

PREFACE

By passing the Pregnancy Discrimination Act (PDA) in 1978, Congress amended Title VII of the Civil Rights Act of 1964, and clarified that discrimination on the basis of pregnancy or related medical conditions is by definition unlawful sex discrimination.

When the Civil Rights Act was passed in 1964, Title VII prohibited discrimination in the terms and conditions of employment on the basis of protected characteristics including “sex.” However, while the original enactment of Title VII contained this general prohibition of discrimination based on “sex,” it did not contain any specific reference to pregnancy. In 1976, the United States Supreme Court decided in *Gilbert v. General Electric*¹ that discrimination on the basis of pregnancy did not necessarily constitute unlawful sex discrimination. It was in response to this controversial Supreme Court case that Congress amended Title VII with the PDA. In addition to clarifying that discrimination on the basis of pregnancy and related conditions is by definition unlawful sex discrimination, Congress also mandated that employees affected by pregnancy and pregnancy-related medical conditions be treated the same as those who are not so affected but who are similar in their ability or inability to work. Although much of the older case law concerning pregnancy discrimination related to employee benefits that excluded pregnancy and pregnancy-related conditions from coverage, modern PDA practice typically involves discrimination cases brought by pregnant employees who have been terminated or otherwise discriminated against. The litigation of these cases and the judicial application of the PDA’s language to different factual scenarios have resulted in numerous legal issues that are unique to this particular type of discrimination claim.

The Purpose of This Book

The purpose of this book is to advance the cause of women who wish to start a family without ending a career, by assisting plaintiff lawyers who represent employees in pregnancy discrimination cases. Even employee advocates who are well versed in anti-discrimination laws generally may not be sufficiently knowledgeable with regard to the numerous issues that are unique to PDA litigation and/or that arise more frequently in pregnancy discrimination cases than in other types of discrimination cases.

¹429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976).

While there are numerous books and publications available to employee advocates regarding sexual harassment, age discrimination, and other employment discrimination topics, there has not yet been a book that specifically relates to pregnancy discrimination. This can be frustrating since pregnancy discrimination cases constitute an ever-increasing portion of the case load for plaintiff employment lawyers. This book is designed to fill that void and to give plaintiff lawyers a thorough understanding of all of the different issues that arise in PDA litigation, so that these matters may be considered with regard to case selection, discovery, strategic decisions regarding what types of evidence to emphasize, and legal issues to be argued to trial and appellate courts.

In addition to making strategic suggestions, this book is also designed to provide a source of useful case law and legal authority for plaintiff lawyers in PDA cases. The author's hope is that when plaintiff lawyers brief pregnancy discrimination issues for the court, including summary judgment responses and the like, they can use this book to find analogous authority to cite to in their briefs and memos. Rather than having to "reinvent the wheel" and research every issue from scratch when representing PDA plaintiffs, plaintiff lawyers should be able to use this book as a time-saving device so that they can efficiently and effectively represent their clients.

Not only does this book contain case law that is favorable to PDA plaintiffs, it also includes extensive analysis regarding case law that is favorable to defendants. The author hopes that plaintiff lawyers can use this book to see both sides of the issues, and consider possible ways of distinguishing unfavorable cases that defendants are likely to rely upon.

Finally, the author also hopes that this book will provide a source to management lawyers in advising their clients, so that employers are well-equipped to comply with the law as it relates to their pregnant employees and to resolve cases in which there have been violations.

How This Book Is Organized

This book is organized on a topical basis in four parts:

- Part I—Overview;
- Part II—Proof of Discrimination Under the PDA;
- Part III—Accommodation of Pregnancy and Interrelation of the PDA With Other Federal Statutes; and
- Part IV—Miscellaneous Issues.

Part I consists of three chapters.

Chapter 1 is an introduction providing the statutory provisions and a base of knowledge from which plaintiff lawyers can start.

The purpose of Chapter 2 is to familiarize lawyers with the issue of who is protected by the PDA. In addition to protecting pregnancy itself, there are also issues that arise in PDA litigation regarding whether other types of conditions are sufficiently related to pregnancy such that the PDA is applicable.

Chapter 3 provides a detailed analysis of all of the Supreme Court jurisprudence related to pregnancy discrimination law, and provides guidance regarding the significance of these cases to issues that are likely to arise in modern PDA practice. Subsequent chapters in this book contain topics that often relate, directly or indirectly, to the Supreme Court jurisprudence. There are therefore several cross-references in subsequent chapters to the Supreme Court case law discussed in Chapter 3.

Part II, Proof of Discrimination Under the PDA contains four chapters.

Chapter 4 relates to the use of temporal proximity in proving pregnancy discrimination, provides an explanation regarding when and to what extent this evidence may be significant, and provides useful case law regarding proximity.

Chapter 5 provides a detailed analysis of what constitutes direct evidence and other comments that are considered probative in PDA cases. This includes the cutting-edge topic of stereotypes relating to family responsibilities, which has recently been given much attention both in academia and in the case law.

Chapter 6 relates to proof of knowledge of pregnancy. Indeed, defendants in PDA suits sometimes deny that the decision maker had knowledge of the plaintiff's pregnancy, and Chapter 6 provides a thorough analysis of proving such knowledge by means of circumstantial evidence, and of using false denials of knowledge to the advantage of plaintiffs.

Chapter 7 is perhaps the most important chapter in this book because it relates to issues regarding comparator evidence that very frequently arise in modern PDA practice. Indeed, it is considered black letter law that employers may terminate pregnant employees for absenteeism, even if it is absenteeism related to pregnancy, as long as they would similarly terminate non-pregnant employees who missed the same amount of work. As a general rule, plaintiffs are required to use comparator evidence or to compare themselves to similarly situated, non-pregnant employees who missed work and were not terminated for it. This can be extremely difficult. Because even the most normal pregnancies will inevitably result in some work being missed, it is of critical importance that plaintiff lawyers are familiar with the exceptions to the requirement of comparator evidence. Indeed, many PDA lawsuits are dismissed due to a lack of comparator evidence, and the question of whether one of the exceptions to the requirement of comparator evidence applies is often critical to surviving judgment as a matter of law.

Part III, Accommodation of Pregnancy and Interrelation of the PDA With Other Federal Statutes, consists of Chapters 8 and 9.

Chapter 8 relates to accommodation of pregnant workers under the PDA, which only provides pregnant workers with a comparative right to be accommodated. That is, they only must be accommodated to the extent that they must be treated equally relative to similarly situated employees. Topics regarding accommodation under the PDA include the recent cutting-edge issue of whether pregnant employees may take advantage of light-duty policies by comparing themselves to those with occupational injuries. Since there is conflicting authority among the circuits that have decided this issue, it is important that plaintiff lawyers be familiar with this topic. Other topics discussed in this chapter include whether the disparate impact theory can be taken advantage of with regard to such matters as leave policies or lifting requirements.

The purpose of Chapter 9 is to familiarize plaintiff lawyers with other federal statutes that plaintiff attorneys may be able to take advantage of when representing PDA plaintiffs. Sometimes plaintiffs can take advantage of a statutory duty to accommodate, rather than relying upon the mere comparative right to accommodation that exists under the PDA. Chapter 9 therefore includes a thorough discussion of the Americans with Disabilities Act, as amended by the ADA Amendments Act of 2008, and case law concerning whether employees with pregnancy-related disorders may be considered “disabled” under the ADA. Chapter 9 also includes a discussion of the Family and Medical Leave Act (FMLA) as it relates to pregnancy and childbirth, and a recent amendment to the Fair Labor Standards Act (FLSA) which requires employers to accommodate new mothers who are breastfeeding.

Part IV, Miscellaneous Topics, consists of Chapter 10 through 14.

The purpose of Chapter 10 is to familiarize plaintiff lawyers with state law concerning pregnancy discrimination claims, in particular the issue regarding whether pregnancy is protected under state civil rights laws containing a general prohibition of “sex” discrimination, and to suggest strategies for litigating this topic. Many states have anti-discrimination laws that prohibit discrimination on the basis of “sex” but do not have a specific reference to pregnancy. And of those states, many, but not all, have rejected the infamous *Gilbert*² decision that resulted in the passage of the PDA, as discussed at the outset of this Preface.

Chapter 11, Unwed Pregnant Employees, relates to an issue that occasionally arises in PDA cases: unmarried employees who become pregnant and are terminated for having premarital sex or for becoming pregnant out of wedlock. The defendants in these types of cases are typi-

²General Electric Co. v. Gilbert, 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976).

cally religious employers, which raises First Amendment considerations. Chapter 11 provides a thorough analysis of this body of case law, and the circumstances under which unwed pregnant employees may prevail in claims for pregnancy discrimination.

Chapter 12, Female Decision Makers, is a very brief chapter. It nevertheless makes an important point about many of the meritorious PDA suits involving women decision makers, and an explanation of why plaintiff lawyers should not shy away from taking these cases even though pregnancy discrimination is considered to be a subcategory of sex discrimination.

Chapter 13, Juries and Pregnancy Discrimination Cases, provides strategic pointers with regard to jury instructions for pregnancy discrimination, and an analysis of whether it is appropriate for juries to be instructed that pregnancy discrimination is a subcategory of sex discrimination. Chapter 13 also provides a thorough discussion of jury selection in PDA cases, and provides several hypothetical case scenarios and sample voir dire questions relating to each of them.

Finally, Chapter 14, Special Damages Issues, provides an analysis of damages issues that arise more often in pregnancy discrimination cases than in other discrimination cases, such as mitigation issues related to visibly pregnant women seeking work, and the effect of daycare expenses on back pay.

This treatise is current through 2010 with some recent 2011 authority and case law that came to the author's attention during editing. Comments or suggestions for additional topics to be covered in supplements would be appreciated. The author can be contacted at dan@magidwilliams.com. Any contributors will be acknowledged in future supplements.

Contributors

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³129 S. Ct. 1962, 173 L. Ed. 2d 898 (2009).