



Fifth Circuit Holds Lactation Discrimination is Unlawful Sex Discrimination

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The U.S. Court of Appeals for the Fifth Circuit has unanimously held that discrimination on the basis of lactation or milk expression violates Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended by the Pregnancy Discrimination Act (“PDA”). The decision overturned a Southern District of Texas trial court’s dismissal on summary judgment.

The lawsuit was filed by the Equal Employment Opportunity Commission (“EEOC”) on behalf of a woman who claimed that she was fired after giving birth and inquiring as to whether she would be able to pump breast milk once she returned to her job. The trial court dismissed the claim, holding that “pregnancy related conditions,” which are protected by the PDA, end on the day a woman gives birth, and that lactation was therefore not included in that term (*EEOC v. Houston Funding II LLC*, No. 4:11-CV-2442).

The Fifth Circuit took the opposite view, holding that lactation is a physiological condition distinct to women who have undergone pregnancy and childbirth, and that men, as a matter of biological fact, can neither lactate nor be fired for such a reason (*EEOC v. Houston Funding II LLC*, No. 12-20220 (May 30, 2012)). Therefore, the Court held, lactation is included in the term “pregnancy related conditions” and is protected by the PDA and Title VII. The case has been remanded back to the lower court for a trial on the merits.

In New York, it has been the law for several years that employers must allow nursing mothers reasonable paid or unpaid time to express breast milk and provide employees with space to do so (see <http://www.cullenanddykman.com/news-advisories-56.html>). In addition, the Affordable Care Act recently amended the Fair Labor Standards Act to provide similar protections for working mothers (see <http://www.cullenanddykman.com/news-advisories-12.html>). Employers must consider their obligation to provide time and space to express breast milk, as taking action against an employee for such a reason could violate the New York Labor Law, the Fair Labor Standards Act, and Title VII.

If you have any question about this post, or any labor or employment related issue, please contact us at 516-357-3700.

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