ARIZONA
EMPLOYMENT LAW LETTER
Part of your Arizona Employment Law Service

January 2015

Phoenix regional attorney promotes EEOC guidance

by Dinita L. James
Gonzalez Saggio & Harlan LLP

Mary Jo O'Neill, the regional attorney for the Equal Employment Opportunity Commission (EEOC) based in Phoenix, gave a spirited presentation to the Labor and Employment Section of the State Bar of Arizona in late October on the new enforcement guidance on pregnancy discrimination recently released by her agency. Arizona Employment Law Letter reported on that guidance in our September 2014 issue (see "EEOC issues pregnancy discrimination guidance for the first time in 30 years" on pg. 6). Here's a recap of O'Neill's remarks.

Myths, fears, stereotypes

O'Neill expressed the view that pregnancy discrimination remains a serious issue in the workplace. In issuing the guidance, the EEOC cited an increase in the number of charges of pregnancy discrimination as demonstrating the need for guidelines on the Pregnancy Discrimination Act (PDA), which was enacted 36 years ago. O'Neill has analyzed the charge filing data and identified a 70 percent increase in pregnancy discrimination charges by women of color.

"Everyone is afraid to tell [her] boss because there is going to be a negative impact," O'Neill stated. She recounted a time early in her career at the EEOC when someone holding the high-level regional attorney position that she now holds told her not to hire women of childbearing age.

O'Neill emphasized the importance of training employers on the PDA and urged the management-side employment lawyers in the audience to develop and offer such training to their clients.

EEOC at your door

The Phoenix District Office is engaged in intensive investigation of pregnancy discrimination charges. Without identifying the employer, O'Neill gave an example of a current pregnancy discrimination claim involving a car dealership now being investigated by the EEOC in Phoenix. According to O'Neill, the employee who filed the charge was newly pregnant, and when she told her boss, he fired her on the spot. O'Neill quoted the boss as saying, "I can't have you throwing up in my cars." The EEOC sent two investigators to the car dealership to deliver notice of the charge personally and conduct an immediate interview of the boss who fired the employee.

Regional Director Rayford O. Irvin was in the audience for O'Neill's presentation, and he confirmed that his investigators do employ such tactics on occasion. Thus, employers should be aware that you won't always get notice of EEOC charges by U.S. mail.

Controversy over light duty

O'Neill acknowledged that one of the most controversial aspects of the EEOC guidance relates to light duty. The guidance requires that if an employer provides light duty to any category of employee, then it also must provide light duty to pregnant workers who need it. The guidance does allow you to require compliance with generally applicable rules, such as having a medical certification establishing the necessity of light duty.

O'Neill said the EEOC guidance "is grounded in a strong analytical framework." She acknowledged that the U.S. Supreme Court might overrule the guidance in *Young v. United Parcel Service, Inc.*, a case that was argued before the justices on

December 3, 2014. The employer in that case, UPS, provided light duty to only three categories of employees. Two of the categories included workers with on-the-job injuries and workers with disabilities for whom reasonable accommodation is required by the Americans with Disabilities Act (ADA). O'Neill said the third category contains her favorite fact from the case: UPS drivers who had lost their U.S. Department of Transportation (DOT) certification also got alternative duty. According to her, that category included drunken drivers who had their driver's licenses suspended or revoked.

Disparate impact

Foreshadowing some of the arguments before the Supreme Court in the *Young* case, O'Neill said employees and their counsel shouldn't forget to consider whether a disparate impact claim might be possible when an employer has limited leave and light-duty policies. She suggested a potential target for PDA claims: policies that are neutral on their face but have a disparate impact on pregnant workers.

At least one justice, Stephen Breyer, suggested at oral argument that the employee might have a better chance of success on that theory than in claiming that UPS was intentionally discriminating against pregnant women by limiting the availability of light duty to three categories of employees. If the Supreme Court determines in the *Young* case that the EEOC's guidance on light-duty jobs goes too far, don't be surprised if the agency files a lawsuit attacking similar policies under the disparate impact theory.

O'Neill also acknowledged that the EEOC's guidance might have the unintended consequence of leading employers to offer no light-duty assignments for any categories of employees.

Bottom line

Because we will not get the Supreme Court's ruling in the *Young* case for several months and the EEOC's aggressive enforcement of the PDA likely will continue in the meantime, cautious employers should review their light-duty policies. If only certain categories of employees Ã¢â‚¬â¢ such as those with on-the-job injuries who are receiving workers' compensation benefits Ã¢â‚¬â¢ are entitled to light-duty work assignments and you deny a light-duty assignment to a pregnant employee, the EEOC may come knocking at your door.

Dinita L. James, the partner in charge of the Phoenix office of Gonzalez Saggio & Harlan LLP, is the editor of Arizona Employment Law Letter. You can reach her at dinita_james@gshllp.com or 602-840-3301.