



## Ohio Supreme Court to Provide Direction Through the Maze

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**\*As seen in the November [HRACO issue](#).**

Anyone who has paid any attention to the press covering the state of the law regarding pregnancy discrimination in Ohio knows that its an area where clarity is greatly needed. Hopefully, by accepting the case of *Nursing Care Management of America d/b/a Pataskala Oaks Care Center v. Ohio Civil Rights Commission*, the Ohio Supreme Court has signaled that it will provide some much needed guidance in the interpretation and application of Ohio's pregnancy discrimination laws.

The case arises from the brief employment of Tiffany McFee as a nurse at Pataskala Oaks Care Center. Ms. McFee was hired by Pataskala Oaks as a Licensed Practice Nurse on June 9, 2003. Approximately eight months later, on January 26, 2004, Ms. McFee presented her employer with a physician's note indicating that she was medically unable to work due to a pregnancy-related medical condition, and that she would be unable to return to work until six weeks after her delivery. Ms. McFee gave birth on February 1, 2004.

Pataskala Oaks had a leave of absence policy based on the Family and Medical Leave Act ("FMLA"). Pursuant to the FMLA, Pataskala Oaks' policy allowed 12 weeks of leave for eligible employees, who must have worked for the company for at least 12 months prior to the commencement of their leave. Because Ms. McFee had not worked for Pataskala Oaks for 12 months, she was ineligible for leave under Pataskala Oaks policy. As a result, her employment with the company was terminated. Employees who are terminated because they are ineligible for leave are told that they can re-apply for employment when they are able to resume work. Pataskala Oaks' Director of Nursing contacted Ms. McFee on February 25, 2004, and left her a voicemail message informing her of a full-time position if Ms. McFee was interested. Ms. McFee never returned the call.

She did, however, file a charge of discrimination with the Ohio Civil Rights Commission ("OCRC"), claiming that her termination constituted pregnancy discrimination. The OCRC found "probable cause" that Ms. McFee's termination was in violation of Revised Code ("R.C.") 4112, the Ohio statute that prohibits pregnancy discrimination. The case proceeded to the next step -- a hearing (or in this case, because the facts were undisputed, submission based on stipulated facts and briefs), to an Administrative Law Judge ("ALJ"). The ALJ recommended that the OCRC dismiss its complaint, because, in her opinion, Ms. McFee's termination did not violate Ohio law. The Ohio Civil Rights Commission rejected the ALJ's recommendation, and issued a Final Order holding that, because Ms. McFee was fired solely due to her need for maternity leave, her termination amounted to pregnancy discrimination.

Pataskala Oaks appealed the case to the Licking County Court of Common Pleas, which reversed the decision of the OCRC. The Common Pleas Court held that because Ms. McFee was treated the same as any other employee who was temporarily unable to work but did not qualify for leave under Pataskala Oaks' policy, her termination was not the result of pregnancy discrimination. The OCRC then filed an appeal to the Fifth District Court of Appeals, which reversed the Common Pleas Court's decision -- again finding that Ms. McFee's termination violated Ohio law. It was this decision that the Ohio Supreme Court chose to review.

If this all sounds complicated -- it is. There have been four decisions in this case so far -- two finding that Ms. McFee's termination violated Ohio law, and two finding that it did not. Why all the confusion? Because there are two fundamentally different views regarding what Ohio's pregnancy discrimination law prohibits, and what it requires. The ALJ and the Common Pleas Court opinions represent one -- and in this writer's opinion, the correct -- point of view: that Ohio's pregnancy discrimination laws require that pregnant employees in Ohio be treated the same as other employees who are temporarily unable to work. Under this view, because Pataskala Oaks' policy is applied the same way to all employees, Ms. McFee's termination does not constitute pregnancy discrimination; she was terminated because she was not eligible for leave -- the same as any other employee would have been -- regardless of the reason for the need for leave. The appellate court, however, adopted the view that the OCRC espouses -- that, in Ohio, maternity leave must be provided to any employee who needs it -- regardless of whether the employee qualifies for leave under the terms of the employer's policy.

From where does this confusion stem? A brief civics lesson will provide some context for the answer. The Ohio General Assembly -- comprised of the elected officials of the Ohio House of Representatives and the Ohio Senate -- have the authority, vested in them by the Ohio Constitution, to pass laws governing the state. Frequently, when enacting legislation, the General Assembly will delegate rulemaking authority to an administrative agency to create rules -- also known as regulations -- to interpret and thus help implement legislation enacted by the General Assembly. The OCRC is such an administrative agency.

The General Assembly enacted legislation -- codified at R.C. Chapter 4112 -- prohibiting discrimination in the workplace. The law specifically prohibits discrimination on the basis of pregnancy, providing, "Women affected by pregnancy, child birth, or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work ...". When enacting the law, the General Assembly granted the OCRC authority to adopt and promulgate rules to effectuate the anti-discrimination law. The OCRC did so, and it is these rules, and the proper interpretation of them, that have given rise to the confusion evident in the Pataskala Oaks case.

The interpretation, and interplay, of the following two separate sections of the rules create the debate in the Pataskala Oaks case. One provision states, "Where termination of employment of an employee who is temporarily disabled due to pregnancy or a related medical condition is caused by an employment policy under which insufficient or no maternity is available, such termination shall constitute unlawful sex discrimination." The other section provides, "Women shall not be penalized in their conditions of employment because they require time away from work on account of childbearing. When, under the employer's leave policy, the female employee would qualify for leave, then childbearing must be considered by the employer to be justification for leave of absence for female employees for a reasonable period of time. For example, if the female meets the equally-applied minimum length of service requirements for leave time, she must be granted a reasonable leave on account of childbearing. Conditions applicable to her leave, other than its length, and her return to employment, shall be in accordance with the employer's leave policy."

The ALJ and the Common Pleas Court concluded that these two regulations allow employers to create leave policies, including maternity leave policies, that set conditions -- including length of service requirements -- upon an employee's eligibility. Pregnancy must be considered justification for leave under such policies, and pregnant employees must be treated the same, for purposes of leave, as other employees who are temporarily unable to work.

The OCRC and the Fifth District Court of Appeals see things differently. Under their interpretation of the regulations, no maternity leave was available to Ms. McFee because the need arose during her first year of employment, when she was ineligible for leave. Therefore, she was terminated pursuant to a policy under which no maternity leave was available and her termination constituted unlawful sex discrimination.

The core issue-- whether Ohio law requires preferential treatment of pregnant employees, or instead

requires that they be treated the same as other employees -- has been addressed by several courts in other cases -- with conflicting results. Ohioans -- employers and employees alike -- need clarification on this issue. Hopefully, with the Pataskala Oaks case, the Supreme Court will clear up the confusion.