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Question: Are employers required to provide "reasonable accommodations" for pregnant employees?

Quick Answer: The U.S. Supreme Court may soon answer this question in *Young v. United Parcel Serv., Inc*.

- *McFee v. Nursing Care Mgt. of Am., Inc.,* Ohio Supreme Court, June 22, 2010
- *Young v. United Parcel Serv., Inc.,* United States Court of Appeals for the Fourth Circuit, Jan. 9, 2013
- *Latowski v. Northwoods Nursing Center,* United States Court of Appeals for the Sixth Circuit, Dec. 23, 2013

Four years ago, the Ohio Supreme Court decided McFee v. Nursing Care Mgt. of Am., Inc., 126 Ohio St.3d 183. In *McFee*, a pregnant employee needed maternity leave during her first year of her employment, but her employer provided leave only to employees *after* the first year of employment. As Ohio law requires pregnant women to be "treated the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work," R.C. 4112.01(B), the Court held it was not unlawful for McFee's employer to terminate her. She was treated "the same" as any other employee similar in their ability to work who had been employed for less than one year.

Persons with disabilities are entitled to reasonable accommodations, such as leave from work and light duty. This raises a question not addressed in *McFee*: whether the requirement to treat pregnant employees "the same" as other employees includes the requirement to provide light duty and leave if such accommodations are provided to disabled employees who are "similar in their ability or inability to work."

In Young v. United Parcel Serv., Inc., 707 F.3d 437, (4th Cir.2013), the Fourth Circuit held that not providing light duty to pregnant workers – but allowing it for disabled employees – was neither direct evidence of pregnancy discrimination, nor did it raise an inference of discrimination. The court held that providing accommodations under the ADA is a neutral, pregnancy-blind approach, and does not discriminate based upon pregnancy. The U.S. Supreme Court agreed to review the case and heard oral arguments on Dec. 3, 2014.

The question asked of the Supreme Court on appeal is "Whether, and in what circumstances, an employer that provides work accommodations to non-pregnant employees with work limitations must provide work

accommodations to pregnant employees who are 'similar in their ability or inability to work.'"

The Sixth Circuit recently touched upon a similar topic. While not addressed in the context of disability, the court compared the lifting restrictions of an employee injured on the job with the lifting restrictions of a pregnant employee, and held them to be "similarly situated in their ability to work." In reversing a summary judgment decision, the court found that a prima facie case for pregnancy discrimination had been established, and that a jury could "easily conclude" that a policy "terminating otherwise qualified workers" that had "any restrictions arising from non-workplace injuries" to be so lacking in merit as to be a pretext for discrimination. Latowski v. Northwoods Nursing Center, 549 Fed. Appx. 478, (6th Cir.2013).

Finally, the EEOC recently issued new regulations that address how pregnancy may be entitled to accommodations. The regulations note that under the 2008 amendments to the ADA, an impairment caused by pregnancy (but not pregnancy itself) can more easily qualify as a disability, and thus be entitled to a reasonable accommodation. The Supreme Court's upcoming *Young v. UPS* decision will likely provide further clarification on this issue.

Importance: Pregnancy discrimination cases have been the subject of recent high-profile cases, and the Supreme Court's acceptance of the *Young* case may provide some much-needed guidance on the issue.

Question: What constitutes a hostile work environment?

Quick Answer: A workplace where an employee's supervisor engages in discriminatory based comments and actions, and there is no action taken by the employer to curtail the harassment.

- *Coy v. County of Delaware,* Southern District of Ohio, Eastern Division, Jan. 10, 2014
- *Smith v. Superior Products LLC,* Tenth Appellate District, Franklin County, May 8, 2014
- *Gorajewski v. Douglas,* Sixth Appellate District, Lucas County, March 28, 2014
- *Chapa v. Genpak,* Tenth Appellate District, Franklin County, March 11, 2014

The question of what constitutes a hostile work environment has recently been considered by several courts. Criteria have been formulated to determine if a workplace is hostile. The court examines 5 factors: (1) was the plaintiff a member of a protected class, (2) was there unwelcome harassment, (3) was the employee's membership in a protected class the source of the harassment, (4) did the harassment interfere with the employee's work and create a hostile environment and (5) Respondeat Superior (employer liability). Harris v. Forklift Sys. Inc., 510 U.S. 17 (1993).

The case of Coy v. County of Delaware, 993 F. Supp. 2d 770 (S.D. 2014) determined that the plaintiff was subjected to a hostile work environment resulting from the frequent sexually based comments by her supervisor. This satisfied the five criteria for a hostile work environment. As a female she was a member of a protected class. The court considered comments made directly to her and those made out of her presence which she knew about. It weighed the comments made directly to her more heavily than those she just knew about. The court determined the comments were sufficiently prevalent as they occurred

almost daily. The frequency of comments derogatory to women combined with being passed over for promotion and the harasser being the employee's supervisor lead to a hostile workplace finding.

A similar holding came in Smith v. Superior Products LLC., 2014 Ohio 1961 (10th Dist. 2014) which found that a supervisor's ongoing use of racially offensive language and his habit of putting a cocked gun on his desk when meeting with black employees created enough evidence that there was a hostile working environment. The harassment was severe, physically threatening and interfered with the employee's performance. The employee took a demotion and transfer to avoid working with this manager. This interference was heightened when the employee was not recalled from a layoff in-part because of his unwillingness to work with this manager. These factors fulfilled the criteria for a hostile work environment created by plaintiff's supervisor.

The court focused on the necessity of their being an adverse impact to plaintiff's employment for a workplace to be considered hostile in Gorajewski v. Douglas, 2014 Ohio 1296 (6th Dist. 2014). Plaintiff claimed to be subjected to sexually harassing emails. However, the plaintiff had been placed with the company through a temporary service and had voluntarily quit the assignment. The court held that a hostile work environment did not exist even if the supervisor's actions rose to the level of harassment because no tangible employment action, affecting plaintiff's employment occurred. There was no evidence that her supervisor's actions had any causal connection to her continuing to be employed by the company.

The requirement that the hostile environment be created by a supervisor thereby engaging Respondeat Superior liability on the part of the employer was addressed in Chapa v. Genpak, 2014 Ohio 897 (10th Dist. 2014). The court ruled there was not a hostile workplace because the alleged harassment had been infrequent and did not rise to the level of being humiliating or threatening. Comments were not at a level of severity that would be harassment as the employee was called a burrito or baby loco not a stronger insult to a Hispanic such as wetback. The court characterized it as infrequent banter between co-workers who hung out together. This decision was supported by the alleged harasser not being plaintiff's direct supervisor and usually working a different shift so there was no basis for liability on the part of the company.

Importance: These cases demonstrate an adherence to the requirement that all five criteria exist, with special emphasis on the requirement a supervisor instigate the situation or other demonstration of company responsibility in order for the court to declare a workplace hostile.

Question: Can temporary impairments be treated as disabilities?

Quick Answer: Yes if they are sufficiently severe and of a lengthy duration.

- *Summers v. Altarum*, United States Court of Appeals for the Fourth Circuit, Jan. 23, 2014
- *Roghelia v. Hopedale Mining*, Seventh Appellate District, Harrison County, June 23, 2014

In Summers v. Altarum Institute, Corp., 740 F.3d 325, (4th Cir. 2014), the court held that although impairments that last only for a short period of time are typically not covered by the ADAAA they may be covered if they are sufficiently severe. An employee successfully pled that his temporary impairment which included surgery, complete bed rest, pain medication and physical therapy which resulted in his being unable to put any weight on his left leg for six weeks and his being unable to walk normally for seven

months, was a disability. The court relied on the 2008 changes to the ADAAA which were enacted to expand the scope of protection available because Congress believed that the Supreme Court had improperly restricted the scope of the ADA. The court also relied upon EEOC regulations which expressly provided that an impairment lasting or expected to last fewer than six months can be substantially limiting for purposes of proving an actual disability. The court limited its holding by noting that temporary disabilities require only temporary accommodations.

The ADAAA changes also expanded the definition of perceived disabilities by removing the requirement that they be perceived as limiting a major life activity. In Roghelia v. Hopedale Mining, 2014 Ohio 2935, (7th Dist. 2014), the court reversed the lower court's granting of the employer's motion for summary judgment after determining that the employee failed to demonstrate that the employer perceived him as being substantially limited in a major life activity. The court held that the test for a perceived disability is not whether the disability is perceived to limit a major life activity, but rather whether there is a perception of the disability. There the employee amputated his thumb while working for the employer and was unable to work for three months. When the employee returned to work he was still experiencing pain in his hand which required another surgery. While he was off work for two weeks to have the surgery, his employer fired him for absenteeism. There was conflicting evidence about whether the employee had violated the employer's absenteeism policies or whether his continuing medical problems were the reason for his termination. The court held that whether the employee was perceived as disabled was a question of fact for the jury and so was whether his termination was based on that perception or if it was based on his alleged violation of the absenteeism policy.

Importance: All of these cases reflect the 2008 changes to the ADAAA which were designed to expand the scope of protection under the ADA which the Supreme Court in previous decisions had restricted.

Question: Can landlords avoid liability for no-pet policies with temporary exemptions?

Quick Answer: A temporary exemption may avoid liability, but only if the approval is not unduly delayed. The answer is no for a temporary approval with no change in policy.

- Overlook Mutual Homes, Inc. v. Spencer, 415 Fed. 617 (6th Cir. 2011)
- Prindable v. Ass'n of Apartment Owners of 2987 Kalakaua, 304 F. Supp.2d 1245 (D.Haw. 2003)
- Sabal Palm Condominiums of Pine Island Ridge Ass'n v. Fischer, 6 F.Supp.3d 1271 (S.D. FL. 2014)
- Velzen v. Grand Valley State University, 902 F. Supp. 2d 1038 (W.D. Mich. S.D. 2012)

Facts in *Overlook*: In response to the Spencer's getting a cockapoo for their daughter who was being treated for an anxiety disorder, Overlook sought to enforce their long-standing no-pet policy. While there was a threatened eviction, Overlook refrained from taking that action while they requested information supporting the accommodation request. When the Spencer's refused to sign a release allowing Overlook to obtain their daughters medical and counseling records, Overlook filed a declaratory judgment action but still did not begin eviction proceedings or make an official decision on the request.

Facts in *Prindable*: The Association of Apartment Owners (AOAO) was governed by bylaws that prohibited animals but excepted qualified individuals with disabilities who may have assistance animals. There was

an initial dispute about the adequacy of medical documentation provided but after these were supplemented and Prindable filed with the Hawaii Civil Rights Commission, AOAO's board agreed to grant a temporary exemption from their no-pet policy with final approval of the reasonable accommodation request being contingent on the outcome of an investigation by the Commission.

Facts in *Sabal Palm:* Deborah Fischer has multiple sclerosis and is confined to a wheelchair. Her request for a reasonable accommodation described the animal as a trained service dog to assist with tasks of her daily life that included retrieving items, opening and closing doors, and turning light switches on and off. In spite of the obvious limitations caused by her disability and the significant tasks the dog performed, Sabal Palm insisted on verification of the extent of her medical condition as well as her medical need for a dog that weighs in excess of 20 pounds and filed a declaratory judgment action while permitting Deborah to "temporarily keep" the dog.

Facts in *Velzen:* The university's policy limited accommodations to trained service animals. Their approval to keep a guinea pig in a dormitory as an emotional support animal was couched in terms of "standing by its policy" but having been "approved" at this time as an "interim exception", and "temporary."

Importance: In some circumstances, a temporary exemption will avoid liability. Here's when:

- *Overlook:* Overlook moved for summary judgment on the grounds that they were entitled to the information they sought, the animal had no training as required by the Americans with Disabilities Act, and they had taken no action causing the Spencer's harm. The court ruled that it was not necessary for the animal to be a trained service animal in order to qualify as a reasonable accommodation under the Fair Housing Laws. The case then proceeded to a jury trial. At the close of evidence, the court granted Overlook's motion for judgment as a matter of law regarding any Fair Housing Law violations and dismissed the case. The Spencer's appealed to the 6th Circuit court of appeals that upheld a jury verdict because, rather than denying the request, Overlook sought guidance from the court on the validity of an emotional support animal as an assistance animal at a time when there was no precedent for such as determination and Spencer's daughter had the benefit of the emotional support animal while awaiting the outcome of the litigation.

- *Prindable:* Even when Prindable withdrew his charge before the Commission made its determination and opted for court action, the temporary exemption granted by the AOAO board continued. On these facts, defendant's summary judgment was granted because the court found that plaintiff had, in fact, not been denied his request for a reasonable accommodation.

- *Sabal Palms*: A temporary exemption failed to exonerate a defendant when the delayed response to the accommodation request was based on protracted litigation in spite of the fact that the plaintiff had provided extensive medical information and verification of the ways in which the assistance animal ameliorated her limitations. The court acknowledged that the only factor that favored the condominium association was that they permitted the resident to keep the assistance animal while the litigation was pending but nonetheless ruled against them for the following reasons: the severe and obvious physical nature of Fischer's symptoms, yet the association requested extensive documentation including her medical records from all of Fischer's healthcare providers who diagnosed or treated the disability that made a service dog necessary. The association received a certification from Canine Companions for Independence regarding the dog, yet they requested all documents relating to the nature, size, and species of dog and all documents regarding any training received. In spite of the documentation received, both regarding Fischer's medical history and the dog's training, the association found it

insufficient and instituted a declaratory judgment action partly because they believed a dog over 20 pounds was not reasonable or necessary. The court concludes that “housing providers should cooperate with residents to resolve disputes over reasonable accommodations rather than turning to the courts”, citing to *Overlook*.

- *Velzen:* Because this temporary exemption was limited to a particular dormitory and did not constitute a change in policy, the issue of a fair housing violation was not moot, supporting a finding of liability and making injunctive relief appropriate.