

5-11-2012

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Recommended Citation

Joanna L. Grossman, *The Pregnant Workers' Fairness Act: Accommodating the Needs of Pregnant Working Women* Verdict (2012)

Available at: https://scholarlycommons.law.hofstra.edu/faculty_scholarship/946

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Verdict

May 11, 2012

Joanna L. Grossman

The Pregnant Workers' Fairness Act: Accommodating the Needs of Pregnant Working Women



Last week, Democrats in the House of Representatives introduced the Pregnant Workers Fairness Act (PWFA). The bill, if passed into law, would guarantee pregnant women the right to reasonable accommodation when the short-term physical effects of pregnancy conflict with the demands of a particular job, as long as the accommodation does not impose an undue hardship on the employer.

In this column, I'll explain the protections that already are part of pregnancy discrimination law, the ways in which courts have unjustifiably narrowed those protections, and the realities of the situations of pregnant women at work that make existing interpretations of the law insufficient.

The Pregnancy Discrimination Act of 1978: Landmark Legislation that Opened Workplace Doors

Before the passage of the PDA, pregnant women worked—or didn't work—at the whim of employers, who faced almost no constraints on their ability to exclude, sideline, or fire them. Employers, in fact, routinely discriminated against pregnant women with rules that barred them from the workplace altogether or from particular jobs, changed their working conditions unilaterally, forced them out at specific points during pregnancy regardless of their individual physical condition, and refused to allow them to return to work after pregnancy until a fixed time had passed.

The whim to exclude pregnant women from the workforce was neither random, nor the consequence of many individual decisions by employers. The tone was set in large part by legislatures and government employers who had, in many different contexts over many decades, developed hard rules about when and whether pregnant women could work. The government was in no small part responsible for a system that subjected women to forced firings, exemptions from benefits and insurance coverage, and delayed returns to work after childbirth.

The Supreme Court reinforced the systematic exclusion of pregnant women from the workplace with its 1974 ruling in *Geduldig v. Aiello* (<http://supreme.justia.com/cases/federal/us/417/484/case.html>), in which it held, somewhat mysteriously, that pregnancy discrimination is not sex discrimination and therefore does not warrant any sort of heightened judicial scrutiny. In an infamous line of reasoning, the majority wrote of a world divided

into two classes—pregnant and non-pregnant persons—that did not implicate sex or gender.

During the same term, however, the Court held in *Cleveland Board of Education v. LaFleur* (<http://supreme.justia.com/cases/federal/us/414/632/case.html>) that the policies of several school districts forcing pregnant teachers to leave their posts by the fourth month—and not allowing them to return until three months after birth—were unconstitutional under the Fourteenth Amendment's Due Process Clause. Although there was no equality-based right against pregnancy discrimination, these teachers had a right not to be conclusively presumed unable to work, regardless of individual condition. They had the right to an individualized assessment of capacity.

Geduldig and *LaFleur* were odd bedfellows. *Geduldig* seemed to give license to public employers to single out pregnant women for adverse treatment, but *LaFleur* seemed to restrict that license at least to the extent the adverse treatment denied individual women the right to be judged on their own merits.

Then, two years later, the Supreme Court issued a ruling that made clear the era of pregnancy exclusions were not over. It applied *Geduldig's* reasoning to interpret Title VII, the then-decade-old anti-discrimination law that prohibits employment discrimination on the basis of a number of protected characteristics, including sex. In *Cal Fed Savings v. Guerra* (<http://supreme.justia.com/cases/federal/us/429/125/case.html>) to mean that pregnant workers can be treated “no worse than” other temporarily disabled workers, but they can be treated more favorably.

Rights Guaranteed by the PDA

The most significant impact of the PDA, at least initially, was to invalidate widespread formal policies that told pregnant women when they could and could not work, and in which sorts of jobs. The PDA forced employers to shift to a more individualized model under which pregnant women could not be fired, not hired, or otherwise disadvantaged just for being pregnant. Decisions about employment now had to be made based on capacity to work, rather than pregnancy status.

The second and important impact of the PDA was to force changes to standard employer benefit and leave policies, many of which excluded pregnancy altogether. Under the second clause of the Act, employers must treat pregnant employees at least as well as they treat other temporarily disabled workers. Employers thus must, for example, provide paid or unpaid leave to pregnant women who medically require it if they would do so for something who needed it because of some other temporary disability.

In practice, the PDA protects some pregnant women, some of the time, as follows:

- For a pregnant woman who can work at full capacity—i.e., she has no physical effects that interfere with her job responsibilities—the PDA can be effective in protecting her against the stereotypes and animus her employer might harbor about pregnant women generally. If a pregnant woman is able to perform all aspects of her job, she cannot be assumed to have limitations that, in fact, she does not have, nor can she be denied the opportunity to work just because she is pregnant.
- For a pregnant woman who temporarily cannot work because of the physical effects of her pregnancy, the particular demands of her job, or the interaction between the two, the PDA guarantees that she will have the same access to leave and benefits as other temporarily disabled workers do. If the employer is generous, she may be well protected; if the employer provides meagerly in this regard, then she will be less well-protected. She may also have access to twelve weeks of unpaid leave under the Family and Medical Leave Act (FMLA) if her employer is large enough and she works enough hours per year.
- For a pregnant woman who could work, but only if the employer made certain accommodations to her assigned tasks or work environment, the PDA provides a comparative right of accommodation. Under the second clause of the Act, such a woman is entitled to whatever accommodation her employer grants to other temporarily disabled employees. If no such accommodation is granted, the pregnant woman has no absolute right to medically-necessary accommodations and can be discharged for failure to perform her job, subject only to the very limited protection offered by disparate-impact theory. (Disparate impact theory is the basis for challenging employment actions that are not on their face discriminatory, but differentially affect a particular class of employees.)

The PDA's Limitations

Pregnant women with partial incapacity due to pregnancy are the least well-protected by the PDA, which provides only a comparative right of accommodation. This limitation is built into the structure of the statute. But courts have taken a modest right of accommodation and turned it into a barely detectible right of accommodation, through a series of cramped, and often indefensible, interpretations of the PDA.

One such narrowing is in the definition of pregnancy. The PDA prohibits discrimination because of pregnancy, childbirth, and related medical conditions. Although the Supreme Court interpreted this language quite broadly in *International Union v. Johnson Controls*, to include “potential pregnancy,” lower federal courts have ignored this ruling and taken a narrower approach.

As I wrote [in a recent column \(http://verdict.justia.com/2012/02/21/a-federal-judge-thwarts-title-vii-and-the-pregnancy-discrimination-act-by-ruling-bizarrely-that-lactation-is-not-related-to-pregnancy\)](http://verdict.justia.com/2012/02/21/a-federal-judge-thwarts-title-vii-and-the-pregnancy-discrimination-act-by-ruling-bizarrely-that-lactation-is-not-related-to-pregnancy), for example, a federal court in Texas just ruled in *EEOC v. Houston Funding* (<http://law.justia.com/cases/federal/district-courts/texas/txsdce/4:2011cv02442/899819/21>) that lactation is not “related” to pregnancy under the PDA and, thus, a woman can be fired for breastfeeding. Some courts have also ruled that neither contraception nor infertility is “related” to pregnancy under the PDA, which means that employers can refuse insurance coverage or otherwise discriminate on those bases. (The rulings on these issues are mixed, however; the Seventh Circuit takes a much more sensible approach in *Hall v. Nalco* (<http://law.justia.com/cases/federal/appellate-courts/ca7/06-3684/06-3684-2008-07-16-opinion-2011-02-25.html>), which I have written about [here \(http://writ.news.findlaw.com/grossman/20080819.html\)](http://writ.news.findlaw.com/grossman/20080819.html).)

A second type of narrowing of the rights of pregnant women comes from courts' resistance to drawing an inference of pregnancy discrimination. Plaintiffs often have trouble convincing courts that an adverse action they suffered was taken because of the status of pregnancy, as opposed to because of its disabling effects (which is permitted by law) or for some neutral reason.

A classic and troubling case is *Troupe v. May Department Stores*, in which a pregnant sales clerk was fired one day before she was scheduled to begin maternity leave. She was frequently late because of morning sickness. Her employer claimed she was fired for excessive tardiness, not because she was pregnant and planning to take maternity leave. The court agreed with the employer—concluding that it is not pregnancy discrimination if she was fired for being late, even if she was late because she was pregnant. The court is right—pregnancy is not an excuse for failing to perform according to the demands of the job. But without an obvious comparator—a man who was excessively absent and not fired one day before a scheduled leave—the court refused to entertain the possibility that the tardiness did not motivate the firing—that the pregnancy itself or the planned maternity leave did.

The third, and most damaging, type of narrowing of rights against pregnancy discrimination comes in denial-of-accommodation cases. In a growing number of cases, courts have effectively read the second clause out of the PDA. They do this in different ways, but here are the highlights:

- Courts have upheld light-duty policies that restrict such assignments to workers with on-the-job injuries. Rather than take the PDA's second clause at its word (again, it states that pregnant women are entitled to the same accommodations as those “not so affected but similar in their ability or inability to work”), the courts allow employers to define the comparison group based on any criterion that is “pregnancy-neutral” such as the source of the injury. Pregnant women who need leave because of their level of incapacity encounter this same problem—being denied access to paid leave or other benefits because they were “injured” off the job.
- When analyzing formal policies such as these, courts employ “pretext” analysis to smoke out animus against pregnant women. When they do not find animus, they conclude that no discrimination has occurred. But the second clause of the PDA does not merely ban ill-motivated decisions that harm pregnant women. That's the job of the first clause. The second clause requires, affirmatively, that employers treat pregnant workers no worse than other temporarily-disabled workers who are “similar in their ability or inability to work.” This clause is violated by the simple fact of unequal treatment,

regardless of the employer's motive for the policy.

- Courts have refused to allow pregnant women to compare themselves—when invoking the comparative right of accommodation—to employees who receive accommodations mandated by the Americans with Disabilities Act. (The ADA mandates, for employees who meet the definition of “disabled,” reasonable accommodations that do not impose an undue hardship on employers.) Courts have ruled that “ordinary pregnancy” is not a disability within the meaning of the ADA; pregnant women thus cannot seek accommodations directly under the ADA. But neither can they compare themselves to disabled workers, apparently, when enforcing the comparative right of accommodation. This situation is now more troubling than it once was, given amendments to the ADA in 2008 that have been interpreted by the EEOC to protect many types of temporary disability, including those whose only limitations are back pain and restrictions on lifting. Yet, the EEOC still takes the position that pregnant women cannot be treated as “disabled” for purposes of requesting reasonable accommodations, even if their restrictions are identical to another worker who is not pregnant. Who is left for pregnant workers to compare themselves to, now?

Why Do Pregnant Women Need Accommodations at Work?

Until now, I've been discussing only physical disabilities that affect some subset of pregnant women. Pregnant women generally are physically able to engage in paid work, just as they are physically able to carry out other responsibilities in their lives. But there can be conflicts between the physical effects of pregnancy and the demands of a job. Typical conflicts involve lifting restrictions, dangers from exposure to certain toxins, restrictions on standing for long periods, or the need for regular breaks. Many women, especially those who labor in low-wage jobs with inflexible working conditions or those who labor in traditionally male-dominated occupations with serious physical demands and various kinds of hazards, do need some type of accommodation during pregnancy in order to maximize the chances of a healthy delivery and continue working. In many cases, these conflicts can be alleviated with a minor and inexpensive or costless accommodation from the employer. But, as discussed above, employers routinely deny such accommodations under policies that are then erroneously upheld by courts.

The Pregnant Workers Fairness Act (PWFA): A Proposed Law That Should Not Be as Necessary As It Is

The recently-introduced bill, H.R. 5647, which if passed will become the Pregnant Workers Fairness Act, is styled as a “bill to eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.”

The bill focuses on the lack of a meaningful right of accommodation for pregnant women under existing law. The lack of such a right is caused in part by a limitation introduced by design in the PDA. But much of that lack is caused by erroneous judicial rulings that refuse to give the PDA's second clause its intended scope.

The PWFA would, if enacted into law, makes it unlawful to:

- Refuse to “make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee” without demonstrating “undue hardship” to the employer;
- Deny employment opportunities to a woman in order to avoid making required accommodations;
- Force a woman to accept an accommodation she does not want; and
- Force a woman to take leave “under any leave law or policy . . . if another reasonable accommodation can be provided” instead.

The PWFA would be administered as part of Title VII, which means it would apply to employers with at least 15 employees, would require the filing of an EEOC charge as a prerequisite to filing a lawsuit, and would allow an employee to seek money damages for any violation. Its substantive approach, however, is modeled on the Americans with Disabilities Act (ADA), which grants covered employees an affirmative right of accommodation regardless of how others are treated.

The PWFA Should Be Passed, and Even If It Is Not, Courts Should More Carefully Follow Current Pregnancy Discrimination Law, Which Places a Greater Obligation on Employers Than Some Judges Believe

If enacted, the PWFA would provide protection for many pregnant women who struggle to navigate jobs and working environments that were typically not designed with them in mind. An absolute right of accommodation would be particularly helpful for those women working in traditionally male dominated occupations that tend to involve greater physical demands and hazards than traditionally female occupations. This bill could thus help break down the entrenched occupational segregation in the American economy.

But whether or not the PWFA becomes law, courts should pay closer to attention to existing pregnancy discrimination law, which provides many of these protections already. And employers should, whether the law requires them to or not, take the steps necessary to integrate pregnant women into the workforce. Short-term accommodations can have long-term payoffs.



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