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EEOC Pushes Outer Limits of Pregnancy Accommodation

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The Equal Employment Opportunity Commission (EEOC) recently issued enforcement guidance that pushes the outer limits of the Pregnancy Discrimination Act (PDA).

Additionally, in a significant move, the U. S. Supreme Court has agreed to review a decision of the Fourth Circuit Court of Appeals which had held that the PDA did not require United Parcel Service (UPS) to accommodate the restrictions of one of its drivers who was pregnant, even though UPS offers light duty to workers injured on the job.

Coincidentally, in the 2006 opinion of *Reeves v Swift Transportation Company*, the Sixth Circuit Court of Appeals (which hears appeals from federal district courts in Michigan, Ohio, Tennessee and Kentucky) ruled consistent with the Fourth Circuit opinion that is on its way to the Supreme Court.[1]

The PDA amended Title VII in 1978 to include within the definition of discrimination "on the basis sex," "because of or on the basis of pregnancy, childbirth or related medical conditions." It also required that "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…" 42 USC 2000e (k)

In 1980, Michigan's Elliott-Larsen Civil Rights Act (ELCRA) was amended to include within its definition of "sex," "pregnancy, childbirth, or a medical condition related to pregnancy or childbirth…" and, thereafter, it was amended to add language similar to that found in the PDA.

It was generally assumed that you could not treat a pregnant worker differently than any other worker who had medical restrictions, including a worker who was given light duty because of an on the job injury. But the 2006 Sixth Circuit opinion in *Reeves* called into question that assumption.

In 2009, Michigan's Governor Jennifer Granholm signed into law another amendment to the ELCRA that prohibited employers, in relevant part, from treating "an individual affected by pregnancy, childbirth, or a related medical condition differently for any employment-related purpose from another individual who is not so affected but similar in ability or inability to work, **without regard to the source of any condition** affecting the other individual's ability or inability to work." (Emphasis added)

Thus, the previous assumption was expressly incorporated under state law, and Michigan employers continued to be prohibited from granting light duty to workers having on the job injuries while denying light duty to pregnant workers. So, regardless of how the Supreme Court rules on this issue, Michigan employers must comply with the prohibition.

Recently, in its new enforcement guidance, the EEOC has gone even further. First, it has taken the opposite position to the Fourth and Sixth Circuit cases discussed above and adopted the prohibition of ELCRA, even though the PDA does not contain similar language to that emphasized above in the 2009 amendment.

The EEOC continued, indicating that a pregnant worker can compare herself to a disabled employee who received an accommodation for a disability under the Americans with Disabilities Act (ADA). Under the ADA, an employer having 15 or more employees must provide a reasonable accommodation, unless doing so would cause an undue burden on the employer, which is often difficult to demonstrate. Therefore, where an employer has provided, for example, more frequent bathroom breaks, permission to keep a water bottle at the assembly line or a stool to sit on, or has honored weight lifting restrictions as an accommodation to a disabled employee, the pregnant employee can expect similar accommodations for her restrictions.

In addition, if an employer grants medical leaves of absence to employees with disabilities, it would be similarly bound to extend leaves of absences to the pregnant worker, even if the employer is not bound by the Family and Medical Leave Act.

To curtail premiums for worker's disability compensation coverage, an employer may desire to provide light duty for work-related injuries. In Michigan, if employers do, it must also provide light duty to pregnant workers. The Supreme Court may adopt this view under the PDA next term. The EEOC already has.

Certain industries, such as long-term medical care facilities, find this particularly difficult given the high frequency of back injuries and the predominantly female staff. To control the number of employees on light duty at any one time, some employers are developing light duty programs.

If you need assistance with developing a light duty program, or need help avoiding liability when an employee announces her pregnancy, contact the author or another experienced Plunkett Cooney employment attorney.

One employer was found liable for pregnancy discrimination because its manager failed to congratulate the worker after her announcement and another was liable after assigning a pregnant woman to a safer position. Clearly, employers that do what they think is right, do not always comply with the law. Prior to acting, it is wise to seek legal advice.

[1] A 2013 unpublished opinion of the Sixth Circuit disagreed with *Reeves* and ruled it is unlawful.