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November, 2016

Pregnancy

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South Dakota
REPORT

Advocating the Rights of South Dakotans with Disabilities

THE PROTECTION AND ADVOCACY SYSTEM FOR SOUTH DAKOTA

Volume 32, Issue 1

November, 2016

Pregnancy

by Thomas E. Simmons*

Discrimination on the basis of pregnancy can take various forms, from overt discrimination to failing to accommodate a worker's needs associated with her pregnancy.¹ The options for redressing pregnancy discrimination would presumably include the Americans with Disabilities Act (ADA) and the Pregnancy Discrimination Act (PDA). Unfortunately, while intentional discrimination on the basis of pregnancy is illegal under the current state of the law, employers have no affirmative duty of to make even minor or inexpensive accommodations that would permit a pregnant worker to carry out the basic functions of her job.

Historically, courts have held that the ADA does not recognize pregnancy as a disability because pregnancy fails to meet the definitional requirements of an impairment which substantially limits a major life activity.² Pregnancy is a temporary condition. It is difficult to sustain a finding that any of a woman's major life activities is substantially limited when the effect disappears in less than a year. It is the rare case which finds that a woman's pregnancy substantially limits one or more of her major life activities. In 2008, Congress clarified that even episodic impairments can qualify as disabilities.³ The ADA, however, still treats pregnancy as a non-disability based on the rationale that it is a normal condition and not the result of a physiological disorder.⁴

The Pregnancy Discrimination Act (PDA) characterizes employment discrimination on the basis of pregnancy as constituting sex discrimination under Title VII.⁵ The PDA defines sex discrimination to include acts of discrimination on the basis of pregnancy. An employer who lays off a worker because she is pregnant would have no success in arguing that it did not discriminate on the basis of the worker's sex. The PDA supplies an answer in the form of a definitional rule. Pregnancy discrimination *is* sex discrimination.

The other options for redressing pregnancy discrimination in the workplace can found in state laws enacted or pending in about sixteen states (not South Dakota).⁶ South Dakota has its own set of disability discrimination laws, but they contain a definition of disability even more restrictive than the ADA.⁷ Under the South Dakota Human Relations Act, a disability means "a physical or mental impairment of a person resulting from disease, injury, congenital condition of birth or functional disorder which substantially limits one or more of the person's major life functions."⁸ If pregnancy does not fit within the ADA's definition of a disability, it certainly would not fit within the state law's definition of a disability either.

Pending in Congress is the Pregnant Workers Fairness Act.⁹ That Act was first introduced in 2012, then reintroduced in 2015. Neither this pending bill nor other states' laws are currently of much help to women who have suffered discrimination by their employer on account of pregnancy in South Dakota. Of course, there is the Family and Medical Leave Act (FLMA), but it only guarantees twelve weeks of job-protected leave.¹⁰

The problem is in the gap between the ADA and the PDA when it comes to pregnancy. That gap can viewed clearly in what the stalled-out Pregnant Workers Fairness Act would provide: The legislation would make it unlawful to fail to make reasonable accommodations for pregnant workers unless the accommodations would constitute an undue hardship.¹¹ It would provide ADA-style accommodation rights to pregnant women employees of a covered employer.

The ADA fails to guarantee these protections because it fails to recognize pregnancy as a disability. The PDA fails to guarantee these protections because it requires relatively little in the way of accommodation duties. Since the United States Supreme Court decision in *Young v. UPS* in 2015, the PDA cannot be seen as any real guarantor of accommodation rights for pregnant workers.¹² Instead, the PDA focuses on requiring pregnancy-blind decisions in the workplace, requiring similar treatment for pregnant and non-pregnant employees, but imposing no affirmative duty to accommodate an employee who is pregnant.

Here is a crucial difference between Title VII (outlawing discrimination on the basis of sex, race, etc.) and the ADA (outlawing discrimination on the basis of disability). Title VII requires neutrality (except as to some accommodations for religions practices). The ADA requires something more. It requires employers to actually treat employees with disabilities differently from other employees on purpose. It requires employers to make reasonable accommodations that will permit workers with disabilities to do their jobs. The ADA's imposition of an accommodation duty is unique among other Civil Rights laws. It requires employers "to do something that no federal employment rights statute had ever done before: ... engage with a disabled employee or applicant in a good faith interactive process to find ways to accommodate the employee's disability and enable him to work."¹³

And here, then, is the problem. Seeing as pregnancy does not fall within the ADA and that it only falls within Title VII as a variety of sex discrimination, there are no accommodation duties imposed on employers regarding pregnant workers. Federal law fails to recognize an affirmative right to accommodations for pregnancy. So do South Dakota's state law protections.

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¹ See generally, Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125 (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2534216.

² 42 U.S.C. § 12102 (2013).

³ 42 U.S.C. § 12102(4)(D) (2013).

⁴ 29 C.F.R. pt. 1630, app. § 1630.2(h) (2015).

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⁵ 42 U.S.C. § 2000e(k) (2012).

⁶ See Areheart, *supra* note 1, at 1129 n. 12 (citing state laws and pending legislation).

⁷ S.D.C.L. § 20-13-1(4).

⁸ *Id.*

⁹ S. 1512; H.R. 2654.

¹⁰ 29 U.S.C. § 2612(a) (2012).

¹¹ S. 1512 § 2(1).

¹² *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015).

¹³ Areheart, *supra* note 1, at 1157, quoting Linda Hamilton Krieger, *Forward—Backlash against the ADA: Interdisciplinary Perspectives and Implications for Social Justice Strategies*, 21 BERKLEY J. EMP. & LAB. L. 1, 4 (2000).