EEOC Enforcement Guidance Expands Protections Against Pregnancy Discrimination

John Ashby

The Equal Employment Opportunity Commission (EEOC) recently released enforcement guidance related to pregnancy discrimination (the "Guidance")[1] over the vocal dissent of two commissioners. The Guidance, which offers the EEOC's interpretation of the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA), represents the first time since 1983 that the EEOC has offered its official position on the obligations imposed on employers with regard to pregnancy in the workplace.

The Guidance includes a number of controversial positions and interpretations that have generated much commentary and criticism. Most significantly, the Guidance takes the position that employers may be required to provide reasonable accommodations to pregnant employees, even if they do not have a disability as defined by the ADA.

The Guidance confirms the EEOC's focus on pregnancy discrimination — a focus specifically identified as a national enforcement priority in the EEOC's 2012-2016 Strategic Enforcement Plan.[2] As part of that plan, the EEOC has recently devoted much of its litigation efforts on suits alleging sex and pregnancy discrimination. Thus, claims of pregnancy discrimination will likely continue to be a major basis for EEOC enforcement lawsuits in the foreseeable future.

Given the EEOC's emphasis on pregnancy discrimination, employers and attorneys who advise employers should become familiar with the Guidance. This article starts with an explanation of the statutory background of the ADA and the PDA. It then describes the genesis and timing of the Guidance and summarizes some of the important and controversial aspects of the Guidance.

Statutory background

The ADA[3] provides protections against employment discrimination for qualified individuals with disabilities. The ADA further requires employers to provide reasonable accommodations to an employee with a disability that will enable the employee to perform the essential functions of his or her job. Courts have generally concluded that normal pregnancy does not constitute a "disability" under the ADA.[4]

Title VII of the Civil Rights Act of 1964 ("Title VII") prohibits employment discrimination on the basis sex and several other protected classifications. While it seems obvious now that treating an employee differently because she is pregnant would fall within the protections of Title VII, that was not always the case. In *General Electric v. Gilbert*[5], the United States Supreme Court held that discrimination based on pregnancy was not prohibited by Title VII.

Given the EEOC's emphasis on pregnancy discrimination, employers and attorneys who advise employers should become familiar with the Guidance.

In 1978, Congress enacted the Pregnancy Discrimination Act,[6] an amendment to Title VII, for the express purpose of repudiating *Gilbert*. The Pregnancy Discrimination Act contains two key provisions. First, it provides that unlawful sex discrimination under Title VII includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions." Second, it 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." Unlike the ADA, however, the Pregnancy Discrimination Act does not contain a reasonable accommodations provision.

Timing of the guidance

The general purpose of EEOC guidance is to advise the public on current interpretation of the law. Thus, EEOC guidance generally summarizes the law, as interpreted by the courts, as opposed to advocating a change in the law. Some of the EEOC's new pregnancy Guidance follows this approach. However, the Guidance also takes some controversial positions more consistent with advocacy for a change in the law. In fact, as explained in more detail below, the most controversial position taken in the Guidance — that employers may be required to provide reasonable accommodations to pregnant employees, regardless of disability — has been rejected by courts.

In this regard, the timing of the Guidance has been soundly criticized as attempting to jump the gun on Congress and expand the Pregnancy Discrimination Act to accomplish what proposed legislation would accomplish. Members of Congress have introduced the Pregnant Workers Fairness Act[7], which would expand the Pregnancy Discrimination Act to require that pregnant employees be granted reasonable accommodations.

The EEOC's Guidance does not have the force of law. It is entitled to deference from courts only "to the extent of its persuasive power."[8] Some of the key aspects of the Guidance are discussed below.

Pregnancy Discrimination Act coverage

In addition to protecting women who are currently pregnant, the Pregnancy Discrimination Act provides protection based on past pregnancy, the potential to become pregnant and pregnancy-related medical conditions. The Guidance provides examples of conduct that the EEOC would find to be discriminatory, as follows:

Current Pregnancy. An employer may not fire, refuse to hire, demote or take any other adverse action against an employee if pregnancy is a motivating factor in that decision. This is true even if the employer believes it is acting in the employee's or the fetus's best interests.

Past Pregnancy. An employer may not discriminate against an employee based on a past pregnancy. Close timing between childbirth and an adverse employment action, for example, may give rise to an inference of illegal discrimination.

Potential Pregnancy. An employer may not discriminate based on an employee's intent to become pregnant or her decision to use contraceptives.

Related Medical Conditions. An employer may not discriminate against an employee because of a medical condition related to pregnancy and must treat the employee the same as similarly situated, non-pregnant employees with medical conditions. For example, because lactation is a pregnancy-related medical condition, an employer may not discriminate against an employee because of her need to take breaks to express breast milk. Lactating employees must have the same freedom to address lactation-related needs that other workers would have to address other similarly limiting medical conditions.

Light duty and other accommodations

The most controversial aspect of the Guidance is the EEOC's position on pregnant employees' entitlement to light duty work and other accommodations. The Guidance takes the position that, even if they do not have a disability under the ADA, pregnant employees may be entitled to "workplace adjustments similar to accommodations provided to individuals with disabilities," including light-duty work.

Many employers provide light duty work for employees who suffer on-the-job injuries. These light duty programs are generally designed to control workers' compensation costs by returning injured employees to the workplace as soon as possible. Often, employers have implemented policies providing that light duty opportunities are available only to employees injured on the job or employees with disabilities as defined by the ADA. According to the EEOC, such policies violate the Pregnancy Discrimination Act. No federal Court of Appeals has adopted this position, however, and several have rejected it.

Because lactation is a pregnancy-related medical condition, an employer may not discriminate against an employee because of her need to take breaks to express breast milk.

For example, in *Young v. United Parcel Services, Inc.*,[9] a female UPS driver, Peggy Young, requested light duty work after becoming pregnant. UPS requires that its drivers be able to lift up to 70 pounds. After becoming pregnant, Young presented UPS with a note from her doctor stating that Young would not be able to lift more than 20 pounds during the first half of her pregnancy and no more than 10 pounds during the second half of her pregnancy. UPS has a policy limiting light duty work to (1) employees who have been injured on the job and (2) employees who have a disability as defined by the ADA. Young did not fit into any of these categories. As such, she was denied light duty and was instead provided with an extended leave of absence. Young returned to work after giving birth.

Notwithstanding that UPS granted Young leave far in excess of her entitlement under the Family and Medical Leave Act, she filed suit against UPS, alleging that it discriminated against her on the basis of pregnancy in violation of the Pregnancy Discrimination Act. Specifically, Young argued that the Pregnancy Discrimination Act required that UPS provide her with the same light duty opportunities that it gives to employees who have been injured on the job or who have ADA qualifying disabilities.

The Fourth Circuit Court of Appeals rejected Young's argument and affirmed an order of summary judgment in favor of UPS. Specifically, the Fourth Circuit Court of Appeals concluded that UPS did not discriminate against Young on the basis of her pregnancy because UPS's light duty policy was pregnancy-neutral (i.e., neither pregnant nor non-pregnant employees are entitled to light duty unless they have suffered an on-the job injury or have an ADA qualifying disability).

The Guidance reaches the opposite conclusion. Specifically, the Guidance "rejects the position that the [Pregnancy Discrimination Act] does not require an employer to provide light duty for a pregnant worker if the employer has a policy or practice limiting light duty to workers injured on the job and/or to employees with disabilities under the ADA." This interpretation could have far-reaching implications as it provides a pregnant worker with the basis for any accommodation, regardless of disability, that an ADA-disabled worker of similar limitations receives.

The Guidance explains that the threshold for "disability" was substantially reduced by the ADA Amendments Act of 2008 ("ADAAA"), making it much easier for an employee with a pregnancy-related impairment to establish that she has a disability.

The United States Supreme Court has agreed to review the *Young* decision. In connection with its review of *Young*, the Supreme Court is expected to address whether and to what extent the Pregnancy Discrimination Act requires employers to provide reasonable accommodations for employees who have work restrictions because of their pregnancy. Until that time, employers are in a difficult position. They must decide whether to follow the EEOC's Guidance now or wait for final word from the United States Supreme Court.

The immediate question for employers and employment lawyers is whether to revise light duty and accommodation policies consistent with the EEOC's position. Given that the United States Supreme Court will address these important issues soon, such policy changes are probably premature. The better approach is to address accommodation requests from pregnant employees on a case-by-case basis and then revisit broader policy issues after the Court issues a decision in *Young*.

Application of the ADA to pregnancy-related disabilities

The Guidance acknowledges that "pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability." However, the Guidance explains that the threshold for "disability" was substantially reduced by the ADA Amendments Act of 2008 ("ADAAA"), making it much easier for an employee with a pregnancy-related impairment to establish that she has a disability for which she may be entitled to a reasonable accommodation under the ADA. According to the EEOC, examples of pregnancy-related disabilities may include preeclampsia, pregnancy-related sciatica, gestational diabetes, nausea, swelling and depression.

The Guidance provides the following examples of reasonable accommodations that may be necessary to accommodate a pregnancy-related disability:

- Redistributing marginal or non-essential functions (e.g., occasional lifting) that a pregnant employee cannot perform, or altering how an essential or marginal function is performed;
- Modifying workplace policies by allowing a pregnant employee more frequent breaks;

• Modifying a work schedule so that a pregnant employee experiencing severe morning sickness can arrive later than her usual start time and leave later to make up the time;

• Allowing a pregnant employee placed on bed rest to telework where feasible;

• Granting leave in addition to what an employer would normally provide under a sick leave policy;

• Purchasing or modifying equipment, such as a stool for a pregnant employee who needs to sit while performing job tasks typically performed while standing; and

• Temporary assignment to a light duty position

Medical and parental leave

The Guidance provides that pregnant employees must be granted medical leave on the same basis as employees affected by other medical conditions.

Except in very rare circumstances where the employer can show that not being pregnant is a bona fide occupational qualification, an employer cannot require a pregnant employee to take leave as long as she is able to perform her job. At the same time, the EEOC takes aim at restrictive leave policies, suggesting that limits on length of sick leave or policies denying sick leave during the first year of employment may have a disparate impact on pregnant employees.[10]

Finally, the Guidance warns that employers should carefully distinguish between pregnancy-related medical leave and "parental leave," i.e., leave for purposes of bonding with a child and or/providing care for a child. Medical leave related to pregnancy, childbirth or related medical conditions can be limited to women affected by those conditions. However, parental leave must be provided to similarly situated men and women on the same terms. If, for example, an employer provides parental leave to new mothers beyond the period of recuperation from childbirth, it cannot lawfully fail to provide an equivalent amount of leave to new fathers for the same purpose.

The EEOC takes aim at restrictive leave policies, suggesting that limits on length of sick leave or policies denying sick leave during the first year of employment may have a disparate impact on pregnant employees.[10]

Conclusion

The EEOC has sent a strong message that it will broadly interpret the law to expand protections against pregnancy discrimination in the workplace. It further takes the controversial position that pregnant employees are entitled to certain accommodations, including light duty assignments, even if they do not have a disability as defined by the ADA. This creates significant risk for employers that do not offer such accommodations to pregnant employees.

In light of the EEOC's Guidance, employers should review their leave, light duty and accommodation policies for compliance with the ADA and the Pregnancy Discrimination Act. Employers should also pay close attention to the United States Supreme Court's upcoming decision in *Young* and any further direction from the courts.

Endnotes

1. *See* EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues (July 14, 2014), available at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

2. The EEOC's Strategic Enforcement Plan is available at http://www.eeoc.gov/eeoc/plan/sep.cfm

3. 42 U.S.C. 12101 *et seq*.

4. *See Martinez v. NBC Inc.*, 49 F. Supp. 2d 305, 308 (S.D.N.Y. 1999) ("Every court to consider the question to date has ruled that pregnancy and related medical conditions do not, absent unusual conditions, constitute a [disability] under the ADA.'").

5. *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

6. Pub. L. No. 95-955, 92 Stat. 2076 (codified at 42 U.S.C. § 2000e(k)).

7. Pregnant Worker's Fairness Act, S. 942, 113th Cong. (2014).

8. *EEOC v. Sundance Rehab. Corp*., 466 F.3d 490, 500 (6th Cir. 2006); *see also Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 110 n.6 ("[W]e have held that the EEOC's interpretive guidelines do not receive *Chevron* deference.")

9. 707 F.3d 437 (4th Cir. 2013), cert. granted, 81 U.S.L.W. 3602 (U.S. July 1, 2014).

10. *See Abraham v. Graphic Arts. Int'l. Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (10-day absolute ceiling on sick leave drastically affected female employees of childbearing age, an impact males would not encounter); *EEOC v. Warshawsky & Co*., 768 F. Supp. 647, 655 (N.D. Ill. 1991) (requiring employees to work for a full year before being eligible for sick leave had a disparate impact on pregnant workers and was not justified by business necessity).

About the Author

John Ashby *is a partner with Hawley Troxell Ennis & Hawley LLP. He maintains a litigation practice in state and federal courts with an emphasis on employment law consultation and defense of employers.*