during the absence, and even if the absence does not last more than three days. For example, an employee with severe morning sickness which interferes with the employee’s ability to work may qualify for FMLA leave.

D. State Laws

Some states have laws granting protection and/or leave to pregnant workers. For example, California law requires employers with five or more employees to provide female employees unpaid pregnancy disability leave for up to four months, and allow the employees to return to work thereafter. California law also forbids employers from refusing to temporarily transfer pregnant employees to a less strenuous or hazardous position, with the advice of her physician, if the transfer can be reasonably accommodated. The Supreme Court upheld the validity California’s law finding that the intent of Congress was “to construct a floor beneath which pregnancy disability benefits may not drop – not a ceiling about which they may not rise.”

The District of Columbia prohibits discrimination based on breastfeeding. Similarly, Hawaii’s New Mothers Breastfeeding Promotion and Protection Act provides: “No employer shall prohibit an employee from expressing breast milk during any meal period or other break period required by law to be provided by the employer or required by collective bargaining agreement.” Under Montana law, it is unlawful for an employer to terminate a woman’s employment because of the woman’s pregnancy and it is unlawful to refuse to grant an employee a reasonable leave of absence for the pregnancy.

Similarly, the Massachusetts Pregnant Workers Fairness Act prohibits Massachusetts employers from denying pregnant women and new mothers reasonable accommodation for their pregnancies and any conditions related to their pregnancies, regardless of whether the pregnancies or related conditions constitute disabilities under existing federal or state discrimination law. Notably, although an employer may require an employee to provide “documentation from an appropriate health care or rehabilitation professional,” an employer may not require such documentation for the following accommodations: (1) more frequent restroom, food, or water breaks; (2) seating; (3) limits on lifting more than 20 pounds; and (4) private non-bathroom space for expressing breast milk.

Likewise, Colorado’s Pregnant Workers Fairness Act requires employers to accommodate medical conditions and limitations stemming from pregnancy that may not separately qualify as disabilities under the ADA. Also, unlike the ADA, which applies only to
employers with 15 or more employees, Colorado’s law apply to all employers, even those with only 1 employee.\textsuperscript{56} 

The South Carolina Pregnancy Accommodations Act makes it unlawful for an employer “to require an applicant for employment or an employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that the applicant or employee chooses not to accept, if the applicant or employee does not have a known pregnancy limitation related to pregnancy, or if the accommodation is unnecessary for the applicant or employee to perform the essential duties of her job.”\textsuperscript{57} It also prohibits requiring an employee to take leave if another reasonable accommodation can be provided for the known pregnancy-related limitations.\textsuperscript{58} In addition to these examples, various other states offer protections to pregnant employees and new mothers.

\textbf{III. EMERGING LEGAL CLAIMS – RECENT LEGAL CASES}

\textbf{A. Leave Policies}

Title VII and the PDA generally prohibit employers from disallowing an employee to return to work for a specific amount of time after pregnancy or requiring an employee to take leave because of pregnancy.\textsuperscript{59} However, courts have allowed some exceptions to this rule. In \textit{Equal Employment Opportunity Commission v. Detroit-Macomb Hospital Corp.}, the Sixth Circuit held that a hospital’s policy requiring all employees with a temporary medical restriction to be placed on medical leave did not violate Title VII.\textsuperscript{60} The hospital placed two pregnant nurse employees with medical restriction on mandatory leave until the conclusion of their pregnancies. The hospital had a policy in place which required all employees on medical restriction to take leave for the duration of the disability. The court found that the “pregnancy was not a determining factor in the hospital’s decision to place the two pregnant employees on involuntary leave” and as long as the hospital’s policy is applied uniformly, it is not discriminatory.

A mandatory leave policy was also upheld when it concerned the safety of others. In \textit{Levin v. Delta Air Lines, Inc.}, Delta’s policy required flight attendants to be removed from duty as soon as their pregnancy was discovered.\textsuperscript{61} A class of flight attendants challenged the policy on the ground that it discriminated against pregnant women. Delta defended the policy by saying that the presence of pregnant flight attendants would create a threat to the safety of its passengers. The Fifth Circuit found that while the flight attendants presented a \textit{prima facie} case of discrimination, Delta’s rationale, the safety risk to the passengers, was sufficient reasoning for the policy.

\textbf{B. Accommodating Fertility-Related Conditions}

Accommodating fertility treatments has become a contested issue as fertility-related procedures are now more commonplace. Employees have argued that the ability to have children is a “major life activity” under the ADA and therefore employers must accommodate fertility-related conditions. While most courts have rejected that argument on the basis that infertility “in no way” prevents employees from performing their full time duties,\textsuperscript{62} some courts have held that reproduction qualifies as a major life activity.\textsuperscript{63} In \textit{Saks v. Franklin Covey Co.}, the court held that infertility is a disability under the ADA. The court held, however, that the employee’s claim failed because her employer’s health plan did not offer infertile people any less coverage than it offered to fertile people.\textsuperscript{64} In \textit{Saks}, the employee underwent numerous fertility treatments over a period of four years, some of which her employer would not cover under its health plan which excluded surgical impregnation procedures. The employee filed suit
against Franklin Covey alleging ADA, Title VII, and PDA violations. The court found that Franklin Covey’s health plan was not discriminatory – it was offered to every employee equally and the exclusions for certain procedures likewise applied equally. The court also dismissed the employee’s Title VII claim finding “as long as both men and women receive the same benefits and are subject to the same exclusions under an employer’s insurance policy, the policy does not discriminate on the basis of sex.” Likewise, the court dismissed her PDA claims finding that “nothing in [Title VII] requires an employer to provide insurance coverage for every type of infertility treatment. The PDA merely compels employers to give all their employees-pregnant, potentially pregnant, and not pregnant-the same insurance coverage.” Because Franklin Covey provides coverage, including “full coverage” during pregnancy, equally to all employees, there is no discrimination.

However, in a subsequent case, the Seventh Circuit took a different approach in analyzing an employee’s discrimination claim based on her termination for time spent undergoing in vitro fertilization (IVF). In Hall v. Nalco Company, the employee claimed that she was terminated for taking leave to undergo IVF, a procedure that can only be performed on women because of their childbearing capacity. Relying in part on Saks v. Franklin Covey Co., the district court dismissed the employee’s claims on the grounds that infertility is a gender-neutral condition and the PDA does not require an employer to cover fertility treatment as long as the policy is applied equally to men and women. The court rejected this analysis finding that “even when [infertility] is at issue, the employer conduct complained of must actually be gender neutral to pass muster.” Here, employees who take time off for IVF treatment, like employees who take time off to give birth, will always be women. The employee “was terminated not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity.” Because the employee’s claim is, therefore, based on treatment of a person that is different because of sex, there is a valid Title VII action.

The differing analysis used by the court in Saks and the court in Hall suggests that whether a court views the absenteeism as due to infertility, a gender-neutral condition, or a condition related to childbearing capacity, a gender-specific trait, will be determinative on the outcome of fertility-related cases. There will likely be further discussion as more cases arise involving what constitutes a “related medical condition” under the PDA and how to address evolving fertility-related treatment and technology.

C. Accommodating Breast-Feeding, Breast-Pumping and Other Post-Pregnancy Needs

Section 207(r) of the FLSA requires certain employers to provide a nursing mother under their employ with a reasonable break time and a private place other than a bathroom to express breast milk for one year after the birth of her child. Recently, in Delaware, a district court dismissed an employee’s claim against her former employer for violation of the FLSA because while the statute created a private cause of action, it did not offer lost wages as a remedy, which was the remedy sought by the plaintiff. Rather, the FLSA limited the remedies available for violations of § 207(r) to “unpaid minimum wages” and “unpaid overtime compensation.” For this reason, the court awarded summary judgment in the employer’s favor as to its alleged violation of Section 207(r).

Plaintiff Autumn Lampkins ultimately prevailed at trial, however, on her claims of hostile work environment and gender discrimination in violation of Title VII and Delaware state law. Both claims related to Ms. Lampkins’ need to express breast milk at work. The evidence showed that Ms. Lampkins’ employer had failed to provide her with sufficient opportunities to
express milk, initially forced her to express milk in a bathroom, and then required her to express milk in an office which had operating video cameras and windows that allowed other employees to observe her express her milk. She was then required to express milk in an office which had operating video cameras and windows that allowed other employees to observe her express her milk. One male employee was caught observing Lampkins on two occasions when she pumped while another male employee used his keys to enter the office while Lampkins was pumping. Lampkins' supervisor even did paperwork in the office while Lampkins pumped. When co-workers complained about Lampkins' breaks, she was demoted and transferred to another location. Lampkins ultimately resigned her employment. In February 2019, a jury found in Lampkins' favor and awarded her $25,000 in compensatory damages and $1.5 million in punitive damages.
1 See 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and 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...").

2 See 29 C.F.R. § 1604.10(b) ("Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment. Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy, childbirth or related medical conditions on the same terms and conditions as they are applied to other disabilities...").


4 42 U.S.C. § 2000e(k). Some courts have extended this definition to include "potential pregnancy." See Walsh v. Nat'l Computer Sys., 332 F.3d 1150, 1160 (8th Cir. 2003) ("Potential pregnancy ... is a medical condition that is sex-related because only women can become pregnant.") (internal citation omitted).

5 See Reeves v. Swift Trans. Co. Inc., 446 F.3d 637 (6th Cir. 2006) (upholding district court's grant of summary judgment to employer on former employee's pregnancy discrimination claim. "[I]f the Court determined that Plaintiff was entitled to [the requested accommodation]...the effect would be to provide greater protection and benefits to pregnant women than to other employees who suffered from a non-work related injury or illness, such as a heart-attack or cancer.") (internal quotation omitted).


7 See Nicol v. Imagematrix, Inc., 773 F. Supp. 802, 806 (E.D. Va. 1991) (finding that a husband whose spouse was pregnant had standing to sue under Title VII for his claim that he was fired because of his wife's pregnancy).


10 Id.

11 Id.

12 Scherr v. Woodland School Comm. Consolidated Dist. No. 50, 867 F.2d 974, 983-84 (7th Cir. 1989) (finding a genuine issue of material fact as to whether a school district’s policy of requiring employees to choose either paid sick leave or unpaid leave and not allowing a combination of both, was discriminatory against pregnant employees. "[R]ather than insisting on proof of the hypothetical non-pregnant teacher who would combine paid sick leave with unpaid general leave, the district court should look to the proof of the needs of pregnant teachers and compare that to the actual coverage.").

employment was revoked upon the employer’s learning that she would have to miss several weeks of work within the first few months of employment. The court found that the employer’s reasoning, that it would be a “bad business practice to hire an employee who planned to take a leave of absence within a few months of beginning work because [the employer was] concerned about the harmful effect of an interruption in service during the employee’s training period,” was a proper business reason for the revocation. Of note, the court also said that this was “a very close case.”


15 Id.

16 29 C.F.R. § 1604, App, Q & A 9.

17 29 C.F.R. § 1604, App, Q & A 10.

18 29 C.F.R. § 1604, App, Q & A 11.


21 Id. at 1354.

22 Id.

23 Id.

24 See Troupe v. May Dept. Stores Co., 20 F.3d 734 (7th Cir. 1994).

25 In re Carnegie Center Associates, 129 F.3d 290, 296 (3rd Cir. 1997) (“The PDA does not require an employer to grant maternity leave or to reinstate an employee after a maternity leave. The PDA merely requires that an employer treat a pregnant woman in the same fashion as any other temporarily disabled employee.”); see also Cmokrak v. Evangelical Health Sys. Corp, supra (“What [the employee] fails to appreciate is that the PDA does not force employers to pretend that absent employees are present whenever their absences are caused by pregnancy.”).

26 This does not mean, however, that an employer may disguise a discriminatory action as necessary for business reasons. See Atchley v. Nordam Group, Inc., 180 F.3d 1143, 1151 (10th Cir. 1999) (“The jury did not accept this argument—probably because Ms. Atchley was the only employee affected by the so-called restructuring.”).

27 Maldonado v. U.S. Bank, 186 F.3d 759 (7th Cir. 1999); see also Laxton v. Gap, Inc., 333 F.3d 572 (5th Cir. 2003).

28 Id. at 767 (“An employer may, under narrow circumstances that we are not convinced are present here, project the normal inconveniences of pregnancy and their secondary effects into the future and take actions in accordance with and in proportion to those predictions.”).

29 See 29 C.F.R. § 1604.10(b), supra.


34 See 42 U.S.C. § 12101(b)(1)-(4) ("It is the purpose of this chapter...to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities...").

35 See 42 U.S.C. § 12112(a) ("No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.").

36 See 29 C.F.R. § 1630.2(h) ("Other conditions, such a pregnancy, that are not the result of a physiological disorder are also not impairments.").

37 See Navarro v. Pfizer Corp., 261 F.3d 90, 97 (1st Cir. 2001) ("While pregnancy itself may not be an impairment, the decided ADA cases tend to classify complications resulting from pregnancy as impairments.").


44 29 C.F.R. § 825.114 (a)(2)(ii).

45 29 C.F.R. § 825.114(e).

47 See Cal. Gov’t Code § 12945(a).

48 See Cal. Gov’t Code § 12945(b).


50 See D.C. Code § 2-1402.05(a), (b).


52 See Mont. Code Ann § 49-2-310(1), (2).


54 Id.


58 Id.


61 730 F.2d 994, 995 (5th Cir. 1984).

62 See Krauel v. Iowa Methodist Medical Center, 95 F.3d 674, 677 (8th Cir. 1996).


64 117 F.Supp.2d 318, 327 (S.D.N.Y. 2000).

65 Hall v. Nalco Co., 534 F.3d 644 (7th Cir. 2008).


67 Id.

68 The statute exempts “[a]n employer that employs less than 50 employees ... if such requirements would impose an undue hardship by causing the employer significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer’s business.” 29 U.S.C. § 207(r)(3).


71 Id.

72 Id.

73 2018 WL 6188779, at *1.

74 Id. at *2.

Bundles of Joy: Parenting, Pregnancy, and the Workplace

Presenters
Heather J. Casagrande (Global Imaging Systems, Inc.), Tiffany Cox Stacy (San Antonio), and Michael N. Westheimer (San Francisco)

Moderator
James M. Paul (St. Louis)

Applicable Federal & State Law
Pregnancy Discrimination Act

- Prohibits discrimination based on:
  - Current pregnancy
  - Past pregnancy
  - Potential or intended pregnancy
  - Medical conditions related to pregnancy or childbirth

PDA – Duty to Accommodate?

Young v. UPS (2015):
An employee may make out a prima facie case of disparate treatment under the PDA by comparing her own situation with the accommodations offered to employees who are not pregnant but who are similar in their ability or inability to work.
Application of Facially Neutral Policy

Significant Burden Test

- Policy imposes a **significant burden** on pregnant workers, and
- The employer’s legitimate, nondiscriminatory reasons are not **sufficiently strong** to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.

Anna

You interview Anna when she is in her first trimester. Anna is not visibly pregnant, nor does she disclose it. You decide Anna is the best qualified candidate and offer her employment. By the time Anna begins employment one month later, her baby bump is showing. Still, Anna does not say anything about being pregnant. Additionally, you know Anna will not qualify for FMLA when her baby arrives, and you hired Anna because you are busy and need someone in that role. What do you do?
What Would You Do With Anna?

1. Fire Anna immediately for not disclosing her condition.
2. Ask Anna when she is due and ask about her intentions for taking time off from work.
3. Wait until Anna discloses her pregnancy and treat Anna’s request for leave the same as you would treat anyone else who did not qualify for FMLA.

Americans with Disabilities Act

Employers must provide reasonable accommodations to employees and applicants with disabilities, which may include job restructuring, reassignment, modified schedule, etc. (assuming no undue hardship)
ADA Coverage

- Pregnancy is **not** an ADA disability, *per se*
- Pregnancy-related impairments, even though temporary, may qualify as a disability if they substantially limit a major life activity.
  - Minor morning sickness is not a “disability”
- “Regarded as” claims
- Don’t forget applicable state law!

Betty

Betty works in a call center where she is required to be present and available to take calls from 8 a.m. to 5 p.m., Monday through Friday. Betty recently found out she is pregnant, and she is suffering from severe nausea and vomiting throughout the day. As a result, Betty is often late for work and is disappearing throughout the day to go to the restroom. What do you do?
What Would You Do With Betty?

1. Discipline Betty for her tardiness and loafing around.
2. Ask Betty the reason for her conduct, request medical documentation to support her condition(s) and need for accommodation(s), and engage in the interactive process.
3. Rely on Betty’s statements regarding her pregnancy-related conditions and tell Betty her policy non-compliance will be excused during her pregnancy.
4. Both 1 & 2

It’s More Than the PDA – Time Off

- **FMLA**
  - Provides up to 12 weeks of unpaid leave for, among other things, an employee’s serious health condition, including prenatal care and incapacity due to pregnancy
- **Paid Sick Leave (PSL) – Multiple states**
  - Provides protected paid time off for an employee’s own health condition, including pregnancy-related
- **Pregnancy Disability Leave (PDL) – California**
  - Provides protected unpaid time off for a condition related to pregnancy, childbirth, or a related medical condition
Catherine

Catherine is six months pregnant when her physician places her on bed rest due to preeclampsia. Catherine qualifies for FMLA but she wants to “save” her time for after her baby is born. Catherine asks if she can work from home until her baby is born. Catherine provided documentation to support her diagnosis and work restriction, but the documentation does not indicate whether Catherine could work from home. What do you do?

What Would You Do With Catherine?

1. Make her use FMLA and upon expiration, provide Catherine up to six weeks of unpaid leave under your general unpaid LOA policy.
2. #1, but tell Catherine she could work from home if she wants to do so.
3. Request documentation from Catherine’s doctor regarding whether she could work from home and engage in interactive process.
Catherine Changes Her Mind

What if Catherine’s doctor says she can work from home, but Catherine decides she would prefer to rest and take FMLA now?

Emerging Legal Claims
Infertility Treatments

- Likely not a “serious health condition” for purposes of the FMLA
- Infertility is an ADA disability
  - May require time off from work for treatment
- Disparate treatment may give rise to claim of gender/pregnancy discrimination under Title VII

Surrogacy

- Not specifically mentioned by federal law; many state laws silent.
- Courts address on a case-by-case basis:
  - Surrogate mom denied lactation breaks (while moms with babies at home were not) stated a claim under the PDA and California state law.
  - Employee who used a surrogate to give birth denied maternity leave under company policy.
Return to Work Issues

Legal Obligations – FMLA

- Reinstated to the same position, or if no longer available, restored to an equivalent position
- If employee *voluntarily* decides to not return to work, employer can seek reimbursement of employer’s share of healthcare premiums paid
  - Not for periods where PTO was used
- If employee provides notice of intent to not return, reinstatement obligation ends
Breastfeeding

- FLSA/Affordable Care Act requires employers provide unpaid breaks for lactating mothers to express milk
  - Requires a private place for the expression of milk
- State law may provide more protection
- Lactation discrimination can result in claims of gender/pregnancy discrimination

Innovative Ideas for Attracting & Retaining Top Talent
Why It Matters

Increased employee demand for benefits

Decreased unemployment rates

Paid Parental Leave

77% of those surveyed said paid parental leave influenced choice on employer

50% of those surveyed would rather have paid parental leave than a salary increase

50% One employer saw 50% increase in retention of female employees
“Family-Friendly” Workplaces

- Wind-down before leave, ramp-up after leave
- PTO donation bank
- Flex time
- Telecommuting
- Job sharing
- Internal network

Child care support

Lactation support

Concierge service

Family-bonding activities
Pregnancy Disability Leave (PDL) / California Family Rights Act (CFRA)

- Similar and generally run concurrently, except for pregnancy disability
- For pregnancy-related disability leave, PDL applies and CFRA does not
- PDL provides up to 4 months of leave
- CFRA provides up to 12 weeks of baby-bonding leave
- Applicability:
  - PDL: 5+ employees
  - CFRA baby-bonding: 20+ employees
  - CFRA other leave: 50+ employees
Employer-Provided Paid Sick Leave

- Must provide at least 24 hours or 3 days of paid sick leave per year
  - Can be used to care for children or other family
- For separately provided additional paid sick leave, must be allowed to use at least half of annual accrual to care for children or other family
- Growing number of municipalities have paid sick leave ordinances

California State Agency Benefits

- Paid Family Leave (PFL) – EDD wage replacement to care for seriously ill family member or for baby bonding, up to 6 weeks at 60% to 70% of weekly salary
- San Francisco Paid Parental Leave Ordinance (PPLO) – employer must supplement PFL to bring employee up to 100% of weekly salary
California Considerations

- **School and Child Care Activities Leave**
  - Up to 40 hours per year to find, enroll, or re-enroll child in school or with licensed child care provider, to participate in activities at the child’s school or licensed child care provider, or to address a school or child care provider emergency

- **School Appearance Involving Suspension**
  - Must be permitted to take time off to appear in the school of child who is facing suspension

Bundles of Joy: Parenting, Pregnancy, and the Workplace

**Presenters**
Heather J. Casagrande (Global Imaging Systems, Inc.), Tiffany Cox Stacy (San Antonio), and Michael N. Westheimer (San Francisco)

**Moderator**
James M. Paul (St. Louis)