

Discrimination Rights for Pregnant Women

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As an attorney defending people from employment discrimination since 1991, the worst discrimination is against a pregnant employee. Harassing or terminating a pregnant woman can be incredibly heinous. Firing a woman who is pregnant leaves her with no income, no hope to find a new job and no health insurance. All that when she most needs to keep her job, her income and medical insurance to take care of hospital and other bills incurred in an expanding family.

Very few employers will hire a woman who is obviously pregnant. There is going to be time off needed for regular doctor visits. The potential for complications requiring extended time off. The near certainty that delivery of the baby will require weeks of leave. Combined with the possibility that after nurturing her infant the mother will not want to return to the job, makes getting a new job when you are pregnant almost impossible.

Federal, state and local laws do provide some protection from discrimination because of pregnancy. In 1978 Congress amended Title VII to include the Pregnancy Discrimination Act that prohibits discrimination because of pregnancy, childbirth, or related medical conditions. Employers cannot treat pregnant women differently, even if they are doing it to try to protect the woman. A classic example was a case brought by the EEOC against the Rustic Inn Crabhouse, near the Ft. Lauderdale Hollywood Airport, in which the restaurant admitted that it had re-assigned a waitress to the cash register because the owners considered carrying the large trays of crabs and walking around while customers were hammering crabs, dangerous for the woman and fetus. In 2000 the Federal 11th Circuit Court of Appeals found the restaurant's policy regarding reassigning pregnant waitresses was direct evidence of pregnancy discrimination. Of course the restaurant admitted this was their policy, which rarely happens.

Florida law is less clear on pregnancy discrimination because it is not specifically mentioned as a protected category under the Florida Civil Rights Act, Fla. Stat. §760. Most courts have agreed that Florida law provides protection based on pregnancy, but there are some lawyers who will disagree in defending companies that terminate pregnant women. The leading case in Florida is *O'Loughlin v. Pinchback*, 579 So. 2nd 778 (Fla. 1st DCA 1991) finding that §760 protects women from discrimination because of pregnancy. The theory is that gender discrimination as protected by state law has the same construction as gender discrimination laws in Title VII, so they will be interpreted the same way and provide pregnancy protection. See *Kelly v. KD Construction of Florida*, 866 F.Supp. 1406, 1411 (S.D. Fla. 1994).

The Federal Family and Medical Leave Act (FMLA) also provides for limited leave to accommodate pregnancy and serious medical conditions related to pregnancy. The FMLA provides for up to 12

weeks of unpaid leave within a 12-month period for serious health conditions, provided the employee has worked for at least a year and worked at least 1250 hours and the company has more than 50 employees within a 75-mile radius. The leave can be taken intermittently (an hour or hours at a time) but the limitation of 12 weeks is absolute. If an employee takes more than 12 weeks of unpaid FMLA leave, then they can be fired. Otherwise an employer must return an employee to the same or similar position after returning from FMLA. Unfortunately, the leave is unpaid and few people can afford a long-term leave without income. A father is also eligible for FMLA leave to care for his wife and baby.

There is an issue as to whether pregnant women are protected by the Americans with Disabilities Act (ADA) which was amended in September 2008 so that more people are protected from discrimination because of their disabilities. The Amendments to the ADA are effective as of January 1, 2009. It reverses several U.S. Supreme Court decisions that narrowed the scope of the ADA so that it was almost impossible to prove that you were qualified for a job and disabled. Protection under the ADA is now expanded to include almost any substantial restriction of any bodily function or system and for medical records which show an impairment of any major life function. However, because pregnancy is a temporary condition, it has been found to be outside the protection of the ADA. Whether that continues to be the analysis of the courts as they begin to interpret the ADA as amended, is yet to be seen.

The real importance of the lack of protection under the ADA is that employers do not have to accommodate pregnant employees. Pregnant women often need accommodations. Frequent bathroom breaks, inability to stand for long periods of time, help in lifting heavy objects, juice breaks, scheduling doctor visits, limits on environmental stressors or contaminants do not have to be provided by the employer. The employer can treat a pregnant employee like any other employee without any special treatment or reasonable accommodation.

However, there is another potential cause of action for negligent still birth if you can prove the employer was responsible for a miscarriage. This can happen when an employer intentionally harasses a pregnant employee, forcing them to stand during a long shift, refusing to assist them with moving heavy objects or ordering them to perform duties which caused the loss of a fetus. Damages in those cases run into the millions of dollars, even though there is no ADA protection.

If you or someone you know is suffering discrimination on the job because of their pregnancy, get legal protection immediately. Having a lawyer involved in protecting your rights could mean the difference between having a healthy baby that you can afford, or losing a baby because the employer violated your rights. For more information, contact the Law Offices of Randy A. Fleischer, P.A. in Davie Florida, located in the center of Broward County.

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