a better balance
the work and family legal center

80 Maiden Lane, Suite 606, New York, NY 10038 | t: 212.430.5982 | info@abetterbalance.org | abetterbalance.org



February 14, 2012

**VIA ELECTRONIC SUBMISSION**

Jacqueline A. Berrien
U.S. Equal Employment Opportunity Commission Chair
131 M Street, N.E.
Washington, D.C. 20507

**Re: Comments from A Better Balance: The Work & Family Legal Center on Unlawful Discrimination Against Pregnant Workers and Workers with Caregiver Responsibilities**

Dear Chair Berrien:

We want to commend and thank you for your commitment to addressing Unlawful Discrimination Against Pregnant Workers and Workers with Caregiver Responsibilities.

A Better Balance: The Work and Family Legal Center is a non-profit legal advocacy organization dedicated to empowering individuals to meet the conflicting demands of work and family without sacrificing their economic security. We believe that workers should not have to face impossible choices between earning a paycheck and caring for themselves or their loved ones. The founders of A Better Balance are a group of lawyers who have successfully worked together on a variety of women's rights and economic issues. We employ a range of legal strategies to promote flexible workplace policies, end discrimination against caregivers, and value the work of caring for families.

A Better Balance also hosts the Families @ Work Legal Clinic, where we partner with the prominent New York employment law firm, Outten & Golden, to assist low-income working New Yorkers with pregnancy discrimination, caregiver discrimination, and other related issues. We receive calls from men and women across the tri-state area as well as from individuals all over the nation in response to our advocacy efforts. Hearing from these individuals who are struggling with difficulties at work puts us in a unique position to provide insight into the problems people are experiencing on the ground. We are consistently shocked by the stories we hear, despite the fact that the Pregnancy Discrimination Act was passed over thirty years ago. One woman's employer said that he "should have fired her on the spot" when he found out she was pregnant. Another was told by her supervisor, "you can't keep your job with this situation," pointing to her pregnant belly. The time is ripe for the EEOC to revisit the PDA in the context of the modern workforce and we thank you for prioritizing this issue.

Detailed below are A Better Balance's comments regarding the February 15, 2012 EEOC commission meeting. First, the EEOC's guidance should clarify employers' obligations in the aftermath of the *Bloomberg* decision. Second, the EEOC should clarify that the ADAAA combined with the PDA now require employers to provide reasonable accommodations to pregnant women who are similarly situated to temporarily disabled workers covered by the ADAAA. Third, the EEOC should collaborate with the DOL to educate the public about the interaction of different laws and regulatory schemes to provide more comprehensive information to working families.

Thank you again for the opportunity to comment on these critical issues. We look forward to working with you.

Sincerely,
Dina Bakst
Co-Founder & Co-President

Phoebe Taubman
Senior Staff Attorney

Elizabeth Gedmark
Law Fellow

cc: Stuart J. Ishimaru
Constance S. Barker
Chai Feldblum
Victoria A. Lipnic

a better balance
the work and family legal center

80 Maiden Lane, Suite 606, New York, NY 10038 | t: 212.430.5982 | f: 212.430.5983 | info@abetterbalance.org | abetterbalance.org

## I. The EEOC Should Clarify Employers' Obligations in the Aftermath of the *Bloomberg* Decision

The EEOC's caregiver discrimination guidance of 2007 was groundbreaking, but several years later, the problem persists. The *Bloomberg* decision stated in dicta that employers are not required to provide work/life balance to their employees.[1] This has led to confusion about how discrimination laws apply to caregivers. The vast majority of our callers are women who are treated poorly after announcing their pregnancies or upon returning from maternity leave.

We continue to see instances of stereotyping about caregivers. One woman's supervisor told her, "taking care of a baby is easy, you need to focus on work now," and constantly referred to her maternity leave as "vacation," implying that she was lazy and devaluing the difficult work of caring for a newborn. Another woman's boss refused to send her on a long-term travel assignment she had completed successfully many times before she became a mother because, in his words, he "couldn't have a woman with a baby" on the trip. He sent a male employee instead.

Misinformation is rampant among employers and employees alike. One clinic caller was pregnant and diagnosed with gestational diabetes. Although she repeatedly spoke with her employer's Human Resources department, she was not provided with reasonable accommodations under the Americans with Disabilities Act. She had to stay late to make up time missed for doctor's appointments and was not given breaks to eat. In fact, Human Resources told her she should do anything she could to make her supervisor happy, in order to avoid being fired for missing work for doctor's appointments. We are consistently surprised to find out how little Human Resources departments know about discrimination laws.

Our callers face other roadblocks to successful litigation besides confusion and misinformation. We repeatedly see instances where there are no similarly situated workers for comparison. For example, one cashier who was treated poorly after returning from maternity leave did not know of any other disabled or temporarily disabled co-workers returning from an extended medical leave. Since employers are permitted to treat all employees poorly, it is assumed that they would do so if the circumstances arose (in other words, if they employed disabled workers).

Additionally, some "savvy" employers who wish to push out pregnant women think that by waiting to fire or take adverse actions against the employee until she comes back from maternity leave, they are abiding by the law. One woman we heard from was immediately placed on a part-time schedule upon returning from maternity leave. She was also given a pay cut, demotion in title, and lost her benefits. Yet another woman was given fewer hours because it was presumed that she would want more time with her new child. For these women working in retail, reduced schedules were unaffordable.

**Recommendation**: **The EEOC should clarify that there is no need for a non-pregnant comparator if other evidence suffices to show discrimination on the part of the employer.**

[1] *E.E.O.C. v. Bloomberg L.P.*, 778 F. Supp. 2d 458 at 485 (S.D.N.Y. 2011).

80 Maiden Lane, Suite 606, New York, NY 10038 | t: 212.430.5982 | f: 212.430.5983 | info@abetterbalance.org | abetterbalance.org

As Joan Williams, a leading scholar on work/family issues has indicated, the *Bloomberg* decision incorrectly presumed that pregnant women taking maternity leave must provide a comparator in order to show discrimination.[2] This places a great hindrance on pregnant women because it is often difficult to find a similarly situated non-pregnant worker for comparison.[3] This is not only because there might not be such a worker at the place of employment, but also because it can be difficult for employees to obtain such information. Contrary to the decision in *Bloomberg*, women are not asking for the law to grant them "work/life balance," instead they are asking for existing sex and pregnancy discrimination laws to be enforced.

**The EEOC should clarify that as long as an adverse employment action was taken because of pregnancy, childbirth, or a related condition, then an employer can be held in violation of the PDA regardless of when the adverse employment action actually took place.** It is illegal to fire women because of pregnancy, even if the employer waits until an employee returns from maternity leave. The EEOC should also clarify that women who are thought to be pregnant (or thought to have a condition related to pregnancy or childbirth) are covered by the PDA, even if they are not actually pregnant or suffering from a related condition. Additionally, a court in Texas recently ruled that breastfeeding is not a condition related to pregnancy or childbirth.[4] The EEOC must make clear that lactation is covered by the PDA because it is a medical condition related to childbirth.

**The EEOC should also amend the PDA regulations to require employers to provide greater notice to employees of their rights under the law.** 42 U.S.C. § 2000e-10 requires employers to post a notice of pertinent provisions of Title VII and information about filing a complaint, but employers are not required to tell employees about their rights even when they find out that an employee is pregnant.[5] This results in a great number of pregnant women not realizing that their employers are violating the law when they make employment decisions based on an employee's pregnancy. The EEOC should promulgate regulations or at least best practices guidance stating that employers should not only post notice of the PDA, but also place notice in employee handbooks and notify employees of the law when they announce their pregnancies, similar to notice requirements under the FMLA. This would greatly assist pregnant women in understanding whether their employers' practices are legal or not. Information about filing a complaint should also be included.

---

[2] Joan Williams, *Bloomberg Case: Open Season to Discriminate Against Mothers?*, new deal 2.0, (August 23, 2010), available at: http://www.newdeal20.org/2011/08/23/bloomberg-case-open-season-to-discriminate-against-mothers-56094/.

[3] Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 Georgetown L. J. 567, 614-15 (2010).

[4] *E.E.O.C. v. Houston Funding II, Ltd.*, No. H-11-2442 (S.D. Tex. February 2, 2012).

[5] "(a) Every employer, employment agency, and labor organization, as the case may be, shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint. (b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense." 42 U.S.C. § 2000e-10.

a better balance
the work and family legal center

80 Maiden Lane, Suite 606, New York, NY 10038 | t: 212.430.5982 | f: 212.430.5983 | info@abetterbalance.org | abetterbalance.org

**II. Clarify that Pregnant Women Should be Treated the Same as Similarly Situated Temporarily Disabled Workers, Who Now Have Added Protections Under the Americans with Disabilities Act Amendments Act.**

There are now more pregnant women in the workforce than ever before.[6] Many of them need minor accommodations from their employers so that they can stay healthy. These women are forced out on leave, terminated, or have to jeopardize their health because their employers are unwilling to provide reasonable accommodations. Employers are not required to accommodate them under the Americans with Disabilities Act, since the women do not have pregnancy-related disabilities. This gap in existing law frequently results in pregnant women being treated worse than disabled workers, despite the fact that they are similarly situated in their ability or inability to work.

Dina Bakst, Co-President & Co-Founder of A Better Balance, recently wrote about this phenomenon in an Op-Ed in the New York Times,[7] calling for legislation in New York State and nationwide to close this loophole.

Women who are not accommodated but are in need of income often have no choice but to continue working under unhealthy conditions, thus risking their own health as well as the health of their babies. Women who cannot continue working or choose to prioritize their health are often fired. Research has shown that stress from job loss can increase the risk of having a premature baby and/or a baby with low birth weight.[8] This is a matter of public health concern.

The stories we heard in response to the New York Times Op-Ed illustrate the need for clarification in this area. For example, one woman who worked as a concierge for a large hotel chain was laid off when she was 8-months pregnant. According to her, the hotel systematically tells pregnant women that they should resign or go on disability rather than allow them to sit for a few minutes. The hotel does this to pregnant women even while providing accommodations for employees suffering from other temporary injuries or ailments.

Getting fired or being pushed out on unpaid leave has devastating effects on women and their families. Low-income women, who often have physically demanding jobs requiring accommodation, especially cannot afford to lose critical income at a time when they need to provide for a new family member. The EEOC must take action to prevent this from happening.

---

[6] Melissa Alpert and Alexandra Cawthorne, *Labor Pains: Improving Employment and Income Security for Pregnant Women and New Mothers*, Center for American Progress (August 3, 2009), pg. 2, available at: http://www.americanprogress.org/issues/2009/08/pdf/labor_pains.pdf.
[7] Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. Times (January 30, 2012), available at: http://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html.
[8] March of Dimes, *Stress and Pregnancy* (January 2008/January 2010), available at: http://www.marchofdimes.com/pregnancy/lifechanges_indepth.html.

a better balance
the work and family legal center

80 Maiden Lane, Suite 606, New York, NY 10038 | t: 212.430.5982 | f: 212.430.5983 | info@abetterbalance.org | abetterbalance.org

**<u>Recommendation</u>: The EEOC should clarify that the Pregnancy Discrimination Act (PDA) requires employers to treat pregnant women with temporary incapacities the same as they must now treat employees with temporary disabilities under the Americans with Disabilities Act Amendments Act (ADAAA).**

Under the ADAAA, employers must now accommodate a greater number of individuals with disabilities, including those with temporary disabilities. The EEOC's regulations make clear that temporary disabilities are covered by the ADAAA. Specifically, "[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting…"[9] Additionally, the appendix to the new regulations clarify that circumstances similar to those that a pregnant woman might face can be covered by the ADAAA. For example, "someone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting"[10] However, as the appendix states, because pregnancy is not a result of a physiological disorder, it is not itself an impairment even if a pregnant woman had the same 20-pound lifting restriction.[11]

Thankfully, the appendix also states that "a pregnancy-related impairment that substantially limits a major life activity is a disability…"[12] However, for women with normal pregnancies in need of reasonable accommodations, more legal protections are needed.

The PDA requires employers to treat pregnant women "the same for all employment-related purposes…as other persons not so affected but similar in their ability or inability to work."[13] Thus, an employer must treat a pregnant woman who cannot lift 20 pounds the same as a temporarily disabled man with an impairment preventing him from lifting 20 pounds. Since the regulations are clear that temporary disabilities must be accommodated, and pregnant women must be treated the same as those with temporary disabilities, then it stands to reason that pregnant women must be accommodated as well. The EEOC should make this clear so that employers understand how their obligations to pregnant women have changed with the ADAAA, despite the fact that most pregnant women are not actually covered by the ADAAA. Pregnant workers would benefit greatly from clarity so that they can truly understand their legal protections.

A Better Balance also supports new legislation explicitly requiring employers to reasonably accommodate pregnant workers in New York State and on the federal level. This affirmative obligation on the part of employers would be incredibly useful for pregnant women, for whom litigation may not be an option. Having such laws on the books would be invaluable so that women (and their lawyers) can negotiate directly with employers prior to filing suit, instead of

[9] 29 C.F.R. § 1630.2(j)(1)(ix).
[10] 29 C.F.R. pt. 1630 app. § 1630.2(j)(1)(viii).
[11] 29 C.F.R. pt. 1630 app. § 1630.2(h).
[12] *Id*.
[13] 42 U.S.C. § 2000e(k).

80 Maiden Lane, Suite 606, New York, NY 10038 | t: 212.430.5982 | f: 212.430.5983 | info@abetterbalance.org | abetterbalance.org

having to go through the discovery process in order to find out how the employer has treated similarly situated temporarily disabled workers.

## III. The Family and Medical Leave Act Needs Clarification and Interagency Collaboration

Although the Department of Labor enforces the Family and Medical Leave Act (FMLA), the EEOC enforces laws requiring that family leave be granted equally and in a non-discriminatory manner. Additionally, it is our experience that individuals and employers are often confused about how different laws and regulatory schemes work together.

One woman we spoke with was having a very difficult pregnancy. She worked at a non-profit organization as a receptionist. She was sometimes tardy or absent because of pregnancy-related sickness. When she was about 32 weeks pregnant, her boss told her that she needed to leave work and go on disability, despite the fact that she wanted to keep working and her doctor had cleared her for work. Her supervisor never mentioned the FMLA or intermittent leave for pregnancy. Forcing pregnant women out on leave early violates both the Pregnancy Discrimination Act and the FMLA.

Another caller to our hotline, who suffered a fetal demise at 29 weeks gestation, was told by her HR director that she was ineligible for maternity leave because she was not going to be caring for a child. The HR director failed to inform the woman of her FMLA rights for self-care and recovery, and misinformed her about her rights to disability benefits related to her stillbirth. The caller was understandably frustrated and angry: "I shouldn't be at home grieving this loss and having to worry about being terminated."

Women are disproportionately the caregivers in the United States, but it is important to remember that male caregivers also face discrimination and trouble at work. In a survey of approximately 250 working fathers living across the country, more than 12% said that they have been penalized or had their commitment to their jobs questioned due to family responsibilities.[14] One man we met through the clinic had been working for a very large retailer for over a year when his mother became very ill. As a result of her illness, he was sometimes tardy or absent from work. After working another year for the same employer, and never being told of his FMLA rights, he asked if he could switch to part-time work in order to care for his mother. He was fired the next day. His supervisor knew about his mother, but still never notified him that his time off from work would be covered under the FMLA. To add insult to injury, his employer contested his application for unemployment insurance benefits leaving him with nothing during an incredibly stressful time in his life. We see time and time again employers who fail to provide adequate notice of employees' FMLA rights and great confusion surrounding intermittent FMLA leave.

[14] Dina Bakst, Jared Make, and Nancy Rankin, *Beyond the Breadwinner: Professional Dads Speak Out on Work and Family*, pg. 16 (June 2011), available at: http://www.abetterbalance.org/web/images/stories/Documents/valuecarework/Reports/ABB_Rep_BeyondBreadwinner.pdf. (shortened link: http://bit.ly/yxiuWn).

a better balance
the work and family legal center

80 Maiden Lane, Suite 606, New York, NY 10038 | t: 212.430.5982 | f: 212.430.5983 | info@abetterbalance.org | abetterbalance.org

**Recommendation**: **The DOL, EEOC, and other agencies should work together to provide a comprehensive, collaborative inter-agency resource for pregnant women.** The United Kingdom has such a resource on their Directgov website.[15] This easy to use website compiles all relevant information for pregnant workers in one place. For example, for the woman who was facing potential PDA and FMLA violations, she needs a user-friendly, easy-to-access website or phone number where she can understand her rights under both laws and easily file complaints with both agencies.

**Federal Government agencies should also work to educate both employers and employees about notice requirements and intermittent leave under the FMLA.** Intermittent leave can be a confusing concept. It would be best if agencies could provide specific examples of precisely how intermittent leave and reduced schedules can be taken for pregnant women. Employers also need to know how forcing pregnant women out on early leave or disability can be a violation of the PDA as well as a potential violation under the FMLA. Enforcement of notice requirements is needed as well.

Individuals who have suffered from discrimination are looking for easy ways to tell their stories. In response to Dina Bakst's previously mentioned Op-ed in the New York Times, websites covering the story received hundreds of comments from interested individuals, many of whom communicated their own discrimination stories. One woman named Evelyn wrote on Facebook that she had a miscarriage when she was 6 months pregnant. She took time off of work to recover mentally and physically and was fired with a severance package while on leave. She wrote, "I could have sued them, I know that. However, I was too distraught about the loss of my baby…" For women and families who are dealing with a significant life change it is too much to ask them to navigate confusing laws and regulations (or hire a lawyer when they have suddenly lost income). There must be an easier method for voicing concerns, sharing stories, and even anonymously reporting problem employers. This should be incorporated in a user-friendly website that provides legal information to empower workers as they navigate these complicated areas of law.

## IV. Conclusion

We commend the EEOC on your commitment to ending discrimination against pregnant women and caregivers. We look forward to working with you to ensure that working families do not sacrifice their economic security while providing care to loved ones. Thank you for the opportunity to submit these comments.

[15] *See* http://www.direct.gov.uk/en/Parents/Moneyandworkentitlements/WorkAndFamilies/Pregnancyandmaternityrights/DG_10026556. (shortened link: http://bit.ly/y0Yiey).