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7th Circuit Allows "Anticipatory Termination" of Pregnant Employee in Limited Circumstances

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Most employers, upon learning that an employee is pregnant, offer a hearty congratulations and then begin planning how to handle the period of time that the employee is on an approved leave of absence. Sometimes, however, an employer may find itself facing a particularly challenging set of circumstances created by the pregnant employee's anticipated absence and/or inability to perform her job duties while pregnant. Although it is not necessarily the desired outcome, there are instances where the employer may anticipatorily terminate the pregnant employee. Doing so is fraught with risk and may have negative consequences for how a company is viewed both by employees and the public, but, if necessary, it can be done.

The **Pregnancy Discrimination Act (PDA)** prohibits employers from discriminating against pregnant employees simply because they believe the pregnancy might prevent the employees from doing their jobs. The PDA's protections, however, are not absolute as noted recently by a federal district court in Chicago. Employers may, according to the court, terminate a pregnant employee as a result of her inability to perform the essential functions of her job in certain limited situations. This, of course, assumes that the employee is not eligible for leave under the Family and Medical Leave Act and that the employer does not offer leave to nonpregnant employees who similarly are unable to work for limited periods of time.

In *Cadenas v. Butterfield Health Care II, Inc.* (N.D. Ill. July 15, 2014), the employer—a residential health care facility—terminated a certified nursing assistant after she notified her supervisor of the physical limitations she would eventually experience during the course of her pregnancy. The employee, who needed to be able to push, pull and lift more than 20 pounds in order to perform the essential functions of her job—including repositioning patients—informed the facility that she would be unable to lift, pull or push that amount once her pregnancy reached 20 weeks. Plaintiff, who was 15 weeks pregnant when she turned in her doctor's note, was not yet eligible for any type of leave and was terminated immediately. Although the facility informed the employee that she could be rehired after she had her baby and no longer had any physical restrictions, she filed suit, claiming pregnancy discrimination.

Recognizing that an employer is not required to accommodate a pregnant employee's physical restrictions if it would not have accommodated a nonpregnant employee's similar restrictions, the Cadenas court explained that an employer—absent a duty to accommodate—may generally

terminate an employee because she cannot perform the basic functions of her job, even if the restriction is due to the pregnancy. In short, employers are not required to give a pregnant employee special treatment if it would not have afforded the special treatment to a non-pregnant employee.

Significantly, the court explained that only in limited circumstances would an employer have sufficient concrete evidence of future limitations to justify an anticipatory termination on the basis of legitimate, nondiscriminatory staffing needs. As an example, the court referenced a Seventh Circuit case, *Marshall v. American Hosp. Ass'n*, 157 F.3d 520 (7th Cir. 1998), where the circuit court of appeals upheld summary judgment for an association that terminated a pregnant employee who planned an eight-week leave during the run-up to the employer's annual conference, the organization of which was one of the employee's primary job duties. Since Butterfield failed to provide evidence that there was a sufficient business justification for not allowing the employee to work during the five weeks before her restrictions went into effect, the district court denied the employer's motion for summary judgment. Had the facility simply waited until the employee could no longer do her job, it could have terminated the employee without liability, according to the court.

Terminating a pregnant employee is rarely a good idea. However, that does not mean that it may not be done. There are circumstances where it may be unavoidable, such as a reduction in force or as a result of serious misconduct. Whatever the reason, it should be well documented and easy to explain to an investigator, judge or jury. Although less common, there may also be times when exceptional business necessities arise, enabling employers to take anticipatory action in planning for future staffing needs. Such decisions should never be taken lightly and should be made after consultation with legal counsel.

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