

Liability for employer who can't 'have a big fat pregnant woman working' at his restaurant

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The Pregnancy Discrimination Act (PDA), enacted as an amendment to Title VII of the Civil Rights Act of 1964, prohibits discrimination against women on the basis of pregnancy. Common types of pregnancy discrimination can include treating an employee less favorably because of a current or past pregnancy, a potential or intended pregnancy, her use of contraception, having or contemplating an abortion, lactation and breastfeeding, or a medical condition related to pregnancy or childbirth.

In light of the broad coverage of the PDA, employers must take care to create and implement neutral policies that don't discriminate against women on the basis of pregnancy. Could you differentiate between a neutral policy and a policy that appears neutral but actually has a disparate impact on pregnant employees? And is a facially discriminatory policy against a pregnant woman—i.e., a policy that's explicitly discriminatory—ever permissible?

You're a mean one, Sam-I-Am

Brittany Everts worked as a server at Sushi Brokers. Several months into her employment, she became pregnant. And, as is the case with all progressing pregnancies, she started to grow a baby bump. When the restaurant owner noticed Everts' baby bump, he called her shift manager to express his displeasure about having a pregnant employee working at his restaurant.

The owner stated in his voicemail message:

We got Baby Momma. We got—oh, I can't leave these messages because obviously we'd get in trouble—but it's just ridiculous. It's all the same

stuff. We can't have a big fat pregnant woman working in my restaurant. I'm sorry[,] it doesn't fly. I will not hire them when they walk in. I will not eat them with eggs. I will not eat them with ham. No green eggs; no ham; no nothing.

Rather than play Sam-I-Am and persist until the owner gave in, the shift manager fired Everts two days later after she refused to accept a reassignment to the lower-paying hostess position.

Everts sued Sushi Brokers for pregnancy and gender discrimination. During the litigation, the restaurant admitted that her pregnancy was one of the reasons she was set to be reassigned. Based on the incriminating voice mail, the reassignment, and other evidence, Everts asked the court to find Sushi Brokers liable for discrimination.

Sushi Brokers claimed that it has a policy of assigning all overweight employees (or employees who are "too large") to the hostess position for their protection because it's unsafe for them to work in the tight, confined areas behind the bar. However, that argument was refuted with evidence that it reassigned only pregnant servers and made accommodations for overweight servers to work in other locations with more room. In his deposition, the owner even admitted that rather than firing pregnant servers, the restaurant reassigned them to the hostess position. That was direct evidence that Everts was discriminated against because she was pregnant.

Oh, the excuses you'll make: BFOQ

In admitting to its policy to move all large employees to the hostess position to promote safety, the restaurant was trying to offer up a defense that not being pregnant (or not being overweight) was a

bona fide occupational qualification (BFOQ) for the server position. In extremely rare instances, a BFOQ is a narrow exception to the general prohibition against discrimination on the basis of sex or pregnancy.

An employer that seeks to prove a BFOQ must show that pregnancy actually interferes with a female employee's ability to perform the job, and the defense must be based on objective, verifiable skills required by the job rather than vague, subjective standards. The defense cannot be based on perceived dangers to the employee or her fetus, fears of potential tort (personal injury) liability, assumptions and stereotypes about the employment characteristics of pregnant women (e.g., their turnover rate), or customer preferences.

To establish not being pregnant as a BFOQ for servers, the restaurant had to meet both parts of a two-pronged test:

1. The specific job qualifications of a server justify the discrimination because they are necessary for the essence of the business.
2. Nearly all pregnant women lack the qualifications for the job, or it would be impractical to test pregnant servers to ensure that they are qualified.

Sushi Brokers' BFOQ defense failed because Everts presented evidence that the restaurant didn't treat overweight servers the same as pregnant servers. The court also rejected the restaurant's argument that it was worried about the safety of the mother and fetus because there was no proof that nearly all pregnant women lack the ability to work as servers or that it's unsafe for others if pregnant women work as servers.

The central premises of Sushi Brokers' argument were:

1. Servers had to be able to carry heavy plates in proximity to sharp sushi knives in a crowded area where a server might get bumped or fall.
2. Pregnant women had to be reassigned because studies on trauma during pregnancy

show that a pregnant woman cannot handle trauma to her stomach and it's unsafe for her and her fetus.

The court accepted the first part of the argument—that servers have to be able to carry heavy plates—but rejected the second part. There was no evidence that servers were likely to experience trauma to the stomach, and furthermore, concerns about safety for a mother and her fetus don't prove that pregnant women lack the qualifications to be servers. Sex can be a BFOQ in some situations where safety is a concern, but not this one.

One fish, two fish, red fish, sue fish

First and foremost, managers and business owners alike must undergo antiharassment and antidiscrimination training to ensure they understand the difference between permissible and unlawful conduct. Proper training in this case might have thwarted the owner's voice mail or, at the very least, the subsequent adverse employment action of discharging the server after she refused to accept reassignment.

Second, you should review your policies to ensure not only that they aren't facially discriminatory but also that they aren't discriminatorily applied and they don't have a discriminatory impact on employees in certain protected categories. Sometimes, discriminatory policies are obvious (e.g., Sushi Brokers' policy), but sometimes, they aren't. If you have a legitimate reason to prefer one sex over the other (or nonpregnant women over pregnant women), you must make sure there's a specific job qualification necessary for the business that virtually all people of the other sex (or pregnant women) don't have and that it would be impractical to test the disfavored individuals for the qualification.

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