

Employment Law

MONTHLY

Attorney Advertising

June 2013

EDITOR-IN-CHIEF:

Vito A. Gagliardi, Jr.
973.889.4151
vagagliardi@pbnlaw.com

PORZIO EMPLOYMENT LAW ATTORNEYS:

Phillip C. Bauknight
Frank A. Custode
Marie-Laurence Fabian
Gary M. Fellner
Vito A. Gagliardi, Jr.
Thomas O. Johnston
Raquel S. Lord
Okechi C. Ogbuokiri
Suzanne E. Peters
Michael L. Rich
Eliyahu S. Scheiman
Kerri A. Wright

James H. Coleman, Jr.,
Retired Justice, New Jersey Supreme Court

Quick Links

[More On Us](#)



[Join Our Mailing List!](#)

EEOC Victory May Lead To Increase In Pregnancy-Related Discrimination Litigation

By Frank A. Custode, Esq.

A recent decision rendered by the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") illustrates the continuing expansion of pregnancy-related discrimination claims. In *Equal Employment Opportunity Commission v. Houston Funding II, Limited, et al.*, No. 12-20220 (5th Cir. May 30, 2013), the Fifth Circuit held that a company's decision to terminate a female employee because she is lactating or expressing breast milk constitutes sex discrimination in violation of Title VII of the Civil Rights Act of 1964 ("Title VII"). This holding is important for employers because it likely will lead to a significant increase in pregnancy-related discrimination claims prosecuted by the Equal Employment Opportunity Commission ("EEOC").

Background

In March 2006, Donnicia Venters ("Venters") began working for Houston Funding II Limited and Houston Funding Corporation ("Houston Funding") as an account representative/collector. In December 2008, she took a leave of absence due to her pregnancy. Houston Funding had no maternity leave policy in effect at the time of her leave, and was not covered by the Family & Medical Leave Act due to its size.

Following her child's birth, Venters told Henry Cagle ("Cagle"), Houston Funding's Limited Partner, that she would return to work as soon as she was released by her doctor. Due to complications related to her pregnancy, Venters was on leave through mid-February 2009. During her leave, Venters regularly contacted her supervisor Robert Fleming ("Fleming") as well as other Houston Funding managers.

While on leave, Venters asked Fleming if it would be possible for her to use a breast pump at work. When Fleming discussed Venters' request with Cagle, he "responded with a strong 'NO.' Maybe she needs to stay home longer." On February 19, 2009, Venters called Cagle and advised that her doctor released her to return to work. During this conversation, she mentioned she was lactating and asked whether she could use a back room to pump breast milk. According to Venters, there was a long pause from Cagle, and then he told her the company filled her position. On February 20, 2009, Houston Funding mailed a letter to Venters (dated February 16, 2009), notifying her that she was terminated due to job abandonment, effective February 13, 2009.

Venters Files A Charge of Discrimination With The EEOC

Following her termination, Venters filed a charge of sex discrimination with the EEOC. In response, Houston Funding asserted that Venters had not contacted her supervisor during her maternity leave and had not attempted to return to work. Following its investigation, the EEOC brought action against Houston Funding under Title VII in the United States District Court, Southern District of Texas ("District Court") alleging that Houston Funding discriminated against Venters based on her sex, including her pregnancy, childbirth and/or related-medical conditions.

In response, Houston Funding moved for summary judgment, asserting that even if the Court accepted Venters' allegations as true, "firing someone because of lactation or breast-pumping is not sex discrimination" and that lactation is not a medical condition related to pregnancy. The District Court granted Houston Funding's motion for summary judgment in its entirety. The EEOC subsequently appealed the decision to the Fifth Circuit.

Fifth Circuit Holds That Title VII Prohibits Discrimination Based On Lactation/Expressing Breast Milk [1](#)

On appeal, the Fifth Circuit held that taking an adverse employment action against a female employee because she is lactating or expressing breast milk constitutes sex discrimination in violation of Title VII. Specifically, the Fifth Circuit held that "the EEOC's argument that Houston Funding discharged Venters because she was lactating or expressing milk states a cognizable Title VII sex discrimination claim" given that "[a]n adverse employment action motivated by these factors clearly imposes upon women a burden that male employees need not -- indeed, could not -- suffer."

Additionally, the Fifth Circuit held that "lactation is a related medical condition of pregnancy for purposes of the PDA" because "[l]actation is the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth." Furthermore, the Fifth Circuit determined that Houston Funding's proffered reason for the termination, namely, job abandonment, was pretextual in nature.

Based on the foregoing, the Fifth Circuit held that there was "triable evidence from which a fact finder may conclude that Houston Funding violated Title VII by discharging Ms. Venters" and therefore, vacated the District Court's judgment and remanded the matter for further proceedings consistent with its decision.

Practical Tips

In light of the Fifth Circuit's ruling in the *Houston Funding* case, employers should implement the following tips:

- Employers should have maternity leave policies in place. This decision demonstrates the importance of having an established protocol for handling pregnancy-related leaves.
- Employers should communicate in writing with employees while they are on leave. This avoids any ambiguities about the communications between the employer and the employee while the employee is on leave.

This decision demonstrates that the EEOC is clearly willing to prosecute pregnancy-related claims. Based on the Houston Funding holding, employers should expect to see an increase in the prosecution of these claims. As a result, employers should approach pregnancy-related issues with caution and should consult with counsel to discuss the appropriate accommodations for female employees with pregnancy-related issues, including but not limited to lactation.

1 We note that Title VII includes the Pregnancy Discrimination Act ("PDA"). The PDA prohibits sex discrimination based on pregnancy. The PDA provides that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, pregnancy, childbirth, or related medical conditions . . ." 42 U.S.C. § 2000e-(k).

The Porzio Employment Law Monthly is a summary of recent developments in employment law. It provides employers with an overview of the various legal issues confronting them as well as practical tips for ensuring compliance with the law and sound business practices. This newsletter, however, should not be relied upon for legal advice in any particular matter.