

November 19, 2009

Via Electronic Submission

Stephen Llewellyn
Executive Officer, Executive Secretariat
Equal Employment Opportunity Commission
131 M Street, NE
Suite 4NW08R, Room 6NE03F
Washington, DC 20507

Re: ADA Amendment Act NPRM
Docket ID: EEOC-2009-0012

Dear Mr. Llewellyn:

Legal Momentum, the nation's oldest legal defense and education fund dedicated to advancing the rights of women, respectfully submits the following comments regarding the Equal Employment Opportunity Commission's ("EEOC") proposed revision of its regulations and accompanying interpretive guidance pertaining to the ADA Amendments Act of 2008 (ADAAA).¹

We commend EEOC for its continuing commitment to and progress toward expanding the reach of the ADA to afford equal employment opportunities to all qualified individuals. We submit this comment to raise an important issue that could further that goal and positively affect the lives of workers with pregnancy-related disabilities who are nonetheless able to fulfill the essential functions of their jobs with or without a reasonable accommodation. Specifically, Legal Momentum urges EEOC to incorporate, into its Interpretive Guidance at Section 1630.2(h), its own language confirming that "**Certain impairments resulting from pregnancy may be disabilities if they substantially limit a major life activity,**" currently posted on EEOC's website as "Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008."²

¹ Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-35, 122 Stat. 3553 (2008) (codified in scattered sections of 42 U.S.C. and 29 U.S.C.) [hereinafter "ADAAA"].

² Equal Employment Opportunity Commission, Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008 (2009) [hereinafter "Q&A"], available at http://www.eeoc.gov/policy/docs/qanda_adaaa_nprm.html.

Introduction

EEOC has long held that the state of being pregnant does not per se constitute an impairment or a disability, as is reflected in its interpretive guidance.³ However, EEOC has also long recognized that an impairment arising from pregnancy can, in some circumstances, constitute a disability under the ADA, as is reflected in its Compliance Manual.⁴ Because EEOC has published these two interpretations in different forums, confusion has arisen in federal courts over whether the ADA is applicable in any pregnancy-related context. Legal Momentum strongly urges the EEOC to combine its comments into one prominent place: the interpretive guidance following its regulations. This action will both eradicate any lingering uncertainty over whether pregnancy-related impairments can be covered under the ADA as well as implement the letter and the spirit of the ADAAA which specifically mandates broader coverage.⁵

Confusion in the Courts Based on EEOC Guidance Requires Clarification

In EEOC's current and newly proposed regulations, pregnancy is addressed only in the interpretive guidance which states: "[o]ther conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments."⁶ However, this statement does not consider, let alone resolve, the question of whether pregnancy-related conditions can qualify as impairments under the ADAAA. In fact, this sentence standing alone has created confusion and erroneous rulings pertaining to coverage for pregnancy-related disabilities.

Courts considering the applicability of the ADA to pregnancy-related conditions often turned first to EEOC's position that pregnancy does not constitute an impairment, and then to EEOC's interpretive guidance that states "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities."⁷ Relying on these two statements in tandem, courts often dismissed claims arising from pregnancy-related conditions prior to engaging in an analysis to determine whether the specific impairment affecting the plaintiff rose to the level of a disability.⁸

These courts have ignored or overlooked the fact that EEOC has long held the position that pregnancy related impairments *can* rise to the level of a disability, a position clearly reflected in EEOC's Compliance Manual.⁹ The manual, which provides guidance to field staff for assessing

³ 29 C.F.R. § 1630 app. § 1630.2(h) (2008).

⁴ 2 EEOC COMPLIANCE MANUAL, EEOC Order 915.002 § 902.2(c)(3) (1995) [hereinafter "COMPLIANCE MANUAL"], available at <http://eeoc.gov/policy/docs/902cm.html>.

⁵ See ADAAA, supra note 1, at § 2(a)(1) (finding that "Congress intended that the Act 'provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' and provide broad coverage").

⁶ 29 C.F.R. § 1630 app. § 1630.2(h)

⁷ Id. at § 1630 app. § 1630.2(j). EEOC's proposed regulations eliminate this statement.

⁸ See, e.g., Villarreal v. J.E. Merit Constructors, 895 F. Supp. 149, 152 (S.D. Tex. 1995); Tsetseranos v. Tech Prototype, 893 F. Supp. 109, 119 (D.N.H. 1995); Johnson v. A.P. Prods., 934 F. Supp. 625, 627 (S.D.N.Y. 1996); Hogan v. Ogden, 2008 U.S. Dist. LEXIS 58359, 12-13, FN5 (E.D. Wash. 2008).

⁹ COMPLIANCE MANUAL, supra note 4 (emphasis added).

discrimination charges, expounds upon this concept and sets out the requirement for further analysis:

Section 902 Definition of the Term Disability (1995)

(3) Pregnancy -- Because pregnancy is not the result of a physiological disorder, it is not an impairment. 29 C.F.R. pt. 1630 app. § 1630.2(h); see also *Byerly v. Herr Foods, Inc.*, 61 EPD Par. 42,226, 2 AD Cas. (BNA) 666 (E.D. Pa. 1993). **Complications resulting from pregnancy, however, are impairments.**

Example 1 -- CP is in the third trimester of her pregnancy. Her pregnancy has proceeded well, and she has developed no complications. CP does not have an impairment. Pregnancy, by itself, is not an impairment.

Example 2 -- Same as Example 1, above, except CP has developed hypertension. CP has an impairment, hypertension. (Remember that the mere presence of an impairment does not automatically mean that CP has a disability. **Whether the hypertension rises to the level of a disability will turn on whether the impairment substantially limits, or is regarded as substantially limiting, a major life activity.**)¹⁰

More recently, EEOC squarely addressed this issue in an internet posting discussing the ADAAA. Arriving at the same conclusion as set out in the Compliance Manual, “Questions and Answers on the Notice of Proposed Rulemaking for the ADA Amendments Act of 2008,” provides the following succinct information:

18. Is pregnancy a disability under the ADAAA?

No. Pregnancy is not an impairment and therefore cannot be a disability. (See current Appendix section 1630.2 (h).) Certain impairments resulting from pregnancy, however, may be disabilities if they substantially limit a major life activity.¹¹

Yet, neither EEOC’s Compliance Manual nor its website Q&A are authoritative or binding sources for the courts. They are also much less visible than EEOC’s formal regulations and guidance. As such, the courts may continue to rely on prior erroneous caselaw and EEOC’s incomplete interpretive guidance if EEOC fails to act.

Requested Change is in Accordance with Broad Mandate of ADAAA

Moreover, the letter and the spirit of the ADAAA mandates broad coverage for individuals with disabilities, setting out to counter the history of narrowly defined court-imposed tests, and to a lesser extent, EEOC regulations and guidance, that have thus far thwarted this goal.¹² EEOC has taken an important step towards effectuating its directive by eliminating from its regulations the limiting language, “temporary, non-chronic impairments of short duration, with little or no long

¹⁰ Id. (emphasis added).

¹¹ Q&A, supra note 2 (emphasis added).

¹² ADAAA, supra note 1, at § 2.

term or permanent impact, are usually not disabilities," as courts relied on that statement in part to deny coverage for all pregnancy-related conditions. It is now equally incumbent upon EEOC to use its rulemaking authority to rectify the known and still-remaining area of confusion as set out below.

Conclusion: Specific Proposed Change

Legal Momentum respectfully urges EEOC to incorporate its own language from its website Q&A "**Certain impairments resulting from pregnancy, however, may be disabilities if they substantially limit a major life activity,**" into its Interpretive Guidance at Section 1630.2(h) after the statement that pregnancy is not a per se impairment. This consolidation will correct prior erroneous beliefs and provide future guidance for courts grappling with the contours of the ADA's expanded coverage.

Very truly yours,

/s/

Irasema Garza
President

/s/

Rachael N. Pine
Executive Vice President
and Director, Programs Division

/s/

Michelle A. Caiola
Senior Attorney