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Pregnancy discrimination at work: an open secret

By Lauren Mayo-Abrams

It is a simple fact: pregnancy discrimination still runs rampant in the workplace. In over 20 years of practicing employment litigation in California, my pregnancy discrimination caseload has not let up.

There are typically two types of cases. The first is when a woman finds out she is pregnant in the course of employment, and after a stellar career with no performance problems, she finds her position has “been eliminated” along with one or two other employees, of course, to make it look inconspicuous.

The other situation, which is much more common, is when a woman returns from maternity leave. Suddenly her job has been eliminated; or while she was out on leave — Family and Medical Leave Act, California Family Rights Act, Pregnancy Disability Leave, and beyond — mistakes were discovered in her work; she now sucks at her job, and the company is much better off without her, so she is terminated upon her return from leave or is not allowed to return from leave. This occurs regularly, despite the law promising one the right to return to the same or similar position. *See* 2 Cal.C.Reg. Section 11043(a), 11043(c)(2); 29 C.F.R. Pt. 1064, App.

These situations are especially sad, considering how many professionals now make the difficult decision to put off childbirth until their early 40s in an effort to first establish themselves in their careers. This scenario is particularly prevalent in the legal profession as well as the tech industry. The California Equal Pay Act (and its recent revisions) may mandate similar pay for similar positions. *See* California Labor Code Section 1197.5; *Jones v. Tracy School Dist.*,

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27 Cal. 3d 99, 103-04 (1980). It may even recognize bias in the workplace. But the wage gap laws that went into effect this year cannot protect female workers against inherent bias regarding pregnancy in the workplace.

Candid employers will still tell you they would rather hire a 30-something-year-old male manager, director, vice president, or even CEO, than a female because they fear the possibility of pregnancies, maternity leaves, and requests for accommodations that

may come their way. Given this ethos, is it really surprising to hear that many women still hide in their cars to pump breast milk? Many women are unaware that they have a right to a private place to pump in the workplace. *See* California Labor Code Sections 1030-1033; 29 USC Section 207(r). Meanwhile, women who do know their rights are often chided, shamed and made to feel embarrassed for using provided space. It is no wonder that they conclude

that it is easier to hide in a car, and hope no one sees.

These issues persist despite California’s strong pregnancy and parental leave laws. Indeed, part of the problem is the pernicious myth of generous parental leave policies. By now, we have all heard the stories of organizations and companies that have adopted amazing parental leave policies (think the Bill and Melinda Gates Foundation, Amazon and Google, to name a few). However, having words written on paper guarantee-

ing parental leave is meaningless if employees know that, in practice, they will face harassment and/or retaliation for exercising their right to take this leave. Yet the law gives employees that right — the right to bond with a child, a newborn baby, an adopted or fostered child. It is the law.

Perception is also a challenge for those advocating on behalf of pregnant employees. A negative message is often sent when well-known new mothers, albeit through no fault of their own, are forced to return to work shortly after giving birth. Marissa Mayer, the then-CEO of Yahoo, took a mere two weeks off after giving birth to her twins. Recently, Illinois Senator Tammy Duckworth had to return to Washington D.C. a mere 10 days after giving birth so that she could cast a vote in the Senate.

Where does this leave us? What is the solution to this tenacious problem? How do we get to a place where women know for a fact that they will not face any negative repercussions for getting pregnant, and men and women feel secure when taking time off to bond with the newest addition(s) to their family? The clearest answer — that employers and management should act like decent human beings and stop discriminating against their pregnant employees — is also the least practical. If it

were that easy, this problem may never have existed, or would have been solved decades ago after passage of the Pregnancy Discrimination Act of 1978.

The most likely solution will involve a complicated amalgamation of education, enforcement and turnover in the workforce. Both workers and employers need to have a better understanding of the rights and responsibilities associated with anti-discrimination laws. As any prudent lawyer will confirm, it is far easier to have well-informed parties sit down at the negotiating table. No matter how much education is offered, however, there will always be bad apples who will seek to drive their pregnant workers away. Government and private enforcement will be needed to ensure that the objectives of anti-discrimination legislation are carried out. Finally, equality will likely be aided by an ever-evolving workforce. Older workers will retire, and younger workers, who are more likely to have been raised with the notion that men and women are equal, will take their place.

While we could look to other systems to note the benefits of family leave and bonding time (take many of our European friends, for example), that is another discussion. The fact is that it is against the law in California to retaliate against an employee for taking the

time to bond, or medically heal.

Yet it still happens — all the time — in California. So women hide the fact they are pregnant from their employers. They hide the fact they are breastfeeding. They aren’t celebrating the new adoption or foster baby/child at work for fear of repercussion. They fear going out on leave. They are afraid to request medically necessary accommodations. This list could go on. What a shame.

Lauren Mayo-Abrams is the founding member of the Law Offices of Lauren Abrams. She specializes in all aspects of employment litigation, including wrongful termination, whistleblower and retaliation, class actions, protected leaves of absences, discrimination, harassment, wage and hour violations and civil rights cases.



MAYO-ABRAMS