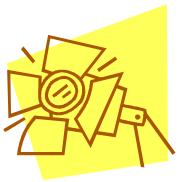
Fall 2011

SPECTRUM

Kansas Human Rights Commission



Spotlight on….

...Pregnancy Discrimination

You Decide Case Study

When Martha Anderson (not her real name), an assistant manager at a large-chain pizza restaurant, became pregnant in April, her doctor ordered her not to work more than 8 hours a day. Despite her doctor's request, the restaurant's manager continued to schedule her to work 10 hour days and 15 hours on Sunday. Then a district manager intervened, and for a month her work restrictions were met. But in June, her hours increased.

Later that month she began having contractions, and her doctor ordered bed rest. Because she had worked at the restaurant less than a year, she was ineligible under the Family Medical Leave Act (FMLA), but she was assured by her district manager that she could have her job back after the birth of her child.

Over the next few months, she had a series of confusing conversations with the human resources department, while waiting for paperwork dealing with her pregnancy-related disability. She received a letter stating she would receive two weeks leave after nine months, but the human resources department said that information was wrong; she would be eligible for long-term disability after 60 days. Then in August, she was allegedly told she would not be eligible until after 90 days, and human resources would send the paperwork.

Three months later, on November 1, she finally received the forms from her employer. As she was filling them out, she discovered that she was not eligible for leave benefits because she had already been fired—-months ago.

Her employer argued it was an administrative oversight that the company's human resources department did not realize that she had been terminated months earlier. The pizza chain argued the firing of Anderson was perfectly proper. The company's handbook stated that employees ineligible for FMLA could apply for and receive an additional leave of absence up to 30 days. It would have been normal policy to terminate Anderson if she was unable to return to work after 30

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All too often one of the happiest times in any woman's lifetime, the pregnancy and birth of a child, can be marred by illegal discrimination, either purposeful or unintentional. The Kansas Act Against Discrimination (KAAD) prohibits sex discrimination in employment and through the Kansas Administrative Regulations bars discrimination based on pregnancy in the workplace.

In 1988, the Kansas Supreme Court found in *Kansas Gas and Electric Co. v. KCCR*, 232 Kan. 763 that adverse actions involving maternity leave rights and related rights as established by Kansas Administrative Regulations constituted sex discrimination under the KAAD.

At the federal level, Title VII of the Civil Rights Act prohibits sex discrimination in employment. The Pregnancy Discrimination Act (PDA) of 1978 amended Title VII to clarify pregnancy discrimination in employment was also prohibited under Title VII.

Pregnancy discrimination remains significant. Pregnancy discrimination charges filed with the U.S. Equal Employment Opportunity Commission increased by 154 percent from Fiscal Year 1997 to Fiscal Year 2010. EEOC monetary benefits (the amount of money paid to complainants by employers), not including litigation, totaled $18 million in Fiscal Year 2010. 16 percent of the KHRC "probable cause" employment findings in FY 2011 included maternity issues.

Exclusionary Policies and Practices are Prohibited

K.A.R. 21-32-6(a) provides that any policy or practice which excludes applicants or employees because of pregnancy is prima facie discrimination. For example, refusing to hire or promote a pregnant female for the sole reason of her pregnancy would be a basis to allege discrimination.

"Maintaining a blanket policy against hiring pregnant women is a clear violation of the law," said EEOC trial attorney Nedra Campbell regarding the EEOC's suit against Weight Watchers under the Pregnancy Discrimination Act. In this particular case, the EEOC alleges a pregnant applicant, who was a long-term client of Weight Watchers who had successfully met and maintained her weight goals and was encouraged to apply for a group leader position by her own Weight Watchers group leader, was told that Weight Watchers did not hire pregnant women and would not consider her further for the job.

Equal Terms and Conditions for Pregnancy As Temporary Disabilities

K.A.R. 21-32-6 (b) establishes that disabilities related to preg-

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nancy or childbirth are considered for job-related purposes temporary disabilities, and should be treated on the same terms and conditions as other temporary disabilities. Employment policies, procedures and benefits addressing temporary disabilities shall be applied equally to pregnancy or childbirth as they are to other temporary disabilities, including terms and conditions. Therefore, if an employer allows leave for temporary disabilities, then equal leave for pregnancy or childbirth is required under the regulation.

The PDA contains similar provisions. For example, an employer may not single out pregnancy-related conditions for special procedures to determine an employee's ability to work. However, if an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees with pregnancy-related conditions to submit such statements.

The PDA provides that if an employee is temporarily unable to perform her job because of pregnancy, the employer must treat her the same as any other temporarily disabled employee. For example, if the employer allows temporarily disabled employees to modify tasks, perform alternative assignments, or take disability leave or leave without pay, the employer must allow an employee who is temporarily disabled because of pregnancy to do the same.

Any employer provided health insurance must cover expenses for pregnancy-related conditions on the same basis as other medical conditions. Employees on leave because of pregnancy-related conditions must be treated the same as other temporarily disabled employees for accrual and crediting of seniority, vacation calculation, pay increases and temporary disability benefits.

The EEOC in August settled complaints for $80,000 wherein a company's pregnant workers were treated unequally compared to others with medical conditions. In these instances, the employer required pregnant female workers to pay for their own pregnancy-related medical expenses, whereas they paid for the expenses of employees with other medical conditions.

Questionable Terminations and Reasonable Leave

K.A.R. 21-32-6 (c) provides that terminations of temporarily disabled employees based on insufficient or no leave is discriminatory if it has a disparate impact on employees of one sex and is not justified by business necessity.

K.A.R. 21-32-6 (d) goes on to state that childbearing must be considered by the employer to be a justification for a leave of absence for female employees for a reasonable period of time, and that female employees, following childbirth and upon signifying her intent to return to work within a reasonable time, shall be reinstated to her original job or to a position of like status and without loss of service credits, seniority or other benefits.

When evaluating business necessity and reasonableness, consideration must be given to the nature of the employee's duties, the importance to the operation of the employer's business, the size of the employer, availability of temporary workers and job-shifting of other employees, practices utilized for absences not related to pregnancy and childbirth, etc. There may be other considerations.

In addition, almost all leaves of absences due to pregnancy can

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days, the company maintained.

What is your determination?

( ) Yes, Anderson was discriminated against because of her pregnancy.

( ) No, Anderson was not discriminated against because of her pregnancy.

Why? _____

You Decide Case Study

(Conclusion)

(X) Yes, Anderson was discriminated against because of her pregnancy.

When asked by an investigator whether they tried to accommodate Anderson by giving her additional leave, company representatives did not believe they were required to do anything beyond what was provided in the employee handbook.

In fact, a company is required to do a lot more. Under the Minnesota Human Rights Act*, as well as the Americans with Disabilities Act, an employer must provide a reasonable accommodation to a pregnant employee, regardless of the company's handbook.

If a pregnant employee cannot perform her current duties because of a disability, the employer must determine whether there is another job available that the worker could perform, with or without a reasonable accommodation. If the employee can't be reassigned, the employer must consider placing the disabled employee on a leave of absence, to allow for the employee's return to work within a reasonable time.

The pizza chain might have argued that granting an extended leave would have imposed an undue hardship—if an employer can show that providing an accommodation would create an undue hardship, it doesn't have to provide one.

It is likely that allowing Anderson to return to work would not have caused the company an undue hardship, the department noted. The chain has hundreds of employees in several locations, and could probably have found a spot for her, even if it needed to fill her current job while she was on leave, the department concluded. If no assistant manager positions were available, the company could have offered her a comparable or lesser position as a temporary accommodation.

The Minnesota Department of Human Rights found probable cause to believe the pizza chain had violated the Human Rights Act by terminating Anderson instead of attempting to accommodate her pregnancy-related disability.

In a negotiated settlement, the pizza chain agreed to provide Anderson with $15,000 in back pay. It denies wrongdoing.

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* and the Kansas Act Against Discrimination

The above case study was provided by the Minnesota Department of Human Rights

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be reasonably accommodated after evaluating what the employer would do if the person otherwise became ill or had other personal reasons for leave, and reviewing the cost, difficulty and timeline for advertising, interviewing, hiring, and training a replacement.

Employers may not require that maternity leaves begin or end at predetermined times, without regard to individual capabilities and demands of the particular job.

The PDA also establishes leave standards. The PDA requires that pregnant employees be permitted to work as long as they are able to perform their jobs. Pregnant females cannot be summarily required to stop working or commence early maternity leave when they are able to perform their job functions or due to unjustified "fetal protection policies".

In September, the EEOC filed suit alleging a restaurant manager asked a pregnant employee to resign and told her that she could not work beyond the seventh month of pregnancy, despite the fact the employee never complained that she was unable to carry out her duties and her doctor never provided any work restrictions. The restaurant manager contended he was protecting the pregnant worker and the fetus. In response, Jim Sacher, EEOC regional attorney said, "Federal law protects the right of woman to remain gainfully employed during her pregnancy. The Supreme Court has made clear that the decision whether a pregnant woman should work rests with her. She alone, and not the employer, is responsible for making decisions that affect her safety and that of her child."

Other Trends

Pregnancy discrimination complaints often allege termination either shortly after notifying the employer of the pregnancy or during maternity leave. Such actions presumptively constitute a violation. In one case, the EEOC filed suit in September where an employee was allegedly fired within hours of notifying her employer of her pregnancy. An EEOC representative said, "It is a severe injustice to terminate an employee based solely on the fact that she is pregnant."

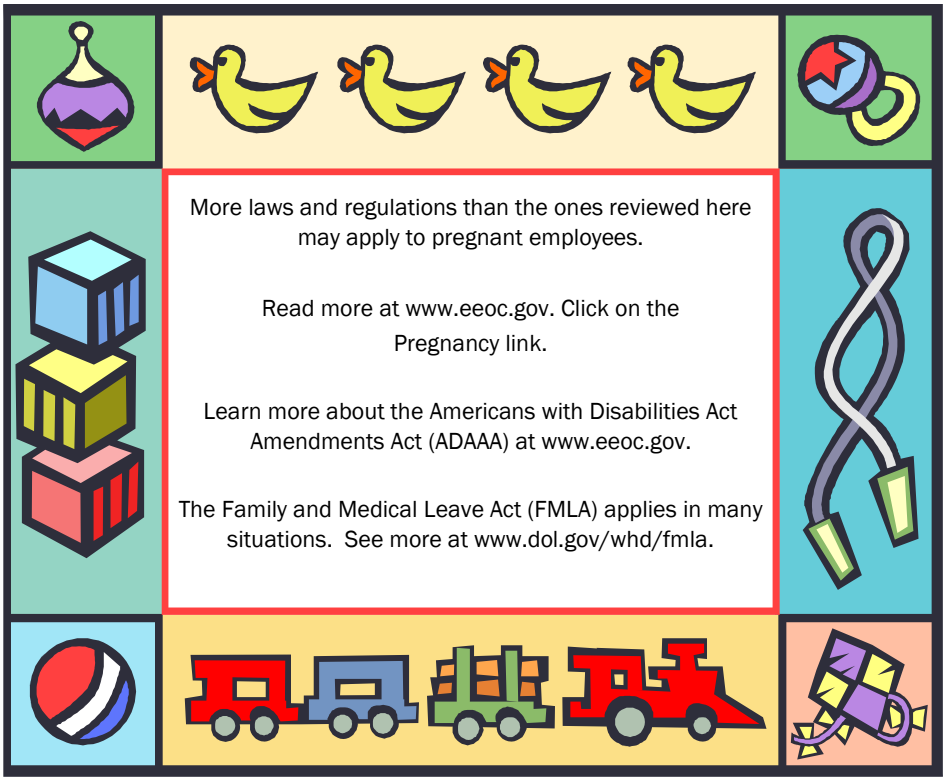
Kansas Administrative Regulation 21-32-6 Pregnancy and Childbirth

(a) A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy is prima facie discrimination.

(b) Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth and recovery therefrom, are for all job related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. Written or unwritten employment polices and practices involving matters such as the commencement and duration of leave, the availability of extensions, the accrual of seniority and other benefits and privileges, reinstatement, and payment under any health or temporary disability insurance or sick leave plan, formal or informal, shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.

(c) Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such termination is discriminatory if it has a disparate impact on employees of one sex and is not justified by business necessity.

(d) Childbearing must be considered by the employer to be a justification for a leave of absence for female employees for a reasonable period of time. Following childbearing, and upon signifying her intent to return within a reasonable time, such female employee shall be reinstated to her job or to a position of like status and pay without loss of service, credits, seniority or other benefits.



More laws and regulations than the ones reviewed here may apply to pregnant employees.

Read more at www.eeoc.gov. Click on the Pregnancy link.

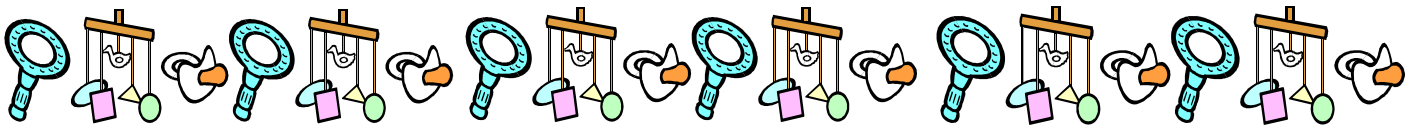
Learn more about the Americans with Disabilities Act Amendments Act (ADAAA) at www.eeoc.gov.

The Family and Medical Leave Act (FMLA) applies in many situations. See more at www.dol.gov/whd/fmla.

Conclusion

Years ago, a sponsor of the PDA stated, "The entire thrust...behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life." Thirty-three years after the passage of the PDA, these goals remain the same.

Credits: U.S. Equal Employment Opportunity Website (www.eeoc.gov) and Chief Legal Counsel Brandon Myers, retired



Pregnancy Floor and Ceiling Analogy

Case law holds that federal law sets a minimum floor below which benefits, i.e. maternity/child bearing /leave, etc. may not fall; not a ceiling above which they cannot rise. So, if states or municipalities grant higher levels of benefits for females in such cases then that is entirely allowable.

The Kansas Act Against Discrimination (KAAD) grants higher standards for maternity leave and other benefits. The Kansas Supreme Court held that providing preferential leave treatment for a woman recovering from childbirth in that the leave may be more than that given to a male employee with a temporary disability is perfectly allowable. Therefore, if employers don't give necessary leave time, and/or reinstatement to the same or like employment, then there is a disparate impact on females who lose their jobs, etc., while gone for delivery and recovery, and this impacts women adversely due to their sex, since women give birth and will experience these kinds of absences more than men generally.