



Transfer During Pregnancy Raises Bias Claims, Sixth Circuit Rules

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The Sixth Circuit Court of Appeals, the federal appeals court that governs Michigan, recently addressed the ability to transfer a pregnant employee to a light duty position without the transfer constituting an adverse employment action. The case addressed the legality of the transfer and ultimate termination of a female welder under the ADA, Title VII and state statutory protections. The federal appellate court held that a female welder at a boat repair facility who was involuntarily transferred after becoming pregnant may pursue pregnancy and disability discrimination claims regarding the transfer, but has no bias claim regarding her termination after a doctor ordered bed rest for the remainder of her pregnancy.

In analyzing the transfer issue, the court recognized that welding work at that company was physically demanding, it required "heavy lifting, climbing up ladders and stairs, maneuvering into barge tanks, and, occasionally, the overhead handling of equipment." In addition, "welders were exposed to fumes, dust, and organic vapors in the course of their work."

In this case, the employee was transferred from her position as a welder to the tool room on the night shift. The appellate court recognized that the employee received the same salary, experienced no loss in benefits, and had in some ways better working conditions in the tool room. Although the trial court found the transfer from a welder job to a tool room was not an adverse employment action, the Sixth Circuit said a reasonable jury could find adverse action in that the employee, a single mother, was transferred to the night shift in a job requiring less skill, even though her pay remained the same. "[T]he evidence is sufficient to raise a genuine issue of material fact as to whether management, rather than undertaking an objective evaluation to determine whether the employee could perform her welding job while pregnant, instead subjectively viewed the employee's pregnancy as rendering her unable to weld." Further, the appellate court found that the plaintiff raised a triable ADA claim based on the theory that her supervisor regarded her as substantially limited in working a class of

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jobs (welding) because of her past history of miscarriage.

This decision demonstrates the broad standard of what constitutes an "adverse employment action" and underscores the importance of employers not assuming or speculating as to an employee's abilities or inabilities. Instead, employers are obligated to engage in a dialogue with an employee as to his/her ability to perform the essential functions of the job, with or without accommodation, and utilize the opinions and recommendations of healthcare providers where appropriate.

There is no one-size-fits-all answer with respect to disability issues. Employers are to avoid making decisions based upon preconceived notions or stereotypes. Instead, employers should engage in the interactive process with the employee and, where appropriate, seek input from legal counsel before an employment decision is made, not after.
