ECKERT SEAMANS
ATTORNEYS AT LAW

PREGNANT WORKERS: The evolution from "not covered" to fully protected participants in the workforce

Presented by John J. Myers
Eckert Seamans Cherin & Mellott, LLC

Human Resources Forum
May 19, 2016

John J. Myers

MEMBER
BOARD OF DIRECTORS

John Myers focuses his practice on labor and employment litigation and counseling. He has defended employers throughout the country in cases involving claims of employment discrimination, wrongful discharge, ERISA violations, breach of employment contracts, minimum wage and overtime pay violations, and a variety of employment-related torts. John is also experienced in restrictive covenant and trade secret misappropriation litigation.

REPRESENTATIVE MATTERS

- Successfully upheld age discrimination summary judgment decision in Court of Appeals. *Willis v. UPMC Children's Hospital of Pittsburgh*, 808 F. 3d 638 (3d Cir. Dec. 22, 2015).
- Award of summary judgment in ERISA case, holding that a supplemental pension plan was a "top hat" plan. *Sikora v. UPMC and Affiliates Non-qualified Supplement Benefits Plan*, (W.D. Pa. 12/22/2015).
- Summary judgment granted by U.S. District Court in an ADEA case brought by discharged Nurse Practitioner. *Willis v. UPMC Children's Hospital of Pittsburgh*, 2015 WL 539995 (W.D. Pa. 2015).
- Defense jury verdict in an FMLA retaliation case on remand from Lichtenstein v. University of Pittsburgh Medical Center, 691 F.3d 294 (3d Cir. 2012). Judgment affirmed, 2015 WL 399958 (3d Cir. 2015).
- *Bensinger v. Western Psychiatric Institute and Clinic* (Pa. Super. Aug. 2014), In a case of first impression, the Pennsylvania Superior Court affirmed a defense verdict in a Whistleblower case, holding that there is no right to a jury trial under the Pennsylvania Whistleblower Law.
- *Buller v. PPG Industries* (Feb. 2014), Defense verdict in a jury trial alleging that the plaintiff was discharged because of her disability or her age.
- *Camesi v. UPMC*, 729 F.3d 239 (3d Cir. 2013)Successfully decertified a Fair Labor Standards Act class of 3,000 opt ins and defeated plaintiffs' attempted appeal.

ECKERT SEAMANS
ATTORNEYS AT LAW

PITTSBURGH, PENNSYLVANIA

600 Grant Street
44th Floor
Pittsburgh, PA 15219

P: 412.566.5900

F: 412.566.6099

jmyers@eckertseamans.com

PRACTICE AREAS:

Labor & Employment

Litigation

STATE ADMISSIONS:

Pennsylvania

COURT ADMISSIONS:

Pennsylvania Supreme Court

U.S. Courts of Appeal for the First Circuit

U.S. Courts of Appeal for the Second Circuit

U.S. Courts of Appeal for the Third Circuit

U.S. Courts of Appeal for the Fourth Circuit

U.S. Courts of Appeal for the Sixth Circuit

U.S. Courts of Appeal for the Seventh Circuit

U.S. Courts of Appeal for the Eighth Circuit

U.S. Courts of Appeal for the 11th Circuit

U.S. Supreme Court

U.S. District Court for the Middle District of Pennsylvania

U.S. District Court for the Western District of Pennsylvania

EDUCATION:

J.D., Tulane University School of Law, 1976; Editor, *Tulane Law Review*, Order of the Coif

B.A., Franklin & Marshall College, 1973

- *Henderson v. UPMC*, 640 F.3d 524 (3d Cir. 2011). This seminal case in the Courts of Appeal affirmed dismissal of a class action Complaint which alleged that the employer failed to keep accurate records of hours worked, as required by Section 209(a) of ERISA, because it did not include off-the-clock work plaintiffs allegedly performed.
- *Huston v. Procter & Gamble Paper Products Corp*. 568 F. 3d 100 (3rd 2009), decision establishing circuit precedent for level of management whose knowledge of sexual harassment may be imputed to the company.
- *Eastman Kodak Co. v. Bayer Corp.*, 576 F. Supp. 2d 548, 551 (S.D.N.Y. 2008), affirmed 2009 WL 2767021 (2d Cir. 2009), ERISA top hat plan litigation interpreting supplemental pension plan to deny executive's claim and Eastman Kodak indemnity claim.
- Have tried dozens of employment discrimination jury trials to verdict.

PROFESSIONAL AFFILIATIONS

- Allegheny County Bar Association
- Pennsylvania Bar Association

COMMUNITY INVOLVEMENT

- The Education Partnership, Board of Directors

AWARDS AND RECOGNITION

- Selected for inclusion in *Pennsylvania Super Lawyers*
- Selected for inclusion in *The Best Lawyers in America* for Employment Law – Management, Litigation – Labor & Employment, Litigation – ERISA; Commercial Litigation
- Attained an AV® Preeminent™ rating from Martindale-Hubbell

NEWS AND INSIGHTS

Articles:

- "After the dust settles: What Ricci vs. DeStefano means to employers," *Eckert Seamans' Legal Update*, November 2009.
- "Private Sector Commentary: Bias Ruling Creates Confusion for Employers," *Pittsburgh Post-Gazette*, August 2009.
- "Supreme headache for employers? High court ruling could clear way for more employee discrimination suits," *Pittsburgh Post-Gazette*, July 2006.

Presentations:

- "State Law Bans on Discretionary Clauses in Disability Plans," ACI Litigating Disability Insurance Claims Forum, January 2016.

- "Defending claims involving remote work using Blackberry devices, home computers, I-phones and similar devices," ACI Wage and Hour Forum, Miami, Florida, January 2015.
- "The Conflicted Fiduciary – post-Glenn Developments in the Standard of Review," presented at ACI's 8th National Forum on ERISA Litigation, October 2014.
- "Considerations for Other Types of Leave," presented at the National Business Institute's Employee Leave Law from A to Z continuing legal education program, August 2014.
- "The Fluctuating Work Week," presented at the ACI National Forum on Wage & Hour Claims and Class Actions, May 2014.
- "Equitable Remedies Under Section 502 (a)(3) after *Cigna Corp. v. Amara*," presented at the ACI National Forum on ERISA Litigation in Chicago, April 2014.
- "Benefits Claims Litigation," presented at the ACI 6th National Forum on ERISA Litigation in New York City, October 2013.
- "Employee Termination Decisions: Negotiating the Minefield," presented at the Eckert Seamans Human Resources Forum, June 2013.
- "The Americans with Disabilities Act: Judicial developments in defining who is disabled and how disabled employees must be accommodated," presented at Eckert Seamans' Human Resources Forum, January 2013.
- "Affirmative Defenses under the Equal Pay Act," presented at the Pennsylvania Bar Institute Employment Law Institute West, 2012, November 2012.
- "Hot Topics in Wage and Hour Law: "Off-the-Clock" Claims, Meal and Rest Breaks, and Tipping," presented at the ACI National Forum on Wage Hour Claims & Class Actions in New York City, June 2012.
- "Arbitration of Employment Disputes – Panacea or Plague? Or Neither?" presented at Eckert Seamans' Human Resources Forum, May 2012.
- "Attorneys' Fees Under the FLSA – Are the Courts Following the Law?" presented at the American Conference Institute National Forum on Wage Hour Claims and Class Actions in Miami, Florida, January 31, 2012.
- "News You Can Use: A Review of Recent Judicial, Legislative and Regulatory Developments of Significance to Employers," co-presented with Ryan Siciliano at Eckert Seamans' Human Resources Forum, November 2011.
- Wage & Hour Symposium, Course planner and panelist, Pennsylvania Bar Institute seminar, held September 20, 2011.
- "Off-the-Clock Collective Actions under the Fair Labor Standards Act," presented at an American Conference Institute Seminar in Miami, Florida, February 2011.

- "ERISA Litigation", presented at the American Conference Institute in New York City, October 2010.
- "Don't Ask, Don't Tell, " co-presented with Mariah Klinefelter at the Eckert Seamans' Human Resources Forum, December 2009.

Quoted:

- "Workers Who Drop Claims Can't Fight Decertification: 3rd Circ." *Law360*, September 4, 2013.
- "Legal Perspectives on Video Interviewing," *InterviewStream Blog*, July 9, 2013.
- "Future of Class-Action Cases Still Unclear," *Human Resources Executive* (online), February 1, 2012
- "Hospitals Wage Battle with OFCCP," *BNA, The Daily Labor Report*, February 18, 2011.
- "Layoffs without lawsuits: Treating people well can be good business in a downturn," *Wire Rope News & Sling Technology*, October 2010.
- "Fired for Taking Vacation: When the Boss Asks You to Cancel Plans," *The Wall Street Journal*, July 16, 2010.
- "Holding Associates Accountable," *Human Resources Executive* (online), November 24, 2009.
- "Protecting the Workplace," *Human Resources Executive* (online), October 27, 2009.
- "Clarifying Supervisory Notification," *Human Resources Executive* (online), July 13, 2009.
- "Reverse Discrimination Quashed," *Human Resources Executive* (online), June 30, 2009.
- "Supreme Court: New Haven Violated Title VII by Discarding Promotion Exam Results," *SHRM Online*, June 29, 2009.
- "Firefighter Ruling May Aid Employers, Hurt Sotomayor," *Labor Law360*, May 2009.
- "Layoffs Without Lawsuits," *AQUA: The Business Magazine for Spa & Pool Professionals*, April 2009.
- "How to Play Fair," *Industry Week*, April 2009.

Pregnant Workers:

The evolution from "not covered" to fully protected participants in the workforce

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What Result?

- Employee takes 3 months maternity leave. Due to complications during delivery, she needs additional time off. Must the time off be given?
- Employer has 5 clerical employees doing same job. In downsizing, eliminates the job of one of the employees who is on maternity leave because she is absent. Problematic?
- Pregnant employee cannot perform lifting requirements of job and requests a light duty position. Must employer provide her with one?

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The Beginning

Title VII of the Civil Rights Act of 1964:

> "It shall be an unlawful employment practice for an employer … to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual … because of such individual's … sex."

Is discrimination because of pregnancy discrimination because of sex?

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Geduldig v. Aiello (U.S. 1974)
Gilbert v. General Electric Company (U.S. 1976)

- California by law provided disability benefits for disabled employees, but excluded disabilities resulting from pregnancy. Lawsuit claimed Equal Protection violation.
- *General Electric Company* – comprehensive disability income plan excluded disabilities related to pregnancy. Lawsuit claimed violation of Title VII.
- Supreme Court: Discrimination against pregnant employees is not gender-based discrimination, just because only women can become pregnant.

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Congress Responds: The Pregnancy Discrimination Act of 1978 42 U.S.C. § 2000e(k)

- "The terms 'because of sex' or 'on the basis of sex' include, but are not limited to:
  - because of or on the basis of pregnancy, childbirth or related medical conditions; and
  - women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work."

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PDA in the Courts

- *Klancer v. GTE Products Corporation* (3d Cir. 1994)
  - Employee discharged during pregnancy leave because of policy that provided that after a certain number of absences, employees would be discharged, regardless of the reason for absences.
- *In Re Carnegie Center Associates* (3d Cir. 1997)
  - Employee's job was selected for elimination rather than another person's solely because employee was absent on maternity leave.
  - "An employer legitimately can consider an employee's absence on maternity leave in making an adverse employment decision ... the plaintiff employee seeking to recover under the PDA must show that the employer treated her differently than non-pregnant employees on disability leave."
- *Troupe v. May Dep't Stores Co*. (7th Cir.1994)
  - "The PDA does not require employers to offer maternity leave or take other steps to make it easier for pregnant women to work. Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees."

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Family and Medical Leave Act of 1993

- Employees who are eligible are entitled to up to 12 weeks of leave per year, with guaranteed reinstatement, for (1) incapacity resulting from serious health conditions, including pregnancy related absences and (2) post-birth child care leave.
- No-fault policies cannot count FMLA leaves.
- For eligible pregnant employees, addresses absenteeism issue.

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California Federal Savings & Loan Assoc. v. Guerra, 479 U.S. 272 (1987)

- California requires employers to provide up to 4 months of leave to employees disabled by pregnancy. Employer sued alleging that this law discriminates in favor of women, because the law did not require leave for any other disabilities.
- Supreme Court: the PDA was intended to be "a floor beneath which pregnancy disability benefits may not drop - not a ceiling above which they may not rise."
- *I.e.,* one can favor pregnancy, but cannot burden it.

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Newport News Shipbuilding Company v. EEOC, 462 U.S. 669 (1983)

- Employer's Medical Plan covered pregnancy-related medical expenses for employees, but not for spouses.
- Supreme Court: Plan violates the PDA because it discriminates against male employees by not covering pregnancy and child birth medical expenses for them.

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Schafer v. Board of Public Education of the School District of Pittsburgh, Pa., (3d Cir. 1990)

- School District's collective bargaining agreement allowed female employees to take up to four months of paid leave, whether disabled or not, for pregnancy and child rearing, but did not allow male employees child care leave.
- Held: Provision violated Title VII, because fathers were denied a benefit provided only to female employees.

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International Union v. Johnson Controls, Inc., 499 U.S. 187 (1991) – Fetal Protection Policies

- Employer's fetal protection policy required that employees in jobs entailing lead exposure certify that they were not capable of pregnancy to be eligible, because lead exposure would jeopardize health of any fetus.
- Held: "Johnson Controls' professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a bona fide occupational qualification (BFOQ) of female sterility. Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents. Congress has mandated this choice through Title VII, as amended by the PDA."

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Protective Policies and Practices

- *What if Employee is actually pregnant?*
  - *E.E.O.C. v. Catholic Healthcare West* (pregnant employees not permitted to work in areas involving radiation exposure)
- *What if the Employee's doctor has provided work restrictions? Can Employee elect to waive them?*
  - *E.E.O.C. v. Greystar Management Services* (No working around chemicals)
  - *Noecker v. Reading Hosp*. (Could not lift over 25 pounds)

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Are abortions protected activity?

- *Doe v. C.A.R.S. Protection Plus, Inc*., 527 F.3d 358, 364 (3d Cir. 2008 (PDA prohibits employer from discriminating against female employee because she has exercised her right to have an abortion)
- *Turic v. Holland Hospitality*, Inc., 85 F.3d 1211, 1214 (6th Cir. 1996) (discharge of pregnant employee because she contemplated having abortion violated PDA).
- Questions and Answers on the Pregnancy Discrimination Act, 29 C.F.R. pt. 1604 app., Question 34 (1979) ("An employer cannot discriminate in its employment practices against a woman who has had or is contemplating having an abortion.")

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Break Time and Place for Nursing Mothers – Obamacare § 4207

- Effective March 2010, Employers must provide "reasonable break time" for breastfeeding employees to express breast milk until the child's first birthday.
- Employers must provide a private place, other than a bathroom, for this purpose.
- State laws: Most states have similar laws.

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ADA Amendments Act of 2008

- Pregnancy is not an "impairment" so it is not a disability. Complications of pregnancy are typically temporary and not substantial, so not a disability.
- ADAAA greatly expanded definition of disability to include such functions as standing and lifting and minimized importance of duration.
- Consequence – pregnancy-related complications may be protected by ADA, with its requirement of reasonable accommodation.
- Case study: *Bray v. Town of Wake Forest,* 2015 WL 1534515 (April 6, 2015 E.D.N.C.) (Police officer who alleged she could not run, jump or lift more than 20 pounds because of her pregnancy-related conditions stated a claim under the ADAAA)

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Reasonable Accommodation for Pregnancy

- If an employer accommodates other disabilities either because the ADA requires it or because the injury is job-related, must the employer also provide reasonable accommodations for disability caused by pregnancy?
  - Former EEOC Guidelines: Yes. So long as employer accommodates any employee who is unable, for example, to lift or stand, it must accommodate a pregnant employee.
  - *Serednyj v. Beverly Healthcare, LLC,* 656 F. 3d 540, 547–552 (7th Cir. 2011) and all other circuit courts: No.
  - Controversy based upon wording of second clause of PDA.

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Young v. United Parcel Service, Inc., 135 S.Ct. 1338 (U.S. March 25, 2015)

- Plaintiff's doctor: No lifting >20 lbs for first 20 weeks of pregnancy and >10 lbs thereafter. Job required lifting up to 80 lbs. Plaintiff asked for a light duty job as an accommodation and was refused.
- Employer accommodated lifting restrictions caused by a disability under the ADA; by a job-related injury to avoid workers' compensation expenses; and where driver lost DOT certification for medical reasons. Other employees who could not driver for medical reasons were not accommodated.
- Plaintiff forced to take unpaid leave of absence until after child born.

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Competing positions as to meaning of PDA Second clause

- EEOC/Plaintiff: PDA "requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work."
- Employer: PDA requires only that pregnancy be treated the same as "other similar" disabilities; i.e., not job related or ADA disabilities. Courts should compare the accommodations an employer provides to pregnant women with the accommodations it provides to others within a facially neutral category (such as those with off-the-job injuries) to determine whether the employer has violated Title VII.

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Supreme Court's Decision

- *Court adopted a middle ground*: Rejected EEOC's position as creating a "most-favored nation" status for pregnancy; rejected UPS position because it did not give full effect to the second clause of the PDA.
- *Holding*: Where employer has accommodated other types of disabilities, but not pregnancy, and the employer's policies impose a significant burden on pregnant workers, the court/jury must determine whether the employer's reasons for accommodating those other disabilities and not pregnancy are sufficiently strong to justify the burden on pregnant workers; or—when considered along with the burden imposed—do those policies give rise to an inference of intentional discrimination.

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After *Young*, Must Pregnancy Disabilities be Accommodated?

- Not necessarily – *Young* decision has made the issue one that must be considered on a case-by-case, or employer-by-employer, basis.
- First, does the employer accommodate non-pregnant employees *[in similar jobs?]* who are unable to perform their duties for medical reasons.
- Second, does the employer have a legitimate non-discriminatory reason for the difference in treatment? Not merely more expensive or inconvenient.
- Third, does the employer's policies create a significant burden on pregnant workers? i.e., Most non-pregnant workers are accommodated but most pregnant workers are not.
- Finally, are the reasons for the difference in treatment strong enough to justify the burden on pregnant workers to avoid an inference of intentional discrimination.

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Post – *Young* Guidance

- Almost no guidance from the case law.
- EEOC revised Guidelines (July 2015): Do little to clarify – repeat the *Young* holding.
- Assessment: Accommodation only of ADA-disabled workers will not give rise to a duty to accommodate pregnant employees. Accommodation also of employees with on-the-job injuries probably will not give rise to a duty – but might be an issue of fact.
- Accommodation of pregnancy does not import all of the ADA requirements into Title VII. *See Salmon v. Applegate Homecare,* (D. Utah 2016)

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State Laws Requiring Reasonable Accommodation

- Several states (and NYC) have enacted laws requiring reasonable accommodation for pregnancy. E.g., California, Illinois, New Jersey, Maryland, Utah
- Reasonable accommodation includes (Cal.): any change in the work environment or in the way a job is customarily done that is effective in enabling an employee to perform the essential functions of a job. In N.J., "for needs related to the pregnancy ... Based on the advise of her doctor." Reasonable accommodations include, but are not limited to an employer:
  1) modifying work practices or policies;
  2) modifying work duties;
  3) modifying work schedules to permit earlier or later hours, or to permit more frequent breaks (e.g., to use the restroom);
  4) providing furniture (e.g., stools or chairs) or acquiring or modifying equipment or devices;

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State Laws Mandating Minimum Leave for Pregnancy

- A number of states require that employers provide a minimum period of unpaid leave for disabilities resulting from pregnancy. This leave is in addition to FMLA leave under state and federal law.
  - WA – 12 weeks
  - CA – 4 months
  - CT – 16 weeks over two-year period
- Regulations for federal contractors require that employees be granted a leave for "a reasonable time" with reinstatement for child bearing. 41 C.F.R. § 60-20.3.

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What Result?

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Questions?

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(412) 566.5900 | jmyers@eckertseamans.com

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