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pregnancy

*discrimination
complaints higher*

Obama's State of the Union address signals greater enforcement of civil rights laws

By **BERNADETTE STARZEE**

The number of pregnancy discrimination cases has risen in recent times, and the current economic and political climate will likely beget more.

According to the U.S. Equal Employment Opportunity Commission, pregnancy discrimination complaints climbed from 3,977 in fiscal year 1997 to 6,196 for fiscal year 2009, a 56 percent increase. This category rose significantly more sharply than all workplace discrimination

charges, which increased by 16 percent (from 80,680 to 93,277) in that span.

The pregnancy statistics include complaints at the EEOC and state and local fair employment practice agencies. The total payout for settled pregnancy discrimination cases increased from \$5.6 million to \$16.8 million in the 12-year span.

"Women have a greater awareness of their rights today than in the past," said Ellen R. Storch, counsel at Kaufman Dolowich Voluck & Gonzo, a Woodbury-based national labor and employment law firm representing employers, who noted the increased sophistication may be partly due to the fact that women are having children later in life than they did a generation ago. "Because they're more established in their careers, they have more to lose if they suffer an adverse em-

ployment action like a termination or a demotion and, as a result, may be more likely to allege discrimination," she said.

But Storch pointed out that an increase in cases doesn't necessarily mean there is more discrimination or that more cases have merit. According to the EEOC, in fiscal 2009, slightly more than half (54.3 percent) of the cases were found to have no reasonable cause, a percentage that has remained fairly consistent throughout the past 12 years (it was 52.9 percent in 1997). Of the 2009 cases, just 27.4 percent resulted in a favorable outcome for the charging party.

However, employers beware: Discrimination cases, including those related to pregnancy, will likely rise further given the economy and the current administration's agenda.

“When there are more layoffs and cutbacks, some of the people losing their jobs or having their hours cut are inevitably going to be women who just announced that they are pregnant or who recently returned from maternity leave,” Storch said, noting that in tough economic cycles, people may be more likely to pursue a discrimination claim because they have a greater need for the income. For instance, their spouses are more likely to be out of work, and the claimants are more likely to have a harder time finding a new position. “Jobs are more precious today,” Storch said.

Statements in President Barack Obama’s State of the Union address in January should have put businesses on alert, said Jonathan Trafimow, a partner who heads the employment law practice group at Moritt Hock Hamroff & Horowitz in Garden City. Obama said his administration “has a civil rights division that is once again prosecuting civil rights violations and employment discrimination.”

Added Trafimow: “Employers should be warned: Vigorous enforcement of employment-related discrimination and wage/hour claims is coming.”

Pregnancy discrimination involves treating an employee or job applicant unfavorably because of pregnancy, childbirth or a medical condition related to pregnancy or childbirth. The law forbids discrimination when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training and fringe benefits.

Further, if a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the employer must treat her the same as any other temporarily disabled employee, such as someone who had gall bladder surgery or who broke a leg. For example, the employer may have to provide modified tasks, alternative assignments, disability leave or unpaid leave.

Claims often arise when a woman is fired, demoted, given a pay decrease or denied a promotion or plum assignment shortly after announcing pregnancy or returning from maternity leave. However, timing alone does not a legal case make. “Just because the bad thing happened right after a woman announced her pregnancy, it doesn’t necessarily mean one has anything to do with the other,” Trafimow said. “You have to prove

causation.” Evidence may include comments made and/or historic actions taken by the employer.

According to Storch, employers sometimes make comments when a woman announces her pregnancy, which may be used to support an employee’s claim that the employer harbored a discriminatory attitude. Examples of such comments include “You’re going to have another kid? Didn’t you just have a baby last year?” and “Are you serious about your career or not?”

When contemplating layoffs, an employer should consider whether a disproportionate number of employees from a protected group will be let go under the firm’s chosen criteria. “Make a decision based on objective criteria, such as ‘last hired, first fired,’ or terminating those whose performance, based on measurable benchmarks, is the weakest,” Storch advised. However, if, upon further review, it appears that members of a particular protected class are seemingly disproportionately affected, an employer may want to alter the selection process to avoid even the appearance of discrimination.

Employers have to be mindful of their history in handling extra leave taken by other employees. For instance, Trafimow said, a firm with predominantly male employees may look back and discover

that over the past few years, there had been several cases in which male employees exceeded their allotted time off (such as taking more sick days than allowed). “A firm may have a pregnant woman who exceeds her time off,” Trafimow said. “It may be a blatant violation of company policy, but if the firm never disciplined male employees by firing them, it has to think about its exposure if it fires the woman.”

A firm that gets wind of a possible discrimination case should take immediate action, Trafimow said.

“By doing a bona fide internal investigation, you can come to a conclusion and offer the employee some retribution to try to fix the problem,” Trafimow said. “With good communication, you might be able to head it off before it becomes a big problem.”

Companies can help protect themselves by having clear policies that prohibit discrimination and by creating and enforcing a procedure by which employees have an avenue to bring concerns and complaints to the company. “It’s incumbent on the company to not only have a good policy and complaint procedure on paper, but to make it a real venue by ensuring employees know about it and that managers are trained in it,” Trafimow said.



Jonathan Trafimow of Moritt Hock Hamroff & Horowitz cautions companies to proactively address potential discrimination claims.