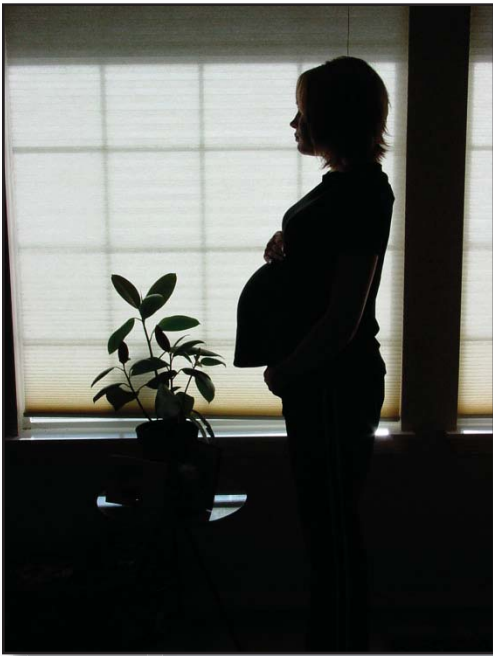


Circuit Split: Disparate Treatment For Occupational Injuries vs. Non-Occupational Injuries

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May employers, with respect to disability leave policies and accommodations, treat employees disabled due to occupational injuries differently from employees disabled due to non-occupational injuries? Currently, the law appears divided on this issue, as courts of appeal in two different circuits differ.

The Sixth Circuit in *Ensley-Gaines v. Runyon* addressed whether granting “limited duty” assignments only to employees with occupational injuries and “light duty” (as opposed the more favorable “limited duty”) assignments to employees with non-occupational injuries (such as pregnancy) violates Title VII - a federal law prohibiting employment discrimination. The Sixth Circuit held that the policy does violate Title VII, which requires that pregnant workers receive the same benefits “as other persons not so affected but similar in their ability or inability to work.” 42 U.S.C. § 2000e(k). The court reasoned that employees disabled by pregnancy were similar to employees injured by occupational accidents in their “ability or inability to work.” Since pregnant employees and employees who were injured on the job are no different in their ability or inability to do their work, the latter cannot receive more favorable treatment than the former.

However, when confronted with a similar issue, the Fifth

Circuit in *Urbano v. Continental Airlines, Inc.* held differently. The plaintiff in *Urbano* had requested a “light duty” assignment due to back pains and lifting restrictions resulting from her pregnancy. Her request was denied. The airline’s policy granted mandatory “light duty” transfers only to employees suffering an occupational injury. Employees with a non-occupational injury or illness were required to request alternative work assignments through the normal duty system, which did not guarantee a transfer. The Fifth Circuit held that the plaintiff had failed to establish a prima facie case of discrimination under Title VII because she could not prove she had been treated differently from employees suffering from non-occupational injuries. Under Title VII, an employer is obliged to ignore a woman’s pregnancy and “to treat the employee as well as it would have if she were not pregnant.” Thus, Continental was entitled to deny *Urbano* a light duty assignment as long as it “treats similarly affected but non-pregnant employees the same.” In *Urbano*, each of the forty-eight employees who received a light-duty assignment in 1994 had suffered an occupational injury. Thus, the court held that *Urbano* had not been denied a light-duty assignment because of her pregnancy, but because her back troubles were not work related.

The California Appellate Court in *Spaziano v. Lucky Stores, Inc.* agreed with the Fifth Circuit when addressing whether a collective bargaining agreement that gives a one-year leave of absence to employees disabled due to occupational injuries, and a six-month leave of absence to employees disabled due to non-occupational injuries, discriminates against pregnant employees and violates the Fair Employment Housing Act. The court held that the leave policy did not. Instead, the policy established a “neutral rule that incidentally affected pregnant employees as part of a larger group.” The fact that the policy granted more than the statutorily required leave to workers disabled by pregnancy was likely an influencing factor in the court’s decision that Lucky’s policy was not discriminatory nor unfair toward pregnant employees. Instead, the policy treated pregnant workers the same as, or better than, all other employees who were temporarily disabled due to non-occupational injuries.

Employers have various reasons for wanting to treat

employees disabled due to occupational injuries differently from employees disabled due to non-occupational injuries. Certain occupations expose workers to an increased risk of incurring work-related injuries. Therefore, employers may feel compelled to provide lengthier leaves of absence to employees disabled due to an occupational injury. Whatever the reason, employers must protect themselves from potential liability by ensuring that they adhere to all applicable laws prohibiting discrimination in the workplace including:

- Title VII of The Civil Rights Act
- Americans with Disabilities Act
- Fair Employment and Housing Act
- California Family Rights Act
- Family Medical Leave Act
- Workers' Compensation laws

To help prevent possible charges of discrimination, employers should:

- monitor the consistency with which their disability leave and accommodation policies are applied
- consider having counsel review such policies before distributing them to employees
- document and file any and all requests for leave and/or accommodations, as well as actions subsequently taken by the employer

The complex overlap among these statutes may cause problems for employers. Compliance with one statute does not guarantee compliance with another. Whether some or all statutes apply must be determined on case-by-case basis. For questions regarding your disability leave policy or accommodation practices, contact an attorney at Cook Brown, LLP. ■