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OHIO SUPREME COURT RULES THAT EMPLOYER PROPERLY TERMINATED EMPLOYEE FOR TAKING UNAUTHORIZED BREAKS TO PUMP BREAST MILK.

In *Allen v. Totes/Isotoner Corp*. (2009)[1], the Ohio Supreme Court recently ruled that the plaintiff, a terminated employee, failed to establish a case of pregnancy discrimination after her employer terminated her for taking unauthorized breaks to pump breast milk. The employee admitted that for approximately two weeks, she had taken breaks without her employer's knowledge or authorization to so.

Though the employee took the extra breaks to pump breast milk for her child, the Supreme Court declined to reach the issue of whether alleged discrimination due to lactation was included within the scope of Ohio's pregnancy discrimination statute. Instead, the court ruled that the employer's legitimate, nondiscriminatory reason for the termination – failure to follow directions – was not a pretext for discrimination based on the employee's pregnancy or a condition related to her pregnancy.

COURT OF APPEALS RULES THAT OHIO EMPLOYERS MUST PROVIDE REASONABLE PREGNANCY LEAVE, REGARDLESS OF THE PREGNANT EMPLOYEE'S LENGTH OF SERVICE.

In a case that is currently being reviewed on appeal to the Ohio Supreme Court, the Fifth District Court of Appeals held in *Nursing Care Management of America, Inc. v. Ohio Civil Rights Commission* (2009)[2], that Ohio employers must offer "reasonable maternity leave" to pregnant employees without regard to the employees' length of service with the employer.

In *Nursing Care Management*, approximately eight months after being hired, the plaintiff, a licensed practical nurse, provided her employer a physician's note stating that she was medically unable to work due to pregnancy-related swelling, and recommending a return to work date six weeks following her delivery. The plaintiff delivered her baby six days after she submitted the above-referenced physician's note to her employer. The employer's FMLA leave policy permitted up to 12 weeks of leave due to pregnancy, but this leave right was limited to employees with at least one year of service with the employer. The employer terminated the plaintiff's employment three days after the birth of her child because at the time of her request for leave, the plaintiff had been employed for less than one year.

The plaintiff filed a charge of discrimination with the Ohio Civil Rights Commission ("OCRC") claiming that her termination constituted pregnancy discrimination. The OCRC concluded that because the employee was terminated solely due to her need for maternity leave, her termination constituted pregnancy discrimination. The common pleas court disagreed, finding that because the plaintiff was treated the same as any other employee who was temporarily unable to work, but did not yet qualify for leave under the employer's leave policy, her termination was not the result of pregnancy discrimination.

The OCRC appealed the decision, arguing that Ohio law requires employers to provide reasonable maternity leave regardless of any contrary provisions in its leave policy. Conversely, before the court of appeals, the employer argued that Ohio law permits employers to make maternity leave contingent upon length of service, as long as the length of service contingency is evenly applied to all employees, regardless of gender or pregnancy.

The court of appeals, however, agreed with the OCRC, holding that Ohio Administrative Code 4112-5-05(G)(2), the only provision dealing directly with the leave rights of pregnant employees, prohibits termination of a pregnant employee due to lack of maternity leave under the employer's leave policies. Citing the policy reasons underlying both the Ohio and federal pregnancy discrimination statutes, the court of appeals reasoned that its holding supported the statutes' goal of preventing women from being forced to choose between their job and the continuation of their pregnancy.

Until the Ohio Supreme Court provides a definite opinion on this issue, the answer as to whether Ohio employers can deny reasonable pregnancy leave to employees who otherwise do not qualify for such leave under the employer's policies is uncertain at this time.

[1] 123 Ohio St.3d 216
[2] 181 Ohio App.3d 632

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Another uncertainty is the minimum length of pregnancy leave that must be afforded by Ohio employers. The Ohio Civil Rights Commission attempted to address this question directly two years ago. The OCRC voted in October of 2007 to approve a revised Ohio Administrative Code ("OAC") regulation clarifying the obligations of employers with respect to pregnant employees. This rule change was previously published by the OCRC for a period of public comment, and the OCRC voted to approve the change over vigorous opposition by small employers and despite a request by Governor Strickland to delay approval of the new rule in order "to assure that Ohio businesses have time to fully understand the implications the proposed rule change will have on their business." [3]

The revised OAC section approved by the OCRC in October of 2007 would have required Ohio employers to provide a minimum of 12 weeks of unpaid leave if medically required due to pregnancy or childbirth-related medical conditions. However, a bit surprisingly, the OCRC withdrew this revised OAC section in late December 2007, apparently due to pressure from Governor Strickland.

Therefore, Ohio law at present does not define the minimum leave time that must be afforded pregnant employees, regardless of their length of service. The current OCRC regulation on pregnancy leave requires Ohio employers to provide pregnant employees with maternity leave "for a reasonable period of time." However, neither the court of appeals' decision in *Nursing Care Management* nor any provision of the Ohio Revised Code or the OAC defines exactly how much leave time must be afforded pregnant employees in order to be considered reasonable. Also, is the required minimum leave time the same for all Ohio employers, large and small? Does the nature of the employer's business or the position held by the pregnant employee matter? These are all uncertainties left in the wake of the court of appeals' decision in *Nursing Care Management*, which is currently under review by the Ohio Supreme Court.

[3]See, "Civil Rights Commission Plans to Press for Revised Pregnancy Leave Rule Despite Governor's Requested Delay," Gongwer's Ohio Report, Vo. 76, No. 230 (Nov. 23, 2007).

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