Pregnancy Discrimination Act (2005)

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Basic Concepts & Definitions

The legalized discriminatory treatment of women employees has a long history in the U.S. and was grounded in part on the belief that all women were or would become mothers. In Bradwell v. Illinois (1872) and Muller v. Oregon (1908), state laws limiting the types of jobs women were allowed to perform and the number of hours women were allowed to work were upheld by the U.S. Supreme Court based on arguments that: (1) the government had an interest in promoting the maternal functions of women; and (2) the maternal functions of women were incompatible with work outside of the home. In the case of employees who became pregnant, it was legal for firms to refuse to hire a pregnant woman, to fire a woman when she became pregnant, or to insist that a pregnant woman resign at a pre-specified point in her pregnancy (e.g., when she began to “show”). Employers who allowed pregnant women to keep working could legally demote them, refuse to provide maternity leave (either paid or unpaid), or they could mandate pre-specified maternity leave periods that were unrelated to the woman’s ability or desire to work (e.g., mandatory six month maternity leave beginning three months prior to the woman’s due date). It was not unusual for employers to eliminate all the accrued seniority of a woman who took maternity leave and then returned to work, or for employers providing group health insurance to exclude pregnancy and childbirth from coverage.

Title VII of the 1964 Civil Rights Act outlawed discrimination based on sex in all terms and conditions of employment (not solely in compensation, as in the 1963 Equal Pay Act). The term “sex” was added to the list of prohibited bases for discrimination shortly before the bill’s passage. Consequently, as Supreme Court Justice Rehnquist wrote in General Electric v. Gilbert (1976), “The legislative history of Title VII’s prohibition of sex discrimination is notable primarily for its brevity.” The lack of both congressional hearings and significant congressional debate provided little guidance for either the federal enforcing agency (i.e., the Equal Employment Opportunity Commission), or for the federal courts to use to determine if Congress had intended for discrimination against pregnant workers to be classified as an illegal form of sex discrimination. While Title VII did not originally authorize the EEOC to promulgate rules or regulations regarding the implementation of Title VII, it did permit the EEOC to issue “interpretive
EEOC interpretive rulings do not control the opinions federal courts issue regarding the interpretation of Title VII, but interpretive rulings are considered to be "a body of experience and informed judgment to which courts and litigants may properly resort for guidance." (U.S. Supreme Court in *Gilbert v. General Electric*, 1976).

The EEOC’s first official statement on the legality of pregnancy discrimination under Title VII was made in 1966. In a ruling on the legality of differential treatment of pregnancy-related medical disabilities from other non-work-related medical disabilities, the EEOC’s General Counsel opined that it would be legal under Title VII to treat pregnant workers differently (and less favorably) than other workers.

In 1968, a task force of the President’s Citizens Advisory Council on the Status of Women took a contrasting position to the EEOC’s 1966 opinion permitting discriminatory treatment of women employees based on pregnancy. Among the Council’s recommendations was implementation of a national unemployment insurance program that would protect workers from temporary wage losses due to disability, including disabilities related to pregnancy.

Four years later the Equal Employment Opportunity Act (EEOA) was adopted to amend Title VII. These amendments did give the EEOC the power to issue regulations regarding the implementation of Title VII. Within weeks of the passage of the amendments, the EEOC issued regulations that were strongly influenced by the 1968 recommendations of the President’s Citizens Advisory Council. Specifically, in Title 29, Code of Federal Regulations, Section 1604.10, the EEOC reversed its previous position and classified pregnancy discrimination as illegal sex discrimination under Title VII (Williams, 1993).

The federal courts also wrestled with the question of the legality or illegality of pregnancy discrimination as cases were brought to them during the 1970s under Title VII and/or the Equal Protection Clause of the 14th amendment to the U.S. Constitution. Different district and appellate courts arrived at different conclusions. For example, in 1972 in *LaFleur v. Cleveland Board of Education*, the 6th Circuit Court of Appeals ruled that the school board’s requirement that healthy pregnant teachers begin maternity leave during their second trimester of pregnancy was unconstitutional sex discrimination. But, in 1973, in *Cohen v. Chesterfield County School Board*, the entire (i.e., *en banc*) 4th Circuit Court of Appeals held that the school board’s requirement that healthy pregnant teachers begin mandatory maternity leave during the second trimester of their pregnancy was not unconstitutional sex discrimination.

In the mid-1970s the U.S. Supreme Court settled the disagreements of the various district and appellate courts. In 1974 the U.S. Supreme Court, in *Geduldig v. Aiello*, held that discrimination based on pregnancy was not a violation of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution. And in 1976, in *Gilbert v. General Electric*, the Court ruled that discrimination based on pregnancy did not violate the prohibitions against sex discrimination in Title VII of the 1964 Civil Rights Act. In both cases the Court noted that there were women in the group of pregnant workers (i.e., the
group discriminated against) and in the group of non-pregnant workers (i.e., the group not discriminated against). Because there were women in both groups, the Court reasoned that pregnancy discrimination could not be discrimination based on sex.

The Supreme Court is the final arbiter regarding the meaning of the U.S. Constitution, so there was nothing Congress could do regarding the Court’s interpretation of the Equal Protection Clause of the 14th amendment. However, in the Gilbert decision the Court was interpreting a statute passed by Congress and in that situation Congress does have the power to clarify what it intends laws to cover. So, in 1978 Congress overrode the Supreme Court’s decision in the Gilbert case by adopting the Pregnancy Discrimination Act, as an amendment to Title VII of the 1964 Civil Rights Act.

The PDA expands the definition of “sex” in Title VII as follows:

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, including the receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

The language of the PDA clarifies that pregnancy-related employment discrimination is one type of illegal sex discrimination. It prohibits discrimination in all terms and conditions of employment, including, hiring, discharge, pay, and fringe benefits. When the PDA became effective, in 1979, for the first time in U.S. history, discrimination against women employees based on pregnancy became illegal throughout the U.S.

Although there are areas of overlap between the PDA and the 1993 Family and Medical Leave Act (FMLA), the PDA was not a precursor to the FMLA. Statutes prohibiting discrimination based on a specific characteristic (i.e., civil rights laws) and statutes mandating specific entitlements can be viewed as representing different types of laws (Williams, 1993). The PDA was a reaction to a specific Supreme Court ruling that curtailed the civil rights of women who became (or might become) pregnant. As civil rights law, the PDA merely circumscribes the behavior of employers towards their female employees affected by pregnancy -prohibiting those behaviors that are designated as discriminatory. But, the PDA does not mandate that employers take any specific positive actions in the treatment of those employees.

In contrast, the FMLA was passed, in part, to provide minimal maternity leave rights not guaranteed by Title VII as amended by the PDA. Unlike the PDA, the FMLA does mandate positive action in the form of a very specific entitlement for both men and women working for employers covered by the law, to unpaid, job-protected leave for qualifying reasons that include birth or adoption of a child, and serious health condition of the employee, and of the employee’s parent, spouse, or child.

Some have argued, however, that laws mandating that employers make specific accommodations to individuals, based on specific characteristics of the persons affected, are a form of required civil rights
protection, given society’s obligation to accommodate all of its members • together with their concomitant characteristics. (Feldblum, 2003). Viewed in this light, the FMLA may be understood as an extension of civil rights law. Moreover, as the U.S. Supreme Court ruled in Nevada Department of Human Resources v. Hibbs (2003), Congress was specifically concerned with protecting women’s rights “to be free from gender-based discrimination in the workplace.”

Importance of Topic to Work-Family Studies

Working parents typically spend decades walking the tightrope of work-family balance. Most of the time that journey begins with a pregnancy. Although stereotypes left over from the Victorian age present an image of women who leave the labor force, permanently or for an extended time period, by the time they become pregnant, data collected by the U.S. Census Bureau indicate that the majority of women with young children remain in the labor force. Therefore, prohibiting pregnancy discrimination in the workplace benefits the majority of women. In 2002, 54.6 percent of women with children under the age of one were employed. The percentages of mothers employed are positively related to the age of her child(ren), the mother’s education level, and the mother’s age. The percentage of mothers employed is negatively related to the number of children in the household. Widowed, divorced or separated mothers are more likely to be employed than married mothers. And married mothers are more likely to be employed than single mothers who have never been married. Black mothers are more likely to be employed than white mothers. And white mothers are more likely to be employed than Hispanic mothers (U.S. Bureau of the Census, 2003).

Women who chose not to have children, as well as those who chose to temporarily or permanently exit the labor force following the birth of a child, also benefit from the prohibitions established by the PDA. For example, a childless woman who is denied a promotion, advanced training, or some other workplace benefit because her employer thinks she will become pregnant and quit someday, can demand her civil rights. Likewise, a woman who intends to leave the workforce following the birth of her first child cannot be fired prematurely by her employer because of her plans.

The manner in which a woman’s employer responds to her pregnancy can have lifelong impacts on her and her family’s economic well-being. Employment-related pregnancy discrimination imposes costs on working mothers and their families in the form of:

- Lower lifetime wages. When a pregnant employee is illegally fired and attempts to start over in a new job, with no accumulated seniority, the likely result is a lower lifetime income (Waldfogel, 1998). Or consider a pregnant employee who keeps her job, but is passed over for a raise because she is pregnant. Although she may receive raises in the future, they will compound upon a lower base income leading to substantially lower income over the course of her career.
• Lower retirement benefits. If a pregnant woman is fired from her job before she becomes vested in a pension plan her employer offers, her retirement income will be lower than if she had been allowed to retain her job. Also, in situations where vesting isn’t a requirement, retirement income tends to be based on lifetime income, so discrimination that reduces lifetime income, also reduces a woman’s retirement income.

• Loss of health insurance. Because most people in the U.S. rely on their employers for access to affordable health insurance, a worker who is fired because she is pregnant loses her health insurance just when she really needs it. If she also provided insurance for her family through her work, her family will be negatively affected too.

• Less bargaining power with husbands. A reduction in a woman’s financial independence, caused by lower income, tends to negatively affect her ability to negotiate joint decisions with her spouse (Blumstein and Schwartz, 1983; England and Kilbourne, 1990).

• Increases the likelihood that members of a female-headed household will be living in poverty. Low levels and low rates of payment of child support combined with lower income due to pregnancy discrimination increases the already high probability that the income of a female-headed household will be below the government-defined poverty level (McLanahan and Kelly, 1999).

Earlier generations of women, who suffered some, or all of the costs listed above, were at a substantial financial disadvantage to the women who are able to exercise the legal protections of Title VII, as amended by the Pregnancy Discrimination Act and/or the Family and Medical Leave Act.

Improving the economic well-being of working mothers also has positive effects on the well-being of children. This occurs because income earned or controlled by fathers is less likely to be spent on children than income earned or controlled by mothers (Crittenden, 2001). Thus, anti-discrimination policies, such as the PDA, that raise a mother’s lifetime income, are likely to provide additional benefits to her children.

Some economists argue that anti-discrimination policies, such as the Pregnancy Discrimination Act, may have negative effects on most women of childbearing age that outweigh the positive effects experienced by a few members of that group (Summers, 1989). Because benefits such as job-protected, paid maternity leave impose costs on employers, it is argued that employers will attempt to pass these costs onto women of childbearing age by paying them lower wages than men, or not hiring them at all. Of course this kind of attempt to shift the costs of hiring women of childbearing age would violate Title VII and Equal Pay Act prohibitions against unequal compensation based on sex. In any event, in the case of anti-discrimination protections for pregnant workers, the provision of benefits such as paid, job-protected maternity leave can provide benefits to employers that will outweigh the costs of providing these benefits. While the costs of providing relatively short leaves (i.e., twelve weeks or less) are not likely to
be substantial, the costs to a firm of forfeiting its investment in the education and training of a pregnant worker and the costs of recruiting and training a new employee are oftentimes high—especially during an economic expansion (when labor markets are tight) and for employees working in highly skilled jobs.

**State of the Body of Knowledge**

All employers in the United States, public or private, with fifteen or more employees on their payroll (for each working day in each of twenty or more calendar weeks during the current or proceeding calendar year) are covered by Title VII of the Civil Rights Act of 1964, which includes the PDA’s prohibitions on discrimination based on pregnancy. In addition, more than one-half of the states in the U.S. have adopted laws making Title VII’s prohibitions against sex-discrimination applicable to employers with fewer than fifteen employees • resulting in an extension of the PDA’s coverage of women workers (Workplace Fairness, 2004b). Eleven states make Title VII prohibitions on workplace discrimination applicable to firms with one, or more employees. Title VII’s anti-discrimination provisions apply equally to full-time and part-time employees (Walters v. Metropolitan Educational Enterprises, Inc., 1997). Workers are covered while they are applying for jobs, and from their first day of employment through their receipt of retirement benefits (Manhart v. Los Angeles Department of Water and Power, 1978).

The construction of the PDA primarily reflects the “equal treatment” philosophy espoused by some feminist legal scholars (Vogel, 1993; Williams, 1993). These scholars argue that legislation from the later 1800s and early 1900s, singling out women for special treatment in the work place (e.g., maximum hours legislation for women, minimum wage legislation for women, etc.), perpetuated a stereotype of women workers as less capable and less reliable than men, thus causing more discrimination against women workers. The equal treatment philosophy discourages adoption of such laws because they nudge (or force) families to structure their relationships along sex-based lines. Instead of arguing that pregnancy is a characteristic unique to women that requires special employment policies, equal treatment advocates seek paradigms that allow for comparisons between women affected by pregnancy and their non-pregnant co-workers in order to eliminate stereotypes of women workers as less capable. In U.S. public policy this philosophy has led to the classification of pregnancy-related medical disabilities as temporary disabilities, analogous to breaking a leg, or having appendicitis, and to the classification of maternity leave as a type of short-term medical disability leave.

Other feminist legal scholars advocate “special treatment” of pregnant employees based on the argument that pregnancy places special burdens on women because of real physiological differences between men and women (Dowd, 1986). Proponents of special treatment argue that because male norms govern most workplaces, treating women exactly the same as men in all the terms and conditions of their employment ends up putting women at a disadvantage relative to men (Kenney, 1995).
Although the equal treatment philosophy guides much of the federal courts’ interpretations of which employer behaviors constitute pregnancy discrimination, the special treatment approach gained some ground in 1987 as a result of the U.S. Supreme Court’s ruling in *California Federal Savings and Loan Association v. Guerra*. In that case the Court held that the PDA created a floor below which workplace benefits for pregnant workers couldn’t fall • not a ceiling above which they couldn’t rise. In the *Cal. Fed.* case the Supreme Court stipulated that employers that wanted to provide more generous leave benefits to pregnant workers could only do so during periods when the affected women employees were experiencing a pregnancy-related medical disability (e.g., during a pregnancy-related complication, or in the immediate weeks following childbirth). The Court’s ruling also made it clear that states were permitted (as California had) to pass their own laws mandating benefits for pregnant workers that were not mandated for workers with other temporary disabilities.

In fact a number of other states (e.g., Delaware, Hawaii, Nebraska, and Oregon, among others) have passed state laws with specific provisions that outlaw pregnancy-related employment discrimination (Workplace Fairness, 2004a). At worksites where state anti-discrimination law mandates greater benefits and/or coverage to workers than Title VII, employers are obliged to provide employees with the greater level of benefits and/or coverage.

Following the equal treatment approach, under Title VII, as amended by the Pregnancy Discrimination Act, a woman affected by pregnancy or pregnancy-related conditions (e.g., pregnancy-complications, miscarriage, abortion, or childbirth) must be evaluated and treated, in all the terms and conditions of her employment, based on either her ability or inability to perform the major functions of her job (EEOC Guidelines, 1999).

Because normal pregnancy is not defined as a disabling condition, a healthy pregnant employee must be treated as favorably, in pay and all fringe benefits and working conditions, as other healthy employees who are in her job category. For example, a healthy pregnant city bus driver must be treated as favorably at work as all other healthy city bus drivers. A healthy pregnant accountant must be treated as favorably as all other healthy accountants employed by her firm. She cannot be steered away from the most lucrative assignments just because she is pregnant, because her supervisors are trying to “protect” her, or because the firm’s clients don’t want a pregnant accountant handling their projects.

A healthy pregnant employee, who is able to perform her major job duties cannot be fired, demoted, denied a promotion, or switched to an alternative job against her will just because she is pregnant. A healthy pregnant employee normally cannot be required to produce a doctor’s note to keep working beyond a certain point in her pregnancy. In fact, if a pregnant employee stays healthy, continues to be able to perform her major job duties, and so desires, she must be allowed to work until she goes into labor (with a few exceptions • such as flight attendants and airline pilots).
A healthy, qualified pregnant job applicant cannot be rejected for a job solely because she is pregnant. Employers are prohibited from adopting fetal protection policies that limit or exclude employees from performing certain jobs because of potential harm to the employee’s offspring if those policies are applied exclusively to women. In *UAW v. Johnson Controls, Inc.* (1991) the Supreme Court ruled that a company policy was illegal because it excluded all non-sterile women from well-paid jobs where there was actual or potential exposure to lead. The Court noted that the company was treating all female employees as “potentially pregnant” and thus in violation of the PDA. Also rejected by the Court was the company’s claim that the intent of the policy was not to discriminate against women, but to protect the health of their employee’s offspring. The Court’s held that, “Decisions about the welfare of future children must be left to the parents who conceive, bear, support and raise them rather than to the employers who hire those parents.”

Should a pregnant woman or woman affected by a pregnancy-related condition experience a disability that impedes her performance of one or more of her major job duties, she must be treated at least as favorably as her firm treats other employees in her job category when they become affected by a short-term, non-occupational disability that impedes their ability to perform one or more of their major job duties. This stipulation applies whether or not the firm’s short-term disability policies are written or unwritten and informal. For example, a pregnant waitress, advised by her doctor or nurse midwife not to lift trays weighing over twenty pounds, should receive on-the-job accommodations (e.g., making two trips with a lighter tray) to the same extent the restaurant has provided, or would provide, an on-the-job accommodation for a waiter or waitress who couldn’t lift heavy trays due to a non-work-related back injury.

Firms that provide group health insurance must provide an insurance plan that covers medical costs due to pregnancy and childbirth on the same terms that costs due to other medical conditions are covered. For example, when an employer’s policy covers eighty percent of the costs of doctor’s visits and in-patient hospital care, it must also cover eighty percent of the costs of pre-natal and post-partum doctor’s visits, and of the costs of a hospital delivery of the baby. However, in the case of abortion, all employers are legally permitted to offer group health insurance that only covers abortions performed to save the life of the mother and may choose not to cover elective abortions.

An EEOC opinion issued in 2000 states that illegal pregnancy discrimination occurs when an employer’s group health insurance plan does not cover all federal government-approved prescription contraceptives to the same extent that other prescription medications, devices, and preventative services are covered, including vaccinations, oxygen tanks, preventative physical exams, etc. (EEOC, 2000). Two federal district courts followed the EEOC guidance in their rulings in *Erickson v. Bartell* (2001) and in *Cooley, Jackson, Love, and Branham v. Daimler Chrysler Corp.* (2003). Because EEOC guidelines don’t have the force of law, and because federal district court rulings only apply in the jurisdiction of the specific court that heard the case, it will be important to see if other federal district courts rule that group health
insurance plans must cover prescription contraceptives on the same terms that other prescription medications and devices are covered. Despite the limits of the rulings to date, in order to avoid protracted litigation, some employers have already begun to cover prescription contraceptives in their health insurance plans (Planned Parenthood, 2004).

Firms that do provide paid medical leave to employees in a given job category must provide paid leave on equal terms to women employees in that job category to recover from childbirth or other pregnancy-related medical disabilities. Neither eligibility periods, notification standards, maximum amounts of leave available, nor the crediting of periods on leave toward seniority and retirement benefits can be less favorable for women taking leave for pregnancy-related reasons than they are for employees taking leave for other types of short-term, non-occupational disabilities. For example, if a firm credits time employees spend on medical leave as time served for accrual of retirement benefits, then the firm must equally credit time women spend on maternity leave.

The religious or other moral beliefs of employers or their clients are not legal grounds for violating the Pregnancy Discrimination Act. Employers who believe a mother’s place is at home may not discriminate against a pregnant woman. Employers cannot discriminate against unmarried, pregnant employees in hiring, firing, provision of benefits, etc. unless male employees who engage in sex outside of marriage are equally targeted for enforcement of the rule and equally penalized for violating it.

Because the philosophical foundation of the PDA is the equal-treatment approach to employees affected by pregnancy or pregnancy-related conditions, the PDA mandates no specific set of benefits that employers must provide to pregnant employees, but sets up a framework for treating pregnant employees as favorably as similarly situated non-pregnant employees. In contrast, the Family and Medical Leave Act (FMLA) requires covered employers to provide a very specific set of employment benefits up to twelve weeks of unpaid, job-protected leave to eligible male and female employees for the birth or adoption of a child, and/or a serious health condition experienced by the employee, the employee’s spouse, child, or parent. While Title VII, as amended by the PDA, covers all terms and conditions of employment (e.g., hiring, firing, pay, opportunities for promotion, retirement benefits), the FMLA applies only to leave, reinstatement following leave, and continuation of group health insurance benefits during the period of leave. The two statutes are not redundant, although there is overlap in several areas including notification of the need for leave, leave taking for prenatal care, leave for pregnancy-related complications, leave following childbirth, and job-reinstatement following leave (EEOC, 2001). In situations where both Title VII and the FMLA apply, the employer may not force employees to trade off benefits mandated by one law for benefits mandated by the other, but instead must provide the most generous combination of benefits called for by the two statutes together.

The federal enforcing agency for the PDA is the Equal Employment Opportunity Commission (EEOC), which investigates charges of pregnancy-discrimination filed with the agency within stipulated deadlines.
Although private sector employees alleging pregnancy discrimination are not required by Title VII to exhaust internal grievance procedures before pursuing external ones, missing EEOC filing deadlines will foreclose an individual’s right to pursue federal remedies to illegal discrimination. Another prohibited behavior under the PDA is employer retaliation against any individual who files a charge of pregnancy discrimination or against any individual who provides information to the EEOC during its investigation of a discrimination charge. See the EEOC web site at http://www.eeoc.gov for more information.

Implications for Research and Practice

The major weakness of the Pregnancy Discrimination Act is its mechanisms for enforcement. Consider a pregnant employee who believes she was illegally denied a promotion, maternity leave, or health insurance benefits. If she does complain of discrimination to her supervisors and/or the EEOC, she is likely to find that her relationship with her co-workers and her supervisors is negatively affected. She will likely endure daily contact with individuals whom she has identified as discriminators. And while retaliation against employees who complain of discrimination is illegal, many employees fear that retaliation will be the result of complaining about their treatment. These are all powerful disincentives for filing a complaint in cases where pregnancy discrimination occurred, but the woman was able to keep her job. The impacts of the disincentives is made clear by Becker (1991) who reports that only one percent of employees who feel they were discriminated against even went as far as just consulting with a lawyer.

The nature of pregnancy discrimination is such that a woman often finds that the discriminatory acts of her employer rob her of income and/or benefits • just when her expenses for caring for a new baby and for medical care are about to increase dramatically. Although the woman’s need for relief from discrimination tends to be immediate, the discrimination complaint process moves very slowly. Filing a complaint with the EEOC is largely a pro forma matter for most individuals complaining of discrimination (i.e., complainants), but as noted above, it is a critical step that may not be missed. On average 600 days will elapse from the time when an employee files a complaint with the EEOC until the EEOC; (1) gives the employee the go ahead to sue on her own, or (2) decides to represent the complainant. When the EEOC represents the complainant, the EEOC pays the costs of resolving the complaint. But, because the EEOC represents the employee in court in only a small percentage of complaints • in most years less than ten percent • the employee who braves the federal complaint process should be prepared to hire and pay the fees of an employment attorney. For cases that do go to trial, the median time until final disposition of the case is fourteen months (Summers, 1992).

If the employer is found guilty of discrimination, Title VII permits the judge to award the employee monetary payments for compensatory damages (e.g., for lost pay), punitive damages, and an additional monetary payment equal to the attorney’s fees. But the typical costs of bringing a lawsuit to trial exceed $40,000, much of which attorneys typically ask for up front (Summers, 1992). Thus, women with low incomes are unlikely to be able to enforce the protections of the PDA.
Part of the EEOC’s problem in enforcing anti-discrimination law is a lack of resources. Throughout the 1980s and into the 1990s, the number of discrimination charges filed with the EEOC grew significantly with no commensurate increases in the Agency’s limited resources. Because of decisions by Congress and the President to limit the EEOC’s budget, its workforce of 3,390 full-time employees in 1980 dropped to 2,544 by the end of 1998 (EEOC, 2002). During the same time the EEOC gained responsibility for investigating charges of sexual harassment and disability discrimination. Thus, the number of all charges filed increased from 62,135 in 1990 to 84,442 in 2002 (EEOC, 2002, 2003b).

Since 1991 the EEOC has been seeking other ways of resolving discrimination-related disputes between employees and employers (besides litigation) that cost less, utilize fewer personnel, lead to a quicker resolution of complaints and are at least equally as effective (EEOC, 2003a). In 1995 the EEOC chose mediation as its official, alternative dispute resolution tool. Mediation is a form of conflict resolution in which a neutral third party assists the employer and employee in reaching a voluntary, negotiated resolution of a charge of discrimination. The decision to mediate is completely voluntary for both parties and there is no charge for the service. If a voluntary, negotiated settlement cannot be achieved through EEOC mediation, the employee can be issued a “right to sue” letter from the EEOC and is free to pursue resolution through litigation. Because EEOC research indicates mediation is achieving its goals, efforts are focused on how to encourage more employers and employees to utilize mediation instead of litigation to resolve discrimination charges.

While the EEOC efforts are commendable, a pregnant employee’s fear of retaliation, the costs, in time and money, shouldered by an employee who files a charge with the EEOC and a law suit in the federal courts, combined with the mismatch between the EEOC’s workload and its resources all substantially weaken the enforcement mechanisms of the PDA and thus promote employer non-compliance. Thus, more research is needed into a variety of public policy responses that will promote enforcement of federal anti-discrimination law in general, and the PDA in particular. Some work has already been done by Summers (1992), Lamber (1992), Turner (1995), Becker (1991) and others, but more is needed.

References


Bradwell v. State of Illinois, 83