# Employment Law Update November 2014

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## Lessons Learned from the EEOC's Guidance on Pregnancy Discrimination

By: Jennifer Craighead Carey
Related Practice Area: Employment

*By: Jennifer L. Craighead, Esquire*

A pregnant nursing assistant for a long term care facility gives her employer a doctor's note with a 20 pound lifting restriction for the duration of her pregnancy. The job requires her to lift in excess of 50 pounds on a routine basis. The employer has a light duty program, but the program is only available to employees with temporary work-related medical conditions and for 90 days maximum. Must the employer accommodate the pregnant employee's weight restriction with a light duty assignment? This is just one of the issues that the Equal Employment Opportunity Commission (EEOC) addressed in its recent "EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues". The Guidance is designed to update the EEOC's legal position on pregnancy and related issues under both the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA). The PDA prohibits employers from discriminating against an employee on the basis of pregnancy, childbirth, or related medical conditions and requires that women affected by pregnancy, childbirth, or related medical conditions must be treated in the same manner as other employees not affected but similar in their ability or inability to work. The ADA prohibits discrimination based on disability and requires an employer to reasonably accommodate disabled employees. Although pregnancy is not a disability, pregnancy-related impairments or complications that satisfy the ADA's broad definition of the term "disability" must be reasonably accommodated.

**1. PDA:** The Guidance provides a lengthy discussion about the types of employer conduct that may constitute pregnancy discrimination, including the following:

A. Reproductive Risks: The Guidance makes clear that an employer's concern about risks to the employee or her fetus will rarely, if ever, justify sex-specific job restrictions for women of childbearing age.

B. Infertility Treatment: The Guidance states that decisions based on a female employee's infertility treatments may

constitute sex discrimination. For example, a female employee penalized for taking time off for surgical impregnation may have a claim for sex discrimination.

C. Lactation and Breastfeeding: The Guidance notes that discrimination based on lactation or breastfeeding violates Title VII of the Civil Rights Act, which prohibits sex discrimination. For example, a manager's statement that he demoted an employee because of her breastfeeding schedule raises an inference of sex discrimination since breastfeeding is based on lactation, a pregnancy-related medical condition.

D. Leave: According to the Guidance, an employer may not discriminate against women with a medical condition relating to pregnancy or childbirth and must treat women the same as others who are similar in their ability or inability to work but are not affected by pregnancy. For example, an employer's policy provides four weeks of medical leave to employees who have worked for the employer less than a year. A pregnant employee would be entitled to four weeks of medical leave on the same terms as all other employees who have worked less than a year and require leave for a temporary medical condition.

E. Light Duty: A pregnant worker must be given light duty or other accommodations that are granted to other employees who are similar in their ability or inability to work. For example, an employer has a policy of providing light duty, subject to availability, for any employee who cannot perform one or more job duties for up to 90 days due to injury, illness, or disability. An employee requests a light duty assignment for a 20 pound lifting restriction related to her pregnancy. The employer denies the light duty request, claiming that pregnancy itself is not an injury, illness, or disability and that the employee does not have an ADA disability since there are no pregnancy complications. According to the EEOC's Guidance, the employer has violated the PDA because the employer's policy treats pregnant employees differently than other similar employees. Instead, the employee should have been given a 90 day light duty assignment. But if the employer's light duty program places restrictions on the availability of light duty jobs-for example, limits on the number of light duty positions or the duration of light duty assignments-the employer may lawfully apply those restrictions to pregnant workers as long as the same restrictions apply to other workers similar in their inability to work. ***Importantly, the Guidance underscores that an employer cannot deny light duty work to pregnant employees by asserting that such work is only available for on-the-job injuries; rather, an employer must provide light duty to pregnant workers on the same terms that light duty is offered to employees injured on-the- job who are similar to the pregnant worker in their ability or inability to work.*** This portion of the Guidance contradicts a number of PDA court cases holding that employers may limit light duty programs to work-related injuries without violating the PDA, since such policies equally affect male employees with non-work-related temporary conditions. But on July 1, 2014, the U.S. Supreme Court agreed to address this issue in a case involving UPS. Although the EEOC's Guidance is not legally binding, the Supreme Court may adopt the EEOC's position, making it the law of the land.

**2. ADA:** The Guidance notes that some impairments of the reproductive system or related to pregnancy may rise to the level of a disability under the ADA. For example, disorders of the uterus and cervix may cause complications that require bed rest during pregnancy. Other impairments involving major bodily functions also qualify as disabilities under the ADA. Examples include pregnancy-related anemia, pregnancy-related sciatica, pregnancy-related carpal tunnel syndrome, gestational diabetes, nausea causing severe dehydration, abnormal heart rhythms that may require treatment, swelling that limits circulation, and depression. Additionally, employers may be required to provide different or additional accommodations to an

employee who is already disabled, but whose condition is made worse because of pregnancy.

The Guidance provides several examples of pregnancy-related accommodations, including redistributing marginal functions that the employee is unable to perform, altering how an essential or marginal job function is performed (e.g., modifying standing, climbing, lifting, or bending requirements), modifying workplace policies, purchasing or modifying equipment and devices (e.g. providing a stool), modifying work schedules, granting leave above what the employer would normally provide under sick leave policies, and providing a temporary light duty assignment.

The Guidance concludes with a discussion of other laws that may apply to pregnant employees, including the Family and Medical Leave Act and Section 4207 of the Patient Protection and Affordable Care Act, which mandates reasonable break time for nursing mothers. The Guidance also includes a final section on best practices under the PDA and ADA. A copy of the Guidance is available on the EEOC's website at http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

In light of the guidance, we strongly recommend that employers take the following minimum precautions:

- Ensure that leave and light duty policies comply with the PDA and ADA as they relate to pregnant employees;
- Train managers and supervisors about pregnant employees' rights and the employer's obligations to pregnant applicants and employees;
- Adopt a process for employees to request reasonable accommodations under the ADA, including for pregnancy-related complications;
- Obtain legal counsel regarding fetal protection policies or practices, since such policies or practices rarely pass legal scrutiny;
- Provide a private location-other than a bathroom-for employees to express breast milk and provide reasonable break times for employees to do so;
- Review EEO and harassment policies in light of the new Guidance.

Barley Snyder's Employment Group regularly works with employers to assist in the review of policies and procedures, to provide guidance on compliance matters, and to provide management training. Please contact any member of our Employment Group should you require assistance.

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**EEOC Files Two Ground-Breaking Cases Equating Transgender Discrimination with Sex Discrimination Under Title V**

By: Jennifer Craighead Carey and Jason D. Samuel
Related Practice Area: Employment

*By: Jennifer L. Craighead, Esquire and Jason D. Samuel, Esquire*

On September 25, 2014, the U.S. Equal Employment Opportunity Commission (EEOC) filed two lawsuits on behalf of transgender individuals. These lawsuits, which alleged sex discrimination, are part of the EEOC's Strategic Enforcement Plan (SEP) that the EEOC first announced in 2012. The SEP's stated purpose is "to stop and remedy unlawful employment discrimination, so that the nation might soon realize the Commission's

vision of justice and equality in the workplace."

In the first of these landmark suits, *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.,* Amiee Stephens worked for Harris Funeral Homes as a Funeral Director/Embalmer for six years. In 2013, Stephens notified Harris that she was in the process of a gender transition from male to female, and that she would begin to dress as a woman at work. Harris fired Stephens two weeks later. In the second case, *EEOC v. Lakeland Eye Clinic,* the employer fired an employee after the employee announced that she was transgender and began presenting as a woman. Both suits seek monetary and injunctive relief.

The EEOC has taken the position that the employers in these cases violated Title VII of the Civil Rights Act of 1964, which prohibits sex-based discrimination. Although Title VII does not explicitly prohibit transgender or gender stereotype employment discrimination, the EEOC contends that the two employers violated Title VII's sex discrimination prohibition because the employers "gender stereotyp[ed]" the two discharged employees. According to the EEOC, Harris told Stephens that what she "propos[ed] to do" was unacceptable, and Lakeland discharged its employee despite her satisfactory work performance.

Until a few years ago, the EEOC's position would have been unheard of. Most federal courts held that Title VII did not offer discrimination protection to transgender employees. And for several years, efforts in Congress to extend those protections to transgender employees have failed.

But in the wake of those legislative failures, several federal appeals courts around the country began holding that transgender employment discrimination victims could sue under Title VII's prohibition against sex discrimination. These cases are all based on language from the 1980 Supreme Court case of *Price Waterhouse v. Hopkins.* In that case, Justice William Brennan authored a concurring opinion indicating that discrimination based on an employee's failure to comply with gender stereotypes violates Title VII's prohibition against gender discrimination. But basing these decisions on the *Hopkins* case is highly controversial, principally because a majority of the Supreme Court justices refused to adopt that case's discussion of gender stereotyping discrimination and the discussion of gender stereotyping discrimination was not entirely relevant to the holding in *Hopkins,* which addressed the standard of proof in so-called "mixed motive" cases. And since *Hopkins,* the Supreme Court has never revisited the issue of whether Title VII prohibits discrimination based on gender stereotyping.

What does all this legal debate mean for employers? Well, employers should realize that the EEOC-the federal agency charged with enforcing Title VII- views discrimination against transgender individuals as violating Title VII. So the EEOC will handle those cases the same way it currently handles other cases alleging sex discrimination.

Also, several courts have indicated that they agree with the EEOC's approach. And because the EEOC has listed improving employment conditions for transgender employees as one of its top strategic initiatives, employers should expect the EEOC to closely scrutinize employers accused of transgender discrimination.

Also, 18 states and the District of Columbia now have anti-discrimination laws that prohibit discrimination on the basis of gender identity. Pennsylvania is not among those 18 states. But 160 cities and counties throughout the country-including the cities of Philadelphia, York, Harrisburg, and Lancaster-also ban discrimination on the basis of sexual orientation, gender identity, or both.

Given all this, employers should consider taking the following minimum steps to mitigate their legal risks:

1. Employers should amend their sexual and other harassment policies to reflect that the employer prohibits employment discrimination and harassment on the basis of sexual orientation and transgender identity.

2. Employers should provide training to all management and supervisory personnel to ensure that they are aware of the recent developments in EEOC Title VII enforcement and are fully cognizant of their obligations to maintain a non-discriminatory work-environment.

Barley Snyder's Employment Group frequently provides counseling to employers on all Title VII discrimination matters. Should you have questions regarding these latest developments, please contact a member of our Employment Group.

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**Whistleblower Liability: Two Recent U.S. Supreme Court Rulings Could Have Major Implications for Employers**

By: David J. Freedman
Related Practice Area: Employment

*By: David J. Freedman, Esquire*

The United States Supreme Court's 2013-14 docket featured a number of labor and employment law decisions warranting employers' attention. Media headlines focused mostly on cases dealing with employers' religious beliefs and limiting President Obama's power to unilaterally appoint members to the National Labor Relations Board. As important as those cases were, two lesser reported cases regarding whistleblower protections could have more lasting effects on employers of all sizes and types.

The first case, *Lawson v. FMR LLC* addressed the scope of whistleblower protections under the Sarbanes-Oxley Act of 2002 (also known as SOX), which Congress enacted in the wake of several corporate accounting scandals. Congress designed SOX to restore trust in financial markets by rooting out corruption at publicly-traded corporations. Among other provisions, SOX features whistleblower protections making it illegal for a publicly-traded "company . . . or any officer, employee, contractor, subcontractor, or agent of such company" to retaliate against "an employee" who provides information or participates in an investigation of mail fraud, bank fraud, securities fraud, or violation of any rule or regulation of the U.S. Securities and Exchange Commission. SOX entitles victims of such retaliation to a host of remedies, including reinstatement to employment, back pay with interest, and compensation for attorneys' fees.

Although SOX targets publicly-traded corporations, the plaintiffs in *Lawson* worked for FMR, LLC, a non-public accounting firm that provides advisory and management services to mutual funds owned by Fidelity, a publicly-traded corporation. The plaintiffs sued under SOX's whistleblower protections, alleging that FMR fired them in retaliation for raising concerns about FMR's accounting methods. The federal trial court that originally heard the case dismissed it, reasoning that SOX's whistleblower protections extend only to employees of publicly-traded companies, not employees of non-public companies that perform work for public companies.

The Supreme Court disagreed, holding that SOX's whistleblower's protections extend to employees of non-public

companies that perform work for public companies, even if the underlying employer-employee dispute is unrelated to any fraud against shareholders of the publicly-traded company. Justice Ruth Bader Ginsberg, writing for the Court's majority, found that SOX's language supported such a ruling. Justice Ginsberg also noted that non-public firms-such as the now-defunct Arthur Anderson-played crucial roles in enabling fraud at Enron and WorldCom, which inspired Congress to pass SOX. Plus, almost all publicly-traded mutual fund companies have no employees of their own; all of their work is performed by subcontractors.

As a result, limiting SOX's whistleblower protections to employees of publicly-traded companies would effectively immunize the entire mutual fund industry from liability for retaliating against employees who blow the whistle on corporate wrongdoing.

But as Justice Sonya Sotomayor pointed out in her dissenting opinion, providing whistleblower protection to employees of non- public contractors of public companies gives SOX's anti-retaliation provision "a stunning reach." For example, could an employee of a small cleaning company that contracts to clean a Starbucks restaurant sue his employer if he is demoted after reporting that another nonpublic company client has mailed the cleaning company a fraudulent invoice? Does a babysitter have the right to file a cause of action in federal court for SOX retaliation if the parent-a Wal-Mart employee-fires the babysitter when she expresses concern that the parent's child may have participated in an Internet purchase fraud? These scenarios do not implicate publicly-traded companies or financial markets in any real way. Yet, *Lawson's* holding seems to open the courtroom door for such cases. Of course, an employer could defend those cases on their merits by demonstrating that its actions had nothing to do with the employee's reporting of the alleged fraud. But, in Justice Sotomayor's words, "there is very little reason to think that Congress intended to sweep such disputes into federal court" and doing so imposes "costly litigation burdens on any private business that happens to have an ongoing contract with a public company."

So any employer-large or small-that does business with a publicly-traded company now must worry about the potential of SOX retaliation liability when deciding whether to take adverse actions against an employee, even if the dispute with the employee has nothing to do with the company's relationship with a publicly traded company. Employers who find themselves in that situation should evaluate this litigation risk in the same way they balance litigation risks posed by employment discrimination laws, like Title VII, the Americans with Disabilities Act, and the Age Discrimination in Employment Act.

In the second important retaliation case of the 2013-14 term-*Lane v. Franks*-the Supreme Court weighed in on retaliation in the public sector context. The Free Speech Clause of the U.S. Constitution's First Amendment provides government employees with a limited protection against employment retaliation. That is, government employees are entitled to First Amendment protection for speech involving matters of public concern-i.e. "citizen speech"- but not for speech relating to purely personal concerns. Edward Lane worked as an administrator for Central Alabama Community College (CACC), a governmental unit of the State of Alabama. Lane discovered that Suzanne Schmidtz, a state representative, was on CACC's payroll, even though she never came to work. Lane eventually fired Schmidtz after she failed to respond to Lane's requests that she come to work. A federal criminal investigation ensued, and Schmidtz was charged with several counts of mail fraud and theft of government funds.

Lane testified before the grand jury that issued those indictments and-under subpoena- at Schmidtz's two criminal trials. Ultimately, a jury convicted Schmitz, and she was sentenced to 30 months in prison and ordered to pay

$177,251.82 in restitution. Just three months after Schmidtz's second trial, CACC's president terminated Lane's employment as part of a 29-employee layoff. Although the college president later changed his mind and reinstated 27 of the 29 employees previously selected for layoff, Lane was not reinstated.

Lane then sued, alleging that CACC violated the First Amendment by terminating him for his truthful testimony against Schmidtz. There was no dispute that Lane's testimony implicated an important public concern. The lower courts that heard the case, however, dismissed Lane's suit, reasoning that because Lane's testimony involved his duties as a public official he was not speaking as a citizen and, therefore, was not protected by the First Amendment.

The Supreme Court disagreed, holding that a government employee's truthful, sworn testimony constitutes citizen speech protected under the First Amendment, even if the testimony relates to the employee's public duties. In the unanimous opinion, Justice Sotomayor reasoned that sworn testimony, even by public employees regarding their employment, implicates public concerns because anyone "who testifies in court bears an obligation, to the court and society at large, to tell the truth." That "obligation renders sworn testimony speech as a citizen and sets it apart from speech made purely in the capacity of an employee." Government employees will surely rest easier knowing that they are protected from retaliation for testifying truthfully regarding their job duties.

But the Court also made clear that government employees are not immunized from adverse actions simply because they have testified in response to a subpoena. A public employer may still take action against an employee who testifies falsely or who unnecessarily discloses sensitive, confidential, or privileged information while testifying. Likewise, a public employer may take action against an employee who admits to wrongdoing during while testifying. And, of course, a government employer can defend an alleged First Amendment violation through evidence that the employee's protected speech was not the reason for the adverse action taken.

As these two cases demonstrate, all employers- large or small; governmental or private; publicly traded or closely-held-can potentially be held liable for retaliating against whistleblowers. Of course, that is nothing new. Almost all federal and state employment discrimination laws feature protections for employees who oppose illegal discrimination or participate in the investigation of such discrimination. But as these two Supreme Court cases demonstrate, the scope of employee conduct that can bring employees within these protections continues to expand.

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