



Ringling in the New? Pregnancy Discrimination and Pregnancy-Related Leaves

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In recent months, the Washington Supreme Court clarified state anti-discrimination laws and regulations regarding hiring and employment of pregnant women. Protections for pregnant women are also part of Washington and federal laws that allow leaves for pregnancy-related conditions and newborn childcare. Now is a good time to review your policies and procedures to ensure that you are following the most recent guidance from the Court and complying with state and federal leave laws.

Disparate Treatment Based on Pregnancy is a Form of Sex Discrimination

In December 2007, the Supreme Court reviewed a case in which a pregnant job applicant was rejected after disclosing her pregnancy. *Hegwine v. Longview Fibre Co.*, 2007 Wash. LEXIS 873 (2007). During Hegwine's hiring interview, the employer ("Fibre") informed her that the position she sought had a 25-pound lifting requirement. Fibre subsequently offered her the position, contingent on her passing a physical exam. After Hegwine indicated on Fibre's required medical history questionnaire that she was pregnant, the company raised the position's lifting requirement to 40 pounds. When Hegwine obtained medical approval to lift that amount, Fibre increased the requirement yet again, this time to 60 pounds. Fibre then rejected Hegwine for the position, saying her "availability" did not permit her to perform the job. Hegwine sued, alleging sex discrimination. Following a bench trial, the trial court ruled in Fibre's favor, accepting its argument that Hegwine's pregnancy was a disability, which prevented her from performing an essential element of the position—the ability to lift 60 pounds. The Court of Appeals rejected that reasoning and, applying a sex discrimination analysis, entered a judgment for Hegwine.

Affirming the Court of Appeals, the Supreme Court held that under the Washington Law Against Discrimination ("WLAD") and interpretive regulations in the Washington Administrative Code, pregnancy-related disparate treatment is *not* subject to a disability accommodation analysis, but is a form of sex discrimination. The Court noted that an employer may justify rejecting a pregnant applicant based on business necessity or a bona fide occupational qualification, but the evidence must support those grounds. In Hegwine's case, the Court concluded that though Fibre asserted the lifting requirement was a business necessity, the repeated increases in that requirement *after* Hegwine's pregnancy was disclosed and the shifting explanation for the rejection decision established as a matter of law that Fibre's decision not to hire Hegwine reflected pregnancy-based discrimination. The Court also held that Fibre's inquiry into applicants' pregnancy status as part of their pre-employment medical examination violated the WLAD.

***Hegwine* provides some important reminders to employers:**

- **Do not** inquire into a woman's pregnancy status during the pre-employment process.
- **Do not** make employment decisions based on assumptions about a pregnant woman's abilities and restrictions.
- **Do** formulate clear job descriptions that include any physical requirements *before* interviewing applicants; do not alter those descriptions during the hiring process as grounds to reject an applicant.

Pregnancy-Related Leaves

Hegwine relied in significant part on Washington Human Rights Commission regulations prohibiting discrimination against women because of pregnancy or childbirth. Among other things, the regulations require employers with eight or more employees to provide women with a leave of absence for the period they are sick or temporarily disabled from working because of pregnancy or childbirth ("pregnancy disability leave"). There is no specified time limit on such leave. Women returning from pregnancy disability leave must be restored to the same job or a similar job with at least the same pay, except in the case of demonstrated business necessity. To the extent an employer provides paid leave or other benefits for periods of sickness or other temporary disabilities, it must provide the same benefits for paid pregnancy disability leave.

In addition to pregnancy disability leave, an employee may be eligible for leave to care for a newborn child under the federal Family and Medical Leave Act ("FMLA") and the recently adopted Washington Family Leave Act ("FLA"). The FMLA and FLA are effectively identical in most respects. Both apply to employers with 50 or more employees and have the same eligibility requirements: an employee must have worked for the employer at least 12 months, and at least 1,250 hours during the last 12 months. Eligible employees are entitled under both Acts to a total of 12 weeks of leave during any 12-month period for the birth of a child and/or in order to care for the newborn child. As with pregnancy disability leave, an employee returning from FMLA or FLA leave must be restored to the same or an equivalent job. However, whereas the FMLA requires continuation of any employer-paid health care benefits during leave, the FLA requires only that employees be allowed to continue such coverage at their own expense.

The Intersection of Pregnancy Disability Leave and FMLA/FLA Leave

Washington employees are entitled to pregnancy disability leave regardless of whether they qualify for FMLA and FLA leave. If a woman is eligible for FMLA leave, that leave, with the consequent right to employer-paid medical coverage, may begin running concurrently with pregnancy disability leave. However, FLA leave is *in addition to* pregnancy disability leave. Thus, a woman is entitled to pregnancy leave for the period of actual disability from pregnancy and childbirth, *and then*, if she is eligible, to 12 weeks of FLA leave to care for her newborn child. Any FMLA leave time remaining after the pregnancy disability period is over must be used concurrently with the 12 weeks of FLA leave—a woman is entitled to only *12 weeks total* of such leave each year in addition to pregnancy disability leave.

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