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A Case Of First Impression: The Third Circuit Recognizes That Having An Abortion Is Protected By Title VII

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It is well established that Title VII, as amended by the Pregnancy Discrimination Act ("PDA"), protects women from workplace discrimination based on their pregnancy.[2] However, in a case of first impression, the Third Circuit – which covers New Jersey, Delaware, Pennsylvania, and the Virgin Islands – held that Title VII protection also is available to women who have an abortion.[3] Only one other Court of Appeals has explicitly addressed this issue – the Sixth Circuit – and it also held that Title VII applies to women who have an abortion.[4] Other circuit courts have yet to address the issue, and the issue has not yet been addressed by the Supreme Court. Thus, it is likely that the recent Third Circuit opinion of *Doe v. C.A.R.S. Protection Plus, Inc.* will not be the last decision to address this issue.

FACTS

Plaintiff Doe was hired by the defendant in 1999 to work as a graphic artist.[5] In August 2000, Doe learned that she was pregnant, and she told her supervisor, who was a vice-president and part owner of the company, that she was pregnant and that she will make up any time lost to doctor's appointments.[6] After one of her doctor's appointments, Doe's physician informed her that some problems were detected in her blood work, and her physician ordered additional tests.[7] These

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[2] *See* Doe v. C.A.R.S. Protection Plus, Inc., 527 F.3d 358, 363-64 (3d Cir. 2008).
[3] *Id.* at 364.
[4] Turic v. Holland Hospitality, Inc., 85 F.3d 1211 (6th Cir. 1996).
[5] *Doe*, 527 F.3d at 362.
[6] *Id.*
[7] *Id.*

tests required Doe to miss several work days.[8] After undergoing diagnostic tests, Doe learned that her baby had severe deformities, and her physician recommended that she terminate the pregnancy.[9]

While Doe was attending doctor appointments, before she learned the status of her baby, either Doe or her husband contacted her supervisor to advise him that she would miss work.[10] Doe's supervisor approved all the absences. After Doe learned about the condition of her baby and the need to terminate the pregnancy, Doe's husband called the supervisor and asked if Doe could have the following week off, which, according to Doe's husband, the supervisor approved.[11] After the abortion, Doe and her husband had a funeral for the baby, which was attended by Doe's sister-in-law, who also happened to work for the defendant.[12] When Doe's sister-in-law was leaving work to attend the funeral, she noticed that the supervisor's personal secretary was packing up Doe's personal belongings from her desk. After being told about her desk, Doe called her supervisor and was informed that she was fired for job abandonment.[13] After Doe's termination, her supervisor was overheard saying that Doe "didn't want to take responsibility."[14]

After her termination, Doe filed a charge of discrimination with the Equal Employment Opportunity Commission ("EEOC"), obtained a right to sue letter, and then filed an action in federal court.[15] The District Court granted summary judgment for the defendant, noting that Doe could not connect her termination to the pregnancy.[16] Doe then appealed, and the Third Circuit, in addressing this novel issue, reversed the finding of the District Court.[17]

ANALYSIS

Under the PDA, the terms "'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . ."[18] The Third Circuit held that an abortion falls within the meaning of a "related medical condition" under the PDA, relying on a Sixth Circuit decision that held as such, the EEOC's interpretation of the PDA, and the legislative history of the Act.[19] Thus, the court concluded that women who elect to have an abortion are provided the same protections under Title VII as those who are pregnant.

The Third Circuit was also critical of the District Court because it treated Doe's claim as an ordinary gender discrimination claim without recognizing the uniqueness of actions involving pregnancy discrimination.[20] The court expounded on the elements of a *prima facie* case of discrimination under the PDA, noting that a plaintiff is required to show that: 1) her employer knew of the pregnancy; 2) she was qualified for the job; 3) she suffered an adverse employment action; 4) a causal connection exists between her pregnancy and the adverse employment action.[21] Moreover,

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[8] *Id.*
[9] *Id.*
[10] *Doe*, 527 F.3d at 362.
[11] *Id.*
[12] *Id.* at 363.
[13] *Id.* at 368.
[14] *Id.*
[15] *Doe*, 527 F.3d at 363.
[16] *Id.* at 361-62.
[17] *Id.* at 362.
[18] 42 U.S.C. § 2000e(k) (2006).
[19] *Doe*, 527 F.3d at 363-364.
[20] *Id.* at 364.
[21] *Id.* at 364-66.

the court recognized that the PDA does not mandate that employers treat pregnant employees better than others with a temporary disability, but it does require that employers do not treat pregnant employees worse.[22] The court in this case found the following evidence compelling in reaching its decision. First, the court was troubled by the defendant's "less than compassionate" leave policies, which included no personal or sick leave, the reduction of vacation time for every work day that was missed, and the purported policy that employees who miss time because of illness must call in everyday.[23] The record in this case demonstrated that this alleged policy was not enforced for all employees.[24] Next, the supervisor's comment about Doe not wanting to take responsibility resonated with the court, as did the timing of Doe's termination: three working days after the abortion.[25] Finally, the court was not swayed by defendant's argument that Doe's husband did not notify her supervisor about her condition, as the company did take steps to cover for Doe's absence just prior to her abortion.[26]

LESSONS FROM THE CASE

This case not only highlights an expansion of Title VII protection, but it also serves as a warning to employers that apply to all forms of discrimination. Employers should have reasonable leave policies that are uniformly enforced. There is no doubt that the court found the employer's draconian, and somewhat nebulous, leave policies disturbing. If the employer had clearly defined policies, especially as to pregnancy-related issues, and had applied them in a uniform manner, there potentially could have been a different outcome in this case. Moreover, employers, at least those who are in the area covered by the Third Circuit, must treat an employee's request for leave to have an abortion as they would any other request for disability-related leave.

TITLE VII v. THE FIRST AMENDMENT

One potential consequence of this decision could lead to a battle between the protections afforded by Title VII and the First Amendment. In the *Doe* case, the court cited to *Curay-Cramer v. Ursuline Academy*, 450 F.3d 130 (3d Cir. 2006), noting that the Third Circuit did not decide the issue of whether Title VII protections apply to those who have an abortion, but it also cited with approval the Sixth Circuit case *Turic v. Holland Hospitality, Inc.*, referenced above, that held that Title VII rights apply to women who have an abortion.[27] A brief analysis of the *Curay-Cramer* case is necessary to set forth the potential legal confrontation that awaits the Third Circuit.

In *Curay-Cramer*, plaintiff, a teacher at a private Catholic school, was terminated after she signed her name to a pro-choice advertisement in a local newspaper.[28] The Third Circuit dismissed her Title VII claims on the grounds that she did not engage in a protected activity when she signed the advertisement, as she was not complaining about an employment practice.[29] However, the court did note that applying Title VII to a religious employer could raise serious constitutional questions.[30] The court noted that generally courts cannot become involved in analyzing religious doctrines that

[22] *Id.* at 366.
[23] *Id.*
[24] *Id.* at 367.
[25] *Id.* at 368-69.
[26] *Id.* at 367-68.
[27] *Id.* at 363.
[28] Curay-Cramer v. Ursuline Acad., 450 F.3d 130, 132 (3d Cir. 2006).
[29] *Id.* at 136-37.
[30] *Id.* at 137.

are used as a basis to terminate an employee, noting that such inquiries may impinge upon rights guaranteed by the First Amendment.[31] In *Curay-Cramer*, the court noted that plaintiff's allegation that male employees who had committed similar offenses had not been terminated would require the court to delve impermissibly into church doctrine, and thus infringe upon the First Amendment Religion clauses.[32]

The court in *Curay-Cramer* did note that there are employment situations in which a court may make a "limited inquiry" as to whether an employer may rely upon a religious doctrine as a legitimate, non-discriminatory reason for taking an adverse employment action.[33] As an example, the court cited to a case in which the Third Circuit addressed an Age Discrimination in Employment Act claim, where the plaintiff claimed he was terminated because of his age, and that the employer's proffered legitimate, non-discriminatory reason for the termination was that he married in violation of canon law.[34] In that case, the court determined that as long as the plaintiff was not challenging the validity of the religious doctrine, but only questioned the employer's motivation, excessive entanglement questions concerning the First Amendment would not be raised.[35]

Courts will be faced with a challenging question when a religious employer – whose religious tenets prohibit abortion – terminates an employee for undergoing such a procedure. Based on *Doe*, women who have an abortion are entitled to the protection of Title VII, but it remains to be seen how courts will balance that protection with the First Amendment Religion clauses. Such a scenario may fit into the "limited inquiry" category, but if a woman has an abortion for medical reasons, such as a health risk to the mother or child, and is subsequently terminated, courts may view a subsequent claim as a direct challenge to the validity of a religious doctrine. It will be worth watching how courts, especially the Third Circuit, address the above scenarios.

CONCLUSION

The *Doe* case establishes that women who experience adverse employment actions because of an abortion are now clearly protected by Title VII. Thus, employers must treat an employee's request for leave to have an abortion as they would any other request for disability-related leave. Moreover, the *Doe* case serves as a reminder to employers that they need to have clearly defined policies that are uniformly applied to avoid potential discrimination claims. Finally, the *Doe* decision has laid the foundation for a potential legal battle between Title VII protection and the First Amendment.

[31] *Id.* at 138.
[32] *Id.* at 140.
[33] *Curay-Cramer*, 450 F.3d at 139.
[34] *Id.* (citing Geary v. Visitation of the Blessed Virgin Mary Parish Sch., 7 F.3d 324, 330 (3d Cir. 1993)).
[35] *Id.*