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OFFICE ROMANCE AND PREGNANCY: HOW EFFECTIVE IS TITLE VII PROTECTION?

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ABSTRACT

Title VII of the Civil Rights Act of 1964 as amended grants protection to employees against discrimination by an employer on the basis of sex, which is defined by the act to include pregnancy or childbirth. However, astute employers are not likely to generate direct evidence that an employee termination was based on sex, nor admit that a dismissal is related to such matters. This article analyzes some of the hurdles unwed plaintiffs face when alleging a wrongful discharge for sex discrimination due to pregnancy in the workplace under Title VII.

A HYPOTHETICAL EMPLOYMENT SCENARIO

Fact patterns for certain case types have a familiar ring after a while. Yet each set of circumstances is somehow unique. This hypothetical situation helps focus on some of the key factors that assist a court in determining the presence or absence of sex discrimination in an at-will employment scenario when an unwed pregnant employee is terminated [1].

A single female public employee is assigned to work with a married male employee on a project. Over a period of time, a serious romantic relationship develops. The man separates from his wife, and the two coworkers begin living together. Fearful of repercussions from their employer, the couple maintains privacy at work with respect to their relationship. For the sake of appearance, they install separate phone lines in their home. Actual knowledge of their living arrangements is entrusted to only a handful of coworkers. Nevertheless, their supervisor learns what has happened. Perhaps because the project is at a critical phase, no disciplinary action is taken. In fact, performance evaluations for both of

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them continue to be excellent. Now the divorce is final, and the woman would like to bear a child, but without the benefit of marriage. The organization appears to have tolerated the cohabitation of these two unmarried people because the relationship is not open and notorious. However, the woman suspects that her pregnancy, which cannot easily be hidden, might precipitate rumors at higher management levels and possibly result in disciplinary action, even termination. The basis for her concern is a portion of the Personnel Policies and Procedures Manual that mandates all employees conduct themselves in a manner that reflects favorably on the employer. The manual further states that improper conduct is grounds for disciplinary action. Since the handbook also states the aim of disciplinary action is to correct the unsatisfactory behavior, and because pregnancy outside of marriage is not a condition that can be rectified without sanctifying the relationship by marriage, and since this woman wishes not to be married, it seems to her that discharge is inevitable. What is the extent of protection under Title VII for a woman who desires to experience childbirth out of wedlock when the employer has established a rule that seems to forbid such behavior?

STATUTORY PROTECTION

The Legal Framework

Title VII of the Civil Rights Act of 1964, 42 U.S.C. ss 2000e through 2000e-17, says in part: "It shall be an unlawful employment practice for an employer . . . to discharge any individual . . . , because of such individual's . . . sex [2]. In 1978, Congress amended the statute by passing the Pregnancy Discrimination Act to make clear that the term "because of sex" includes "because of . . . pregnancy, childbirth, or related medical conditions" [3]. Claims brought against employers under the statute could allege per se discrimination where the employer admits that pregnancy out of wedlock was the reason for the termination. In that case, the employer will usually argue that business necessity requires that an unwed mother be terminated [4]. Indeed, Title VII provides an exception to the antidiscrimination law where a particular sex-related characteristic is a bona fide occupational qualification reasonably necessary to the normal operation of a particular business [5]. However, the exception is to be interpreted narrowly [6]. So, if an unmarried woman was adequately performing the responsibilities of her job, an employer would have to demonstrate how pregnancy outside of marriage or how an illegitimate child born to the woman would undermine the essence of the business operation [6, at s 184 n.66].

Some suits brought under the Pregnancy Discrimination Act in Title VII will be argued under a theory of disparate treatment. That is where two persons who are similarly situated are nevertheless treated differently because of a protected attribute, i.e., pregnancy or childbirth [7]. So, for example, where an employer who knows the identities of two unmarried parents terminates the mother, but

not the father, courts will find discriminatory intent [8]. But more than that, discrimination might be found if an employer fires a pregnant unmarried woman and replaces her with someone who is not a pregnant unmarried woman [7]. In fact, a court might find discrimination even if the woman was not replaced [7]. Employees who allege disparate treatment on the basis of pregnancy or childbirth can prevail without presenting direct evidence of discrimination, e.g., testimony regarding statements made by the employer or documents generated by the employer that directly suggest discrimination was a motivating factor in the action taken against the employee [7].

Allegations of disparate treatment under Title VII can rest on circumstantial evidence alone [7]. In such cases, the courts will generally apply the burden-shifting framework formulated by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green* [9]. However, the *McDonnell* case involved discrimination in the hiring practices, not the firing practices, of an employer [7, 9]. So, parts of the framework have been modified by various courts to suit the particular facts of a disparate treatment case [10]. In *Texas Department of Community Affairs v. Burdine,* the court did adapt the *McDonnell* model for employment termination cases [11]. In that case, the plaintiff had to make a prima facie showing of employment discrimination by proving four elements: 1) the plaintiff must belong to a protected class, 2) she must be qualified for and adequately perform her job, 3) she had to be nevertheless dismissed, and 4) the employer subsequently hired someone with equivalent qualifications to perform substantially the same work [7]. This last element was altered in a 1990 case before the First Circuit of the United States Court of Appeals: the employer had a continued need for someone to perform the same work after the plaintiff left [7, at 155]. In addition to that, some courts do not always require adequate performance to satisfy the second element of a prima facie case [12]. In other words, the plaintiff's burden to make a prima facie case is not onerous; she must merely raise an inference of pregnancy discrimination [12]. Then, once the prima facie case is established, the burden shifts to the defendant to articulate some legitimate and non-discriminatory reason for the termination [7]. It is important to emphasize that the defendant does not have to prove the nondiscriminatory justification for the firing [7]. The mere offering of a legitimate reason shifts the burden back to the plaintiff, who must then demonstrate that proffered reasons were only a pretext for discrimination [7].

Some actions brought under the Pregnancy Discrimination Act might include a disparate impact claim. While charges of disparate treatment require proof of discriminatory intent, claims of disparate impact require only proof of discriminatory effect [4, at 948]. As articulated in *Chambers v. Omaha Girls Club, Inc.,* the plaintiff must first show that a facially neutral employment practice has a significantly adverse impact on a protected group [4, at 948]. Proof of disproportionate impact generally involves a presentation of statistics indicating the employment practice 1) affects women at a substantially higher rate than men

within a specified geographical area; 2) affects a higher percentage of women employees within the workplace, or 3) affects the percentage of women in the relevant labor market of a geographic area [4, at 948]. With respect to pregnancy discrimination, all three approaches mean a plaintiff would have to demonstrate that more fathers of illegitimate children were permitted to keep their jobs than unwed mothers, either within a geographic area, at a particular workplace, or within a specific labor market. Unfortunately, statistics to support such allegations could be difficult to gather. Nevertheless, if the burden is met, it then shifts to the employer to demonstrate that "the practice has a manifest relationship to the employment in question and is justified by business necessity" [4, at 948]. Again, the bona fide occupational qualification exception to Title VII is to be narrowly construed. Still, if that effort is successful, the burden then shifts again to the plaintiff to show that other practices exist which would satisfy the employer's legitimate interests while not having a discriminatory effect [4, at 948]. Such a showing would indicate that the employment practice was merely a pretext for discrimination [4, at 948]. An example of a facially neutral policy that could have a disproportionate impact is a rule that promises disciplinary action for improper conduct. The regulation is on its face neutral, but when the employer consistently uses the rule to dismiss unwed mothers while retaining the unmarried fathers, a disparate impact claim might be made.

Title VII Pregnancy Discrimination Cases

The outcome of an employment sex discrimination case is extremely fact-dependent [7, at 159]. One of the critical factors in the analysis of such a case is evidence of satisfactory job performance on the part of the plaintiff. In *Day v. Eddy's Toyota of Witchita, Inc.*, the U.S. District Court concluded from the facts that an unwed pregnant woman who had often been warned about excessive socializing and the need to pay stricter attention to her duties could not make a prima facie case of discrimination after being discharged [12]. The court believed testimony to the effect that the general manager who instructed the personnel department to dismiss the employee was unaware of her pregnancy, even though the personnel manager who did the firing was aware of the pregnancy and openly disapproved [12].

In *Chambers v. Omaha Girls Club, Inc.*, the court held that the termination of an unmarried pregnant woman was permissible because of the unique mission of the employer to prevent the growing epidemic of teenage pregnancy by providing positive role models [4, at 947, 952]. The analysis proceeded under both a disparate treatment theory and a disparate impact theory. The crux of the disparate treatment opinion was that the club had a legitimate nondiscriminatory reason for the discharge, i.e., the need to battle a serious social problem [4, at 948]. Likewise, the disparate impact analysis led to the conclusion there was a business necessity for denying employment to a single pregnant woman, i.e., the employer fell

under the bona fide occupational qualification exception to Title VII [4, at 949]. Applying that exception, the court determined a rational relationship existed between the fundamental purpose of the club and its employment policy [4, at 950]. When the U.S. Court of Appeals for the Eighth Circuit denied a petition for rehearing in this case, several dissenting judges asserted that "[t]he Omaha Girls Club's termination of its arts and crafts teacher because of her pregnancy is the most blatant form of sex discrimination that can exist" [4, at 583]. Although the dissentors acknowledged the bona fide occupational qualification (BFOQ) exception to Title VII, they did not believe the employment of a pregnant single female as an arts and crafts teacher would hinder the goals of the organization [4, at 585]. According to the dissent, the BFOQ exception must not be based on the subjective beliefs of the employer, but on an objective level, i.e., nonpregnancy must be reasonably necessary to the essence of the employer's business [4, at 585]. The dissent concluded that as long as an unwed pregnant employee is able to perform the duties of a particular job, the employer's moral aims are irrelevant [4, at 585]. The point is that some employers may be able to establish a rational relation between a policy that requires moral behavior and the operation of their business if the court focuses on the goals of the enterprise and not on the duties of a particular job.

In spite of the fact that the Eighth Court denied a rehearing in *Chambers,* the First Circuit held under a different set of facts in *Cumpiano v. Banco Santander Puerto Rico* that an employer violated Title VII when an unmarried pregnant employee was discharged for failing to abide by a code of conduct prescribed in the employee manual [7, at 159]. Although there was no question the employee had violated the rules by committing adultery, the court relied on the fact that the affair, which went on between the two employees prior to the pregnancy, had been conducted in an open and notorious fashion for years before the birth of the illegitimate child [7, at 151]. Yet the employer did nothing to discipline either employee until the pregnancy [7, at 151]. Consequently, the employer's contention that dismissal was predicated on violation of the employee manual was not credible [7, at 151]. Thus, employers who establish standards of morality, but ignore illicit affairs until a child is born, may not be able to support a discharge on the basis of the immorality.

CONSTITUTIONAL PROTECTION

If the facts of a case indicate an unmarried pregnant woman who was dismissed by her employer was not performing her job responsibilities well, or if the employee had clearly violated a code of conduct promulgated by the employer, and if there was a plausibly reasonable business purpose for the employer's action, is it possible the employee might have additional protection under section 1983 and the United States Constitution?

Pregnancy Cases Before the PDA

Prior to passage of the Pregnancy Discrimination Act, pregnancy discrimination claims were not necessarily filed as Title VII sex discrimination cases. In 1977, for example, the U.S. District Court for the Western District of Pennsylvania decided *Hollenbaugh v. Carnegie Free Library* on the basis of equal protection and substantive due process. The court held a public employer's decision to discharge plaintiffs because they were living together in open adultery did not violate the equal protection clause, nor did it violate plaintiffs' constitutional right of privacy [13]. In that case, a divorced female librarian and a married male janitor, both employed by a public library, became romantically involved. When the woman became pregnant, she requested and received a leave of absence from the library's board of trustees. At that time, the man left his wife and began living with the woman. The board communicated its disapproval to the employees, and when the couple would neither marry or live apart, the board terminated both of them. The outcome of the case turned on the court's rejection of the plaintiffs' contention that the discharge was motivated by the fact that the two had given birth to an illegitimate child [13, at 1331].

The question presented with regard to equal protection was whether a rational relationship existed between the class of people in question, i.e., those living in open adultery, and a legitimate governmental interest. Plaintiffs argued there was no rational relationship between their conduct and their fitness to perform their jobs [13, at 1332]. The library board, however, contended that the state had an interest in properly performing its function as a library within a relatively small community [13, at 1333]. To accomplish that purpose, employees who had direct contact with the public (including children) on a regular basis could not be living in a manner that would bring complaints from the community [13, at 1333]. The court's conclusion in this regard seems strained. While a librarian may have responsibilities that involve contact with the community, a janitor would not. Furthermore, the married janitor was the person living in adultery, not the divorced librarian. So, while the janitor might have been fired for living in adultery, it was the librarian who dealt with the public. The connection between the governmental interest and the employee conduct, therefore, would appear to be irrational. The court might easily have concluded that adultery was only a pretext for discrimination.

Turning to the substantive due process claim, the court began with the basic proposition that the constitutional guarantee of personal privacy extends only to fundamental rights, or those implicit in the concept of ordered liberty [13, at 1333]. The court then asserted that although the right to privacy encompasses personal intimacies of the home, it does not include a right for two persons, one of whom is married, to live together [13, at 1334]. But the court did not address whether two unmarried adults had a constitutional right to privacy with respect to their decision to have a child. Indeed, had the court not rejected the plaintiffs' contention that the reason for dismissal was the birth of an illegitimate child, the

outcome would probably have been different (see next case). Also missing from the court's analysis is the substance of the community complaints. While the court considered them significant, the record does not reveal whether there were complaints about the fact that the two employees had an illegitimate child. Such complaints would have been evidence that the reason for discharge was a pretext.

In the 1978 case of *Lewis v. Delaware State College,* the U.S. District Court for the District of Delaware held that an unwed mother did have a constitutionally protected right to choose whether or not to bear an illegitimate child [14, at 248]. In that case, the college refused to renew the contract of the director of residence halls for women because: 1) an unwed mother could not effectively counsel women students; 2) she had not fulfilled a contractual obligation to be of good moral character; and 3) the college would lose public support if the circumstances became public knowledge [14, at 247]. The court rejected the first reason, because the plaintiff's duties did not include counseling students on personal matters [14, at 247]. With regard to the second matter, the court declared that unwed parenthood does not conclusively establish present or continuing immorality [14, at 247]. Finally, the court maintained that interference with constitutional rights cannot be justified by hostility from the community [14, at 248]. This case is distinguishable from *Hollenbaugh* in that the father of the illegitimate child (also an employee of the college) was not fired and did not live with the plaintiff. Had that been the case, and the college formulated its reasons for dismissal to focus on the living arrangements, the court might not have found that the plaintiff possessed a constitutional right to privacy.

The constitutional protections, therefore, are little different from Title VII protections. In fact, the analysis still boils down to whether an employer had a legitimate nondiscriminatory reason for the dismissal of an unwed pregnant employee.

CONCLUSIONS

What would constitute solid legal advice to the woman in our hypothetical case? First of all, the employee could easily establish a prima facie case under Title VII. She is a member of a protected class. She has been receiving excellent performance evaluations. If she were dismissed, the employer would still need a person to fulfill her job duties on the project.

When the burden shifts to the employer, one of the possible legitimate reasons for the termination could be that the employee violated the code of conduct. However, since the immediate supervisor is aware the two employees have been living together, and no disciplinary action has been taken in spite of the rule against improper conduct in the manual, the employee should be able to establish that a violation of the code is not the true reason for a possible discharge. On the other hand, if the person responsible for making the decision to fire employees is a higher-level manager who is not aware of the living arrangements, but learns about them only when the pregnancy is discovered, then the facts resemble those

in *Day,* where the general manager who made the decision to terminate knew nothing of the pregnancy. Proving discriminatory intent by the senior manager would be more difficult.

It is highly unlikely the employer would admit the pregnancy was the reason for the termination and try to support that with a business necessity rationale. If it were attempted, however, the employee would have to direct the court's attention to the requirements of her job, and not the subjective stance of the organization.

Although the arguments based on constitutional protections may be just as difficult, this couple has put forth extra effort to keep the relationship private. A court may be willing to find a constitutional right to privacy in this case. The facts of the hypothetical case may be distinguishable from *Hollenbaugh,* because the library in that case was located in a small town. If our employee is situated in a larger metropolitan area, the court may not consider community complaints to be such a major factor in its decision.

So, in spite of the protection made available to employed pregnant women under Title VII, it is still possible for employers who plan their firings carefully to terminate such women for legitimate reasons. The challenges to the employer is to figure out what those nondiscriminatory reasons are. The challenge to the employee is to know the employer.

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ENDNOTES

1. Some pregnancy discrimination cases deal with the denial of maternity leave to an unwed pregnant employee. See 15 Am.Jur.2d s 183. This paper, however, is concerned only with termination actions.
2. 42 U.S.C. ss 2000e-2(a). It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

3. 42 U.S.C. ss 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, and nothing in section 2000e-2(h) of his title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or except where medical complications have arisen from an abortion: Provided, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.
4. Some employers have been victorious under the bona fide occupational qualification exception in Title VII. *See, e.g., Chambers v. Omaha Girls Club, Inc.* 629 F.Supp. 925 (D.Neb. 1986), rehearing denied, 840 F.2d 583 (8th Cir. 1988).
5. 42 U.S.C. s 2000e-2(e).
6. *See* 15 Am.Jr.2d s 184 n.67 The Equal Employment Opportunity Commission (EEOC) has promulgated a regulation that binds the EEOC to interpret the exception narrowly. 29 CFR s 1604.2.
7. *Cumpiano v. Banco Santander Puerto Rico,* 902 F.2d 148, 153 (1st Cir. 1990).
8. *See* 15 Am.Jur.2d s 183 n. 57 "In the absence of any provision requiring the termination from employment of an unmarried father, a rule requiring the termination of an unmarried pregnant female cannot be justified." EEOC Decision No. 71-562, CCH EEOC Decisions par. 6184.
9. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 1824, 36 L.Ed.2d 668 (1973). The four elements are: 1) that Plaintiff is a member of a protected class; 2) that Plaintiff is qualified for the job sought; 3) that Plaintiff was rejected for hiring; and 4) that after his rejection the defendant continued to look for employees with his qualifications for the position.
10. *Burdette v. FMC Corp.* 566 F.Supp. 808, 815 (1983). "This court, then, guided by both the holding in *McDonnell Douglas* and subsequent cases addressing the area of disparate treatment, would frame the prima facie elements of Plaintiff's case as follows: . . ." The list included only three elements.
11. *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 254-56, 101 S.Ct. 1089, 1094-96, 67 L.Ed.2d 207 (1981).
12. *Day v. Eddy's Toyota of Witchita, Inc.,* 1989 WL 6036 *4 (D.Kan.).
13. *Hollenbaugh v. Carnegie Free Library,* 436 F.Supp. 1328 (W.D. Pa. 1977).
14. *Lewis v. Delaware State College,* 455 F.Supp. 239 (1978).

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