

Employment & Immigration Law

Title VII Bars Discrimination Against An Employee For Having An Abortion

By David W. Garland and William R. Horwitz

In a significant ruling regarding a highly controversial subject, the U.S. Court of Appeals for the Third Circuit recently held that Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), as amended by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (the "PDA"), prohibits an employer from discriminating against an employee for having an abortion. The Third Circuit had not previously considered this issue. Its decision, in *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008), should serve as a reminder to employers of the importance of issuing and uniformly applying appropriate employee policies.

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The Facts

Defendant C.A.R.S. Protection Plus, Inc. ("CARS") insures used cars. In June 1999, the company hired plaintiff Jane Doe as a graphic artist. She reported to Fred Kohl, Vice-President and part-owner of CARS.

In May 2000, Doe learned that she was pregnant and notified CARS. On August 7, her doctor informed her that a blood test revealed problems with the pregnancy. Doe took off from work the next two days for a sonogram and additional tests. On August 9, her doctor informed her that her baby would have "severe deformities" and "recommended that her pregnancy be terminated." Doe's husband notified CARS that she would be absent the next day, August 10. The company approved the absence.

According to her husband, he called again on August 10. He informed Kohl that Doe would be terminating the pregnancy the next day and requested that she be permitted to take off the following week. Her husband alleged that Kohl granted his request. On August 11, Doe

had an abortion and, on August 16, held a funeral. That day, the office manager saw an employee collecting Doe's personal belongings from her desk. The office manager informed Doe, who called Kohl. Kohl indicated that CARS had terminated her employment. According to CARS, it terminated her employment for unexcused absences on August 11 and the following week.

Doe filed a charge of discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC"). The EEOC issued a right-to-sue letter and she filed a lawsuit in the U.S. District Court for the Western District of Pennsylvania.

Title VII and the PDA

Title VII bars employment discrimination against an individual "because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). As amended by the PDA, Title VII defines "because of sex" or "on the basis of sex" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). The law further provides that "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."

The District Court

In the lawsuit, Doe asserted a Title VII gender discrimination claim, alleging that CARS had terminated her employment because she had undergone a surgical abortion. The district court concluded that there was insufficient evidence to allow a reasonable jury to find that similarly situated employees who had not undergone abortions were treated differently or other evidence of discriminatory animus toward her for having an abortion. As a result, the court determined that Doe could not establish a prima facie case of discrimination. The court further held that, even if Doe could have established a prima facie case of discrimination, summary judgment would be warranted because no evidence showed that CARS' proffered nondiscriminatory reason for discharging Doe was pretextual. The court granted CARS' motion for summary judgment and Doe appealed.

The Third Circuit

On appeal, the Third Circuit considered whether the Title VII term, "related medical conditions," includes abortions. The court considered the plain language of the PDA and the EEOC guidelines interpreting it. The guidelines state that "[t]he basic principle of the Act is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work." Appendix 29 C.F.R. pt. 1604 App. (1986). The guidelines further state, "[a] woman is therefore protected against such practices as being fired, or refused a job or promotion, merely because she is pregnant or has had an abortion."

The court also considered the legislative history of the PDA, quoting the following: "Because [the PDA] applies to all situations in which women are 'affected by pregnancy, childbirth, and related medical conditions,' its basic language covers women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised

her right to have an abortion." H.R. Conf. Rep. No. 95-1786 at 4 (1978) as reprinted in 95th Cong., 2d Sess. 4, 1978 U.S.C.A.N. 4749, 4766.

According to the court, "the plain language of the statute, together with the legislative history and the EEOC guidelines, support a conclusion that an employer may not discriminate against a woman employee because she has exercised her right to have an abortion." The court held that the term "related medical conditions" includes abortions.

The court then turned to Doe's claim. It noted that the PDA does not "require preferential treatment for pregnant employees," but "mandates that employers treat pregnant employees the same as non-pregnant employees who are similarly situated with respect to their ability to work."

The court then explained that because Doe relied upon indirect evidence of pregnancy discrimination to support her claim, a modified *McDonnell Douglas* burden-shifting analysis applies. Under this analysis, according to the court, a plaintiff must first establish a prima facie case of pregnancy discrimination by demonstrating that: (1) she was pregnant and the employer was aware of the pregnancy; (2) she was qualified for the job; (3) she suffered an adverse employment action; and (4) there was "some nexus between" her pregnancy and the adverse employment action "that would permit a fact-finder to infer unlawful discrimination."

CARS argued that Doe had failed to satisfy the fourth element, but the court disagreed. CARS maintained that it required a sick employee (or the employee's spouse) to call the office every day during an absence and that Doe's employment was terminated for failing to do so. Evidence revealed, however, that other employees who were unable to work had not been required to call in daily. In fact, Kohl's administrative assistant testified that CARS had a "separate set of rules" for every employee and "there was no uniformly enforced rule concerning the use of vacation or sick time." Thus, according to the court, the evidence established that "the treatment given other employees differed from that given to Doe," thereby

raising an inference of discrimination and satisfying "her minimal burden of establishing a prima facie case."

In any event, the court found that evidence of a comment by Kohl regarding Doe's supposed refusal to "take responsibility" for her abortion was, itself, sufficient to raise an inference of discrimination. Moreover, the court agreed with Doe that the short lapse between the time that the company learned of the abortion and the time that it terminated her employment was also, by itself, sufficient evidence to raise an inference of discrimination.

After determining that Doe had established a prima facie case of discrimination, the court continued its *McDonnell Douglas* analysis and determined that Doe's alleged unexcused absence constituted a legitimate, nondiscriminatory reason for terminating her employment. The court then considered whether Doe could establish that this proffered reason was merely a pretext for discrimination.

The court indicated that a plaintiff may rely upon the same evidence in establishing pretext as she used to establish a prima facie case. Given Kohl's comment suggesting that Doe should take responsibility for her abortion and testimony of Doe's husband that he had called CARS and obtained approval for Doe's absence, the court concluded that sufficient evidence existed to permit a "jury to determine that CARS' asserted reasons for discharging her are pretext." The court reversed summary judgment for CARS and remanded the case for trial.

Conclusion

In *Doe v. C.A.R.S. Protection Plus, Inc.*, the Third Circuit held, for the first time, that Title VII bars discrimination against an employee for having an abortion. The decision highlights the importance of taking carefully reasoned and supportable employment actions pursuant to consistently applied policies. An employer that, like CARS, has a "separate set of rules" for every employee will find itself hard-pressed to defend a discrimination lawsuit. ■