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Third Circuit Rules Title VII Protects Women Who Have an Abortion

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In a case of first impression, the U.S. Court of Appeals for the Third Circuit has ruled that the protections generally afforded pregnant women under Title VII, as amended by the Pregnancy Discrimination Act (PDA), also extend to women who have elected to terminate their pregnancies. *Doe v. C.A.R.S. Protection Plus, Inc.*, Nos. 06-3625, 06-4508 (3d Cir. May 30, 2008). The PDA prohibits discrimination "on the basis of pregnancy, childbirth, or related medical conditions."¹ Consistent with the legislative history of the PDA and the interpretive guidelines of the Equal Employment Opportunity Commission (EEOC), the Third Circuit found that an abortion is included in the "related medical conditions" referenced in the statute.

The Facts at Issue in Doe

Jane Doe was hired by C.A.R.S., a used car insurer, as a graphic artist in June 1999. In May of 2000, Doe learned that she was pregnant. Shortly thereafter, Doe spoke with her supervisor, Fred Kohl, about making up any time missed from work due to regularly scheduled doctors' appointments related to her pregnancy. Kohl told Doe that they would "play it by ear."

In August of 2000, Doe's doctor informed her that problems were detected in her recent blood test and that more tests would be necessary. Doe informed Kohl that she would be absent from work on August 8th for additional testing. When Doe's doctor recommended that Doe undergo an amniocentesis test the following day, Doe's husband called and notified Kohl that Doe also would be absent on August 9th. The amniocentesis test revealed that Doe's baby had severe deformities and Doe's doctor recommended that the pregnancy be terminated. According to his deposition testimony, Doe's husband contacted Kohl on August 10th to inform him that the pregnancy would be terminated the following day. He requested permission from Kohl for his wife to take an additional week of vacation for Doe to recover from surgery, which Kohl allegedly approved.

A funeral was held for Doe's baby on August 16th, for which C.A.R.S. office manager, Leona Dunnett requested time off to attend. As she was leaving the office, Dunnett noticed another C.A.R.S. employee packing up the personal belongings on Doe's desk. After Dunnett told Doe about what she had seen, Doe called Kohl for an explanation. Kohl notified Doe that her employment with C.A.R.S. had been terminated for job abandonment. Dunnett testified that after Doe's termination, she walked into Kohl's office where he and another C.A.R.S. employee were discussing Doe's abortion. Dunnett was upset to hear Kohl say that Doe "didn't want to take responsibility."

After receiving a right to sue letter from the EEOC, Doe filed a complaint in the U.S. District Court for the Western District of Pennsylvania alleging employment discrimination on the basis of her gender in violation of Title VII, as amended by the PDA. The district court granted C.A.R.S.' motion for summary judgment and dismissed Doe's complaint with prejudice.

The Third Circuit's Analysis

In a decision that contained two significant components, the Third Circuit reversed the district court's order granting summary judgment. The court started by recognizing that the PDA protects women from discrimination based on their decision to have an abortion. Title VII of the Civil Rights Act of 1964,² prohibits employment discrimination on the basis of sex. In 1978, Title VII was amended to include the PDA, which defines the terms 'because of sex' and 'on the basis of sex' to prohibit discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."³ Although the Third Circuit never squarely addressed the issue of discrimination based on abortion, the legislative history surrounding the PDA provides that the Act's basic language was intended to cover women who chose to terminate their pregnancies. "Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion."⁴ The EEOC's guidelines similarly include abortion as a right protected by the PDA.⁵

After recognizing that Doe was protected by the PDA, the court clarified the elements of a *prima facie* case of discrimination under the PDA. To establish a *prima facie* case, an employee is required to show: (1) that she was pregnant and her employer had knowledge of her pregnancy; (2) she was qualified for her job; (3) she suffered an adverse employment decision; and (4) there is some nexus between her pregnancy and the adverse employment action. The Third Circuit reiterated that the burden on a plaintiff in demonstrating the elements of a *prima facie* case at the summary judgment phase is a minimal one. As such, the fact that Doe was terminated just three days after having a surgical abortion, in and of itself, was sufficient for Doe to make out a *prima facie* case of discrimination.

Once a *prima facie* case is established, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. In this case, the lower court found credible Kohl's testimony that he never received a telephone call from Doe's husband regarding Doe's absence on August 11th or requesting vacation for the week of August 14th. Therefore, it held that Doe was legitimately terminated for failing to follow the company's required call-off policy and abandoning her position.

In overruling the district court, the Third Circuit pointed to numerous examples in the record where Doe did, in fact, cast doubt upon the company's reason for her termination. First, Doe's husband's testimony established that Kohl was aware of and approved Doe's absences. Second, testimony from Dunnett established that she initially took the call from Doe's husband on August 11th and transferred it to Kohl. Dunnett also testified that after the call transfer,

Kohl asked Dunnett to make sure that the receptionist desk was covered during the lunch hour for the following week, a task for which Doe was normally responsible. Finally, the Third Circuit pointed to evidence that inferred that discrimination was more likely than not a motivating or determinative cause of Doe's termination. Such evidence included Kohl's comment about Doe "taking responsibility," and testimony from several witnesses that similarly situated C.A.R.S. employees were treated differently when calling off work for illnesses.

Implications for Employers

The *Doe* decision highlights the necessary steps employers should take to prevent discrimination and avoid litigation. Simple changes in C.A.R.S. policies and decisionmaking could have resulted in a dramatically different outcome. To avoid discrimination and related litigation, in all categories of protected employees, employers should train managers and decisionmakers to do the following:

- Establish clear employment policies for calling off and using sick/disability leave, vacation time, PTO, etc.
- Disseminate a written notice to all employees setting forth the consequences for failing to abide by company policies, and require employees to acknowledge receipt of such notice.
- Treat any request for leave related to an abortion the same as any other pregnancy-related request or request for sick/disability leave.
- Be consistent with all employees.
- Establish an oversight procedure to ensure that all adverse employment actions are motivated by legitimate, business-related concerns.
- Take any and all complaints of discrimination seriously by conducting a prompt and thorough investigation of the complaint.
- Communicate the results of the investigation and resulting decision, and advise the complaining party that there will be no retaliation as a result of the complaint.
- Ensure that no retaliation occurs.

¹ 42 U.S.C. § 2000e(k).

² 42 U.S.C. § 2000e, *et seq.*

³ 42 U.S.C. § 2000e(k).

⁴ H.R. Conf. Rep. No. 95-1786 at 4 (1978) as reprinted in 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766.

⁵ 29 C.F.R. § 1604.

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