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The Ohio Supreme Court recently issued an opinion in *McFee v. Nursing Care Management of America* in which it finally put to rest the Ohio Civil Rights Commission's contention that Ohio law mandates employers provide maternity leave even where leave would not be available to a similarly situated non-pregnant employee.

Ohio Supreme Court Rules Neutral Leave Policy Not Direct Evidence of Sex Discrimination

By Sue Marie Douglas and Meredith C. Shoop

The Ohio Supreme Court, in *McFee v. Nursing Care Mgt of Am., Inc.*, Slip Opinion, No. 2010-Ohio-2744 (June 22, 2010), recently ruled that an employer's neutral leave policy that imposes a uniform minimum length of service for eligibility is not direct evidence of sex discrimination, even when it results in an ineligible employee's termination for taking maternity leave. The court's decision rejects the Ohio Civil Rights Commission's long-held position that Ohio's civil rights laws mandate employers provide maternity leave even where leave would not be available to employees who are not pregnant.

Plaintiff Tiffany McFee, an eight-month employee of Pataskala Oaks Care Center, was terminated from employment when, due to conditions related to pregnancy, she took an unauthorized leave of absence before she was eligible for leave under her employer's policy. At the time of McFee's termination, her employer maintained a leave of absence policy requiring employees to have at least one year of service before being eligible for a leave for any purpose. As McFee had only worked for Pataskala Oaks for eight months, she was not eligible for leave.

After her termination, McFee filed a charge of discrimination with the Civil Rights Commission, claiming her termination constituted unlawful sex discrimination in violation of Ohio Revised Code Section 4112.02. Though an administrative law judge recommended the claim be dismissed, the Commission rejected that recommendation and found that the Pataskala Oaks' termination of McFee for taking maternity leave constituted direct evidence of discrimination and, accordingly, that McFee's termination constituted unlawful sex discrimination in violation of Ohio law.

The case ultimately reached the Ohio Supreme Court, which found for Pataskala Oaks, holding a leave policy that includes a uniform minimum-length-of-service requirement does not constitute direct evidence of sex discrimination. The court reasoned that the Ohio statute, like its federal counterpart, the Pregnancy Discrimination Act, merely requires that pregnant employees be treated the same as other employees who are similar in their ability or inability to work.¹

The Ohio Supreme Court therefore rejected the Civil Rights Commission's interpretation of the law, as found in the administrative regulations it promulgated, to require employers to provide maternity leave regardless of whether an employee qualifies for leave under the employer's uniform minimum-length-of-service leave policy.² Because the Ohio civil rights law and its federal counterpart merely require equal treatment, while the Commission's interpretation provided pregnant employees with special rights, the court found such an interpretation of the regulations to be unconstitutional.

Specifically, the Ohio Civil Rights Commission, an agency whose members are appointed by the Executive Branch, is empowered to promulgate regulations to "effectuate" the provisions of Ohio's civil rights statutes. Thus, its power is limited by the intent of the legislature as reflected by the text of the statute. Where the statute provides for equal treatment, but the Commission reads into it the requirement that pregnant employees be granted special privileges, the Commission has "usurped the legislative function, thereby violating the separation of powers established in the Ohio Constitution."

The administrative regulation in question provided that an employee's termination "shall constitute unlawful sex discrimination" if it is caused by a leave policy which provides for insufficient or no maternity leave.³ Thus, the court noted, read by itself, section 4112-5-05(G)(2) could be construed to provide that any termination based upon an employee's need for maternity leave constitutes unlawful sex discrimination. However, the regulations also provide that maternity leave must be granted when "under the employer's leave policy, the female employee would qualify for leave."⁴ The court read the two regulations in tandem to obtain a result that was consistent with the purpose of the enabling statute: that an employer cannot lawfully terminate an employee for violating a policy that provides no or insufficient maternity leave *when the employee is otherwise eligible for leave*.

Thus, the court held, if an employee is fired for taking maternity leave that violates the employer's "pregnancy-blind" policy, the facts of the case must be analyzed under the *McDonnell Douglas* burden-shifting framework to determine whether the firing was discriminatory. In *McFee*, the court found the plaintiff had produced no independent evidence that the denial of leave was a pretext for discrimination, and thus reversed the appeals court's ruling in the plaintiff's favor and dismissed the case.

What this Means for Ohio Employers

This ruling is important to Ohio employers, who have, for several years, been in the untenable position of choosing between complying with the Ohio Civil Rights Commission's position that maternity leave must be provided even where an employee otherwise would not qualify for leave under the employer's uniform policy, and avoiding liability for reverse discrimination resulting from the provision of leave to pregnant employees and not similarly situated non-pregnant employees. The rule of law is now clear: employees must be treated equally, and there is no mandatory maternity leave law in Ohio. This decision brings Ohio squarely in line with the requirements of the federal Pregnancy Discrimination Act.

The *McFee* decision may also finally put to rest the Commission's campaign, initiated in 2007, to revise its regulations to mandate employers provide maternity leave beyond even that which the Commission had read into the current rules. In particular, the agency had pushed for a mandatory minimum maternity leave of twelve weeks, and an even clearer expression of the requirement that such leave be provided regardless of whether a pregnant employee would otherwise be eligible for leave under the employer's uniform leave policy. This controversial proposal resulted in the resignation of former chairwoman of the Ohio Civil Rights Commission, Barbara Sykes, in late 2007, and has been held up in legislative committees ever since.

It should be noted, that the *McFee* decision does not affect Ohio employers' obligations to provide maternity leave under the federal Family and Medical Leave Act (FMLA). Eligible employees for Ohio employers covered under the FMLA remain entitled to leave for pregnancy-related purposes. Similarly, Ohio employers whose leave policies provide for medical leave must apply those policies equally, and grant maternity leave where they would otherwise grant medical leave to a non-pregnant employee. This is true even for small employers who are not covered under the FMLA, as well as for employers who provide leave beyond the requirements of the FMLA.

Moreover, employers who choose to offer maternity leave where they would not otherwise offer leave to employees may be exposed to liability for reverse discrimination claims by similarly situated non-pregnant employees who are denied leave. Thus, employers should consult counsel when crafting leave policies or when questions arise regarding the application of those policies.

Finally, employers should also be mindful of the Americans with Disabilities Act (ADA), which requires employers to engage in an interactive process to accommodate employees with disabilities who do not meet the requirements for leave under the FMLA or the employer's leave policy. Though pregnancy itself is not a disability, certain medical conditions which may accompany pregnancy could qualify as a disability under the ADA. Under such circumstances, accommodation of the employee's disability may be necessary even though the employee is not eligible for leave.

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¹ OHIO REV. CODE §§ 4112.02(A) and 4112.01(B); 42 U.S.C. §§ 2000e-2(a)(1) and 2000e(k).

² OHIO ADMIN. CODE 4112-5-05(G)(2).

³ *Id.*

⁴ *Id.* 4112-5-05(G)(5).