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# 60-Second Memo

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### **Always . . . A Woman: Seventh Circuit Court of Appeals Holds In Vitro Fertilization Is Protected by The Pregnancy Discrimination Act**

**By: Lynn U. Thorpe, Esq.**

Federal courts continue a trend to interpret the Pregnancy Discrimination Act (PDA) broadly, as the Seventh Circuit Court of Appeals last month held that an employee who was fired after taking time off for in vitro fertilization could bring a sex discrimination claim under the PDA's amendments to Title VII of the Civil Rights Act of 1964. [Hall v. Nalco Company, -- F.3d --, 2008 WL 2746510 \(7th Cir. July 16, 2008\).](#)

Nalco initially hired Cheryl Hall in 1997 and, in 2000, she took on the duties of a sales secretary. In March 2003, Ms. Hall requested and received a four-week leave of absence to undergo in vitro fertilization. Multiple treatments are sometimes needed to achieve a successful pregnancy, as was the case for Ms. Hall. In July, she requested additional time off for the following month to undergo the procedure again.

Meanwhile, Nalco was undergoing a reorganization, which started in January 2003. The office in which Ms. Hall worked was slated for consolidation with another office. Both offices

employed a sales secretary and, after the reorganization, only one would be needed. At the end of July - just after Ms. Hall requested her second leave - Ms. Hall's supervisor, Marv Baldwin, told Ms. Hall that the other office's secretary would be retained instead of her. Mr. Baldwin further told Ms. Hall that her termination "was in [her] best interest due to [her] health condition." Mr. Baldwin had also discussed the matter with the employee relations manager, whose notes of their conversation indicated that Ms. Hall had "missed a lot of work due to health." Another note stated "absenteeism - infertility treatments". The sales secretary who was retained was female but incapable of becoming pregnant.

Ms. Hall sued Nalco for sex discrimination pursuant to the PDA. The PDA prohibits discrimination "because of sex," which includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). At the district court level, Nalco argued infertility is gender neutral, affecting both men and women. The court agreed, finding that infertile women were not a protected class under the PDA, and granted Nalco summary judgment.

The Seventh Circuit reversed. It noted that female fertility, or the capacity to become pregnant, was a condition related to pregnancy, and thus covered by the PDA's definition of sex.

The Seventh Circuit held that the district court erred in its interpretation of the U.S. Supreme Court case, *United Auto Workers v. Johnson Controls Inc.*, 499 U.S. 187 (1991). As the Seventh Circuit noted that, in *Johnson Controls*, the Supreme Court found that an employer policy that barred all fertile women from jobs involving lead exposure because of its potentially damaging effect on fertility and the fetus was invalid under the PDA because it "classifie[d] on the basis of gender and childbearing capacity, rather than fertility alone."

Focusing on the "fertility alone" language, the district court had held that Ms. Hall's allegations did not state a PDA claim because infertility is a gender-neutral condition. But the Seventh Circuit held that the lower court missed that, "[a]s *Johnson Controls* illustrates, even where (in)fertility is at issue, the employer conduct complained of must actually be gender neutral to pass muster." The Seventh Circuit concluded that Ms. Hall's employment was terminated for the "gender-specific quality of childbearing capacity" rather than the "gender-neutral condition of infertility." The Seventh Circuit further noted that employees discharged for taking time off to undergo in vitro fertilization - just like employees taking time off to give birth or receive other pregnancy-related care - "will always be women."

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Addressing the merits of Ms. Hall's claim, the Seventh Circuit concluded that there were fact issues as to whether Nalco's stated reason for her termination, the consolidation of offices, was pretextual. With the termination following on the heels of Ms. Hall's second request for leave, the comment by Ms. Hall's supervisor about Ms. Hall's condition and the notes in Ms. Hall's file regarding her health, absenteeism and infertility treatment, the court found sufficient issues of material fact that warranted a trial.

Given all of the advances in reproductive technology, it is important for employers to be cognizant of the broad reach of the PDA, so that employment decisions are not improperly made for a reason that could be considered as based upon an employee's sex.

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