

Pregnancy in the Workplace

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Introduction

Pregnancy discrimination is synonymous with sex discrimination because pregnancy is a condition that can only be experienced by women. Thus, as women continue to enter the workforce in larger numbers, pregnant working women will also increase. How employers treat pregnant women is a social issue that concerns women, legislatures, and employers. The issue of pregnancy discrimination has been addressed in both Europe and the US. This form of discrimination is most prevalent in the hiring practices of corporations. For instance, if a pregnant woman goes to an interview, the likelihood that her pregnancy will count against her in a hiring decision is very high.

What is considered pregnancy discrimination? What problem or problems does this form of discrimination cause for both the employee and employer? This article will review the legislation passed that addresses pregnancy discrimination in the workplace in the US compared to Europe and convey new developments on this topic through the perspective of different points of view.

Legislation in the US

Like other forms of discrimination, pregnancy discrimination is not only morally and ethically wrong, there are also legal ramifications. Two laws that protect and aid pregnant women in the US are the Pregnancy Discrimination Act (PDA) and the Family Medical Leave Act (FMLA). The distinctions between these two laws are that the PDA specifically addresses the treatment of pregnant employees by employers whether they are hiring new employees or dismissing workers. The FMLA deals with the need for pregnant employees to take time off work in relation to their pregnancy or the care of their new child. The FMLA includes a broader scope of issues since it addresses rights of both women and men employees who pursue a leave of absence for the care of any family member requiring special care. Whether the family

member is a newborn child or an elderly parent, which may cause the employee to request additional time off.

Pregnancy Discrimination Act (PDA)

The PDA, an amendment to the Civil Rights Act of 1964 added in 1978, states that it is against the law for employers to discriminate against pregnant employees. But what is considered pregnancy discrimination? Pregnancy discrimination is defined simply as treating pregnant employees differently from other employees because of their pregnancy. Employers are expected to base employment, and disciplinary decisions on the qualifications and actions of the employee without any connection to her pregnancy.

US Courts Interpretation of PDA

In interpreting the law the courts have ruled in many cases on pregnancy discrimination. A review of some of the decisions passed down by the court clarifies their position.

In December of 1997 pregnancy discrimination made headlines when a celebrity won a lawsuit against her previous employer on pregnancy discrimination. Actress Hunter Tylo sued Spelling Entertainment Inc. for firing her because she was pregnant. In this case the courts ruled in the employees favour awarding Tylo \$4,000,000 dollars for emotional distress and \$894,600 for economic loss. The employers' argument in this case was that the actress could not successfully perform the role of her character on the show *Melrose Place*, as a seductive woman. In addition, they felt she had breached her contract by violating a clause prohibiting her from dramatically changing her appearance (*Costa Mesa*, Feb. 98). This case was decided by a jury siding with Tylo on the basis that Tylo's ability to perform her job was in tact.

Although Tylo was victorious in her pursuit, in many cases the courts have sided with employers. In the case of Mirtha Urbano, a ticketing sales agent for Continental Airlines, Urbano sued the airlines claiming pregnancy discrimination when she was denied her request for light duties despite recommendations from her doctor. Continental

defended its position by stating its policy on transfers in cases of non-occupational injuries. Employees have to bid on the jobs as they become available. In this court case a Fifth Circuit Court of Appeals ruled in favour of Continental Airlines on the basis that the employee was not requesting equal treatment but preferential treatment for her pregnancy (*Monthly Labor Review*, 1999).

In the case of a secretary who was fired while on maternity leave by an employer who was downsizing, the court also ruled in the employers' favour. In this case the employer stated that the employee's absence made it easier to eliminate her position. The reason for her elimination was the economic situation of the company (*HR Focus*, 1998).

What all of the examples above have in common is that they focus on the employers' reason for the action. In the first case, Spelling Entertainment by its own admission fired the actress because she was pregnant. There was no indication that Hunter stopped performing her job. In the other two examples, the employer stated the employees' pregnancy did not impact their decision.

Legislation in the UK

In Europe there are several forms of legislative provisions that protect pregnant women. The Equal Treatment Directive 76/207 (ETD), The Pregnant Workers Directive 92/85 (PWD), and most recently the Employment Relations Act of 1999. The ETD states that "application of the principle of equal treatment with regard to working conditions, including the conditions governing dismissal, means that men and women shall be guaranteed the same conditions without discrimination on the grounds of sex." The PWD is included in Part VII of the Employment Rights Act of 1996. The PWD requires employers to give a minimum of 14 weeks (Under the Employment Relations Act of 1999, employers have to give 18 weeks) paid maternity leave and prohibits an employer from dismissing an employee from the beginning of her pregnancy to the end of her maternity leave, save in exceptional circumstances unconnected with childbirth. In a section of this Act it is

explicitly stated that dismissal of a woman because she is pregnant is automatically an unfair dismissal.

Pregnant Worker Directive vs. Pregnancy Discrimination Act

Although the PWD appears to be similar to the PDA in the US there is a key difference between the two. The PWD shifts the burden of proof to the employer to prove they dismissed a worker within the specified protected period for reasons other than her pregnancy. Under the PDA in the United States the employee has to prove that they were treated unequally by documenting the injustice. The PWD however, does not protect pregnant women beyond the maternity period from dismissal due to excessive absences.

European Courts Interpretation of the PWD/ETD

In the case of Larsson vs. Dansk Handel & Services brought before the European Court, Ms. Larson after taking her full maternity leave exceeded her regular sick days by extending her leave due to an illness that she acquired as a result of her pregnancy. She was fired for excessive absences from Dansk Handel & Services. Larson's argument was that since her illness was causally connected with her pregnancy, she was protected under the ETD. The argument against Larsson was that the ETD includes recognition for a reasonable period of maternity leave. To extend Larsson's leave would put her in a better position than a man. The European Court ruled in favour of the employer stating that absence following maternity leave was to be regarded in the same way as absences by a man. Thus if the employer would dismiss a man that was absent for the same period the treatment given to Larsson's condition was not considered less favourable treatment (*Web Journal*, 1997).

FMLA vs. European Parental Leaves

Although the right to parental leave is recognised by both the United States and the UK the duration and compensation to employees during the leave differs. The following compares the leave granted to employees by the US under the FMLA and the UK under the Employment Relations Act of 1999 and the Maternity and Parental Act.

US

- 12 weeks of unpaid parental leave under the Family and Medical Leave Act (there is also coverage in some employer benefit plans)

UK

- 18 weeks of statutory maternity pay at 90% of the previous wage for six weeks and 12 weeks at a flat rate.
- 40 weeks unpaid family leave.

Problems with Non Uniformity in Benefits

Clearly there are differences between the laws in the US and Europe pertaining to protection of pregnant workers. These differences have become more of an issue since international business has become a way of life for the corporate world.

In July 1999 a case was brought against United Airlines by the women's union "The Association of Flight Attendants." In this case British women working for United Airlines were unable to fly while pregnant. These women were suspended without pay until they could return to work. Since in the US maternity leave is 12 weeks unpaid under the FMLA, the company felt they were within their rights not to pay the British workers while pregnant. For the British citizens under their laws they would generally get 18 weeks paid maternity leave. The airline argued that all of its employees should be treated equally. For the UK citizens, they demanded that they be treated the same as the women of their country.

Given the social differences between the US and the UK (the UK has a stronger social welfare system than the US), it is unlikely that either would dramatically change their laws to suit the others wishes. However, in cases where a company of one country hires workers of another the laws that should apply to both the employer and employee will need to be clearly defined.

Pregnant Employee Perspective

For the pregnant employee, falling victim to pregnancy discrimination can effect the individuals self esteem, increase stress, as well as economic loss. To capture the opinion of the pregnant employee, data was extracted from the website of "Women Friendly Workplace Campaign Speakout." This website is designed to provide a forum for women in the workplace to voice their opinion about various issues related to women. Specifically, a few anonymous statements made by women who feel they were victims of pregnancy discrimination were collected for this analysis. The following examples summarise the message of these statements.

A 23-year-old woman was fired from her job after requesting a leave of absence due to her pregnancy. Losing her job caused her to feel a loss of independence and resulted in her temporarily suffering from depression. She maintains that her dismissal was strongly unjust.

Another example was a woman who suffered from severe morning sickness and was recommended by her doctor to take a few days off to recover. After returning to work, she was told she had to take the remainder of her pregnancy off since her doctor sent a separate request for the woman to stay off her feet in order to avoid swelling. The employee felt betrayed by her company, and later she felt bitter towards the Equal Employment Opportunity Commission because of the many delays in processing her request to sue the company.

Another example is the employee of a temporary agency that was terminated from two long-term assignments once each of the companies became aware of her pregnancy. In her situation she felt frustrated and helpless because she was unable to secure any position despite her qualifications.

What all of these women have in common is that they were seeking a resolution to their problem with the EEOC. All of these women in the examples felt anger and frustration in the decisions made by their employers. Additionally, they felt that the vulnerable position they

were in by being pregnant and having to pursue legal action to protect their rights as employees was difficult.

Employers Perspective

In order to understand why pregnancy discrimination exists in the corporate environment, it is necessary to examine why some employers and managers engage in discriminatory practices.

Many employers feel that a pregnant employee is like a white elephant. By employing someone pregnant they are guaranteed to have high medical costs, a reduction of productivity, and the inconvenience of replacing the employee with temporary help during their maternity leave. In addition, the employer still faces the likelihood that the employee will not return to work after her pregnancy (*Black Enterprise*, 1999).

As the example in the introduction of this article pointed out, few employers would consider hiring an applicant who was visibly pregnant. Consequently, the cost concerns of the employer are valid. In the US leave benefits are paid primarily by employers in contrast to the countries in Europe where leave costs are paid through social insurance systems financed by both the employee, employer and subsidises paid by the government (*HR Magazine*, 2000).

Additionally, the unpaid time off provided under the FMLA still has a cost effect to the employer since they have to hire additional temporary staff to cover the position or have existing staff cover the position at the cost of overtime or reduced productivity.

Conclusion and Recommendations

Although many employers avoid hiring women who are visibly pregnant, having existing employees who become pregnant while employed with the company is virtually unavoidable. As of October 2000, over 58% of women in the US over the age of 20 were employed (*US Bureau of Labor Statistics*, 2000).

The issue of pregnancy discrimination is not unique in the United States; the recent laws passed by the UK to protect pregnant workers reflect the need for such laws. Clearly the courts both in the US and

Europe recognise that employers are not obligated to give pregnant women “special” treatment but equal treatment is the goal of all the statutes covered in this analysis. Employers who pursue dismissal of an employee simply because she is pregnant are doing a disservice to the employee and the company. In effect they are subjecting the company to social and legal scrutiny. Additionally, they effect the overall morale of the staff.

In today’s economy employee retention is a major issue since employees in many fields and professions are in high demand. If an employee feels that their company or the management of her present employer does not care about her as an individual, she is likely to leave. A significant number of women will continue to work while pregnant. Therefore, it is important for the employer to recognise that these women are more than just pregnant workers, they are valuable employees before and after pregnancy. When a pregnant employee is treated unfairly it sends a negative message to the woman and her co-workers about the company and the management. In such cases it is likely that if the woman returns to work she will be resentful towards management.

To avoid a reduction of morale and the potential loss of good employees, the employer should view the cost of a pregnant employee in the same way they view the cost of all employees. For instance, to attract and retain talented people many companies offer incentives like bonus packages and competitive benefits. This type of employee cost is seen as an investment in the human asset. Competent pregnant employees should still be considered valuable.

In a study on employer policies that increase the likelihood of job retention after childbirth, it was found that the following factors effect whether women return back to work after maternity leave (*Social Forces*, 1998);

- Job flexibility, part-time work
- Length of leave
- Ability to avoid mandatory overtime

- Supervisor and co-worker support.

There is a correlation between the return rate of women to the same employer after her maternity leave and how the woman was treated while she was pregnant. By being supportive and flexible of their employees while in this temporary state of pregnancy, employers and managers stand to gain the employee's respect and loyalty. On the other hand, to discriminate against an employee who is pregnant will not only effect morale since others will observe how this employee is treated but it can also lead to legal costs for the company from a potential discrimination lawsuit.

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Subject: Pregnancy discrimination

From: Anonymous

Date: Wed. 17 Nov. 1999, Wed. 3 Nov. 1999, Tues. 7 Dec. 1999.

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