



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Commissioner
Victoria A. Lipnic

STATEMENT OF
THE HONORABLE VICTORIA A. LIPNIC
COMMISSIONER, U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
“ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION
AND RELATED ISSUES”
JULY 14, 2014

I voted to disapprove the proposed Enforcement Guidance on Pregnancy Discrimination and Related Issues (“Pregnancy Guidance” or “Guidance”) recently issued by the Commission. As this matter was considered by way of a notation vote, Commissioners did not choose the opportunity to publicly share our views on the final Guidance prior to voting. I do not quarrel with that decision, but in light of the importance of this issue – and anticipating the public controversy the Pregnancy Guidance is likely to engender – I felt it important to formally set out the reasons for my vote.

As a preliminary matter, I am disappointed that the Commission did not choose to make a final draft of the Pregnancy Guidance available for public review and comment prior to it being put to a vote. On two separate occasions over the last year and a half, I argued that any guidance on this topic be afforded such public notice and comment, to no avail. Indeed, I am particularly troubled by the fact that a majority of the Commissioners endorsed this position, yet appear to have been ignored. I continue to believe that public input on the Pregnancy Guidance would have been invaluable, particularly in light of the fact that the Guidance adopts new and dramatic substantive changes to the law. Allowing for public review would have, in my view, potentially strengthened any final document, but perhaps more important, provided for the increased transparency and credibility of the Commission. Our failure to do so is, to me, a missed opportunity

I also question the wisdom of the timing of the Commission’s actions. The most significant questions addressed in the Pregnancy Guidance are pending before by the U.S. Supreme Court for review and decision. *See Young v. United Parcel Services, Inc.*, 707 F.3d 437 (4th Cir. 2013), *cert. granted*, 86 USLW 3602 (U.S. July 1, 2014) (No. 12-1226). In *Young*, the Court is being asked to decide which workers are the appropriate comparators to a pregnant worker under the Pregnancy Discrimination Act (“PDA”), and what treatment a pregnant worker may be entitled to under that statute. Insofar as these issues – of central importance to the Guidance – will soon be decided by the Court, I think it is unwise of the Commission to issue guidance at this time, potentially setting forth standards and practices for employers that may well be mooted in the very near future depending on how the Court decides *Young*. Moreover, the credibility of the Commission is done no favor by issuing *any* guidance on these points while these critical questions are pending – particularly if the Court adopts a position which directly contravenes that taken in the Guidance (which, in this instance, is far from an unlikely hypothetical or rhetorical

question, insofar as no Circuit Court of Appeals has adopted the Commission's position, and indeed, most have flatly rejected it). Rather than attempt to get out in front of the Court, I think it would have been most prudent to allow the Court to decide these issues, and then issue guidance in light of the Court's *Young* decision.

In the same vein, the Pregnancy Guidance's discussion of an employer's legal obligation under Title VII with respect to contraception has already been overtaken by events, specifically, the Court's recent decision in *Burwell v. Hobby Lobby Stores, Inc., et al.*, --- S. Ct. ---, 2014 WL 2921709 (June 30, 2014). It is my view that the Commission's position with respect to contraception mandates under Title VII needs to be thoroughly reviewed in light of this case, particularly insofar as it held that under the Religious Freedom Restoration Act, and irrespective of other federal law mandates, certain employers may *not* lawfully be compelled to provide all forms of contraception. At a minimum, the Court's *Burwell* decision dictates a full and substantive review of the Commission's guidance on this topic, and the strength and validity of its legal position.

Beyond these procedural concerns, I voted to disapprove the Pregnancy Guidance based on a number of serious concerns I have with its substance.

The Guidance takes the novel position that under the language of the PDA, a pregnant worker is, as a practical matter, entitled to "reasonable accommodation" as that term is defined by the Americans with Disabilities Act ("ADA"). No federal Court of Appeals has adopted this position; indeed, those which have addressed the question have rejected it. Moreover, the Pregnancy Guidance states that non-pregnant workers receiving such reasonable accommodations are the appropriate comparators for purposes of PDA compliance. This, too, is a position rejected by the majority of courts which have considered it. These positions represent a dramatic departure from the Commission's prior position, and perhaps more important, contravene the statutory language of the PDA. They do so without sound legal basis or rigorous analysis, and no explanation for the reversal of long-standing Commission policy.

In numerous instances – without significant legal analysis or support – the Pregnancy Guidance takes the position that an individual with a covered disability under the ADA is an appropriate comparator for PDA purposes to a woman who has a similar restriction due to pregnancy. Similarly, the Guidance provides that an employer cannot lawfully deny or restrict light duty based on the source of a worker's restriction, and requires an employer to provide light duty for a pregnant worker, even if the employer's policy limits light duty to workers injured on the job or to employees with disabilities under the ADA. In doing so, the Guidance does not offer any meaningful legal analysis. Rather, the document's legal reasoning consists of summarily repeating the statutory text in rote fashion. I find this wholly unpersuasive.

The Pregnancy Guidance makes at least two legal errors. First, it assumes that all non-pregnant workers who are "similar in their ability or inability to work" to a pregnant worker enjoy the same workplace rights, or are a monolithic and homogenous bloc. This is plainly not the case. Some employees unable to work may be entitled to accommodation pursuant to the ADA; others may avail themselves of leave by virtue of the Family and Medical Leave Act, and still others may be eligible for other benefits

under myriad employer policies and procedures. It is overly simplistic to assume that every worker in every instance is afforded the same rights and benefits.

Second, the Guidance reads out of the law the requirement that pregnant workers be treated the *same*, not better than, other workers for all employment purposes. Courts have routinely observed that the PDA was enacted to ensure that pregnant workers were not treated less favorably simply by virtue of the fact that they are pregnant; the law was *not* adopted to put pregnant workers on a better footing than similarly-situated non-pregnant employees. The Pregnancy Guidance ignores this fact.

The language of the PDA has been in the U.S. Code, unchanged, since 1978. The reasonable accommodation provisions of the ADA have similarly remained unchanged since the statute's enactment in 1990. Insofar as both of these statutory provisions have been in effect in their present forms for decades, without substantive change, to somehow deduce in 2014 that these two provisions somehow now interact to create a new substantive right for pregnant workers strains credulity.

Some have argued that because the ADA Amendments Act of 2008 ("ADAAA") expanded coverage under the ADA to a broader range of individuals with disabilities, as a practical matter this expansion imported the "reasonable accommodation" requirement of the ADA into the PDA. I have seen nothing in the text or legislative history of the ADA, the ADAAA, or the PDA which supports this argument. In fact, given that the primary purpose of the ADAAA was to expand coverage – the law did not purport to alter the substance of the ADA's reasonable accommodation provisions, merely the class of eligible individuals – I am hard-pressed to conclude that the ADAAA somehow "back-doored" reasonable accommodation into the PDA. In fact, the Commission's position for years has been consistent: a routine pregnancy is not a covered disability under the ADA (or ADAAA). While acknowledging that the ADAAA extends the ADA to cover a broader range of pregnancy-related impairments, the Commission has never in regulations or sub-regulatory guidance suggested that a routine pregnancy which is *not* a disability somehow entitles a pregnant worker to rights identical to those who have covered disabilities under the ADA. In light of this clear and consistent precedent, and the potential for confusion if contradicted, the Commission is ill-advised to take this position now.

I am likewise troubled by the tone the Guidance takes with respect to pregnancy-related inquiries or discussion in the workplace, which I fear will have the counter-productive result of making workplace accommodation of routine pregnancies more complicated for employers, and – far more troubling to me – less accessible and available to pregnant workers. The Pregnancy Guidance specifically counsels that employers should not inquire as to whether an employee or applicant intends to become pregnant, and notes that the Commission will generally regard an inquiry of that sort as evidence of discrimination if the employer subsequently takes an unfavorable action affecting a pregnant worker. Moreover, in numerous instances, the Guidance references comments or discussion of pregnancy, or its impact on a pregnant worker's ability to perform her duties, as evidence of discrimination. I fear the cumulative effect of this will put both employers and employees in an untenable position.

While we would all agree that hostile, stereotypical, or degrading remarks regarding an employee's pregnancy (whether phrased in the form of a question about "work" or not) are

unacceptable, I am deeply concerned that the effect of the Pregnancy Guidance will be to cause employers to not do exactly what should be done where an employee informs her employer that she is pregnant. It is my view that when a supervisor or manager learns of an employee's pregnancy, it is entirely appropriate to begin a conversation with the employee about her anticipated plans, schedule, work load, and assignments, so as to develop a plan to address the employee's needs and schedule, while ensuring that necessary work is completed, transitioned or shifted as appropriate, and the like. This is even more so the case where a complication or health issue relating to the pregnancy may not be immediately foreseen, or necessitate more time away from the workforce than originally planned. Suggesting, as the Guidance essentially does, that employers adopt a "cone of silence" with respect to pregnancy is not appropriate or realistic, and in my view works a disservice to both the company and the pregnant worker.

I would make one final observation. The questions raised in the Guidance are important, and in many ways go to some of our fundamental understanding of what we expect as societal norms as they relate to pregnant workers and the rights and responsibilities of employers. In the 21st century workplace, with women participating more fully and in greater number than ever before, there may in fact be strong policy reasons favoring greater protection and accommodation of workers who are or who become pregnant. Indeed, I could present a number of fact patterns or examples where we believe an employer *should* make a job accommodation or modification, hold a job open for a worker temporarily unable to work due to pregnancy, or otherwise "do the right thing" – and it is reasonable to debate whether our laws should be changed to require those practices. There are a number of pressing questions that Congress might choose to consider and address relating to pregnancy and the rights of pregnant workers – the accommodations to which they may be entitled; the ability to communicate openly and honestly on both sides with respect to a pregnant worker's plans, needs, rights, and responsibilities; and more broadly the degree to which workplaces may be required to adopt more flexibility, are all important and fair subjects of good faith debate.

As an administrative enforcement agency, however, it is not the proper role of the Commission to decide those questions of policy, particularly where, as here, the law enacted by Congress plainly does not contemplate the Commission's answers to those questions. Indeed, it bears note that legislation has been introduced in Congress to affirmatively provide that pregnant workers are entitled to "reasonable accommodation" on the same terms as individuals with disabilities under the ADA – legislation which President Obama himself has called on the Congress to pass, so as to more generously protect pregnant workers. This, to me, is compelling evidence that the PDA, as in effect today, does not entitle all pregnant workers to this accommodation. Equally important, it suggests to me that if our laws are to be extended to provide greater protection for pregnant workers, that should – indeed, must – be through the action of Congress.

By its actions with respect to the Pregnancy Guidance, the Commission is not regulating, or even interpreting current law; rather, we are legislating – a task far beyond our purview. For this reason, and the others I have noted, I voted to disapprove the Guidance.

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