

Employers, workers struggle with pregnancy discrimination

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Pregnancy discrimination is a continuing problem for women in the workplace, according to both employment attorneys and the U.S. Equal Employment Opportunity Commission's statistics.

The reasons for this are varied.

Ernie Haffner, an attorney in the EEOC's Washington, D.C., Office of Legal Counsel, told Lawyers Weekly USA that pregnancy discrimination remains a problem because it is often subconscious.

People make assumptions about pregnant workers, like they are going to take a lot of time off, or they aren't going to be committed to the employer, he said.

Patricia Shiu, an attorney with the Legal Aid Society-Employment Law Center in San Francisco, said demographics also play a role, with a work force comprised of at least 50 percent women, the majority of whom are in their child-bearing years. And an increasing number of women have little choice about working during and after their pregnancy because of their economic situation, she noted.

Andover, Mass., employment defense attorney William E. Hannum III noted that the percentage of claims found to be meritorious has also risen over recent years, suggesting that plaintiffs are more aware of their rights.

Hannum, who practices at Schwartz Hannum, also suggested that the current economy could be a factor influencing the increasing number of claims.

When you have a little bit of give in the work force, it's easier to make do when somebody has to go out on a leave of absence, he explained. But in a down economy, employers may have a more difficult time accommodating a pregnancy.

According to EEOC statistics, between 1992 and 2005, pregnancy discrimination claims rose more than 30 percent, from 3,385 in 1992 to 4,449 in 2005. In financial terms, the monetary awards to pregnancy discrimination plaintiffs rose from \$3.7 million in 1992 to a high of \$20.6 million in 2000 (and those amounts don't include damages awarded in litigation).

Jocelyn Samuels, vice president for education and employment at the Washington, D.C., National Women's Law Center, said the rising statistics could be just the tip of the iceberg.

The fact of the matter is that it's never easy to file an EEOC charge or lawsuit, so plenty of other women out there are presumably subjected to these same kinds of illegal practices who decided not to pursue legal action, she said.

Subtle discrimination

The 1978 Pregnancy Discrimination Act amended Title VII to include discrimination on the basis of pregnancy, childbirth or related medical conditions.

Lawsuits can be based on discriminatory hiring, firing or the denial of advancement or fringe benefits, such as seniority.

Close to 30 years after enactment of the act, employers still don't universally realize that pregnancy discrimination is illegal and don't understand the many permutations of conduct that can constitute illegal discrimination, Samuels said.

Pregnant women are also protected under the 1993 Family and Medical Leave Act as well as various state employment laws.

But Shiu said employers continue to discriminate, even blatantly.

A client who works for a major national retailer was told that she wouldn't have a job to come back to after she informed her boss she was pregnant with her second child.

She was told that they had accommodated her once, and they weren't going to do it again, Shiu said.

But more typically, there are no smoking guns, Samuels said.

Shiu agreed that there can be very subtle ways for employers to discriminate against pregnant women. A lot of times, it is couched in terms of child care, like asking during an interview, 'Are you available to work late all the time?' or 'Can you travel at a moment's notice?' which may try to weed out women with familial responsibilities.

Samuels noted a recent 2nd Circuit decision in which a school psychologist alleged she was denied tenure because she was stereotyped as being unable to perform the basic requirements of her job after she had a child. (*Back v. Hastings On Hudson Union Free School Dist.*, 365 F.3d 107 (2004).) The court reversed a summary judgment for the school, holding that a gender-based stereotype about women's abilities to work and parent was actionable.

That kind of stereotyping - the expectation that mothers are by definition less committed or are subpar workers - is in and of itself discrimination, Samuels said, noting that an increasing number of claims are based on this stereotype.

'Put on blinders'

An employee's pregnancy definitely impacts the employer, Hannum said.

There are a lot of challenges and costs, from paperwork to figuring out what to do for the two to three months an employee will be gone, he noted.

But he said he advises his clients to put on blinders when it comes to pregnant employees.

Pregnancy is a protected category, so set it aside, and don't talk about it in terms of performance or productivity, he said. You don't know how someone is going to do based on a generalization, so don't make it. Try to judge someone by performance alone.