U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Commissioner
Constance S. Barker

July 14, 2014

## PUBLIC STATEMENT OF COMMISSIONER CONSTANCE S. BARKER

Issuance of EEOC *Enforcement Guidance on Pregnancy Discrimination and Related Issues*

On May 23, 2014 I submitted to the Chair and each Commissioner the attached memorandum detailing what I viewed then, and still view, as fatal flaws in the now-approved EEOC *Enforcement Guidance on Pregnancy Discrimination and Related Issues* ("the Guidance"). The purpose of the Guidance, as you know, is to provide the public the most accurate explanation that we are able to provide of the rights and obligations under the Pregnancy Discrimination Act (the "PDA"). In the above referenced memorandum, I expressed my concern that the draft of the Guidance that was circulated to the Commissioners for consideration prior to the vote (and that has now been circulated for vote and was approved) offered a novel interpretation of the PDA for which there was no legal basis. The Guidance states that the PDA requires employers to give reasonable accommodations to employees who have work restrictions because of their pregnancy. Thus, the Guidance gives even those who do not have a disability as defined by the Americans with Disabilities Act, as amended, the same right to reasonable accommodations as individuals with disabilities.

Significantly, at the same time that the Guidance was being circulated to the Commissioners for voting, the Supreme Court was in the process of deciding whether or not to review a case that addressed this very issue under the PDA. Now, the Court has granted certiorari in the case. *Young v. United Parcel Serv., Inc.* 707 F.3d 437 (4th Cir. 2013), *cert. granted*, 81 USLW 3602 (U.S. July 1, 2014) (No. 12-1226). Thus, in the next Supreme Court term, the Court will tell us whether and to what extent the Pregnancy Discrimination Act requires employers to provide reasonable accommodations for employees who have work restrictions because of their pregnancy. If our interpretation of the PDA does not correspond exactly with the Court's decision, we will have provided an incorrect interpretation on a very significant issue that the public will rely on. Given the situation, one would think that the Commission would either (1) withdraw the Guidance from voting consideration until the Supreme Court issues a decision in *Young*, or (2) remove the section that proposes the concept of reasonable accommodations until the Court issues a decision in *Young*.

My May 23rd memorandum also requested that the proposed PDA Guidance be made available to the public for review and comment *before* it was circulated to the Commissioners for voting. I had expressed this same concern about keeping the public out of the process and I had made the same request before the criminal background check guidance was circulated for vote, but my concerns went unheeded. Like the criminal background check guidance, the PDA Guidance contains significant -- even dramatic -- changes in current interpretation of the PDA. Before the

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Commission issues a guidance that contains a novel interpretation of the law, the public has the right to be notified and to provide input.

The Commission has now voted to approve the PDA Guidance. I voted against it for the reasons mentioned generally above and as further discussed in my memorandum of May 23 that is attached for your convenience. I would hope that this is the last time this Commission elects to jump ahead of the U.S. Supreme Court and that this is the last time the Commission fails to be transparent in its actions.

Respectfully submitted,

Constance Barker
Commissioner

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Constance S. Barker

# MEMORANDUM

TO: JACQUELINE A. BERRIEN
Chair

JENNY R. YANG
Vice Chair

CHAI R. FELDBLUM
Commissioner

VICTORIA A. LIPNIC
Commissioner

FROM: CONSTANCE S. BARKER
Commissioner

DATE: May 23, 2014

RE: Draft Enforcement Guidance on Pregnancy Discrimination and Related Issues Circulated for Review and Comment April 14, 2014

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On May 7, I shared with each of you a 21-page memo submitted to OLC that contained questions and concerns about the April 14, 2014 Draft Enforcement Guidance on Pregnancy Discrimination and Related Issues (hereinafter, the "Draft Enforcement Guidance"). The memorandum noted some very fundamental flaws in the Draft Enforcement Guidance, as well as a number of minor concerns. Now that I have met with OLC to discuss those concerns, I would like to address with each of you, some of what I view as fatal flaws in the Draft Enforcement Guidance.

I am greatly troubled that the section on "Persons Similar in Their Ability or Inability to Work" introduces an entirely new legal interpretation of the PDA that is unsupported by Congressional intent or court interpretation. That is, the concept that the PDA assures women who are protected under the PDA (hereinafter, "Pregnant Employees") the right to reasonable accommodations the same as persons with disabilities under the ADA, as amended by the ADAAA (hereinafter, "the ADA"). The Draft Enforcement Guidance presents this theory as if it were settled law even though no legal authority is cited, because of course, none exists. *The Draft Enforcement Guidance dictates that Pregnant Employees who do not even have a disability under the ADA are nonetheless entitled to reasonable accommodations, if they merely*

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*have job restrictions that are similar to an individual with a disability.* According to the Draft Enforcement Guidance, a Pregnant Employee with any kind of job restriction need not show that she has a disability under the ADA, to be entitled to reasonable accommodations. Rather, all she has to do is point to an ADA comparator (and arguably even a hypothetical ADA comparator). In effect, the Draft Enforcement Guidance allows Pregnant Employees to bypass the requirements of a qualified individual with a disability under the ADA, *thus elevating Pregnant Employees to a kind of super-status above that of individuals with disabilities. This dilutes the significance of reasonable accommodations and the rights of individuals with disabilities under the ADA.* That is an insult to the disability community and their years of working for legislation that ensured them the reasonable accommodations that they are now entitled to receive by law.

Furthermore, the expansion of the concept of "comparators" to those who merely have similar work restrictions runs counter to the underlying rationale for the use of comparators as evidence of intentional discrimination under Title VII. In order to establish a prima facie case of disparate treatment under Title VII, a plaintiff must show that an action was taken *because of* the particular protected class: *because of* race, *because of* sex, and in the case of the PDA, *because of* pregnancy (42 U.S.C. § 2000e(k)). This fundamental requirement for demonstrating intentional discrimination is in the plain language of the PDA and was repeatedly emphasized in the Congressional record for the PDA (123 Cong. Rec. 23, 29384 (1977)). Comparator evidence is one of the four prongs of the *McDonnell Douglas* test. In order for a plaintiff to establish a prima facie case of intentional discrimination by indirect evidence, she must present evidence that a comparator (that is, a similarly situated employee) outside the plaintiff's protected class was treated more favorably. Such evidence creates an inference that the employer intentionally discriminated against the complainant *because of* his/her protected class. However, if the out-of-class employee was given the favored treatment for legitimate, nondiscriminatory reasons, the inference falls away. Thus, under well established law, providing favored treatment (such as reasonable accommodations) to an employee who is a qualified individual under the ADA, but not to a Pregnant Employee, fails to create any inference of discrimination. The reason for this is very simple. The employee with the disability was given the favored treatment (the accommodations) not for discriminatory reasons but because he was entitled to them as a matter of law. The Draft Enforcement Guidance skews the concept of comparators under Title VII and re-writes the concept as "*me too*" leverage. In other words, "whatever a person with a disability under the ADA is entitled to, I'm entitled to, too."

This *"me too"* factor and misuse of comparators is also written into the section on light duty work assignments. The Draft Enforcement Guidance takes the position that the PDA requires that if a company has a policy limiting light duty work to those who are injured on the job, the company must offer light duty to Pregnant Employees, too. The rationale for this is what is described as "source" discrimination against the Pregnant Employee. That is, that the company is discriminating against the "source" of the injury -- pregnancy. However, the fallacy in this argument is that such a policy denies light duty for every "source" of injury except on-the-job injuries. Thus, if the source of the injury for a male employee is a broken leg from a weekend car accident, he would be denied light duty the same as the Pregnant Employee. A policy that denies light duty assignments across-the-board to all employees except those who but-for their work for the company, would not have sustained the injuries, is not discriminatory. This skewed

use of individuals with disabilities and employees with on-the-job injuries as comparators effectively re-writes Title VII to lower a Pregnant Employee's burden of proof for disparate treatment. Unlike other Title VII plaintiffs, she would not have to present evidence that the alleged discriminatory act was *because of* pregnancy. Thus, the Draft Enforcement Guidance elevates Pregnant Employees to super-status over individuals with disabilities and all other protected classes. This elevation of Pregnant Employees to super-status is expressly contrary to Congressional intent as expressly emphasized in the Congressional Record.

In fact, what the Draft Enforcement Guidance is attempting to do is jump the gun on Congress and expand the PDA to accomplish what legislation that has been introduced into both houses of Congress would accomplish. Recognizing that the PDA does *not* provide reasonable accommodations, members of Congress have introduced legislation that would do exactly that. The Pregnant Workers Fairness Act (S. 942, H.R. 1975, 113th Cong. (2014)), if passed, would expand the PDA to award reasonable accommodations to Pregnant Employees. The very fact that members of Congress find it necessary to amend the PDA to provide reasonable accommodations is clear evidence that the PDA does not currently provide those rights. If the Pregnant Workers Fairness Act is passed, this Enforcement Guidance should certainly incorporate those new expanded rights for Pregnant Employees. However, it is a misuse of our authority to jump ahead of Congress and attempt a back-door amendment to the PDA by incorporating the concepts of the proposed legislation without waiting for Congress to take the bill under consideration.

The section on prescription contraceptives also raises serious concerns. Although entitled "Discrimination Based on the Use of Contraception", the section goes beyond discussion of use of contraceptives and takes the position that the PDA requires that any employer that provides comprehensive health insurance must also provide prescription contraceptives coverage. No authority other than a Commission decision was offered to support this proposition. The Draft Enforcement Guidance notes (in a footnote) Eighth Circuit authority to the contrary, but simply declines to follow it. The cite to the Affordable Care Act ("ACA") is particularly confusing because a large percentage of Title VII employers are exempt from the ACA (all employers with fewer than 50 employees and all those who are grandfathered in). Plus, the ACA now exempts all churches and their affiliated auxiliaries from providing contraceptive coverage. No appellate courts have yet held that the PDA requires employers to provide contraception coverage. More to the point, no courts, to my knowledge, have addressed whether any such requirement under the PDA would apply to churches. We are all aware that the Supreme Court is in the process of reviewing the ACA's religious exemption and whether the Religious Freedom Restoration Act ("RFRA") and or the First Amendment serve to protect for-profit businesses that hold strong religious beliefs, from the ACA's prescription contraceptives requirement. *Kathleen Sebelius, Secretary of Health and Human Services, et al., Petitioners, v. Hobby Lobby Stores, Inc., Mardel, Inc., David Green, Barbara Green, Steve Green, Mart Green, and Darsee Lett, Respondents*, 134 S.Ct. 678 (2013). Regardless of what conclusion the Court may reach, any Opinion they may issue will likely provide elucidation on the extent to which, and for whom, the First Amendment and or the RFRA trump any requirement to provide prescription contraceptives, whether under the ACA or the PDA. It would seem only reasonable, that we would wait for the Court's decision so that we may address this issue rather than simply note that we take no position.

Let me also join the two other Commissioners and reiterate my request that this and other proposed new or revised Enforcement Guidances be made available to the public for review. The proposed PDA Enforcement Guidance introduces entirely new legal theories on the rights of Pregnant Employees under the Pregnancy Discrimination Act. The theories are a dramatic departure from current Commission position. As I pointed out in 2012 with regard to the Criminal Background Check Guidance, significant policy changes should be made available to the public for comment before they are approved by the Commission. This is in accordance with Executive Order 12067, OMB Final Bulletin for Agency Good Guidance Practices, and in keeping with the Administration's emphasis on full transparency in the government.

If the Commission approves a draft of an Enforcement Guidance on the PDA that creates the new legal concepts discussed in this memorandum, I believe the courts will not only find those concepts unpersuasive and decline to follow them, but will also hold that they are arbitrary and capricious and an abuse of Commission discretion. I do not want the reputation of the Commission to be further damaged. Our reputation and credibility has, in my opinion, suffered from several recent lawsuits where we were not only sanctioned, but openly chastised by the courts. I strongly believe that if we approve the current version of the proposed PDA Enforcement Guidance, or something closely akin to it, we are inviting rebuke by the courts.

In closing, the purpose of Enforcement Guidances, in my view, is to advise the public on current interpretation of every aspect of a law as we best understand it. I do not believe that legal theories that lack any legal precedent, or have only weak precedent, should be written into Enforcement Guidances as if they were settled law. The sections of the Enforcement Guidance that would award reasonable accommodations and the right to light duty work to pregnant employees and would requires employers -- even churches -- to provide prescription contraceptive insurance coverage, are premature. Those sections should be removed until further development by the courts or amendments to the PDA by Congress. Unless those sections are removed, or the misstatements and overstatements of the law are corrected, I will not consider my concerns and requests for revisions to have been incorporated into any revision and will insist that no statements be issued suggesting that they were.