

**Mothers-To-Be Not Entitled to *Special* Treatment
under Ohio's Pregnancy Discrimination Statute**

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On June 22, 2010, the Ohio Supreme Court, in a five to one decision, determined that the Ohio statute prohibiting discrimination on the basis of pregnancy does not require employers to give preferential treatment to pregnant employees when applying eligibility requirements for leave. In *McFee v. Nursing Care Management of America*, 2010 Ohio 2744, the Ohio Supreme Court reversed a decision from the Fifth District Court of Appeals to hold that “[a]n employment policy that imposes a uniform minimum-length-of-service requirement for leave eligibility with no exception for maternity leave is not direct evidence of sex discrimination under R.C. Chapter 4112”.

Tiffany McFee was employed by Pataskala Oaks Care Center as a licensed practical nurse. Pataskala Oaks requires that an employee be employed for one year before he or she is eligible for any leave for any purpose. Approximately eight months after McFee was hired, she provided her employer with a note from her doctor stating that she was medically unable to work due to pregnancy-related swelling and that she would be able to return to work six weeks following her delivery. Within a week of leaving work, McFee had given birth. Three days after the birth of her child, Pataskala Oaks terminated McFee's employment on the basis that she had been absent from work before she was eligible for leave under the employer's written leave policy.

McFee filed a charge of discrimination with the Ohio Civil Rights Commission and the Commission determined that Pataskala Oaks' policy constituted unlawful sex discrimination. Pataskala Oaks challenged the Commission's decision and the Licking County Common Pleas Court held that the leave policy was not discriminatory and reversed the Commission's decision. The Fifth District Court of Appeals reversed the trial court's decision and held that Pataskala Oaks' leave policy violated Ohio's sex discrimination laws because it did not provide maternity leave for employees with less than one year of service. The court further held that such a policy was direct evidence of discrimination and, therefore, McFee did not have the burden to offer other evidence of sex discrimination. Pataskala Oaks appealed the Fifth District's decision to the Ohio Supreme Court.

The Ohio Civil Rights Commission has been taking a rather dogmatic approach to pregnancy discrimination claims and its approach in the *McFee* case was no different. The Commission relied on a literal reading of Ohio Admin. Code 4112-5-05(G)(2) which provides: “Where termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical condition is caused by an

employment policy under which insufficient or no maternity leave is available, such termination shall constitute unlawful sex discrimination.” The court of appeals held that this provision required Pataskala Oaks to provide maternity leave to McFee without qualification and that failing to do so is direct evidence of discrimination. The Commission argued that this section makes reasonable leave for pregnancy and childbirth mandatory irrespective of the employer’s written policies governing its employees’ entitlement to leave. The Commission’s reading of the statute and the Administrative Code sections which address it would require that employers give preferential treatment to pregnant female employees and allow them to disregard leave eligibility criteria that are imposed on other employees who are not requesting time off due to pregnancy or childbirth.

Ohio Revised Code §4112.01(B) requires that pregnant employees be treated “the same for all employment-related purposes * * * as other persons not so affected but similar in their ability or inability to work.” The Court concluded that the phrase “treated the same” requires only that the employer give the pregnant employee the same consideration as other employees “not so affected, but similar in their ability or inability to work.” The statute does not provide greater protections for pregnant employees than non-pregnant employees.

In *McFee*, the Supreme Court analyzed the language in the Ohio Administrative Code sections relevant to Ohio’s Pregnancy Discrimination Act. The Court focused on the intent of the General Assembly “to ensure equal treatment for employees affected by pregnancy, but not to impart greater rights or preferential treatment to employees affected by pregnancy.” In doing so, the Court clarified the role of the Commission explaining that “[t]he General Assembly sets public policy, and administrative agencies, when granted rulemaking power, ‘develop and administer’ those policies.” While the General Assembly may require employers to provide maternity leave, the Commission does not have that same authority. Therefore, the Commission cannot create a rule that exceeds the public policy in the governing statute.

Rather than rejecting the Commission’s rule outright on the basis that it exceeds the scope of the governing statute, the Court harmonized Ohio Admin. Code §4112-5-05(G)(2) with Ohio Admin. Code §4112-5-05(G)(5). The Court acknowledged the tension between the two sections noting that subsection (G)(2) appears to suggest that a policy providing no leave is discriminatory, while subsection (G)(5) clearly contemplates that a uniform minimum length of service requirement for leave eligibility is permissible. Ohio Admin. Code §4112-5-05(G)(5) provides that “[w]omen shall not be penalized in their conditions of employment because they required time away from work on account of childbearing. When, under the employer’s leave policy *the female employee would qualify for leave*, then childbearing must be considered by the employer to be a justification for leave of absence for female employees for a reasonable period of time.” (Emphasis added.) The Court’s decision turned on the language in subsection (G)(5) which acknowledges that the female employee must be otherwise eligible for leave under the employer’s policy before it must be provided.

Pataskala Oaks' length of service requirement is "pregnancy blind" and requires that every employee reach twelve months of employment before becoming eligible for leave. Under the Pataskala Oaks' policy, a pregnant employee may be terminated for unauthorized absence just as any other employee who has not yet met the minimum length of service requirement but takes leave based on a similar inability to work. Unless there is other evidence of discrimination or pretext, the statute does not prohibit the employer from terminating the employee affected by pregnancy under these circumstances.

The Supreme Court's decision is consistent with how the federal courts have interpreted the federal Pregnancy Discrimination Act. The language in the federal Act is identical to the language in the Ohio statute and federal courts have consistently rejected any application of the federal Act which would treat pregnant employees more favorably than non pregnant employees under the same circumstances.

Broadly read, the Supreme Court's decision clearly does not mandate an employer to provide preferential treatment to an employee who is pregnant or requires maternity leave. However, the *McFee* decision does not stand for the proposition that there cannot be circumstances under which an employer is engaging in discriminatory treatment of an employee beyond the enforcement of its pregnancy-blind leave policy. *McFee* simply prohibited the leave policy from being used as direct evidence of discrimination and requires an employee alleging discrimination on the basis of pregnancy to establish her claim in the context of the burden shifting framework of the *McDonnell Douglas* analysis. In the absence of any other evidence of discrimination or independent evidence that the proffered basis for the termination was pretext for discrimination, the employee will be unable to maintain the claim of discrimination.

Justice Pfeiffer's scathing dissent focused on the language in subsection (G)(2) and concluded that because there was no maternity leave available to *McFee* under the Pataskala Oaks' policy, her termination constituted direct evidence of unlawful discrimination.

The *McFee* decision is a good decision for Ohio employers in that it allows consistent enforcement of eligibility requirements in leave policies throughout the employer's workforce. Moreover, it is not only consistent with the plain language in R.C. 4112.02(B), but also the interpretation given the federal Pregnancy Discrimination Act by courts throughout the country.