Important Considerations before Employee Termination: Primer on the Law Governing Pregnancy Discrimination Claims.[1]

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Terminating an employee is often a difficult, yet important, decision for any business. Unfortunately, it is also a decision that could lead to potential liability for the business. As a result, the employment attorneys at Nardone Limited recommend that employers contact us and consult our employee termination checklist to identify any potential issues before terminating an employee. When terminating an employee, one potential issue is that the employee may allege that they were wrongfully terminated for discriminatory reasons. This article explains the law governing one of the most frequent areas of wrongful termination accusations--employee claims of alleged pregnancy discrimination.

A pregnant female employee who is terminated may attempt to assert that she was discriminated against under Title VII of the Civil Rights Act of 1964 ("Title VII") and the Pregnancy Discrimination Act. "To establish a prima facie case of discrimination under Title VII, the Plaintiff may prove her claim either through direct evidence, statistical proof or the test established by the Supreme Court in McDonnell Douglas." *Ensley-Gaines v. Runyon*, 100 F.3d 1220, at *1223 (6th Cir.1996). Unless a claim is based on direct evidence of pregnancy-based discrimination, it is analyzed under the framework established by the U.S. Supreme Court in *McDonnell Douglas v. Green*, 411 U.S. 792, 802-03 (1973).[2] To sustain such claims, as a threshold matter, an employee must initially establish what is called a "prima facie" case by showing that:

(1) she was pregnant;
(2) she was qualified for her job;
(3) she was subjected to an adverse employment decision; and,
(4) there is a nexus between her pregnancy and the adverse employment decision.

Id. at 573. For purposes of this article, we will assume that an employee alleging pregnancy discrimination meets element one and is, in fact, pregnant. Each of the other elements will be described in greater detail below.

Element Two – Otherwise Qualified for the Job

"In a termination case * * *, a plaintiff meets the second prong by showing that she was performing 'at a level which met [her] employer's legitimate expectations.'" *Cline v. Catholic Diocese*, 206 F.3d 651, 658 (6th Cir.1999) (quoting *McDonald v. Union Camp Corp*., 898 F.2d 1155, 1160 (6th Cir.1990)). Previous performance reviews and comments by superiors may be considered acceptable evidence that an employee is otherwise qualified for their position. In some instances, where there have been no complaints, disciplinary actions, or warnings, the lack of complaints may be used by the

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[2] *Accord Tysinger v. Police Dep't of City of Zanesville*, 463 F.3d 569, 572-73 (6th Cir.2006).

employee as evidence of their qualifications for the position.[3] This point re-emphasizes our general guidance to employers that it is paramount to timely document employee discipline or performance issues in a detailed and objective manner.

Element Three – Adverse Employment Action

An employee claim pregnancy discrimination must also establish the third element that she suffered an adverse employment action directly as a result of her being a member of a protected class, *i.e.* pregnant female. "To constitute an adverse employment action, a plaintiff must show he has suffered a 'materially adverse change in the terms and conditions of his employment.'" *Zapata v. URS Energy & Constr., Inc.*, N.D.Ohio No. 3:13 CV 2203, 2015 U.S. Dist. LEXIS 84113, *12, (June 29, 2015) citing *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795 (6th Cir.2004). In some instances, employers may argue that an employee suffered no adverse employment action, due to a reorganization/job elimination of her position. To establish a claim under those circumstances, the employee must demonstrate that this explanation is pre-textual and the real reason for her termination or adverse action was her pregnancy.

Element 4 – Nexus between Adverse Employment Action and Pregnancy

The fourth element of a pregnancy discrimination claim, the nexus element, is most often the central issue in case outcomes, which is also true here. To demonstrate the fourth element, an employee must establish that there is a causal nexus between her pregnancy and the adverse employment actions she experienced. This means that the claimant must show that their being pregnant was the reason that the employer took action against them. For example, an employee may need to demonstrate that male employees were given more favorable treatment than she was, *e.g.*, not terminated during a company-wide reorganization. A plaintiff may prove the fourth element of the *prima facie* case through comparison to "another employee who is similarly situated in her or his ability or inability to work [and] received more favorable [treatment]." *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir.1996).

Based on the experience and knowledge of the employment attorneys at Nardone Limited, proximity of time between a pregnancy disclosure and termination is often the only evidence that an employee offers to claim that their termination was discriminatory. The law in the Sixth Circuit is well settled, however, that timing alone is not sufficient to establish a pretext. *Donald v. Sybra, Inc.*, 667 F.3d 757, 763 (6th Cir.2012) ("the law in this circuit is clear that temporal proximity cannot be the sole basis for finding pretext.")(citing *Skrjanc v. Great Lakes Power Serv. Co.*, 272 F.3d 309, 317 (6th Cir.2001)). Indeed, close proximity of time between learning of an employee's protected class status and an adverse action is only a factor in considering the ultimate question of whether the employee can demonstrate that she suffered an adverse action motivated by an employer's discriminatory intent.

Burden Shift

If an employee is able to establish a *prima facie* case, this creates a temporary presumption of discrimination and the burden shifts to the employer to articulate a legitimate explanation for termination or adverse action. Courts have noted that the employer's burden of production is relatively low and that, any "legitimate, non-discriminatory reason" will rebut the presumption triggered by the prima facie case. *See, e.g., Stookey v. South Shore Transp. Co.*, 2012-Ohio-3184, ¶9, 2012 Ohio App. LEXIS 2811 (6th Dist.). The employer's burden is one of production, meaning that to rebut the presumption the defendant

[3] (See, *Flores v. Buy Buy Baby, Inc.*, 118 F.Supp.2d 425 (S.D.N.Y.2000)(lack of complaints, disciplinary actions, or warnings regarding plaintiff demonstrated that she possessed the necessary skills for the job and was therefore qualified for purposes of establishing a prima facie case)

must “clearly set forth, through the introduction of admissible evidence, the reasons” for the termination or adverse employment action.” *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254-55, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). At that point, the presumption of discrimination disappears, and the plaintiff must prove “that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” *Roge v. NYP Holdings, Inc*., 257 F.3d 164, 168 (2nd Cir.2001).

Conclusion

As a takeaway, the first step in ensuring that your business is free from unfounded claims is to document performance or conduct problems when they occur, and do so in a detailed, clear, and objective format. It is important that employers seek out the necessary legal advice to ensure that they are not exposed to a false claim of pregnancy discrimination when considering terminating a poorly performing employee. And, it is even more important that an employer consult legal counsel immediately if they are the subject of a potential wrongful termination claim.

Contact the employment and labor law attorneys at Nardone Limited if you have any questions about this article or how to handle related issues in your business. Nardone Limited attorneys handle the full spectrum of employment law issues, including providing consulting advice, assistance with separation agreements, conducting internal employer investigations, defending EEOC or other administrative investigations, and handling litigation alleging wrongful termination or other employee claims.