

# EEOC tackles bias against pregnant employees and caregivers

By James H. Kizziar, Jr., Esq., Special Labor Counsel for Employment Matters

Responding to what it characterizes as an “emerging discrimination issue in the 21<sup>st</sup> century workplace,”—discrimination against working parents and other caregivers—the Equal Employment Opportunity Commission (EEOC) issued a potentially significant Employment Guidance on May 23, 2007, entitled “Unlawful Disparate Treatment of Workers with Caregiving Responsibilities.”

The 33-page guidelines do not create a new category of protected worker under Title VII of the Civil Rights Act of 1964. Nevertheless, the Guidance:

- signals the EEOC’s intent to aggressively target employment bias against pregnant workers and “caregivers,” particularly working parents;
- warns that even unintentional discrimination against pregnant employees or caregivers, resulting from “unconscious” or “benevolent” gender stereotyping, may be unlawful;
- advises that biased statements and actions by supervisors may be sufficient to support a charge of discrimination, even in the absence of evidence that non-caregivers were treated more favorably; and
- admonishes employers that their obligations toward employees may extend beyond Title VII; for example, to an employee/caretaker of a disabled spouse who may be protected against adverse action under the Americans with Disabilities Act (ADA) or to an employee covered by the Family and Medical Leave Act (FMLA).

The EEOC asserts that increased emphasis on protecting pregnant workers and caregivers is warranted by the changing demographics of the American workforce. For example, women now comprise nearly half the U.S. labor force, although they remain “most fami-

lies’ primary caregivers.” In fact, according to the EEOC, there are almost twice as many mothers of young children working today as there were three decades ago.

The EEOC offers guidelines on preventing unlawful employment bias against pregnant workers and caregivers. For example:

- To avoid creation of a “maternal wall,” employers may not treat working mothers differently from working fathers or childless women.
- Employers should avoid asking applicants and employees any pregnancy-related questions. The EEOC “will generally regard a pregnancy-related inquiry as evidence of pregnancy discrimination where the employer subsequently makes an unfavorable job decision affecting a pregnant worker.”
- Except for pregnancy-related matters, male employees must be treated the same as their female counterparts with respect to parenting and other caregiver leaves.
- Based on the ADA’s prohibition of discrimination against an employee who has a relationship with a disabled child, spouse or parent, an employer should avoid making adverse employment decisions based on stereotypical assumptions concerning the reliability of an employee who is a caregiver.
- An employer may be liable for harassment where offensive comments (or other hostile actions) directed against a pregnant worker, or to an employee associated with a disabled person, are so severe or pervasive that they create a hostile work environment.
- An employer may not retaliate

## ◀ RECAP

## Employment Update

- The EEOC asserts that increased emphasis on protecting pregnant workers and caregivers is warranted by the changing demographics of the American workforce.
- Women now comprise nearly half the U.S. labor force, although they remain “most families’ primary caregivers.” In fact, according to the EEOC, there are almost twice as many mothers of young children working today as there were three decades ago.



against a caregiver or pregnant employee for opposing unlawful discrimination. The EEOC emphasizes that caregivers may be “particularly vulnerable to unlawful retaliation because of the challenges they face in balancing work and family responsibilities.”

An employer can best minimize its risk of incurring liability for discrimination against pregnant workers and caregivers by ensuring that (i) its employment decisions are based on objective criteria and free of stereotypical assumptions; (ii) its supervisors are well trained; and (iii) its policies are consistently enforced. With such practices in place, an employer may take appropriate steps to correct disciplinary or performance problems, even those involving a pregnant worker or caregiver, without running afoul of anti-discrimination laws.

*James H. Kizziar, Jr. a partner with Bracewell & Giuliani LLP in the firm’s San Antonio office, is Special Counsel to TAA for labor and employment issues. He represents management in all aspects of labor and employment law.*