Feldblum Excerpts from Feb 15, 2012 Commission Meeting on Pregnancy & Caregiver Discrimination

COMMISSIONER FELDBLUM: Thank you. Thank you, Madam Chair, for holding this hearing. Thank you, Commissioner Ishimaru, for pushing for it, for working on it. And again, the staffs, Antoinette and Sharon, that did incredible work.

I started looking at this issue probably most intensively about seven years ago, when I started Workplace Flexibility 2010 in 2003. And my goal at that time was simply to bring the issue of the intersection between work and family life, whether it was caregiving or anything else, into the public policy debate in a way that was even broader than the FMLA debate which had started off so much of this incredible work.

I guess I have to say, Commissioner Ishimaru, that I was appalled but probably not shocked by some of the stories that I read. Because, perhaps because of the depressed economy or anything else, employers like to have workers that, as Joan Williams said so many years ago, are like the ideal worker, they don't bring any problems into the workplace. That's just sort of how they want to be.

Now, one thing that's going to be very useful and interesting about this hearing and meeting and testimony is that there are a number of laws right now -- right now -- that do not allow employers to be doing what they're doing. And those are laws like the PDA. Those are laws like the ADA. And in particular, those are the intersection of the ADA and the PDA that in fact provide protection for a number of women and men who are experiencing some of this discrimination.

But the key thing is that words on paper are just words on paper. And our job, as an agency, is to make sure that we are enforcing the laws. And that starts with education. That starts with letting people know what the law says, and this meeting is an incredibly important first step in that regard. It means putting out clear guidance, in writing, about what the law says. It means educating our investigators, so they know when charges come in that a law has been violated. And finally, if need be, it means going to court.

So I'm very, very happy that we are starting in what has already been a very long effort on this -- and we have some of the people testifying today who were at the beginning of that effort, here, as well as people who came into this more recently. I want to acknowledge the presence of Liz Watson in this room. Liz Watson, at Workplace Flexibility 2010, spent two years with Professor Jennifer Swanberg working on an incredible report about how the lack of workplace flexibility affects low-wage workers. And I think as we will discover, the presence of laws like PDA and ADA are most important for low-wage workers who are often working part-time, and do not have the protections of the FMLA.

So I thank both the initial leaders of this movement, like Judy Lichtman, whom I met when I came to Washington 30 years ago as a young babe, as well as Liz Watson, who's the rising generation of those who are going to work on this issue. Thank you so much.

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COMMISSIONER FELDBLUM: Thank you. Ms. Parker, thanks for mentioning that low-wage workers often have too much flexibility. I would certainly commend the Watson-Swanberg report to your attention. The data there showed that half of low-wage workers need traditional flexibility, but the full other half need predictability. So thank you for mentioning that.

Ms. Terman, something that struck me as you were talking about someone who just needs to sit on a stool, and I realized that this was in none of the testimony that came in. In terms of protections under the ADA, I would commend to your attention that the ADA prohibits employers from having qualification standards that screen out or tend to screen out people with disabilities, unless the employer demonstrates that standard is job-related and consistent with business necessity.

The definition of disability, for purposes of that qualification standard, is the third prong of disability, which is simply any physical or mental impairment that isn't both transitory and minor. So I certainly recommend that you should be looking at any company that has a rule that says "You must stand for 12 hours" -- right now, that will screen out people with back impairments, and they have to show it's job-related and consistent with business necessity. Now, they might be able to, like if you have to lift 20 pounds, and then you move into the accommodation world. But I just realized that wasn't in any of the testimony.

Okay. A question to Dr. Berman. I was struck by the fact that, in your data, women without children did the best across the board in your data. That is, they did significantly better than women with children, but they also did better than men, either with or without children. And I'm wondering if this is the flip side of the caregiver stereotype that you talk about. That is, I'm wondering if employers today consider women who have chosen not to have children, or just have not had children, to be the most reliable workers? You know, sort of like they're now the most ideal workers, because they would most likely be devoting themselves to the work, so that these employees might even be seen as better than fathers, who in this day and age might be doing some of that annoying caregiving.

(Laughter.)

COMMISSIONER FELDBLUM: I'm wondering about your thoughts about that?

DR. BENARD: Thank you for your question. That's actually a pretty consistent finding, not only in our work but in some other work, that people do rate the women without children quite highly. And we suspect that is something along the lines of what you suggested, that perhaps, especially because people often expect women to have children, that women who don't have children might be perceived as especially committed to work, especially in professional occupations. And so we think they may be seeing a bonus for that reason.

In the long run, most workers in the workforce do have children, and so I'm not sure that that's an advantage that's necessarily going to help most workers, but we do see that pattern.

COMMISSIONER FELDBLUM: Okay, and my apologies. It's Dr. Benard, not Berman. Sorry for changing your name on you. And thank you for that last comment, because, as Joan Williams states in her written testimony, quote, "Women will never achieve equality until mothers do." Now, I think that's an interesting statement, because as you say, your data shows we're probably seeing discrimination against mothers, rather than discrimination against women. But because the majority of women in our society will become mothers, just based on the current data, we have the ability for someone to say a sentence like, quote, "Women will never achieve equality until mothers do." I think that does raise some interesting theoretical and practical questions that I hope we can explore through the rest of the hearing.

A question to Ms. Terman. You, in your written testimony, talk about something that you didn't say in your oral testimony. So just to put it out there, you note in your written testimony that the ADA requires, because of the expanded definition of disability under the ADA, employers to make accommodations for folks with a range of physical and mental impairments; that the PDA requires that if an employer is making accommodations to other employees with disabilities, they can't then deny those accommodations to pregnant women.

Given the breadth of the coverage of the ADA now, and given the interaction between the ADA and PDA, it would seem to me that it would be a very risky legal proposition, given the laws currently on the books, for any employer with more than 15 employees to deny a pregnant woman the type of reasonable accommodation that it has to provide to individuals with a range of other impairments under the ADA.

Now, I understand that many employers and employees have no clue about their existing rights or responsibilities, and that there's a significant amount of education and outreach that a lot of us need to do.

But my question to you, as a legal matter, do you believe it would be a risky proposition for an employer today, who is covered under the ADA and the PDA, to deny an accommodation to a pregnant woman if that accommodation would not impose an undue hardship on the employer?

MS. TERMAN: Yes, I do. Thank you for your question. I think that's a really important point. The PDA directs employers to treat pregnant women, and women with pregnancy- and childbirth-related conditions, the same as they treat those who are similar in their ability or inability to work. That is the clear mandate of the PDA under the ADA as amended. Now, that group of people is quite a bit broader, and so employers today have an obligation to provide reasonable accommodations and to engage in the interactive process with a much broader group of people with mental and physical impairments. Therefore, pregnant women should be treated the same under the clear mandate of the PDA.

COMMISSIONER FELDBLUM: Thank you so much.

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CHAIR BERRIEN: Thank you, General Counsel. We'd like to turn now to the Legal Counsel of the EEOC, Peggy Mastroianni.

MS. MASTROIANNI: Good morning. Glad to be here. I am going to discuss EEOC's enforcement and policymaking efforts with respect to both pregnancy discrimination and discrimination against caregivers. And let me start with the early days, that's pre-PDA. Our stakeholders knew from day one that Title VII forbade pregnancy discrimination, even though the courts didn't necessarily all know that then. And during the first year after EEOC opened its doors, we received thousands of pregnancy discrimination charges alleging strange questions during interviews about family planning. We received charges from pregnant women who were not hired, who were fired, forced to take leave. And charges from women who, following childbirth, came back to work and discovered that their pension credits were gone, and their seniority as well.

With the passage of the PDA in 1978, we amended our pregnancy guidelines and we focused on pregnancy issues such as light duty, leave, and health insurance. Meanwhile, those issues from the pre-PDA days never went away, as a lot of speakers this morning have observed.

EEOC's enforcement data for the last decade looks about like this. Since 2001, we've resolved 52,000-plus pregnancy discrimination charges. In a quarter of these, a little over 25 percent, actually, we got relief for our charging parties, a total of 150.5 million dollars over this decade. And this is in addition to the money that was recovered in litigation. Our charging parties have been from all walks of life: janitors, truck drivers, teachers, senior executives, respondents: the whole range from small employers to Fortune 500 employers; the charges from every state, and not surprisingly the leading states are Florida, Texas, California, Illinois, and New York.

We've also seen a steady increase in the percentage of pregnancy discrimination charges that we receive from women of color, from about 19 percent in 2001 to 25 percent in 2011. I think these figures are lower than the reality, because we do have a category called "other" or "unspecified race," and I'm sure there are women of color there.

The issues that we are seeing, again, they very much reflect what the General Counsel discussed, 68 to 71 percent, in any of these given ten years, of the charges involve discharge. The second category is terms and conditions of employment, which includes closer scrutiny of pregnant workers, harsher discipline, special medical clearance requirements, no health coverage. And this was 18 to 25 percent of the charges over this ten year period. And then the third largest category is harassment, 9 to 13 percent of the charges.

Now I want to move on to pregnancy and the ADA. The ADA protects people with impairments that substantially limit a major life activity. To what extent is pregnancy protected under the ADA? This is a question that is getting a great deal of attention in the media, and it has already gotten quite a bit of attention in this meeting. Since 1991, the Commission has said that ordinary pregnancy is not an impairment. Consequently, it cannot be a disability. And this we said in our original ADA reg and in the recently amended ADA reg, not in the reg, let me clarify, in the appendix to the reg.

But we have also said, in the most recent appendix to the ADA reg, that impairments associated with pregnancy can be disabilities. So for example, a pregnant woman with gestational diabetes may be entitled to a reasonable accommodation of break time to eat some snacks periodically. So this is something the Commission has said for many years, but now it is in the appendix to the reg.

I think two effects of the ADAAA, of the ADA Amendments Act, should be noted here. First of all, the ADA Amendments Act tells us that the mantra is broad construction, and this means that more temporary impairments are covered under the ADA Amendments Act. And that, in turn, means that more of these pregnancy-related kinds of impairment we can expect to be covered under the ADA.

The second effect of the ADA Amendments Act is a little more indirect. And it was alluded to this morning, I think, in the exchange between Commissioner Feldblum and Ms. Terman. That is, that more people can be expected to receive reasonable accommodation because of the ADA Amendments Act. And this, in turn, essentially will result in a larger pool of PDA comparators, a larger pool of PDA comparators. Now, a few courts have started to address this issue, and the two decisions that I've read, they're not buying this. But I think we're just beginning to talk about this whole issue.

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COMMISSIONER FELDBLUM: Thank you. So first, thank you Legal Counsel Mastroianni and Ms. Martin for pointing out that this potential interaction between the ADA and the PDA has not, in fact, been adopted by at least two courts that have looked at it. So I picked my words very carefully when I asked whether it's not a risky legal proposition for an employer to act as if there isn't this obligation, because they might get a different court.

However, I think there's no doubt that, not only is there need for EEOC guidance, but since I have long ceased to be shocked by the incomparable ability of some courts to ignore plain language, even with guidance from the EEOC, I certainly think there might be additional efforts that need to be made in this area.

The second thing I want to say, just as -- you know, I feel like this is my ADA tip primer moment, and Legal Counsel Mastroianni referenced this sort of at the end, on association. I think it is important to note that, under the ADA, although there's no reasonable accommodation to take time off to care for someone else with a disability -- you only get reasonable accommodation to take care of yourself -- if your employer is not penalizing other people who are taking time off for other things -- going to a Major League Baseball game -- and does penalize someone for taking care of someone with a disability -- child, elder person, whatever -- that is a violation under the ADA.

So my question really goes to the issue of disparate impact. So, Legal Counsel Mastroianni, in her written testimony -- by the way, the written testimony here just was phenomenal. Just, thank you so much -- noted the regulation that Ms. Martin referenced, 29 CFR 1604.10(c), where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available -- such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity. It's a very clear regulation/guidance statement.

In Ms. Feinberg's written testimony on behalf of AARP, she observes that family responsibility discrimination could, "present as disparate impact based on age or sex if an employer imposed unduly

harsh penalties for failing to follow rules on getting approvals for absences that did not account for the periodic need to arrive a little late or leave a little early that often accompanies caregiving." So again, a disparate impact argument on age.

And Ms. Martin, your written testimony, at least, is a clarion call for revitalizing disparate impact theory under Title VII and PDA. As you note, quote, "disparate impact theory holds the potential to reshape work rules that'll harm pregnant women when alternative policies that would serve an employer's business needs equally well available."

Now, personally, I believe a disparate impact claim can logically be made on both age and sex. In fact, the courts in the U.K. have followed this with regard to sex, although the courts in the U.S. have not. So my question for the panel is, given our explicit regulation, I'm curious as to whether you believe it would be useful for the EEOC to attempt to rejuvenate disparate impact analysis in the U.S. courts, if the courts adopt the theory that I discussed before with Ms. Terman about interaction with PDA and ADA. That is, what work would a disparate impact analysis do in addition to that theory that would make us want to wade into that territory? So Ms. Martin, let me start with you.

MS. MARTIN: Well, as I said, I think that the ADA theory in some ways avoids the need to undertake the disparate impact work, which -- those are hard cases to build, and it would be a quicker step to get there just by saying that the duty to accommodate under the ADA extends to the Pregnancy Discrimination Act through the Pregnancy Discrimination Act's requirement of equal treatment.

That being said, I am not sure whether anything that might be reached by disparate impact analysis also would be reached under reasonable accommodation analysis. So I think reasonable accommodation analysis would cover a lot of what we think about and talk about when we talk about these issues, but I'm hesitant to say that it covers everything.

So I wouldn't want to give up one rather than the other, and I think that the principle that disparate impact analysis stands for and communicates is important. I think that the notion that antidiscrimination includes this obligation to amend rules that treat a protected class more harshly when there's no necessity for such a rule is a principle that should definitely be kept in the forefront of discussions, because it helps basically justify the accommodation obligations that we're talking about. It sets it in the clear antidiscrimination framework which we all understand Title VII to create, and I think that that's useful, analytically, for the courts and others.

COMMISSIONER FELDBLUM: Thank you. Legal Counsel Mastroianni's probably glad that my red light is on.

(Laughter.)

COMMISSIONER FELDBLUM: So she can respond if she wants to, but thank you, Madam Chair.

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COMMISSIONER FELDBLUM: Well, you can see how bad I am at math, that I said "Okay, so 18 years ago last month, I worked at the Women's Legal Defense" -- and I said "No, that can't be." No, 28 years ago last month, I showed up as a bright-eyed, natural bushy-haired or whatever law student to do a project on women and health within the Women's Legal Defense fund. I think we see how far we have come in so many ways, in terms of moving a discourse in public policy, but obviously, how far we have to go.

So I have two comments. First is about guidance. Last June, June 2011, we had a hearing on leave as a reasonable accommodation under the ADA that Commissioner Lipnic helped put together. We have been working very hard as a Commission since then on revamping and revitalizing our guidance on leave,

modified work schedules and reduced hours under the ADA. I have great hopes that this will be coming out shortly. I think based on the conversation here today, obviously we should be looking at interaction between ADA, PDA, FMLA in these areas.

Now, this does not substitute for the broader guidance that you are asking for on PDA and Title VII that would address issues like the comparator point, the gender stereotyping point. But I did want to say, for the record, that we have been working on this. This is in the later stages of development, and I hope will be able to be seen soon.

Second, I would strongly encourage you and all your colleagues to read the draft strategic plan that is currently posted on our website and that the Commission will vote on shortly. That plan requires the Commission to develop and vote by September 2012 on an enforcement plan that will establish priorities for the Commission and that will very explicitly integrate our work in the federal sector, dealing with federal employees -- so for your point, Judy, of the federal government as a model employer -- and our public education work.

Now, these priorities will be developed under the assumption of flat funding for the agency. We would love it if Congress gave us the extra 14 million dollars that the President's budget, released this past Monday, called for for the EEOC, but we are not planning on that money as we develop this plan. So, for example, among the issues affecting women and other workers today, I encourage you and your colleagues to focus on what you think we should be focusing on, and to get that to us before September 2012.

So I hope you will consider this panel just the beginning, not the end, of your involvement with us, both as we set the enforcement priorities of this agency and as we develop guidance. Thank you so much, both of you, for your testimony.