

**JUSTIFYING PREGNANCY-RELATED  
EMPLOYMENT DECISIONS UNDER THE  
PREGNANCY DISCRIMINATION ACT**

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**ABSTRACT**

This article provides an overview of recent court cases involving adverse employment actions that were influenced by an employee's pregnant condition. It is intended to provide employers with a better understanding of how the courts adjudicate these types of cases so that they will be better able to make employment decisions that comply with the Pregnancy Discrimination Act. The information reported in this article was gleaned by reviewing all cases decided at the circuit court level and published from January 1999 to June 2004.

The Pregnancy Discrimination Act (PDA) prohibits pregnancy discrimination at the workplace. Enacted in 1978, the law states 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" [1, p. 1].

Because this law defines pregnancy discrimination in very general terms, it does not provide employers with a clear guide for implementing specific policies and practices. Such guidance is better provided by the case law. That is, an employer should refer to past court decisions when trying to determine the legality of an adverse employment action taken against a woman who is protected by the PDA.

Our examination of the case law uncovered two types of PDA cases. In one, the employer attempts to defend its adverse action by claiming that it was not pregnancy-based. In such cases, the employer must demonstrate that it had a legitimate, nondiscriminatory reason for its action, one that had nothing to do with the pregnancy. For instance, it could argue that an applicant was unqualified or an employee had not satisfactorily performed her job. The courts adjudicate such cases by employing the McDonnell-Douglas or mixed-motives standards that are traditionally used in EEO cases [2].

This article examines the other type of case, one in which the employer's actions are admittedly influenced by the plaintiff's pregnancy. In such cases, the employer defends its adverse action by arguing that the inconveniences stemming from an employee's pregnancy caused the employer an economic hardship.

Due to the evolving nature of the law, we reviewed all circuit court case decisions published from January 1999, to June 2004. This timeframe gave us an adequate sample size from which we could draw meaningful generalizations. Some cases reviewed were not included because they did not fit the purpose of the article. From this review, we uncovered the following types of arguments that employers used to defend their adverse employment actions.

- The employee was fired because her pregnancy caused excessive absences.
- The employee was fired or the applicant was rejected because her pregnancy was *expected* to cause excessive absences, especially during critical business periods.
- The employee was fired because she was expected to become less committed to her job once the baby was born.
- The employee was not reinstated to her old job following maternity leave because such an action was not in the employer's best interests.
- The employee was fired because her pregnancy prevented her from performing certain important duties.

The aim of this article is to determine the viability of these defenses in the eyes of the courts. By knowing which, if any, of these defenses can withstand court scrutiny, employers will be better able to make employment decisions regarding pregnant employees and applicants that comply with the PDA. The information is presented in a question-and-answer format.

### **May an Employer Fire a Pregnant Worker for Excessive Absences Caused by Her Pregnancy-Related Condition?**

Pregnant employees often miss work because they experience pregnancy-related medical problems. The Family Medical Leave Act (FMLA) offers protection to these individuals by allowing them to take up to twelve weeks of annual leave for such purposes [3]. However, the FMLA does not cover all employees. Specifically, the law exempts employees who work for small

companies (i.e., those employing fewer than fifty workers) and employees who have worked for their company for less than 1,250 hours during the preceding 12-month period [3].

The issue raised here is whether a firm may legally fire a pregnant employee for excessive absences if she is not protected by the FMLA. Three cases dealt with this issue. In two of the cases (*Armando v. Padlocker* [4]; *Dormeyer v. Commercial Bank of Illinois* [5]), the plaintiffs argued that such discharges represent instances of disparate treatment and thus violate the PDA. The employers prevailed in both cases however, because their actions were consistent with their written policies stating that excessive absenteeism is a cause for discharge. These courts ruled that such discharges comply with the PDA as long as the plaintiffs are treated no differently than nonpregnant employees who have similar attendance records; they are being fired for missing work, not for being pregnant.

In the third case, *Stout v. Baxter Healthcare Corporation* [6], the plaintiff was fired because her absences (due to a miscarriage) exceeded the three-day maximum for probationary employees. The court rejected her disparate treatment claim for the same reason noted in the *Armando* [4] and *Dormeyer* [5] cases. However, the plaintiff also filed a claim of disparate impact, claiming that the employer's policy has harsher consequences for members of her protected group. The plaintiff argued that the amount of leave offered by the employer (three days) is not sufficient to accommodate pregnancy-related absences, as substantially all women who give birth during the probationary period would be unable to work for at least two weeks. The court viewed this argument as a request for preferential treatment for pregnant employees and thus ruled for the employer because the PDA "does not require employers to treat pregnancy-related absences more leniently than other absences" [6, at 3].

The PDA does not mandate preferential treatment and therefore does not prevent a firm from firing a pregnant employer for violations of its attendance policy. PDA compliance is achieved if an employer holds both pregnant and nonpregnant employees to the same attendance standards.

### **May an Employer Fire a Worker or Reject an Applicant Based on Future Anticipated Absences Caused by the Individual's Pregnancy-Related Condition?**

The issue here is whether a firm may legally refuse to employ a woman whose pregnancy is expected to cause *future* absences. As noted in *Maldono v. U.S. Bank and Manufacturer's Bank* [7], the PDA was not designed to handcuff employers by forcing them to wait until an employee's pregnancy causes them economic hardship. Thus, an employer may take anticipatory adverse action against a pregnant employee when "it has a good faith basis, supported by sufficiently strong evidence, that the normal inconveniences of an employee's pregnancy will require special treatment" [7, at 6]. To illustrate this point, the court cited

*Marshall v. American Hospital Association*, in which the court upheld the employer's decision to fire a pregnant employee based on her stated intention to take pregnancy leave during the busiest time of the year [8].

We reviewed three cases that addressed this issue. In *Wagner v. Dillard*, the plaintiff, who was six months pregnant, was rejected for a position at Dillard's Department Store [9]. She alleged that Dillard's refused to hire her because it feared that her pregnancy would cause future absences. She countered this notion by testifying that she told her employer that she intended to work up until delivery and would not take maternity leave following the birth. The court sided with the plaintiff, concluding that Dillard's concern was based on a stereotypical assumption that was not supported by the evidence [9].

In *Laxton v. Gap*, the plaintiff was fired as general manager at Old Navy after announcing that she was expecting a child around Thanksgiving [10]. She alleged that the store discharged her because it would be difficult for them to find a suitable replacement for her when she took maternity leave during the busy holiday season. However, at the time Old Navy made this decision, it had no knowledge of how long the plaintiff would take maternity leave, it just assumed the worst. Not even the plaintiff knew, as she "really hadn't given [maternity leave] a lot of thought because we were just trying to make it through getting the store opened" [10, at 7]. The court thus ruled for the plaintiff, concluding that the discharge was based on the stereotypical belief that all pregnant women need to take significant time off work following the birth of their child.

The court was presented with a similar set of circumstances in *Maldono v. U.S. Bank and Manufacturer's Bank* [7]. Here, the plaintiff was a newly hired part-time teller who was fired the day after she informed her supervisor that she was expecting a child in July. The plaintiff claimed that the bank fired her because it wrongly assumed that she would not be able to work following the birth and would thus be unavailable to substitute for vacationing full-timers throughout the summer, a task which was an essential condition of her employment. The plaintiff testified that she had informed the employer that she had planned to work until she delivered and was not going to take any maternity leave. The court ruled for the plaintiff, stating that the bank cannot terminate her simply because it anticipated, without strong evidence, that she would be unable to fulfill its job expectations. The court concluded by stating, "This is the exact sort of employment action that the PDA was designed to prevent" [7, at 6].

One can conclude from these decisions that an employer cannot take adverse action based on anticipated pregnancy-related absences without strong evidence that such absences are likely to occur. This conclusion holds even when the absences are expected to occur at very inconvenient times. In cases such as these, the court places great weight on the plaintiff's stated intentions regarding pregnancy leave. An employer may not take adverse action based on anticipated future

absences unless the woman specifically states that she intends to take pregnancy leave during a critical business period.

### **May an Employer Discharge a Pregnant Employee Based on the Fear That She Will Become Less Committed to Her Job Once the Baby is Born?**

Employers sometimes fear that once a pregnant employee has her child, she will become less committed to her job. One would expect that an adverse employment action based on such a fear would violate the PDA because it is based on a stereotypical notion. This expectation was tested in *Back v. Hastings on Hudson Union Free School District* [11]. In this case, the plaintiff was a school psychologist who was denied tenure allegedly because the defendant gave credence to stereotypes about mothers with young children, presuming that as a young mother, the plaintiff would not continue to demonstrate the necessary devotion to her job. The plaintiff testified that the employer made the following statements to her regarding fears about her inability to successfully combine work and motherhood:

- “I’m not sure whether you could be a mother and still do this job.”
- “I’m concerned that if you received tenure, you would not be willing to stay until 4:30 [p.m.], and I wonder how you could possibly do this job with children.”
- “If your family is a priority, maybe this is not the job for you.”
- “Once you have tenure, we are concerned that you would not show the same level of commitment that you had shown previously because you had little ones at home.”

The employer denied that its decision to fire her was influenced by these statements, claiming that she was fired because she lacked organizational and interpersonal skills. However, it argued that even if such a charge were true, stereotypic remarks about pregnant women and mothers do not constitute pregnancy discrimination, but rather, parenthood discrimination, which is not a protected class. The employer further argued that to prove pregnancy discrimination, the plaintiff must show that the company treated fathers more favorably than they treated mothers. The plaintiff offered no evidence that this was the case.

The court disagreed with the defendant’s contention that the plaintiff cannot make a claim that survives summary judgment unless she demonstrates that the defendant treated fathers differently than mothers. It noted that stereotyping women as caregivers can by itself be evidence of an impermissible, sex-based motive in the absence of evidence about how the employer treated fathers. To support this notion, the court cited the Supreme Court’s decision in *Department of Human Resources v. Hibbs* [12].

Stereotypes about women’s domestic roles are reinforced by parallel stereotypes presuming a lack of domestic responsibilities for men. Because

employers continued to regard the family as the woman's domain, they often denied men similar accommodations or discouraged them from taking leave. These mutually reinforcing stereotypes created a self-fulfilling cycle of discrimination that forced women to continue to assume the role of primary family caregiver, and fostered employers' stereotypical views about women's commitment to work and their value as employees [12, at 8].

This ruling indicates that employers violate the PDA when they take adverse actions against pregnant women that are based on stereotypical views of motherhood, regardless of whether men are so treated. Thus, to win her case, the plaintiff need not prove that the employer treats men more favorably. Obviously, employers need to ensure that all supervisors, especially those that play a role in the discharge decision, refrain from making any comments regarding their employee's pregnancy because such comments can be used as evidence of discrimination.

### **What Rights Do Pregnant Employees Have When Attempting to Return to Their Previous Job at the Conclusion of Their Maternity Leave?**

Unlike the FMLA, the PDA does not entitle employees to return to their former jobs following maternity leave unless employees returning from temporary disability leave are also entitled to reinstatement. We reviewed three cases in which this issue was addressed. In one case, the employee was demoted; in the other two, their employment was terminated. We now examine how the courts judged the viability of the employer's defense in these cases.

In *Armstrong v. Systems Unlimited*, the company demoted the plaintiff to a position of reduced responsibility upon her return from maternity leave [13]. The employer argued that she was demoted because she had a history of performance problems, such as lack of professionalism, failure to follow through, and poor attendance. Moreover, she did not adequately prepare for her leave, leaving unfinished paperwork, poorly maintained records, and lost documents. The plaintiff claimed the demotion was due to her pregnancy, arguing that the company did not demote nonpregnant employees with performance problems. The court ruled for the employer, stating that the plaintiff's comparison was inappropriate because the performance problems of these other employees were not as severe as hers [13].

In *McLaughlin v. W. & T. Offshore*, the plaintiff was terminated when attempting to return from her maternity leave and replaced by the two nonpregnant employees who had performed her duties during her absence [14]. The employer claimed that the discharge decision had nothing to do with the plaintiff's pregnancy; her replacements had performed these duties better than she did, making fewer errors. The court ruled in favor of the employer because this adverse

employment action was based on her performance, not on her status as a pregnant woman [14].

*Atchley v. Nordham* also involved a pregnant employee who was terminated following her maternity leave [15]. Nordham claimed no other employee had ever been granted a leave of absence and thus, there was no evidence that she was treated differently from other, nonpregnant individuals. The employer also argued that her position had been eliminated because of organizational restructuring. The court ruled for the plaintiff, based on the fact that two other, nonpregnant employees had, in fact, been granted such leave, after which they were allowed to return to their positions. Moreover, the court disbelieved the employer's organizational restructuring argument because the plaintiff's job was the only one affected by the restructuring [15].

It is clear from these cases that the PDA does not guarantee that an employee will be reinstated to her old position following her maternity leave. However, to justify an adverse action, the employer must present a legitimate, nondiscriminatory reason for its actions, such as poor job performance. Alternatively, an employer may assert that as a matter of policy, it does not afford reinstatement rights to any temporarily disabled employees following their leaves. However, the employer must be able to prove this assertion.

### **Under What Circumstances, If Any, Must Employers Offer Pregnant Employees “Light-Duty” Work Assignments to Accommodate Their Medical Needs?**

During their pregnancies, employees may, for medical reasons, become unable to perform some strenuous duties (e.g., lifting). The issue raised here is whether an employer *must* accommodate such individuals by offering them light-duty assignments.

In *Spivey v. Beverly Enterprises*, the plaintiff was a nurse's assistant whose job required her to lift and position patients, among other tasks [16]. After learning she was pregnant, the plaintiff's doctor wrote a note saying that she should weigh no more than 25 pounds and that she should be given a light-duty assignment. The firm refused her request, based on its policy of giving light-duty assignments only to workers who have been injured on the job. The employer fired her because she could no longer lift and position patients. The plaintiff argued that the employer should have modified the job to exclude the lifting and positioning task because it does so for other temporarily disabled workers who have been injured on the job. The employer countered by arguing that there are only a limited number of light-duty jobs available at any given time. If offered to all injured employees, such positions could become depleted and unavailable when needed by employees with workers' compensation restrictions. The court ruled for the employer, stating that the PDA does not require employers to give pregnant employees preferential treatment. When making light-duty assignments, the employer must ignore the



pregnancy and treat the employee as if she were not pregnant. The employer's denial of her request was legal because it denied such request to all temporarily disabled employees who were not injured on the job [16].

A similar set of facts led to a different conclusion in *EEOC v. Horizon/CMS Healthcare* [17]. Here, four plaintiffs asked for light-duty assignments because their pregnancies prevented them from performing tasks that required heavy lifting. The employer refused their requests, based on its policy that such assignments were reserved for employees who had been injured on the job. The employees were terminated, laid off, or placed on unpaid leave of absence. The employer argued that its light-duty policy was nondiscriminatory because its underlying purpose is to reduce workers' compensation costs. The plaintiffs claimed that this explanation was merely a pretext for pregnancy discrimination. The real purpose behind the policy, they argued, was not to limit workers' compensation costs, but rather, to discriminate against pregnant workers. They presented the following evidence to support their claim:

1. Two nonpregnant employees who had suffered *off the job* injuries were given a lightened workload.
2. The employer had never conducted a formalized study of the cost savings purportedly associated with reduced workers' compensation costs, nor was it able to explain in court how such costs were reduced.
3. The following statements were made by management personnel:
  - When one plaintiff informed her supervisor that she was pregnant and inquired into the availability of modified duty, she was told, "We don't have any light duty for pregnant women."
  - Another plaintiff was told by her boss that there is no modified duty work for "pregnant people."
  - Another pregnant female was told by her boss that she was too big to be working and removed her from the schedule [17].

The court ruled for the plaintiffs, concluding that the evidence was sufficient to raise genuine doubt about the defendant's motivation for making a distinction in the modified-duty policy between employees injured on the job and those injured off the job. The court thus refused to grant the employer a summary judgment because a reasonable jury could conclude that the defendant's proffered explanation for the distinction was a pretext for pregnancy discrimination [17].

It is clear from these two cases that the PDA does not legally require employers to accommodate pregnant employees by offering them light-duty assignments. While the PDA does not mandate such preferential treatment, it does require companies to apply their policies uniformly to all temporarily disabled employees. The PDA is violated when an employer denies a pregnant employee a benefit that is generally available to other temporarily disabled employees.

The key issue in these two cases was whether an employer's policy may favor one subgroup of temporarily disabled employees, namely, those who have been



injured on the job. The *Spivey* [16] and *EEOC* [17] rulings seem to contradict one another on this issue. This outcome may be attributable to the manner in which the plaintiffs argued their case. In *Spivey*, the company's justification for its policy was not challenged, and no evidence was presented to indicate that it differentially enforced it. In *EEOC*, the plaintiffs challenged the company's rationale for instituting its modified-duty policy and presented evidence that the company made exceptions to it. It thus appears that companies may legally institute a policy that affords light-duty assignments only to workers who have been injured on the job if they can: 1) demonstrate a legitimate, nondiscriminatory reason for the policy, and 2) make no exceptions to the policy.

## CONCLUSION

The purpose of this article was to provide an overview of recent court cases involving adverse employment actions that were influenced by an employee's pregnant condition. It is clear from the cases we reviewed that the PDA does not mandate preferential treatment for pregnant employees. However, it does prevent employers from making employment decisions based on stereotypic views of pregnant employees. Employers should consider the following guidelines to ensure that their decisions are in compliance with the PDA.

1. Apply all policies (e.g., absence, modified duty) consistently to both pregnant and nonpregnant employees. Inconsistent application can be taken as evidence of discriminatory intent.
2. Avoid making adverse employment decisions based on anticipated absences unless such decisions are based on strong evidence that an employee's pregnancy will require preferential treatment, i.e., specific statements about an employee's intention to take maternity leave during critical business periods (e.g., *Marshall v. American Hospital Association* [8]).
3. Ensure that all supervisors, especially those who play a role in the discharge decision, refrain from making any comments regarding their employee's pregnancy. Even if such comments do not ultimately influence the adverse employment decision, they can be used as evidence of discrimination.
4. Realize that the PDA does not guarantee the reinstatement of an employee to her old position following maternity leave. To justify termination or demotion following leave, the employer must present a legitimate, non-discriminatory reason for its actions.
5. Realize that the PDA does not legally require employers to accommodate pregnant employees by offering them light-duty assignments. The PDA views pregnant employees as temporarily disabled workers who have not been injured on the job. A company has the right to deny modified/ light-duty assignments to all temporarily disabled employees. If it chooses to institute a policy that restricts modified/light duty assignments to workers who have

been injured *on the job*, the firm must be able to demonstrate a legitimate, nondiscriminatory reason for the policy and make no exceptions to it.

### ENDNOTES

1. *Pregnancy Discrimination Act*, 400 U.S. 542, 1971.
2. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802, 1973.
3. *Family Medical Leave Act*, 29 CFR 825, 1993.
4. *Armino v. Padlocker*, U.S. App 11th Cir. LEXIS 7193, 2000.
5. *Dormeyer v. Commercial Bank of Illinois*, U.S. App 8th Cir. LEXIS 17727, 2000.
6. *Stout v. Baxter Healthcare Corporation*, U.S. App 5th Cir. LEXIS 2573, 2002.
7. *Maldono v. U.S. Bank and Manufacturer's Bank*, U.S. App 7th Cir. LEXIS 15118, 1999.
8. *Marshall v. American Hospital Association*, 157 F.3d 520, 1998.
9. *Wagner v. Dillard*, U.S. App 4th Cir. LEXIS 19278, 2001.
10. *Laxton v. Gap*, U.S. App 5th Cir. LEXIS 11334, 2003.
11. *Back v. Hastings on Hudson Union Free School District*, U.S. App 2nd Cir. LEXIS 6684, 2004.
12. *Department of Human Resources v. Hibbs*, 538 U.S. 721, 123 S. ct. 1972, 155 L. Ed. 2d 953, 2003.
13. *Armstrong v. Systems Unlimited*, U.S. App 8th Cir. LEXIS 18485, 2003.
14. *McLaughlin v. W & T Offshore*, U.S. App 5th Cir. LEXIS 20914, 2003.
15. *Atchley v. Nordham*, U.S. App 10th Cir. LEXIS 11380, 1999.
16. *Spivey v. Beverly Enterprises*, U.S. App 11th Cir. LEXIS 30723, 1999.
17. *EEOC v. Horizon/CMS Healthcare*, U.S. App 10th Cir. LEXIS 18315, 2000.

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