WORKLIFE LAW
UC Hastings College of the Law

Pregnancy Accommodation Update For Employers

May 14, 2015

Overview of topics

Pregnancy accommodation under the amended Americans with Disabilities Act

State and local laws that require accommodation

Accommodation under the Pregnancy Discrimination Act and the Family and Medical Leave Act

What to do when an employee asks for an accommodation

Types of accommodations

Tips for managing pregnant employees

Best practices for avoiding lawsuits

Speaker

Cynthia Thomas Calvert is an employment lawyer and a nationally-recognized expert on family responsibilities discrimination (FRD). She is the president of Workforce 21C, which helps employers prevent FRD, manage employees who have family caregiving obligations, implement non-stigmatized flexible work arrangements, advance women, and create inclusive cultures.

Calvert and Joan Williams pioneered the research behind FRD (also known as caregiver discrimination) as part of their work at the Center for WorkLife Law at UC Hastings College of the Law. Calvert served as the Center's deputy director from 2003 to 2010, and continues to work with the Center as a senior advisor. She manages the Center's hotline and network of employment lawyers, researches FRD issues, and maintains the only national database of FRD cases. She co-authored the legal treatise FAMILY RESPONSIBILITIES DISCRIMINATION (Bloomberg BNA 2014) with Williams and Gary Phelan.

Calvert received her J.D. in 1985 from the Georgetown University Law Center and clerked for the Hon. Thomas Penfield Jackson (D.D.C.). She was a partner at the D.C. litigation firm Miller, Cassidy, Larroca & Lewin, L.L.P. (now part of Baker Botts LLP). She practices employment law in Maryland and the District of Columbia. Full bio here: http://www.workforce21c.com/about/ .

Resources

WorkLife Law, www.worklifelaw.org

Workforce 21C, www.workforce21c.com

Federal Statutes

Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

Pregnancy Discrimination Act, 42 U.S.C. §2000e(k)

Family and Medical Leave Act of 1993, 29 U.S.C. §§2601–2654

Agency Guidance

EEOC, Enforcement Guidance on Pregnancy Discrimination and Related Issues http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

EEOC, Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, http://www.eeoc.gov/policy/docs/caregiving.html

EEOC, Employer Best Practices for Workers with Caregiving Responsibilities

FMLA Regulations, 29 C.F.R. Part 825 (available at www.ecfr.gov)

Department of Labor, FMLA Notice of Eligibility and Rights & Responsibilities: http://www.dol.gov/whd/forms/WH-381.pdf

Americans with Disabilities Act Regulations, 29 C.F.R. Part 1630 (available at www.ecfr.gov)

General Information: Pregnancy Accommodation

EEOC, Enforcement Guidance on Pregnancy Discrimination and Related Issues: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

EEOC, Facts about Pregnancy Discrimination: http://www.eeoc.gov/facts/fs-preg.html

Department of Labor, Employment Protections for Workers Who Are Pregnant or Nursing (map and state-specific information): http://www.dol.gov/wb/maps/

A Better Balance, State and Local Laws Protecting Pregnant Workers: http://www.abetterbalance.org/web/ourissues/fairness-for-pregnant-workers/310

Women's Rights Project, ACLU: Map of states' laws: https://www.aclu.org/maps/delivering-fairness-ending-discrimination-against-pregnant-women-and-moms-work

Women's Rights Project, ACLU: Pregnancy and parenting discrimination: https://www.aclu.org/pregnancy-and-parenting-discrimination

Ask JAN (Job Accommodation Network), Accommodation Ideas for Pregnancy: https://askjan.org/soar/other/preg.html

National Partnership for Women and Families, Reasonable Accommodations for Pregnant Workers: State and Local Laws: http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf

State and Local Specific Information and Fact Sheets about pregnancy accommodation

CA: http://www.dfeh.ca.gov/res/docs/Publications/NOTICE%20A.pdf ; http://www.dfeh.ca.gov/res/docs/Publications/NOTICE%20B.pdf ; http://www.dfeh.ca.gov/res/docs/Publications/Brochures/2015/DFEH-186.pdf

DC: http://www.workforce21c.com/dcs-protecting-pregnant-workers-fairness-act/

IL: http://www2.illinois.gov/dhr/Publications/Documents/Pregnancy_Posting-lgl-ENG14.pdf

MD: http://mccr.maryland.gov/cgi-script/csNews/news_upload/Publications_2edb.Pregnancy%20Disability%20-%20Employment%20%28Poster%20Color%29.pdf

MN: http://www.dli.mn.gov/ls/Pdf/pregnancy_nursing.pdf

NJ: http://www.nj.gov/oag/dcr/downloads/fact_preg.pdf

New York City: http://www.abetterbalance.org/web/ourissues/fairnessworkplace/286-nycpwfa ; http://www.legalmomentum.org/sites/default/files/reports/NYC%20PWFA%20Fact%20Sheet%20012814%20FINAL%20%282%29.pdf

WV: http://www.wvemploymentlawblog.com/2014/05/the-pregnant-workers-fairness-act-west.html

Books and articles about family responsibilities discrimination

FAMILY RESPONSIBILITIES DISCRIMINATION by Cynthia Thomas Calvert, Joan C. Williams, and Gary Phelan (Bloomberg BNA 2014).

THE FAMILY AND MEDICAL LEAVE ACT, by Michael J. Ossip & Robert M. Hale, eds. (BNA 2006).

EMPLOYMENT DISCRIMINATION LAW, 5th ed., by Barbara T. Lindemann, Paul Grossman, & C. Geoffrey Weirich (Bloomberg BNA 2012).

THE PREGNANCY DISCRIMINATION ACT: A GUIDE FOR PLAINTIFF EMPLOYMENT LAWYERS by P. Daniel Williams (Bloomberg BNA 2011)

SHRM, Pregnancy Can Produce Variety of ADA, FMLA Claims (Oct. 9, 2013), http://www.shrm.org/legalissues/federalresources/pages/pregnancy-ada-fmla.aspx

AHI, Keep Caregiver Bias Out of Your Workplace, Business Management Daily (June 15, 2012)

Dawn Lomer, 6 Steps to Avoid Family Responsibilities Discrimination Claims, i-Sight (April 2012)

Cynthia Calvert Family Responsibilities Discrimination: Litigation Update 2010, WorkLife Law (2010)

Select Pregnancy Accommodation Cases

The first case described below is the Supreme Court's recent decision in Young v. UPS*, which announced the standard that now applies in disparate treatment cases brought under the Pregnancy Discrimination Act.*

The rest of the cases below were decided under the 2008 Americans with Disabilities Act Amendment Act (ADAAA). The ADAAA expanded the interpretation of "disability" by broadening the scope of "substantially limits" and "major life activity" in ways that permit more pregnancy-related conditions to be considered disabilities. In addition, the ADAAA limited the relevance of the duration of an impairment to certain types of claims, effectively permitting temporary impairments like pregnancy-related conditions to be deemed disabilities. See A Cool Sip of Water: Pregnancy Accommodation After the ADA Amendments Act*, Joan C. Williams, Robin Devaux, Danielle Fuschetti, and Carolyn Salmon, 32 Yale Law and Policy Rev. 1, 97-148 (2013), available at http://worklifelaw.org/wp-content/uploads/2014/07/A-Sip-of-Cool-Water.pdf.*

For additional resources on pregnancy accommodation law, visit WorkLife Law's Pregnant@Work online resource center, launching in June 2015, at pregnantatwork.org.

New Precedent on Pregnancy Accommodation under Title VII:

Young v. UPS, __ U.S. __ (2015): Peggy Young was a UPS delivery driver. In 2006, Young became pregnant. Her doctor restricted her from lifting more than 20 pounds in her first 20 weeks of pregnancy and 10 pounds thereafter. UPS told Young that she could not continue working while under the lifting restriction because her job required her to lift more than 70 pounds. Young was put on leave without pay, and subsequently lost her health insurance coverage.

Young brought suit under the Pregnancy Discrimination Act (PDA), claiming that UPS's failure to accommodate her was unlawful pregnancy discrimination where UPS provided accommodations to three other groups of employees: (1) employees who lost their Department of Transportation

certifications; (2) employees who were disabled within the meaning of the ADA[1]; and (3) employees who were injured on the job. Both the district court and the Fourth Circuit found against Young on summary judgment. The Supreme Court reversed and remanded for further consideration under a newly articulated standard.

The PDA amended Title VII in 1978 to clarify that discrimination on the basis of sex includes discrimination on the basis of pregnancy, childbirth, or related medical conditions. The PDA also provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other person not so affected but similar in their ability or inability to work . . ." The Supreme Court announced in *Young* the standard courts must apply when a plaintiff brings a disparate treatment claim of intentional discrimination under this clause of the PDA. The Court held that – as with disparate treatment claims in other contexts - in the absence of direct evidence, plaintiffs may prove intentional discrimination by using the burden-shifting framework set forth in *McDonnell Douglas*. The Court provided useful guidance on how this framework is applied and, most notably, modified the third step of the framework to announce a new standard that applies in the pregnancy accommodation context.

With regard to the first *McDonnell Douglas* step, the Court held that Young made a prima facie case by showing (1) she was pregnant; (2) she requested an accommodation; (3) her request was denied; and (4) the employer accommodated others "similar in their ability of inability to work." With regard to the fourth prong of the prima facie case, the Court noted that it does not "require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways."

The second step of the *McDonnell Douglas* framework allows the employer to seek to justify its refusal to accommodate the plaintiff by relying on "legitimate, non-discriminatory" reasons for denying her accommodation. Significantly, the Court noted that the reason "normally cannot consist simply of a claim that it is more expensive or less convenient" to accommodate pregnant women. The Court did not indicate what type of justification would be acceptable.

The third step of the *McDonnell Douglas* framework allows the plaintiff to show that the employer's proffered reason for denying the accommodation is in fact pretext. Here the Court modified the traditional standard by announcing a new balancing test. To prove pretext under the PDA, a plaintiff must show "that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden." The Court offered one example of how a plaintiff may make such a showing, based on the facts in *Young*. A plaintiff may show a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. The Court also noted that the fact that the employer provides accommodations to some employees tends to show that its reasons for not accommodating pregnant women are not sufficiently

[1] The Court did not consider whether Young was disabled under the 2008 amendments to the ADA because Young was denied her accommodation before those amendments went into effect. However, both the majority opinion and Kennedy's dissenting opinion noted that the 2008 amendments may require accommodations for pregnant women like Young. Relevant ADAAA cases are discussed below.

strong. As Justice Breyer framed the central consideration: "why, when the employer accommodated so many, could it not accommodate pregnant women as well?"

ADAAA Cases in Which Employees Succeeded or Survived Summary Judgment

Nayak v. St. Vincent Hosp. & Health Care Ctr., 2013 U.S. Dist. LEXIS 3273 (S.D. Ind. Jan. 9, 2013): Plaintiff was pregnant with twins, had severe morning sickness, and needed bed rest. One fetus died; after the other's birth, the plaintiff had severe pelvic pain. She was fired when she could not return to work. She sued her former employer for disability discrimination, and the employer moved to dismiss the complaint. The court denied the motion, relying on ADAAA regulations to find that the plaintiff had pled a sufficient claim that she had a disability that the employer needed to accommodate. The court held that pre-ADAAA cases are no longer persuasive.

Price v. UTi Integrated Logistics, 2013 U.S. Dist. LEXIS 142974 (E.D. Mo. Oct. 3, 2013): The plaintiff had a high risk pregnancy. She had had four prior miscarriages, and she had a blood disorder and open cervix, and she needed leave. She was fired when her FMLA leave expired. She sued her employer, and the employer moved for summary judgment. The court denied the motion, rejecting the employer's argument that pregnancy is not a disability because it is temporary. The court cited the amended ADA and new regulations, and stated that an impairment need not be permanent or long-term and that a complication related to pregnancy can be a physiological disorder that affects the reproductive system. At trial, however, the jury found for the employer on the ADA claim.

Alexander v. Trilogy, 2012 U.S. Dist. LEXIS 152079 (S.D. Ohio Oct. 23, 2012): The plaintiff, a pregnant nurse, claimed that her employer suspended her for taking three days of leave to deal with hypertension and suspected preeclampsia. She sued her employer for pregnancy and disability discrimination, and both parties asked the court to enter judgment in their favor. The court denied the employer's motion for summary judgment on the pregnancy discrimination claim, finding questions of fact existed. The court, in a highly unusual move, granted the *plaintiff* summary judgment on her disability claim, saying that under the ADAAA, preeclampsia is a "physiological disorder that affects the cardiovascular and urinary systems" and citing the regulations to find that the impairment of the operation of a major bodily function constitutes a disability. The court found that the employer was aware that the plaintiff had a disability and that the plaintiff was subjected to an adverse employment action because of the disability.

EEOC v. Midwest Independent Transmission Systems Operator, Inc., 2013 Jury Verdicts LEXIS 7378 (S.D. Ind. July 11, 2013) – A human resources coordinator took maternity leave. After returning to work, she took time off again for post-partum complications. She was set to return, but had to delay her return for an additional 30 days. Before returning to work, she was terminated in a letter referencing her time out of the office. The EEOC sued the employer for failure to accommodate under the ADAAA, and the employer moved for summary judgment. It argued that she was not qualified for her position because she could not work, and that she did not request additional leave as an accommodation. The court concluded that there was a genuine issue of material fact as to whether a leave of absence might have enabled the plaintiff to return to work and thus have been a reasonable accommodation in this case (although it acknowledged that lengthy leaves may not ordinarily be reasonable), and denied the

employer's motion for summary judgment on the failure to accommodate claim. The parties settled prior to trial, with $90,500 in compensation for the employee.

Mayorga v. Alorica, 2012 U.S. Dist. LEXIS 103766 (S.D. Fla. July 25, 2012): The plaintiff had a high-risk pregnancy with complications including "premature uterine contractions, irritation of the uterus, increased heart rate, severe morning sickness, severe pelvic bone pains, severe back pain, severe lower abdominal pain, extreme headaches, and other pregnancy-related conditions." She was terminated upon returning from three weeks of bed rest and sued for disability discrimination and failure to accommodate under the ADA. The employer moved to dismiss on the ground that the plaintiff did not have a disability within the meaning of the Act. In denying the defendant's motion to dismiss, the court acknowledged the impact of the "ADAAA's lenient standards to establish a disability," distinguished healthy pregnancies from pregnancy-related conditions, and found that the plaintiff had alleged sufficient facts to state a claim for relief under the ADA for a pregnancy-related complication. It expressly rejected the employer's argument that the plaintiff's condition was too short in duration to be a disability. The court nevertheless relied heavily on pre-ADAAA case law without acknowledging its questionable validity. The court stated, for example, that a pregnancy-related disability is covered under the ADA only in "extremely rare" cases. Nevertheless, the court refused to dismiss the plaintiff's disability claim, finding that "whether the nature, duration, and severity of [the plaintiff's pregnancy-related conditions] are sufficient to constitute a disability under the ADA" required a factual inquiry. The case later settled.

ADAAA Cases in Which Employers Defeated Employees' Claims

Heatherly v. Portillo's Hot Dogs, Inc., 2013 U.S. Dist. LEXIS 100965 (N.D. Ill. July 19, 2013): A pregnant employee's doctor told her she could not lift, and put her on light duty, then bed rest, because of her high risk pregnancy. She was terminated when she did not return to work or request additional leave. She sued her employer for disability discrimination, and the employer moved for summary judgment. The court cited the ADAAA, found lifting to be a major life activity and found that the temporary duration of pregnancy is irrelevant, but found that the evidence showed she could work and thus was not disabled. The court granted summary judgment to the employer.

Turner v. Eastconn Regional Education Service Center, 2013 U.S. Dist. LEXIS 169785 (D. Conn. Dec. 2, 2013), aff'd, 588 Fed. Appx. 41 (2d Cir. 2014): A special education teacher was pregnant and her doctor did not want her restraining potentially violent students. She was given light duty for a short while and then placed on leave and terminated when her leave was exhausted. She claimed she was disabled or perceived as disabled, and sued for failure to accommodate under the ADAAA. In granting the employer's motion for summary judgment, the court cited the ADAAA, but then applied pre-ADAAA case law, relying on *Wanamaker* and *Sam-Sekur*, both discussed below. It held that temporary conditions cannot be disabilities, even under the ADAAA, and that duration is a factor. It stated that pregnancy is not a disability and the plaintiff did not have any complications. The plaintiff appealed, and the Second Circuit affirmed on the ground that the plaintiff appeared to have abandoned her claim that her pregnancy was a disability and proceeded on the ground that she was "regarded as" disabled, which did not require accommodation. Moreover, the plaintiff had not established that there was a reasonable accommodation that did not eliminate an essential function of her job. The case is now in state court on the plaintiff's remaining state claims.

Nunes-Baptista v. WFM Hawaii, LLC, 2012 U.S. Dist. LEXIS 59838, (D. Haw. Apr. 30, 2012), aff'd 585 Fed. Appx. 611 (9th Cir. 2014).: pregnant bakery manager required accommodations, which the employer provided. She presented her employer with a medical certificate requiring additional accommodation, and was fired the next day for taking food from the cafeteria without paying for it. The court granted the employer's motion for summary judgment on the ADA claim, finding that although the timing of the events was close, the employer's record of accommodating plaintiff and other pregnant employees defeated the claim of pretext.

Abbott v. Elwood Staffing Serv., 2014 U.S. Dist. LEXIS 104343 (N.D. Ala. July 31, 2014): A pregnant assembly line worker complained about having to do strenuous work, and the next day began bleeding vaginally. Her doctor told her to take it easy and not to strain, so she requested light duty to prevent straining. She had no further bleeding and had only routine prenatal care. Her employer made a limited search for a light duty position to which she could be transferred, found none, and denied her request. She was placed on FMLA leave. When she exhausted her FMLA leave, she was terminated and she sued her employer for failure to accommodate under the PDA and ADA, among other things. In a motion for summary judgment, the employer stated that it accommodated only those workers who were injured on the job. She argued she was injured on the job because work-related straining caused her bleeding, and therefore had to be treated like others injured on the job. The court disagreed. It stated that just because she bled on the job doesn't mean she had an injury that occurred at work or that work caused the injury. Although she requested worker's comp, her situation was not treated as a worker's comp situation and she testified at her deposition that she just wanted light duty of the sort that every pregnant woman should have. With respect to her claim under the ADA that she had a disability that the employer failed to accommodate, the court, citing the ADAAA, found she did not have a disability. It found that she was not under special care, had no more bleeding, and didn't need medication, so she had a healthy pregnancy and not a disability. Moreover, she presented no evidence that her impairment substantially limited a major life activity and she testified at her deposition that she did not have a disability. Summary judgment was granted to the employer.

Post-ADAAA Cases in Which Courts Failed To Apply the *Amended* Americans with Disabilities Act

The following cases were decided in the years after the amendments to the Americans with Disabilities Act became effective (Jan. 1, 2009). The adverse actions at issue in each occurred or are alleged to have occurred after the amendments' effective date. The courts acknowledged the ADAAA, but then relied on precedents that are of questionable validity because they were decided prior to the 2008 amendments.

Sam-Sekur v. Whitmore Grp., 2012 U.S. Dist. LEXIS 83586 (E.D.N.Y. June 15, 2012): A pro se litigant had numerous ailments, some of which she claimed were linked to pregnancy. She sued her employer, claiming that it had terminated her because of her pregnancy-related disabilities. In ruling on the employer's motion for summary judgment, the court mentioned the ADAAA, but applied pre-ADAAA law and stated that only in extremely rare cases are pregnancy complications covered by ADA. She amended her complaint to allege a chronic disability that had been caused by her pregnancy. The court denied the employer's motion to dismiss, finding that while the case was not particularly strong, the plaintiff should be permitted to engage in discovery. The case settled several months later.

Wanamaker v. Westport Board of Ed, 11 F. Supp. 3d 51 (D. Conn. 2014): a teacher suffered injury during childbirth, and requested additional leave as an accommodation but claimed that she was terminated instead. She sued for disability discrimination, and the employer moved to dismiss. The court mentioned the ADAAA, but cited pre-amendment law and observed that pregnancy is not a disability and that complications generally do not qualify as disabilities (citing *Sam-Sekur*). The court further said that the plaintiff had not shown she was substantially limited in a major life activity and had not shown that her condition was not temporary. It dismissed the claim without prejudice. 899 F. Supp. 2d 193 (D. Conn. 2012) The plaintiff filed an amended complaint, setting forth more detailed allegations regarding the plaintiff's disability and specifically including that her impairment substantially limited her in the major life activities of walking and standing. The employer moved for summary judgment, conceding that the plaintiff was disabled but arguing that it had met its obligations of reasonable accommodation under the statute. The court denied the motion. It found that the employer had an obligation to engage in the interactive process with the plaintiff even if, as the employer claimed, she did not initiate the process with a request for accommodation because the employer was aware of her disability and her need for accommodation. It further found that questions of fact existed as to whether the employer provided a reasonable accommodation and whether the plaintiff could have performed the essential functions of her job with an accommodation. The case is headed for trial.

ADAAA Claim - Other

Oliver v. Scranton Materials, Inc., 2015 U.S. Dist. LEXIS 27121 (M.D. Pa. Mar. 5, 2015): an executive, pregnant with triplets, was on bed rest because she had high blood pressure and a high risk pregnancy. While she was on bed rest, she was terminated despite having notified her employer of her intent to return to work. The court, ruling on the employer's motion to dismiss, applied the ADAAA and observed that pregnancy complications can rise to the level of disability. It granted the motion to dismiss the claim, however, because it found that the plaintiff had not pleaded her disability with sufficient detail because she did not specify what complications and surgery she actually experienced. The dismissal was without prejudice.