WOMEN AND THE LAW SECTION ANNOUNCES 2021 TEXAS LAW STUDENT WRITING COMPETITION WINNERS

The Women and the Law Section (the "Section") recently announced the winners of the 2021 Texas Law Student Writing Competition.

Taylor Feldt, a student at SMU Dedman School of Law, won the competition for the essay, "Are Men and Women Treated Equally in the Workplace?: A Pregnant Question." She is the Section's recipient of the 2021 Harriet E. Miers Writing Competition Award. Named for the first female president of the State Bar of Texas, the award includes $1,000 for law school educational expenses.

Brooke López, a student at UNT Dallas College of Law, won second place in the competition for the essay, "Title IX and Tampons: How the Department of Education is Failing Menstruators Nationwide." Second place honors include $500 for law school educational expenses.

The Section called for essays identifying and analyzing legal challenges for women in Texas and/or nationwide based on recent news reports.

The Section designed the competition with the following goals: (1) help participating Texas law school students prepare to tackle legal and societal challenges after graduation and strengthen their written advocacy skills; (2) increase awareness of and involvement with the Section; and (3) further the Section's mission.

The Section's mission is to encourage and facilitate the active and effective participation of women – both in the legal profession and in the community -- and to address women's current needs and the issues affecting them.

Are Men and Women Treated Equally in the Workplace?: A Pregnant Question

By Taylor Feldt

Introduction

Societies have treated the sexes differently since their inception. Pregnancy further exacerbates the unequal treatment of men and women, especially in the workplace. One of the reasons that pregnancy remains a source of workplace inequality is that current legal protections for pregnant women do not allow them to successfully bring discrimination claims or acquire adequate remedies. Second, persistent stereotypes about pregnant working women and mothers continue to impose detrimental effects on employment opportunities and career trajectory for women. Lastly, there is a lack of workplace resources for pregnant employees to navigate these biases, as well as the physical effects of pregnancy on work. These concerns are not unsolvable problems, but they require a multi-pronged solution to promote equality between men and women.

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I. The Evolution of Mothers' Involvement in the Workforce

Women became more involved in the workforce as political and legal barriers were broken down. This began in World War II when women had to take over men's jobs as they left for war. Due to the increasing number of women present in the workforce and their expanding political clout, Congress passed the Nineteenth Amendment to give women the right to vote in 1920.[1] The impetus for social reform for women's rights also led to a demand for equal pay of men and women. The Women's Equal Pay Act was proposed in 1945 but failed to pass. The Act prohibited lower wages for women that performed "comparable quality and quantity" to men in the same position.[2] Almost two decades later, in 1963, the Act was adopted as part of the Fair Labor Standards Act, and it made wage discrimination based on sex unlawful.[3] The next federal policy adopted to address discriminatory employment practices against women was Title VII of the Civil Rights Act.[4] This piece of legislation adopted in 1964, forbids an employer covered under the act from "discriminating against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex." The word "sex" was added to the legislation to prevent disparate treatment of female employees and to equalize the sexes in regard to employment opportunities.[5]

As activists focused on achieving access to economic security and paid work for women, the issue of pregnancy moved to the forefront of the women's rights agenda.[6] There was a significant increase of pregnant workers in the twentieth century's workforce.[7] For example, between 1961 and 1965, only 35% of first-time mothers stayed at work until a month within giving birth.[8] On the other hand, 80% of first-time mothers stayed at work until a month within giving birth between 2001 and 2003.[9] Additionally, women began to work more and longer while pregnant and return sooner after childbirth. For example, among women who had their first birth between 1961 and 1965, 44% worked during pregnancy, compared to the 67% of women who worked during their first pregnancy between 2001 and 2003.[10] Now, working through pregnancy is the norm for many pregnant workers.[11]

Women are also returning to work much sooner after childbirth than in earlier eras. Seventy-one percent of mothers are in the labor force.[12] Between 1961 and 1965, only 16% of women who worked during pregnancy were back at work by three months after delivery, and only 26% were back at work twelve months later.[13] Between 2001 and 2003, 58% of women were back at work within three months of delivery and 79% of them were back within twelve months.[14] Single mothers return back to work even sooner than those with partners.[15] In 2015, 42% of working mothers were their family's primary breadwinner and nearly another one-quarter of the workforce were mothers who were co-breadwinners.[16] Pregnant women and mother's participation in the workforce continue to grow as barriers to enter the workforce are reduced and legislation is passed.

II. Legal Recourse For Pregnancy Discrimination

One of the most important pieces of federal legislation that passed as a result of the antidiscrimination movement is the Pregnancy Discrimination Act ("PDA").[17] This law came two years after the United States Supreme Court interpreted Title VII's ban on sex discrimination not to include pregnancy discrimination.[18] As the Court wrote, "lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation . . . just as with respect to any other physical condition."[19] In 1978, Congress overruled the Supreme Court's previous interpretation of

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Title VII and passed the Pregnancy Discrimination Act providing that employees may not be discriminated against on the basis of pregnancy, childbirth, or related medical conditions.[20] The statute required 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.[21] Courts interpret the PDA to include three interrelated rights: the right to an individualized judgment of capacity, the right to work if not incapacitated, and the right to whatever accommodations an employer offers workers who have the same physical capacity to work.[22]

In *Young v. United Parcel Service*, a landmark pregnancy discrimination case, the Supreme Court interpreted the PDA and molded a framework under which women may challenge discriminatory employers.[23] Here, the petitioner, Peggy Young, was not able to perform her normal lifting duties at UPS due to pregnancy. As a result, she could not work and no longer received her employee medical coverage at a time when coverage was crucial.[24] Young filed suit against UPS for pregnancy discrimination, because the company refused to give her an alternative working assignment even though the company had given accommodations to other individuals that suffered disabilities that caused restrictions like Young's.[25]

The Court's decision in *Young* hinged on the interpretation and application of the second clause of the PDA—a claim that an employer intentionally treated a complainant less favorably than employees with the "complainant's qualifications" but outside the complainant's protected class.[26] Under the *McDonnell Douglas* framework, a plaintiff can prove a disparate treatment claim either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using a burden-shifting framework.[27] In *Young*, the Supreme Court adapted the *McDonnell Douglas* framework to fit accommodations for pregnancy. Under this new interpretation a pregnant worker bringing a discrimination claim carries the burden of establishing: that she belongs to the 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."[28] If a plaintiff makes this showing, then the employer has the opportunity "to articulate some legitimate, non-discriminatory reason for" treating employees outside the protected class better than employees within the protected class.[29] If the employer articulates any reason, the plaintiff then has to prove by a preponderance of the evidence that the reasons offered by the employer were not its "true reasons, but were a pretext for discrimination."[30] Even though proving a claim under this framework is still arduous for a plaintiff, prior to *Young* no established legal pathway for pregnancy accommodations existed at all.

III. Archaic Ideology's Effect On Employment Opportunities For Women

In 2003, the Supreme Court stated that women's hindered employment opportunities directly stem from "the pervasive presumption that women are mothers first, and workers second."[31] This is in contrast with the perceived male role of being the worker and breadwinner.[32] The presumptive male domain is the public world of work and politics—the sphere to which our legal and economic systems have been thought appropriately to be directed.[33] The presumptive female domain is the private world of family and home, and nurturing support for men's leadership roles.[34] It is taken for granted that women time and time again *choose* to take on this role in society. This assumption ignores the fact that women have been to an extent forced into this domestic role because of the barriers that exist between them and entering the workplace. In the past, women were forced to rely on their ability to become mothers and wives to successful men because they could not have

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survived economically on their own until this changed with the equal opportunity movement of the 1960's.[35]

Today employers refuse to accommodate motherhood as if applauding the unique condition as an honor, while simultaneously penalizing it.[36] Employers often justify their lack of coverage for pregnant workers by complaining about the costs of covering something that they assumed would, because of its naturalness, occur frequently; in fact, the rate of women not having children has reached historic proportions.[37] There has been a large decline in the amount of women pursuing motherhood and domestic roles.[38] The women who still choose to become mothers are having smaller families and relying on other sources for childcare.[39] Therefore, these pervasive assumptions by employers are not only harmful but false.

Studies show pregnant women are viewed as emotional, irrational, physically limited, and less committed to their jobs than their counterparts.[40] In order to preserve economic interest, employers prioritize employing and accommodating nonpregnant workers over pregnant workers in order to avoid extra cost.[41] Women who work at least 35 hours a week, year-round in the United States were paid only 82 cents on every dollar paid to their male counterparts in 2019.[42] The wage gap between men and women widens when motherhood is factored in. In Texas, Mothers earn only 72 cents on the dollar compared to fathers.[43] These stereotypes that inform decision-making necessitate governmental action to free women's careers from the negative effects of bias.

IV. Solutions Required By Pregnancy Discrimination

Problems faced by pregnant workers are best addressed through laws requiring accommodations. Currently, twenty-nine states and the District of Columbia have adopted their own unique legislation or executive orders that guarantee pregnant employees the right to accommodations at work.[44] These statutes are the result of decades of hard work in the making, yet there is still much to be desired from them.[45] Conservative states like Texas only impose pregnancy discrimination laws on a specific group of government employees. In contrast the District of Columbia imposes its discrimination statutes on all DC employers.[46] There is no legitimate reason for the discrepancy between the two. Additionally, much of the progress that may exist in statutory protections is rolled back by qualifying language. For example the Texas statute allows that an employer only has to make "reasonable effort" to accommodate an employee; it is up to the employer's discretion to accommodate a pregnant woman with another assignment if it is even available.[47] In contrast, the District of Columbia's statute, which seems to offer broad coverage, is qualified by requiring women to provide medical proof of disability in addition to only having to offer an accommodation that lives up to what an individual could subjectively deem a reasonable accommodation.

The conflicts between pregnancy and work need to be resolved with a multi-pronged solution. First, equal pay laws must be fortified and enforced to begin narrowing the gap of treatment between men and women in the workplace. The Equal Pay Act of 1963 helped narrow the wage gap, but more protections are necessary to close the gap entirely.[48] A major handicap placed on women achieving the same income as men is the use of wage history in the hiring process.[49] Additionally, the EPA should allow plaintiffs to recover compensatory and punitive damages, to allow gender-based wage discrimination claims on the same level as discrimination claims based off of race or ethnicity.[50]

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Next, legal avenues and analysis for discrimination claims must be modified. It is important that each state adopt expansive and consistent pregnancy discrimination laws covering a broad range of employees so that more individuals are able to bring discrimination claims forward in the justice system. Pregnancy discrimination claims are among the fastest growing category of claims being filed with the EEOC.[51] Consequently, the EEOC needs to have tools to enforce and monitor discrimination claims with employment related date from employers according to sex and other factors.[52] The Young decision was an important victory for pregnant workers, but the balancing test it set out still left many unanswered questions about when exactly the PDA requires pregnancy accommodations.[53] An updated legal standard should be developed to improve women's ability to win pregnancy discrimination claims. It is recommended that the burden of proof on pregnant women should be lowered and there should be an affirmative burden on employers to prove that a discriminatory policy is warranted by something other than sex, is related to job performance and is consistent with a business necessity. Increased remedies available to pregnant women pursuing discrimination claims would also enhance the legal standard and level the playing field with other disability claims.

Lastly, pregnant women must be provided with more resources so that motherhood and employment do not conflict with one another. Such resources include: paid medical leave, affordable reproductive care and affordable childcare. The Family Medical Leave Act that was signed into law in 1993 only covers about half of working Americans.[54] Tens of millions of Americans are left with no paid days off whatsoever.[55] Further, only 19% of workers in the United States have access to paid family leave through their employers, and just 40% have personal medical leave through an employer-provided short-term disability program.[56] In order for individuals to escape discrimination based off of pregnancy, medical leave should be available to men and women in jobs of all income levels.

In addition to paid leave, there should be an increase in the availability of high quality, affordable childcare. If childcare was more highly funded by the government and affordable to a wider variety of parents, then the conflicts arising between child rearing and work get smaller and smaller.[57] It is currently very hard for parents to find childcare, let alone afford it. The government needs to step in and streamline this process for the familial unit so that moms and dads can return to work, and the economy can flourish.

V. Conclusion

Pregnancy discrimination raises many important issues, but the first step is simply to recognize that the problem exists. It is increasingly common for the modern career woman to postpone having a family or not have children at all. Some might attribute this trend to feminist ideals or societal progression; however, this perspective is naive. Women have not suddenly decided to put career over family because they can. They do it because they have to. This choice is the only way that a woman can hope to be even somewhat equal to a man in the workplace. Legislators and employers have failed in constructing rules and accommodations to adequately support pregnant women. Women should no longer be disadvantaged due to their innate role in reproduction. Women should have the choice to support a family as a breadwinner, a homemaker or both. Making this choice available to women in reality starts with confronting outdated ideology, challenging the legal system and fighting for rightfully deserved resources.

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[1] U.S. CONST. amend. XIX.

[2] *The Equal Pay Act Of 1963: Where Did We Go Wrong?*, 15 The Labor Law. 155, 156 (1999).

[3] 29 U.S.C.A. § 206 (Westlaw 2016).

[4] 42 U.S.C. §2000e-2(a)(1) (Westlaw 2008).

[5] *Id.*; 12 A.L.R. Fed. 15, 2a.

[6] *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 Geo. L.J. 567, 569 (2010).

[7] *See*, William B. Johnston Et Al., Hudson Inst., *Workforce 2000: Work And Workers For The Twenty-First Century*, 85 (1987).

[8] *Id.* at tbl.3.

[9] *Id.*

[10] *Id.* at tbl.1

[11] 98 Geo. L.J. at 574.

[12] U.S. Department Of Labor, Bureau Of Labor Statistics, Current Population Survey, *Employment Characteristics Of Families In 2015*, Table 5.

[13] 98 Geo. L.J. at 573-574.

[14] *Id.*

[15] *Id.*

[16] Center For American Progress, *Breadwinning Mothers Are Increasingly The U.S. Norm* (Dec. 2016).

[17] 42 U.S.C. § 2000e(k) (Westlaw 2008); 98 Geo. L.J. at 569.

[18] *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 128 (1976).

[19] 42 U.S.C. § 2000e(k) (Westlaw 2008); *See Gilbert*, 429 U.S. at 128.

[20] *Id.*

[21] *Id.*

[22] *Choice at Work: Young v. United Parcel Service, Pregnancy Discrimination, and Reproductive Liberty,* 93 Denv. L. Rev. 219 (2015).

[23] *Young v. United Parcel Service*, 575 U.S. 206, 213 (2015).

[24] *Id.* at 211.

[25] *Id.*

[26] *Id.* at 212.

[27] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

[28] *Id.* at 213.

[29] *Id.*

[30] *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 253 (1981) (employer bore only the burden of explaining the nondiscriminatory reasons for its actions when the employee proved a prima facie case of gender discrimination instead of being required to prove by a preponderance of the evidence the existence of nondiscriminatory reasons for terminating the employee and that the person retained instead had superior objective qualifications for the position).

[31] *Nev. Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 737-40 (2003) (upheld the United States Legislature's authority to enact the Family Medical Leave Act due to the States' record of unconstitutional gender-based discrimination in the administration of leave benefits).

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[32] *Transcending Equality Theory: A Way Out Of The Maternity And The Workplace Debate.*, 86 Colum. L. Rev. 1118, 1118.

[33] *Id.*

[34] *Id.*

[35] Neil Gilbert, *A Mother's Work* at 28 (Yale University Press, 2008).

[36] *Id.*

[37] 86 Colum. L. Rev. 1118, *1135; Gilbert, *A Mother's Work* at 3

[38] Gilbert at 3.

[39] *Id.*

[40] *Id*. at 655.

[41] *See Troupe v. May Department Stores Co.,* 20 F.3d 734, 738 (7th Cir. 1994) (no unlawful discrimination found when an employer terminated an employee solely because she was tardy to work due to morning sickness on occasion).

[42] U.S. Census Bureau, Current Population Survey, 2020 Annual Social and Economic Supplement, Table PINC-05.

[43] *Motherhood Wage Gap for Mothers Overall: 2019 State Rankings* (Rep.). (2020, May).

[44] NWLC, *Pregnancy Accommodation in the States* (2020).

[45] Tex. Loc. Gov't. Code § 180.004 (Westlaw 2019).

[46] D.C. Code § 32-1231.01 – 1231.15 (Westlaw 2021).

[47] Tex. Loc. Gov't. Code § 180.004 (Westlaw 2019).

[48] NWLC, *How The Paycheck Fairness Act Will Strengthen The Equal Pay Act* (Jan. 2019).

[49] *Id.*

[50] *Id.*

[51] *See* Nat'l P'ship For Women & Families*, The Pregnancy Discrimination Act: Where We Stand 30 Years Later 12* (2008).

[52] NWLC, *How The Paycheck Fairness Act Will Strengthen The Equal Pay Act* (2019).

[53] *See Young,* 575 U.S. at 206. NWLC, *Pregnancy Accommodation in the Courts One Year After Young v. UPS* (2016).

[54] 29 U.S.C. §2612 (Westlaw 2021); NWLC, *Providing Americans Insured Days of Leave (PAID Leave) Act* (2019).

[55] *Id.*

[56] *Id.*

[57] *See generally* Karen Schulman, NWLC, *Early Progress: State Child Care Assistance Policies* (2019).