Your Monthly Legal Update – November 2008

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IN VITRO FERTILIZATION FALLS WITHIN PROTECTED CLASS STATUS

Happy November everyone!! Well, this month it looks like we are going back to medical issues. This month we will review a recent Seventh Circuit Court of Appeals decision, *Hall v. Nalco Company*, No. 06-3684 (7th Cir., 7/16/2008). This case deals with the Pregnancy Discrimination Act (PDA) which prohibits discrimination on the basis of pregnancy, childbirth, or "related medical conditions". It is the "related medical conditions" that is of interest in this case.

Nalco Company initially hired Cheryl Hall in 1997. She became a sales secretary three years later. In March 2003, Hall requested a leave of absence to undergo *in vitro* fertilization. I am assuming that everyone knows what I am referring to, but to make sure we are all on the same page, I am referring to reproductive technology that involves fertility drugs, the surgical extraction of the female's eggs, the fertilization of the same, and then the surgical implantation of embryos. It should be noted that medically each treatment takes weeks to complete and often more than one treatment is necessary to achieve success. Thus, the court was presented with an issue as to whether a female employee had a right to request time off from her employer to become impregnated in this manner multiple times.

Hall was granted an initial leave for her first request without issue. Hall then asked for a second leave after the initial treatment was not successful. Management had an issue when she made a second request to take time off to undergo a second fertility procedure, but instead of addressing it right then, they appeared to acquiesce to the request. Management then proceeded to terminate Hall shortly before her second leave of absence for her second procedure was to commence. Management labeled this termination as part of a consolidation process. Hall was smart enough to ask her manager why she was chosen, and received a reply from her manager that this was in her best interest as a result of her health condition. I hope that those who are reading this are spotting some red flags, especially within the manager's reply. What is also interesting to note is that the secretary retained in this consolidation was not able to have children. Do you think that management had pregnancy on their minds?

Hall filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) alleging sex discrimination in violation of the PDA. This claim was based on the fact that Hall was a female with a pregnancy related condition of infertility. The District Court (federal trial court) dismissed the complaint, concluding that infertile women were not a protected class. The District Court based their analysis upon the reasoning that infertility is a gender neutral condition and therefore there was no gender specific mistreatment. Hall appealed that decision to the Seventh Circuit Court of Appeals.

The Court of Appeals started its analysis by reviewing the history of the PDA. The Court of Appeals opined that the basic test in any Title VII sex discrimination claim is whether the employment action in question treats an employee in a manner that would be different but for her sex. Therefore, the PDA, which did not modify this basic analysis, made it clear that discrimination based on a woman's pregnancy, is by definition, discrimination because of sex.

The Court of Appeals acknowledged that infertility alone is insufficient for a claim pursuant to the PDA to survive, but opened the door to allow employees to make a claim based on infertility that is gender specific in order to survive judicial scrutiny. The Court of Appeals then reviewed the employer's conduct and determined that its action violated the Act. Employees who are terminated for taking time off to undergo *in vitro* fertilization are no different from employees terminated for taking time off to give birth or receive other pregnancy related care – they will always be women. Therefore, the Court of Appeals concluded that Hall was terminated for a "gender specific quality of child bearing capacity." Any adverse employment action taken by an employer against a female employee based upon childbearing capacity will always result in differential treatment based on the employee's sex.

In this political season, I thought this case would give us even more information for debate, in case you have not had enough. I hope that everyone has a wonderful Thanksgiving!!