COMMENTARY

Reproductive Rights Garnering More Attention in the Employment World

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Employment Law

By Jeffrey Campolongo | August 17, 2023 at 12:04 PM

Last year's U.S. Supreme Court decision in *Dobbs*, which overturned *Roe v. Wade*, put a spotlight on reproductive rights. The decision reminded us that reproductive rights, while at times broadly defined, can be giveth and taketh away. Reproductive rights, like any other legal rights, are whatever we, as a society, say they are. The folks in power (with a modicum of input from those not in power) define the law.

In ancient times, one could be executed for almost anything under Draco's Code, including stealing cabbage or another man's apples. Draco was the 7th Century Greek legislator and the first to introduce a written penal code, hence the origin of the commonly used legal term, Draconian. Before Draco, Greece's laws were either settled by blood feud or through a series of oral laws passed down from generation to generation.

Under the Draconian constitution, however, there was only one penalty, execution, for all convicted violators and the laws were said to be written in blood instead of ink. When asked why so many offences were punishable by death, Draco was said to reply that people deserved to die even for minor crimes, and he could think of no worse punishment for the more heinous ones.

We no longer put people to death, presumably because at some point in the continuum of civilized society, we decided that stealing apples did not warrant a Draconian penalty such as execution. As we pivot to a modern definition of reproductive rights there are some who advocate capital punishment for those performing or receiving an abortion. Such a position would seem more Hammurabi-like, than Draconian, but extreme, nonetheless.

Reproductive Rights: Not Just Human Rights, but Legal Rights

The genesis of reproductive rights stems from a variety of sociological forces. As explained by renowned scholars Joanna N. Erdman and Rebecca J. Cook:

“Reproductive rights refer to the composite of human rights that address matters of sexual and reproductive health. Reproductive rights are protected through the application of human rights in guidelines, national laws, constitutions, and regional and international treaties. While reproductive rights are instrumental to achieving population, health, and development goals, they are also important in themselves as human rights intended to protect the inherent dignity of the individual. Reproductive rights consist of three broad categories of rights: rights to reproductive self-determination, rights to sexual and reproductive health services, information, and education, and rights to equality and nondiscrimination.” See J.N. Erdman, R.J. Cook, in International Encyclopedia of Public Health, 2008.

In the employment law world protection for reproductive rights can be found in a number of federal anti-discrimination statutes such as Title VII (sex discrimination), the Pregnancy Discrimination Act, the Americans with Disabilities Act, the Genetic Information Nondiscrimination Act, and of course, the Family & Medical Leave Act. You can now add to that list the federal Pregnant Workers Fairness Act (PWFA), which became effective on June 27.

The Pregnant Workers Fairness Act

The PWFA essentially codified a reasonable accommodation requirement for employees with known limitations related to pregnancy, childbirth or related medical conditions. In addition to covering pregnant employees, it also protects women undergoing fertility treatment, as well as those who have postpartum depression and those who have had an abortion or pregnancy loss. Some of the types of accommodations could include, but are not limited to, providing chairs or stools for those who have to be on their feet all day; bathroom breaks; temporary reassignments to roles with lighter duties or with less exposure to harmful toxins; flexible schedules to accommodate morning sickness and time off for prenatal checkups and postpartum care. Unlike the ADA, the PWFA does not define the term “reasonable accommodation” so as to provide broad application across a range of jobs and professions.

The EEOC has published a useful resource known as the enforcement guidance on pregnancy discrimination and related issues that outlines the various types of discrimination affecting women, including discrimination based on reproductive risk, intention to become pregnant, infertility treatment, and use of contraception. The National Women's Law Center also keeps a running list of case and states taking action to stop discrimination based on reproductive health care decisions. Some examples of employers firing employees for pursuing pregnancy through the use of assisted reproductive technology, include:

- When an assistant principal at a West Palm Beach high school, disclosed that she was undergoing in vitro fertilization, she was allegedly reassigned to a position with a lower salary and replaced by a man with less experience.
- An unmarried teacher for two schools with the Archdiocese of Cincinnati, Ohio, was fired after she became pregnant using artificial insemination.
- A teacher was fired from her job of seven years teaching French because she and her husband used in vitro fertilization to become pregnant.
- A woman was fired from her teaching job in Indiana for using in vitro.

What Constitutes Adequate Notice When Taking Leave for IVF Under the FMLA?

Legal issues involving a woman's use of in vitro fertilization (IVF) recently made its way to the U.S. Court of Appeals for the U.S. Court of Appeals for the Third Circuit. In *Sinico v. County of Lebanon,* No. 1:18-cv-01259 (M.D. Pa Sept. 9, 2022), Kelly J. Sinico alleged that she was fired and retaliated against because she was receiving IVF treatment as a result of an infertility condition. According to the district court opinion, Sinico was a juvenile probation officer who disclosed to her employer that she was seeking fertility treatments. Sinico used paid sick leave to attend her fertility treatments during work hours.

Sinico alleged that the defendants denied multiple requests that she made for accommodation of her IVF treatment. On May 23, 2017, her employer denied Sinico's request for sick leave to attend a fertility treatment session, instead converting the request to one for vacation leave. Two weeks later, on June 5, 2017, Sinico requested accommodations for an embryo transfer she was scheduled to have on June 10, 2017. Sinico informed her supervisors that she would be on bed rest for 48 hours after the transfer, that she would be limited to minimal movement for another 48 hours, and that she needed to be given light duty or leave for another eleven days after that. Less than a month later she was fired for alleged performance issues. Sinico suffered a miscarriage after her termination, though she did not specifically allege that it was caused by her termination.

The employer argued, and the district court agreed, that Sinico failed to provide adequate notice of her need for leave under the FMLA. Deeming her request for leave "foreseeable," the court dismissed her FMLA interference claim due to her "failure to provide any notice of her request for FMLA leave until three work days before she intended to begin her leave due to a

planned medical procedure" (emphasis in original). Even though the particular date and time of the procedure had not been fixed, the general timing of the procedure, and her need for leave was known to her well before she made her request for leave, the court wrote.

The case was appealed to the Third Circuit where Sinico argued that her embryo transfer was not foreseeable and that her text messages and conversation with her supervisor several days before IVF was to take place was adequate notice of her need for FMLA qualifying leave. See *Sinico v. Commonwealth of Pennsylvania*, Appellate No. 0:22-cv-02998 (3d Cir., argued on July 13, 2023). At oral argument last month her counsel explained that her prior infertility treatments were well known to her employer, though it was not until June 2017 that she found out, for the first time, that she was medically cleared for an embryo transfer.

The appeals panel questioned whether the IVF procedure was akin to an elective heart procedure or more analogous to being on a heart transplant list, awaiting a call that a donor was available. Unlike an elective procedure, Sinico argued that an embryo transplant is only to take place when certain medical conditions have been met, making it much more like awaiting a donor transplant. The need for leave is virtually unforeseeable. When that happens, the FMLA only requires that notice be given as soon as practicable.

The issue here is the reasonableness of the notice. While parties can debate whether a text message was adequate or not, what should not be up for debate is whether reproductive rights are entitled to less deference than any other medical procedure or condition. There is no bright line test, no calendar alarm, no desktop reminder to say when conditions are appropriate for fertility. When it's time, it's time.

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