

At Issue

A RISK MANAGEMENT NEWSLETTER FOR
COLLEGES AND UNIVERSITIES



Pregnancy Discrimination

Disparate Impact Claims Under the Pregnancy Discrimination Act

By: Rona L. Platt, Esq.

The EEOC Issues New Guidance in the Wake of *Young v. United Parcel Services, Inc.*

Earlier this year, the Supreme Court addressed the issue of accommodation under the Pregnancy Discrimination Act (PDA)¹ in *Young v. United Parcel Services, Inc.*² In *Young*, the Supreme Court held that an individual pregnant worker may assert a disparate impact claim under the PDA by meeting the standards set forth in prior precedent. A disparate impact claim is one which asserts that a facially neutral policy or practice is discriminatory because it disparately impacts a protected class of persons.³ As a result of the decision, the Equal Employment Opportunity Commission (EEOC) recently revised its Enforcement Guidance on Pregnancy Discrimination and Related Issues, Notice Number 915.003, dated June 25, 2015 (the "June 25, 2015 Guidance").

EEOC PROVIDES CLARIFICATION

Specifically, the EEOC added language to the June 25, 2015 Guidance clarifying when the disparate impact of an employer's actions may be violative of

the PDA. For example, the PDA defines discrimination on the basis of pregnancy as including the failure to treat women affected by pregnancy "the same for all employment related purposes...as other persons not so affected but similar in their ability or inability to work."⁴ While an employer's policy may not overtly discriminate against a woman on the basis of pregnancy, a policy may nonetheless violate this section of the PDA if it "impose[s] significant burdens on pregnant employees that cannot be supported by a sufficiently strong justification."⁵ The EEOC cautions that when examining or investigating a disparate impact claim under the PDA, all of the evidence must be examined to determine whether reasonable cause exists to believe that the challenged policy or practice is, in fact, discriminatory. The context of the circumstances are relevant to the investigation and the presence or absence of certain evidence should not be considered dispositive.⁶

FORMING A DISPARATE IMPACT CLAIM

To establish a disparate impact claim under the PDA, the person alleging pregnancy discrimination must meet the burden set forth in *McDonnell Douglas Corp. v. Green*.⁷ Doing so requires evidence that a similarly situated, but not pregnant, worker was treated differently or more

IN THIS ISSUE

P.1	Pregnancy Discrimination: New Guidance
P.2	Transgender Employees: And the Current Case Law
P.3	Frozen Pipes: Prevention Methods
P.5	Title IX: Helpful Information

favorably. As the Court noted in *Young*, such a case is established when the person shows “that she belongs to a protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others ‘similar in their ability or inability to work.’”⁸ In the case of a pregnant worker, another “similar in their ability or inability to work” could be someone who has, for example, a lifting restriction because of some other physical impairment.

AVOIDING LIABILITY

If the employee meets that burden, the employer may avoid liability by establishing a legitimate, non-discriminatory reason for treating pregnant workers differently than nonpregnant workers who are similar in their ability or inability to work. The cost associated with providing the accommodation to pregnant workers is not normally considered sufficient.⁹

Even if the employer establishes a legitimate, nondiscriminatory reason, the employee may provide evidence that the reason is pretextual. For example, an employer that accommodates a large number of nonpregnant workers with limitations but denies similar accommodation to large numbers of pregnant workers may be found to be unduly burdening the pregnant workers, and thus be found liable.

GET HELP

Given the Supreme Court’s decision in *Young* and the EEOC’s June 25, 2015 Guidance, you should revisit your policies to ensure that they do not run afoul of the law. Careful consideration should be given to policies addressing accommodations. Consult with your counsel to ensure those policies comply with all applicable federal, state and local laws, including the PDA.

¹ 42 U.S.C. § 2000e(k).

² ___U.S. ____, 135 S.Ct. 1338 (2015).

³ *Ibid.* at 1354-1355.

⁴ 42. U.S.C. § 2000e(k).

⁵ June 25, 2015 Guidance at Section I.B.1.

⁶ *Ibid.*

⁷ 411 U.S.792, 802 (1973).

⁸ 135 S.Ct. 1338, 1354.

⁹ June 25, 2015 Guidance at Section I.C.1.a.ii.

Transgender Employees and the Current Case Law

By: Rona L. Platt, Esq.

As more people publicly identify as transgender, lesbian, gay, bisexual, or otherwise than heterosexual, employers can potentially face issues they never expected. For example, does an employer have to allow a transgender individual to use the mono-sex restroom associated with the individual’s chosen gender? Or may the employer require the transgender individual to use the mono-sex restroom associated with the individual’s biological gender? Do the prohibitions against discrimination on the basis of sex or gender extend to transgender or gender identity? As discussed below, employers must remain informed of the applicable statutes and regulations to ensure that they are not violating the rights of any protected class, which includes transgender individuals.

CASE LAW

In 1989, the Supreme Court decided *Price Waterhouse v. Hopkins*, and held that the protections of Title VII extended to workers who are discriminated against because of sex stereotyping¹. Ms. Hopkins was denied a promotion and told that in order to secure one, she needed to “walk more femininely, talk more femininely, [and] dress more femininely [.]” As the Court made clear, discrimination predicated upon assumptions or expectations about how

a person should dress, behave, etc. because of his or her sex, violate Title VII.

The Court’s pronouncement in *Price Waterhouse* has served as the basis for numerous suits brought by transgender individuals and the number of those suits is increasing. While the Supreme Court has yet to hear a case involving a transgender individual, lower level courts have been busy. For example, Title VII has been held to protect a man transitioning to female who was suspended upon adopting a more feminine look and advising his employer that he was going to transition², a male to female transsexual who dressed as a male while on duty as a police officer but dressed as a woman when off duty³, and an individual in the midst of transition from male to female who was allegedly fired because her employer feared lawsuits by others if she was permitted to use the women’s restroom⁴. In each case, courts found that the plaintiff was discriminated against because of assumptions or expectations about how a person of a given sex should dress, behave or act.



The protection is not limited to Title VII. Among the other statutes found to be violated by discrimination against persons not conforming to gender stereotypes have been the Equal Credit Opportunity Act, where a male dressed in traditionally female attire was denied a loan application and sued⁵. In essence, anytime a statute forbids discrimination on the basis of sex, a court is likely to hold that discrimination against transgender individuals runs afoul of that statute.

EEOC ENFORCEMENT

In addition, the Equal Employment Opportunity Commission (EEOC), which has primary jurisdiction over employment practices complaints arising under, among other statutes, Title VII, investigates charges filed by individuals who believe that they have been discriminated against because they are transgender, or transitioning from one sex, or do not conform to gender stereotypes. In the last three fiscal years, the EEOC investigated more than 300 complaints involving gender identity and/or transgender issues.⁶ In fact, the number of complaints involving gender identity and/or transgender issues filed with the EEOC has increased year over year. In Fiscal Year 2013, 147 charges were filed; in Fiscal Year 2014, 202 were filed; and in the first two quarters of Fiscal Year 2015, 112 charges were filed. In fact, the Strategic Enforcement Plan for Fiscal Years 2013-2016, adopted by the EEOC in December 2012, makes enforcement of Title VII's provisions to protect lesbian, gay, bisexual and transgender individuals a top priority.⁷

GET HELP

You should revisit your policies to ensure that they do not run afoul of the law. For example, the Department of Labor's Occupational Safety and Health Administration (OSHA) mandates that employers provide access to restrooms that correspond to their gender identity⁸. Therefore, if you have mono-sex bathrooms, an employee

transitioning from male to female and identifying as female must be permitted to use the women's room.

Careful consideration should be given to policies addressing discrimination on the basis of all protected classes, including sex, to ensure that it complies. Consult with your counsel to ensure those policies comply with all applicable federal, state and local laws, and protect all to whom the courts have said the protection is extended, including transgender individuals.

RESOURCES

EEOC:

http://www.eeoc.gov/eeoc/publications/brochure-gender_stereotyping.cfm

http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

<http://www.eeoc.gov/eeoc/publications/upload/Gender-Stereotyping-LGBT-brochure-OLC.pdf>

<https://www.osha.gov/Publications/OSHA3795.pdf>

¹ Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that sex stereotyping is a form of gender discrimination).

² Smith v. City of Salem, 378 F.3d 566 (6th Cir. 2004).

³ Barnes v. City of Cincinnati, 401 F.3d 729 (5th Cir. 2005)

⁴ Glenn v. Brumby, 663 F.3d 1312 (11th Cir. 2011).

⁵ Rosa v. Parks W. Bank & Trust. Co., 214 F.3d 213 (1st Cir. 2000)

⁶ http://www.eeoc.gov/eeoc/newsroom/wysk/enforcement_protections_lgbt_workers.cfm

⁷ <http://www.eeoc.gov/eeoc/plan/sep.cfm>

⁸ <https://www.osha.gov/Publications/OSHA3795.pdf>

Frozen Pipes Reminder – Take Steps Now to Avoid this Silent Cold Weather Hazard

By: **Andrew Graham**, Senior Vice President Risk Management Services, Wright Specialty Insurance



Classrooms flooded. Ceilings, flooring, walls, electrical systems damaged. Extra educational space non-existent. Construction in the building during classes. These are some of the unexpected issues faced by colleges and universities that experience pipe freeze damage.

In the Spring 2015 edition of At Issue, we used this past very cold winter's expensive pipe freeze

losses to discuss cold weather preparation for the coming cold. Well, we are at the start of the academic year once again and it is time to make sure steps have been taken against pipe freezes. And if you have not started, there is still time to prepare.

Below is a list of the items discussed in the last issue:

- Like any accident, an investigation should be conducted to determine the root cause of a pipe freeze. Determine the causes and develop a strategy to prevent recurrence incorporating both physical system improvements (insulation) and management improvements (identifying all areas where pipe freezes are possible and taking steps to address those areas).
 - Unusual cold for a certain region of the country is never the only root cause and should not be dismissed as a one-time event especially considering climate change effects. Climate change does not just mean warmer temperatures globally but wider variations from considered norms.
- Did a pipe freeze occur in one structure that is a basic “cookie cutter” of other structures? If so the other identical or similar units may also be at risk. This occurs most often with multiple resident housing units built at the same time.
- Downtimes such as school breaks during the winter are particularly worrisome due to:
 - Reduced staffing.
 - Lowered thermostats to conserve energy.
 - No students or fewer staff members around to detect either malfunctioning heating or frozen/burst pipes.
 - Renovations taking place exposing pipes that are not normally exposed.
- New construction or renovations should incorporate cold weather improvements such as:
 - More and better insulation.
 - Depth of water lines buried in the ground. Deeper is generally better.
 - Locating water lines away from exterior walls.
 - Providing heat where otherwise there would be none.
 - Making water shut-off valves easily accessible and visible.
 - Cracks and holes in exterior walls should be identified and sealed.
- Preparation for known frigid weather:
 - Keep thermostats above 55 degrees.
 - Drain all pipes not in use or for fire protection.
 - Inspect all dry pipe sprinkler valve and fire pump rooms to ensure they are kept warm with a UL Listed space heater or building heating unit.
 - Identify all main water valves and keep access to them clear in case those valves need to be closed in a hurry.
 - Open doors from heated areas to the unheated areas to keep pipes in those areas sufficiently warm.
 - Take thermometer readings during especially cold days to help determine those areas most vulnerable.

Many of the educational institutions in our wide book of business suffered substantial pipe freeze losses last year. Many more had near misses that did not result in damage THIS TIME. For those that sustained damage, make sure that those areas are now protected and any similar areas have been inspected to find weaknesses that need additional protection. Those that did not suffer damage could have just been very lucky. Take luck out of the equation by putting the time and effort in now to identify and address vulnerable areas.

Visit this website for additional information:

<http://www.redcross.org/prepare/disaster/winter-storm/preventing-thawing-frozen-pipes>

Need helpful information about Title IX?

Wright Specialty Insurance has developed a Title IX Resource Center that is on our website. Working in cooperation with Cullen and Dykman LLP, a nationally recognized law firm with a prominent higher education practice, we developed this resource to help our college and university clients comply with the requirements of Title IX.

The Resource Center contains informative documents, links and articles. The topics include:

- Federal Regulations and Guidance
- Claim Recognition
- Reporting and Complaint Handling
- Investigations and Training
- Policy Requirements

You can find our new Title IX Resources at the Risk Management Resource Center under the Policyholders tab (www.wrightspecialty.com/policyholders.html). Policyholders can also receive alerts and additional information by joining a higher education blog provided by Cullen and Dykman, LLP.

If you do not know or have forgotten your user name and password to enter our Risk Management Resource Center, contact Erica Gotay at egotay@wrightinsurance.com.

News & Views

The US Equal Employment Opportunity Commission (EEOC)

The EEOC published information concerning enforcement protections for LGBT workers. The EEOC indicates that while Title VII does not explicitly include sexual orientation or gender identity in its list of protected bases, it interprets the statute's sex discrimination provision as prohibiting discrimination against employees on the basis of sexual orientation and gender identity. See our article on Transgendered Employees.

(Source: US Equal Employment Opportunity Commission)

US Department of State – Travel Warnings

This was a busy summer for the US Department of State. From June through mid-September, the agency issued 22 warnings and six alerts due to conditions in several different regions across the globe. The State Department publishes information when it believes travel for US citizens can be dangerous. The warnings and alerts are usually the result of political unrest, violence linked to large-scale criminal activities, or weather-related events.

(Source: US Department of State, US Passports and International Travel)

Drone Use by Colleges and Universities

Data released last year by the Federal Aviation Administration indicates that 25 percent of more than 900 requests seeking approval to fly drones in the U.S. came from colleges and universities.

(Source: US News and World Report)



Winter 2015-16 Forecast

According to the meteorologists at The Weather Channel, it will be cold this winter in the south and on the east coast, but warmer in the north. Temperatures will be way below average in Texas, Louisiana and Mississippi. Blame it on El Niño.

(Source: The Weather Channel)

AAU Releases Campus Climate Survey on Sexual Assault and Sexual Misconduct

The Association of American Universities released data from its 2015 survey of 27 universities concerning sexual assault and sexual misconduct on campuses. 11.7 percent of student respondents reported experiencing nonconsensual sexual contact by physical force, threats of physical force, or incapacitation since they enrolled at their university. Female undergraduates report an incident rate of 23.1 percent; 5.4 percent for males.

(Source: Association of American Universities)



The Right Partnership for You.®

333 Earle Ovington Blvd., Suite 505, Uniondale, NY 11553-3624
Toll Free: 1.877.976.2111 | Phone: 516.750.3903 | Fax: 516.227.2352
www.wrightspecialty.com

Wright Specialty Insurance is a member of The Wright Insurance Group™
© Copyright 2015 The Wright Insurance Group, LLC. All Rights Reserved.