

Pregnancy Discrimination:

The latest expanding area of law for trial lawyers

By Kelly Armstrong

Employers are unfamiliar with the myriad pregnancy discrimination and leave laws which protect employees under California and federal law. The lack of knowledge has led to an increasing amount of litigation by employees who are terminated after their employer either learns they are pregnant or they go on pregnancy leave. Lawsuits filed by employees who have family responsibilities have increased over 400% in the past decade.¹ The average verdict and settlement is over \$500,000 and employees prevail in almost half of all cases – more than other types of discrimination.² Pregnancy discrimination is an area ripe for litigation because employers repeatedly violate their pregnant employees' rights due to confusion and lack of knowledge regarding the law. Large employers with corporate headquarters in other states are particularly prone to terminating employees in violation of California law. The decision makers are often only trained in federal law and have no knowledge regarding employees' rights in California. Many of them think they can terminate an

employee if they do not return from leave after twelve weeks, but they are incorrect under multiple laws.

There are approximately 10 different laws which relate to employee pregnancy and leave rights. The federal laws, which cover pregnancy discrimination and leave are the Family and Medical Leave Act (FMLA) and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq.

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(Title VII) as to sex discrimination and the Pregnancy Discrimination Act of 1978 (PDA). The California laws which cover pregnancy discrimination and leave are the California Family Rights Act (CFRA), Pregnancy Disability Leave Law (PDLL) under the Fair Employment and Housing Act (FEHA), FEHA as to sex, pregnancy and disability discrimination, Paid Family Leave (PFL) and Article I, § 8 of the California Constitution.

Discrimination on the basis of “pregnancy, childbirth, or related medical conditions” is equivalent to sex discrimination under Title VII and FEHA. The most common form of discrimination against pregnant women is termination. An employee must show that her employer knew she was pregnant and that the employer had

a discriminatory motive. Employees who complain that they are being treated differently due to being pregnant or disabled by their pregnancies are also protected against retaliation under both Title VII and FEHA. FEHA also requires employers to take “all reasonable steps necessary to prevent discrimination and harassment from occurring.” (Cal. Gov. Code. § 12940(k).)

The FMLA provides 12 weeks of job-protected leave to care for the serious health condition of an employee or a family member's serious health condition. It also provides 12 weeks of job-protected leave for the birth of a child, bonding with a new child, or for an adoption or foster care placement. An employee is eligible for FMLA leave if the employer has at least 50 employees within a 75 mile radius of the employee's worksite, the employee has worked for the employer for at least 12 consecutive months prior to the first date of leave and the employee worked at least 1250 hours in the 12 months prior to the first date of leave.

The CFRA is the California counterpart to the FMLA with a crucial distinction. CFRA follows FMLA structure, but excludes pregnancy and pregnancy-related conditions. The PDLL under FEHA provides leave for pregnancy and pregnancy-related conditions, which would run concurrent with an FMLA leave. CFRA also provides for 12 weeks of bonding time after the baby is born. Bonding time does not need to be taken all at once and can be taken incrementally within 12 months of giving birth. The PDLL is part of FEHA. It provides up to four months of job-protected leave for pregnancy related



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disabilities and runs concurrently with FMLA leave. It does not run concurrently with CFRA, which can be taken after the PDLL leave is exhausted.

The requirements to qualify for PDLL leave are significantly less stringent than under the FMLA. An employer need only have five employees, there is no length of service requirement and an employee qualifies as disabled by pregnancy if she is unable to work, unable to perform any one of her essential job functions or is unable to perform her job functions without undue risk to herself or the successful completion of her pregnancy. Moreover, morning sickness and needing time off for prenatal care constitute disability due to pregnancy.

An employee may take protected leave under the PDLL for up to four months due to pregnancy, childbirth, or a related condition. Employees are entitled to reasonable accommodation for conditions related to pregnancy. They may also transfer to an alternative position with equivalent pay and benefits if necessary as an accommodation. Pregnant employees must also be given equal treatment with other employees who are disabled by non-pregnancy related disabilities, excluding occupational injuries or illnesses. Finally, a pregnant employee who goes on leave is entitled to reinstatement to an available comparable position if the employee's position was eliminated or filled due to business necessity.

A qualifying employee would therefore be eligible for four months of PDLL leave running concurrent with the twelve weeks of FMLA leave plus 12 weeks of bonding time under CFRA leave after birth. CFRA bonding leave does not need to be taken

immediately upon the birth of the child, but may be taken within 12 months of birth. CFRA bonding leave also applies to an employee who adopts or takes in a foster child. It should also be noted that PDLL leave can apply after the baby is born if the mother is disabled or has given birth by Caesarean section. Physicians routinely authorize four weeks of disability leave before birth, and six weeks postpartum for regular birth and eight weeks for Caesarean. Many large employers have private short term disability benefits plans, but employees may also apply for State Disability Insurance (SDI) benefits through the Employment Development Department (EDD) in California. There is also PFL which provides for up to six weeks of benefits through SDI for individuals who take time off of work to care for a seriously ill child, spouse, parent, or registered domestic partner, or to bond with a new child. Some employers may also provide paid pregnancy leave as a company policy. After the FMLA, PDLL and CFRA leaves are exhausted, an employee may still be eligible for additional leave due to pregnancy-related disability unless the employer can show that it creates an undue hardship for it to continue to keep the employee's position open. It is difficult for many large employers to establish undue hardship.

Federal law provides significantly fewer protections for pregnant employees than California. Some courts disagree as to whether accommodations are required under Title VII. Some courts have found that denying a pregnant employee accommodation while the same accommodation

is provided to an employee disabled by a non-pregnancy related condition to be discriminatory. (*Ensleyh Gaines v. Runyon* (6th Cir. 1996) 100 F.3d 1220, 1226.) However, most courts hold that employers may ignore pregnancy and treat the employee as if she were not pregnant, so accommodation is not required. (*Piraino v. International Orientation Resources, Inc.* (7th Cir. 1996) 84 F.3d 270, 274.)

Under the FMLA, CFRA and PDLL, the employer must continue the employees' health benefit coverage under any group plan under the same conditions as if the employee had continued to work. The obligation ceases if the employee notified the employer she will not be returning after her leave. The obligation requires the employer to continue paying the same portion of premiums it paid while the employee was working. However, if an employee is on a general FEHA disability leave, which is either not characterized as PDLL leave or the maximum time frame of four

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months for PDLL leave has elapsed, the employer is not required to continue paying the same health benefit contribution. Employees who wish to maintain their group plan coverage must then pay the entire premium themselves.

Employers engage in common tactics in attempting to defend themselves against



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claims for pregnancy discrimination and leave violations. When a pregnant employee goes on leave, the employer will claim that it discovered the employee had performance issues while they were on leave. Employers will also claim that replacing a pregnant employee who is on leave is a business necessity even if hiring a temporary employee would meet the employer's needs as opposed to a permanent replacement.

Employers will also attempt to preclude lost wages damages for a wrongfully terminated employee by offering to reinstate them to their positions and pay all back wages. However, an offer to reinstate the employee must be unconditional, cannot require settlement of any part of the employee's claim and whether a terminated employee reasonably refused an offer of reinstatement is a question of fact. (*Ford Motor Co. v. EEOC* (1982) 458 U.S. 219, 241.) If an employee declines an offer of reinstatement, they must show that they would be going back into a hostile work environment if they accepted the offer. Large employers will further attempt to circumvent an argument regarding animus in the workplace by offering a wrongfully terminated employee a position in a different department under a different supervisor.

Employers' defenses in pregnancy discrimination and leave cases are frequently a moving target due to lack of familiarity with the law. An employer will often provide an employee with one reason for termination when they are terminated, such as job abandonment because they did not return to work after 12 weeks under the FMLA, but once an employee retains counsel, the employer will frequently state that they either discovered poor work performance or needed to restructure. Then the employee can proceed to establish that the employer initially made a mistake by terminating them and is now providing a false reason for termination and the employee was treated in a disparate manner as compared to her non-pregnant counterparts.

If the employee can show that the employer changed its story about why it terminated the pregnant employee, which it often does, the shifting reasons can be used as circumstantial evidence of pretext. (*EEOC v. Ethan Allen, Inc.* (2nd Cir. 1994) 44 F.3d 116, 120 ["a reasonable juror

could infer that the reasons given by the employer were pretextual, changed over time to defend against a claim suggesting ... discrimination....”]; *Payne v. Norwest Corp.* (9th Cir. 1997) 113 F.3d 1079, 1080 [“a reasonable juror could determine that an employer’s changing reasons for termination are pretextual as a truthful employer would not provide different reasons for the same termination”].) Additionally, if an employer relies on poor work performance as a basis for termination, but never discussed the alleged performance issue with the employee prior to termination, that may provide circumstantial evidence of pretext. (*Logan v. Denny’s Inc.*, (6th Cir. 2001) 259 F.3d 558 [no evidence that employer discussed the alleged work issue with the employee]; *Bausman v. Interstate Brands Corp.* (10th Cir. 2001) 252 F.3d 1111 [employer did not communicate work performance issue to plaintiff]; *Schindler v. Bierwith Chrysler/Plymouth* (D. Kan. 1998) 15 F.Supp.2d 1054.)

In many pregnancy leave and discrimination cases, the employee is terminated while they were on protected leave. The

employee then has claims for violation of their right to protected leave usually under the PDLL in addition to wrongful termination based on sex, pregnancy and possibly disability. The employee will be entitled to lost wages and benefits, emotional distress damages, attorney’s fees and potential punitive damages.

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The Americans with Disabilities Act (ADA) does not provide coverage for pregnant employees and pregnancy-related conditions, although there is an increasing need for protections because many non-California employees are forced from the workplace when their pregnancy affects their ability to perform

their job duties. The ADA Amendments Act of 2008 broadened the requirements to include short-term and other minor physical conditions. Additionally, the EEOC stated in its 2011 regulations that the ADA required employers to accommodate employees who experience shortness of breath, fatigue when walking long distances and 20-pound lifting restrictions. These symptoms and accommodations are representative of limitations experienced by pregnant employees. However, the ADA still does not specifically provide protections for pregnant employees. The PDA under Title VII requires employers to treat employees who are disabled the same as other temporarily disabled employees. However, the PDA does not provide California employees with either as many rights or the same leave protections as FEHA, PDLL and CFRA. ■

¹ Calvert, Family Responsibilities Discrimination: Litigation Update 2010, p. 2.

² *Id.*



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