EEOC Issues Guidance on Enforcement of Pregnancy Discrimination Act

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On Monday, July 14, 2014 the EEOC took what appears to be a largely symbolic action recalling Macbeth's soliloquy: "Out, out, brief candle! Life's but a walking shadow, a poor player that struts and frets his hour upon the stage and is heard no more. It is a tale told by an idiot, full of sound and fury, signifying nothing." (Macbeth, Act V, Sc. 5).

The EEOC issued a document titled *EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues.* The Guidance states that it "provides guidance regarding the Pregnancy Discrimination Act a("PDA") nd the Americans with Disabilities Act ("ADA") insofar as they apply to pregnant workers." In its "Questions and Answers" released along with the Guidance, the EEOC stated that the "Enforcement Guidance updates prior guidance on this subject in light of legal developments over the past thirty years."

While we certainly wouldn't characterize the EEOC as "an idiot," after its "strutting and fretting" to issue the document the EEOC Guidance ultimately may prove to signify nothing. While, with certain exceptions, the Guidance is a useful summary of the law the EEOC's stated reason for releasing it and about the assertion that it is an "update" of any kind gives one cause for skepticism.

The Enforcement Guidance does generally provide a summary of existing Pregnancy Discrimination law. Much of the Guidance is useful and noncontroversial. It summarizes and illustrates an employer's obligations under both the PDA and ADA. Among other things, the Guidance reminds employers that the following actions are unlawful.

- It is unlawful for an employer to fire, refuse to hire, demote, or take other adverse action against a woman where pregnancy, childbirth, or a related medical condition is a motivating factor in the adverse employment action. This is true whether the pregnancy is current, past or prospective.

- It is unlawful for an employer to take an adverse action against a pregnant worker based on the employer's concerns about her health and safety. This is true even where the employer believes that it is acting in the employee's best interest.

- It is unlawful for an employer to require a pregnant employee who is able to perform her job to take leave during pregnancy or after childbirth.

- On the other hand, where an employee has a pregnancy-related disability the employer may need to grant a request for leave as a form of reasonable

accommodation. This may be in addition to any leave to which the employee may be entitled under the Family Medical Leave Act ("FMLA").

- However, if the employee is not eligible for FMLA leave, or if the employer is not covered by the FMLA (all public employers and employers with at least 50 employees are covered), or if the employee has exhausted the FMLA leave for which he has eligible *(i.e.,* the employee has taken all 12 work weeks of leave available in the year (either in the last 12 months or in the calendar year—depending on how the employer calculates the leave year)) any additional leave offered as an accommodation to the pregnancy-related disability need not be treated as "job protected" in the same manner that FMLA leave protects the employee's right to return to the particular job held before taking the leave.

It is important to remember, however, that the EEOC's Enforcement Guidance does ***not*** have the force or effect of law. While as the Agency which is entrusted with primary enforcement of the statutes, its interpretations frequently are greeted by courts with a degree of deference, the EEOC's Enforcement Guidance pronouncements do *not* have the same authority as a Congressionally-enacted and presidentially-signed statute or law. They are not binding on any court. They merely indicate how *the EEOC* interprets the law and how it intends to enforce the applicable statute (in this case the Pregnancy Discrimination Act and the Americans with Disabilities Act, as amended). While the Executive branch, of late, sometimes has failed to notice this, the United States Constitution provides for a division of powers between the legislative, executive and judicial branches of government. The Legislative Branch passes laws; the Executive Branch implements laws; and the Judiciary Branch interprets and applies laws. The EEOC is part of the Executive Branch. As such, it has no legislative authority or duties. Its sole regulatory authority is limited to that which Congress specifically has delegated to it. Congress has not delegated law-making power to the EEOC—and indeed it cannot do so within the confines of the Constitution.

Thus the EEOC has no authority under the guise of providing "guidance" to make a new law nor to interpret the existing law as if the agency were a court. Further, the EEOC is not authorized to issue guidance-as-quasi-regulation. The EEOC's power is constitutionally limited. It only can exercise the authority that the law delegates to the agency. Where an agency exceeds its delegated authority, the courts have the authority to overturn an Enforcement Guidance policy, or even a rule or regulation to stop the EEOC in its tracks.

While affording some deference to the Agency's expertise in interpreting the anti-discrimination laws, Courts have not been reluctant to slap down the Agency where it has gone too far. The EEOC has a recent history of going too far and being chastised by the courts. For example, last year, in 2013, the United States Supreme Court severely criticized the EEOC for issuing guidance that made no sense. The Court's June 24, 2013 decision in *Vance v Ball State University* rejected the EEOC's

definition of supervisor as "a study in ambiguity." The Court found "no clear meaning" in the EEOC's 1999 Enforcement Guidance entitled *Vicarious Employer Liability for Unlawful Harassment by Supervisors.* Its "interpretative guideline" described a supervisor as an employee "who wields authority "of sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." The Supreme Court described the EEOC's definition as one that "would present daunting problems for the lower federal courts and for juries."

The EEOC's Pregnancy Discrimination Guidance may have exceeded its Authority. The Pregnancy Discrimination Guidance contains at least one section that could be construed as law-making and overtly political in nature: The PDA Enforcement Guidance's expansive view of "light duty." The Guidance memo advises that an employer must provide light duty for pregnant employees if the employer provides such light duty to employees who are not pregnant but who are similar in their ability or inability to work. It states: "Thus, for example, an employer must provide light duty for 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." While this has *seems* reasonable, the EEOC conveniently ignores the fact that this very question currently is pending before the United States Supreme Court for decision next term in a case called *Young v. United Parcel Service*. The certiorari grant indicates that the Supreme Court will answer this question:

> "Whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are 'similar in their ability or inability to work.'"

The Fourth Circuit Court of Appeals, which heard the appellate case before it went to the Supreme Court had answered NO to the question. This is the same position that at least three other federal appellate courts have taken regarding the light duty leave requirement. In a statement issued in support of the Guidance, EEOC Commissioner Feldblum even acknowledged that this is the very issue pending before the Supreme Court in *Young*, and that the agency would withhold action until the Supreme Court pronounces the definitive interpretation. However, Feldblum characterized the EEOC's action on this Guideline issue as "catching up with our responsibilities under Article II of the Constitution" (i.e., with its duties as an Executive Branch agency rather than "'getting out ahead' of the Supreme Court"). This begs the question: "Why now?"

In granting *certiorari* to the petitioner and accepting this question for review, the Supreme Court acknowledged that the federal circuit courts disagree with each other on the answer, and that it must step in to resolve this matter. The Court most likely will provide its answer before June 30, 2015 when its next term ends. However, to some observers at least, the EEOC's action in precipitously issuing this Guidance now betrays its executive arrogance and a certain absence of respect and deference for the judicial process. It largely appears to be a political move, perhaps with a mind toward influencing the November elections.