Ohio Supreme Court Rules that Minimum Length of Service Requirements for Leave Do Not Violate Ohio's Pregnancy Discrimination Law

July 7, 2010

[Jan E. Hensel](#)

This article was originally published in the *Employment Litigation Reporter* on WestLaw.

On June 22, 2010, the Ohio Supreme Court issued its decision in *McFee v. Nursing Care Management of America, Inc. dba Pataskala Oaks Care Center*. In that decision, the Court held that Ohio law does not prohibit minimum length of service requirements for maternity leave, and does not require preferential treatment of pregnant employees who do not qualify for leave under the employer's leave policies.

The case arose out of the termination of Tiffany McFee, a nurse at Pataskala Oaks Care Center ("Pataskala Oaks"). At the time of Ms. McFee's hire in June of 2003, Pataskala Oaks had a leave policy modeled after the federal Family and Medical Leave Act that permitted 12 weeks of leave for employees who had been employed for a minimum of one year. Approximately eight months into her employment, Ms. McFee requested leave for a pregnancy-related condition. Ms. McFee was ineligible for leave under Pataskala Oaks' leave policy because she had not worked at the facility for 12 months. Because McFee took an unapproved leave, her employment was terminated due to absence.

Approximately four weeks after the birth of her child, Pataskala Oaks' DON called Ms. McFee and left her a message informing her that a full-time day shift position was available at Pataskala Oaks and requested Ms. McFee to contact her if interested. Instead of returning Pataskala Oaks' call, Ms. McFee filed a charge of pregnancy discrimination with the Ohio Civil Rights Commission ("OCRC").

After investigation, the OCRC found that Pataskala Oaks' policy violated Ohio's prohibition against pregnancy discrimination. The case proceeded to a hearing (upon stipulation) before an Administrative Law Judge ("ALJ"). The ALJ found that the OCRC failed to establish a *prima facie* case of discrimination and recommended that it dismiss its Complaint against Pataskala Oaks. The OCRC rejected that recommendation and found that Pataskala Oaks' policy constituted unlawful sex discrimination.

Pataskala Oaks appealed. On review, the Licking County Common Pleas Court found that Pataskala Oaks applied its leave policy consistently to all employees and Ms. McFee was fired because she did not qualify for leave. Therefore, the OCRC failed to establish a *prima facie* case of discrimination. Further, the Court found that even if a *prima facie* case could be established, Pataskala Oaks had a legitimate business reason for the termination -- its consistently-applied leave policy -- and there were no allegations that the policy was a pretext for discrimination. The Court held that Pataskala Oaks' leave policy did not violate the antidiscrimination laws of Ohio and reversed the decision of the Civil Rights Commission.

On further appeal, the Fifth District Court of Appeals reversed the judgment of the Common Pleas Court. The Court of Appeals held that the antidiscrimination laws of Ohio expressly require that employers provide employees with a reasonable period of maternity leave. Because Pataskala Oaks' leave policy did not provide maternity leave for employees with less than one year of service, the Court of Appeals held that the policy violated the pregnancy-discrimination law. The court also held that the policy was direct evidence of discrimination and, therefore, McFee did not have the burden to offer other evidence of discrimination.

Pataskala Oaks sought review before the Ohio Supreme Court. On appeal, Pataskala Oaks argued:

1. an employer's uniform length of service leave policy does not constitute direct evidence of sex discrimination, even when it is applied to employees who require leave for reasons related to pregnancy;

2. Ohio Revised Code Chapter 4112 is an anti-discrimination statute and cannot be interpreted as a mandatory leave statute; therefore, the regulations enacted to implement Ohio's pregnancy discrimination law cannot be interpreted to mandate maternity leave for employees who are not otherwise eligible;
3. if the regulation is interpreted as requiring mandatory leave, it exceeds the statutory grant of authority to the OCRC and is thus unconstitutional; and
4. the *McDonnell Douglas* burden-shifting framework applies in cases alleging sex discrimination on the basis of pregnancy leave, thus requiring the claimant to offer evidence of discriminatory intent if a claim is based on an employment policy that is non-discriminatory on its face.

The regulation enacted by the OCRC to implement the Ohio pregnancy discrimination statutes, Ohio Rev. Code §§ 4112.01(B) and 4112.02(A), was at the core of the controversy. Located at Ohio Adm. Code 4112-5-05, the regulation contains provisions that, on their face, appear to be conflicting. In pertinent part, the regulation provides:

(G)(2) Where termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical condition is caused by an employment policy under which insufficient or no maternity leave is available, such policy constitutes unlawful discrimination.

(G)(5) Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy the female employee would qualify for leave, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable length of time. For example, if the female meets the equally-applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing...

(G)(6) Notwithstanding paragraphs (G)(1), (G)(2), and (G)(5), if the employer has no leave policy, childbearing must be considered by the employer to be a justification for leave of absence for a female employee for a reasonable period of time. Following childbirth, and upon signifying her intent to return within a reasonable time, such female employees shall be reinstated to her original position or to a position of like status and pay, without loss of service credits.

The OCRC argued that (G)(5) did not apply because (G)(2), the only section that specifically addressed "termination" was more specific and therefore controlled. Furthermore, the OCRC argued that because the policy at issue made no maternity leave available to McFee, it was in violation of the regulation and constituted direct evidence of discrimination. The OCRC further argued that because the statute prohibits terminations "because of" pregnancy, and because time away from work is necessary for a woman to give birth and recover, then the statute itself provides for maternity leave and the regulation must be read in accordance with the statute. Finally, the OCRC argued that reading (G)(5) as permitting minimum length of service requirements would invalidate Section (G)(2); because the Court had an obligation to harmonize the conflicting provisions of the regulation if possible, the Court must conclude that the regulation, as a whole, mandates reasonable maternity leave for all employees who require it.

Rejecting the OCRC's argument, the Ohio Supreme Court recognized that the Ohio pregnancy discrimination statutes direct that pregnant employees be treated "the same for all employment-related purposes as other persons not so affected but similar in their ability or inability to work." Thus, the statutes do not provide greater protection for pregnant employees than for non-pregnant employees.

The Court held that if the regulation required preferential treatment of pregnant employees as compared to other employees who are not pregnant but similar in their ability or inability to work, it would unconstitutionally expand the public policy set by the legislature in the statute. Resolving the apparent tension between subsections (G)(2) and (G)(5) of the administrative code provision, the Court held that Ohio Adm. Code 4112-5-05(G)(2) must mean that when *an employee is otherwise eligible for leave*, the employer cannot lawfully terminate that employee for violating a policy that provides no leave or insufficient for temporary disability due to pregnancy or a related condition. Therefore, the Court also held that an employment policy that imposes a uniform minimum length of service requirement with no exception for maternity leave is not direct evidence of discrimination, and the *McDonnell-Douglas* analysis should be applied in cases involving such a policy.

The decision is an important one for Ohio employers. The Ohio statutes prohibiting discrimination provide that pregnant women shall be treated the same for all employment related purposes as other persons not so affected but similar in their ability or inability to work. Most Ohio courts that had previously decided the issue, as well as federal courts interpreting the federal Pregnancy Discrimination Act have ruled that this statutory language means that if an employer has a leave policy that places conditions upon eligibility for leave, such as a minimum length of service requirement, that policy does not violate the prohibition against pregnancy discrimination so long as it is uniformly applied. In other words, even if a pregnant

employee loses her job because she is not eligible for leave, it does not constitute pregnancy discrimination because she is treated the same as all other employees who are temporarily disabled from working.

The OCRC, on the other hand, has taken the position that employees who need leave for child birth or pregnancy -related conditions must be given as much leave as they need, and failure to provide such leave, regardless of the employee's eligibility under the employer's leave policy, constitutes pregnancy discrimination. This interpretation of the law had the effect of turning an anti-discrimination statute into a mandatory, indefinite leave law for pregnant employees. Many employers found themselves unwittingly liable on a pregnancy discrimination charge by applying their uniform leave policy -- oftentimes modeled after the FMLA -- to pregnant employees who were not eligible for leave or who had exceeded their leave allotment.

Although the decision goes a long way towards establishing uniformity in the Ohio law that prohibits discrimination on the basis of sex, it leaves many questions left unanswered. While it is clear that employers can apply a minimum length of service requirement, the syllabus was narrowly tailored to the specific issue presented. Although the Court's decision emphasizes that R.C. 4112 requires that pregnant employees be treated *the same* as other employees who are temporarily disabled from working, will this interpretation extend to an employee who is terminated after she exceeds the allotted leave time? What if an employer that has no leave policy terminates an employee because she needs maternity leave? Under the language of the statute, and consistent with the *Pataskala Oaks* decision, if such a policy is uniformly applied, application of the policy to an employee needing maternity leave would not constitute discrimination. But how could such an outcome be reconciled with the plain language of section (G)(6) of the regulation?

These issues remain unresolved and, unfortunately, are likely to remain so. Although the flaw in the OCRC's reasoning regarding mandatory maternity leave has been apparent to employment lawyers for years, most employers simply do not have the resources -- including the stamina -- to mount a challenge to the Ohio Supreme Court. Hopefully, the Pataskala Oaks decision will send a clear message to the OCRC that the law prohibiting discrimination on the basis of pregnancy does not require preferential treatment of pregnant employees, and any interpretation of the law that requires greater rights for pregnant employees than other temporarily disabled employees is invalid. If so, Ohio employers will be able to safely rely upon their leave policies that treat all temporarily-disabled employees -- including pregnant ones -- the same.

_____

Jan Hensel served as lead counsel for Nursing Care Management of America in the *Pataskala Oaks* case.