PREGNANCY, LIFTING RESTRICTIONS AND UNPAID LEAVE – NO LIABILITY FOR EMPLOYER

PREGNANT EMPLOYEE WITH 10 POUND LIFTING RESTRICTION - WHAT TO DO?

Is it unlawful discrimination for an employer to place a pregnant part-time merchandise stocker with a 10-pound lifting restriction on an involuntary unpaid leave?

In this recent case decided by the Seventh Circuit, the Court said "**No**". . . there was no unlawful discrimination because this pregnant employee was treated no differently than any other employee who was not pregnant.

This question often comes up when an employer is faced with a medical restriction placed on a pregnant employee that prevents the employee from doing her normal job functions. In this case a merchandise stocker who worked at Wal-Mart was required to lift items of up to 50 pounds in her job. The employee, after becoming pregnant, suffered a number of pregnancy-related difficulties that led her physician to place her on a 10 pound lifting restriction. She asked her supervisor for a transfer to a job that only involved folding clothes - - but there was no such position. Her supervisor then told her that according to the company's "*Accommodation in Employment Policy*" she would have to take an unpaid leave of absence because she was not able to perform her job duties. The pregnant employee adamantly refused to accept the leave of absence but asked again for "light duty", specifically folding clothes. The supervisor denied that request and and insisted - - according to the policy - - that the pregnant employee would have to take the leave of absence until her doctor released her from the medical restrictions that prevented her from performing her job. The employee left and never returned to work. She sued for pregnancy discrimination. She lost.

THE EMPLOYER'S ACCOMMODATION IN EMPLOYMENT POLICY

The Court found that this pregnant employee was treated the same as any non-pregnant employee under Wal-Mart's policy that provided:

- *If you have a medical condition that is not a disability, but which prevents you from performing your job, including pregnancy, you may be eligible for a job aid or environmental adjustment under this policy, a leave of absence under the Leave of Absence Policy, or you also may request transfer to another open position under the Associate Transfer Policy. . . . Job aid or environmental adjustment means a change in practices or the work environment which is both easily achievable and which will have no negative impact on the business. This type of accommodation does not include creating a job, light duty or temporary alternative duty, or reassignment.*

In order for an employee to succeed in a case of pregnancy discrimination under this policy - - or a policy like it, the employee must identify a similarly situated employee outside her protected class who was treated more favorably. In this case the pregnant employee was not able to identify any non-pregnant employee who was treated more favorably. And for that reason alone her claims failed. In denying her claims and affirming the lower court's grant of summary judgment, the Seventh Circuit in essence endorsed the Wal-Mart "*Accommodation in Employment Policy*" - - so long as the policy is applied uniformly. In this case it was, or at least the pregnant employee was not able to show that it wasn't.

It is also important to note why this is not a "reasonable accommodation" claim under the ADA. First, she didn't sue for disability discrimination under the ADA. And second, pregnancy is not a "disability " under the ADA that would normally require an accommodation.

THE BOTTOM LINE FOR EMPLOYERS

The Court said it best as it quoted in this case from one of its decisions from last year: "***An employer is not required to provide an accommodation to a pregnant employee unless it provides the same accommodation to its similarly situated non-pregnant employees***."

The Wal-Mart policy is a good one and its provisions might be a good starting place for any employer considering adopting a similar medical accommodation policy in the future.

However, always be aware that even though the policy may be a good one - it's how the policy is enforced is what really matters. Uniformity

is always the key.

Reference: Arizanovska v. Wal-Mart Stores, Inc., (7th Cir. No. 11-3387, June 12, 2012)

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