1982 WL 189483 (S.C.A.G.)

Office of the Attorney General

State of South Carolina
November 8, 1982

***1** Honorable Joseph F. Anderson, Jr.
Post Office Box 507
Edgefield, South Carolina 29824

Dear Representative Anderson:
Your letter of October 18, 1982, to the Attorney General has been referred to me for response. You have asked the opinion of this office on the following two questions:
1. May a School District adopt a policy requiring a pregnant teacher to stop teaching at the end of her sixth month of pregnancy?

2. Is there a specific amount of maternity leave provided for or allowed by our statutes other than the ninety days in which a job must be held open for a person who is ill?

It is our opinion that the answer to both questions is in the negative.

I.

On the matter of a mandatory leave of absence for pregnant teachers, the decision of the United States Supreme Court in Cleveland Board of Education v. LaFleur, 414 U.S. 623, 7 E.P.D. (CCH) ¶9072 (1974), is controlling. In LaFleur, the Court held that a school district's blanket requirement that pregnant teachers take a mandatory leave of absence not later than four months before their expected delivery date, without regard to their continued ability to teach, violates the Due Process Clause of the Fourteenth Amendment. Such a requirement, the Court said, impinges upon a female teacher's fundamental right to decide whether to bear a child. The LaFleur Court considered and rejected the school district's arguments that such a mandatory maternity leave requirement was necessary to maintain continuity of classroom instruction and to keep physically unfit teachers out of the classroom. The Court recognized that continuity of classroom instruction and keeping physically unfit teachers out of a classroom are legitimate state objectives. However, the Court said, the first interest could be adequately served by a requirement that pregnant teachers provide early notice of their condition to school administrators and the second could be adequately served by requiring that pregnant teachers submit to medical examination by a school board physician or provide school administrators with current certification from their obstetricians as to their continued ability to work.

The LaFleur Court did not rule out the possibility that a mandatory maternity leave policy requiring that a pregnant teacher leave work not later than the commencement of her ninth month of pregnancy might pass constitutional muster. Indeed, both the majority and concurring opinions suggested that such a policy would be constitutionally acceptable if supported by proof, for example, 'that such firm cutoff dates were the only reasonable method of avoiding the possibility of labor beginning while some teacher was in the classroom,' or 'that adequate substitutes could not be procured without at least some minimal lead time and certainty as to the dates upon which their employment was to begin.' 7 E.P.D. ¶9072, 6532 n. 13; id. 6535-6536 (Powell, J., concurring). Relying on this dicta in LaFleur and on testimony of school administrators concerning the difficulty of finding qualified substitutes to cover long-term teacher absences without knowing the specific date on which the substitute would commence work, the Ninth Circuit Court of Appeals upheld a mandatory maternity leave policy requiring pregnant teachers to cease work not later than the beginning of their ninth month of pregnancy. deLaurier v. San Diego Unified School District, 588 F.2d 674 (1978). The Ninth Circuit concluded that such a policy violated neither the Constitution nor Title VII

of the Civil Rights Act of 1964, as amended (42 U.S.C. § 2000e et seq.), (hereinafter 'Title VII'), which prohibits public and private employers from discriminating against their employees on the basis of, inter alia, sex.

***2** Based on the foregoing, it is the opinion of this office that a mandatory maternity leave policy requiring that a pregnant teacher cease work at the conclusion of her sixth month of pregnancy would be both unconstitutional and violative of Title VII. However, as LaFleur makes clear, the School District may require that pregnant teachers give school administrators early notice of their condition to facilitate administrative planning toward the important objective of continuity of classroom instruction [a1] and may likewise require that a pregnant teacher who wishes to continue teaching submit a current certification from her physician attesting to her ability to continue work. [aa1] Moreover, in reliance on the dicta in note 13 of the LaFleur opinion, on Justice Powell's concurring opinion in that case, and on the Ninth Circuit's opinion in DeLaurier, it is our opinion that a school district may, without offending the Constitution or Title VII, adopt a policy requiring pregnant school teachers to cease working at the commencement of the ninth month of their pregnancy provided that the school district can substantiate that such a cut-off date is necessary to afford the necessary lead time to procure adequate substitute teachers or is the only reasonable method of avoiding the possibility of labor beginning while a teacher is in the classroom.

II.

Concerning your second question, there is no provision in the statutes for maternity leave as such. This office has previously ruled that '[s]chool districts should treat absences for maternity purposes the same as sick leave.' 1975-1976 Ops. Atty. Gen. 296 at 297. Section 59-1-400, Code of Laws of South Carolina, 1976 (Cum.Supp. 1981), provides for sick leave for full-time employees of public schools and specifies the manner in which such sick leave is accrued. That section also provides:
A school employee using sick leave as provided for in this section shall not be terminated from employment nor shall any such employee be terminated during a continuing sick leave of less than ninety-one days.

Under this provision of § 59-1-400, a school district may, but is not required to, terminate an employee if the employee continues in sick leave status for more than ninety (90) days.

If it is the standard and uniform practice of a school district to permanently replace (i.e., fire) an employee who continues on sick leave for more than ninety (90) days, neither state nor federal law prohibits the application of this practice to employees whose continuing sick leave of more than ninety days is due to pregnancy or a pregnancy-related condition. However, Title VII as well as the state Human Affairs Law requires that if a school district holds open the jobs of males and non-pregnant females even though they have been on continuous sick leave for more than ninety days, the school district must do likewise for pregnant employees. See, Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); In Re Southwestern Bell Telephone Co. Maternity Benefits Litigation, 602 F.2d 845, 849 (8th Cir. 1979); Communication Workers v. South Central Bell Telephone & Telegraph, 515 F.Supp. 240, 244-246 (E.D.La. 1981); 29 C.F.R. § 1604 Appendix (Questions and Answers on the Pregnancy Discrimination Act), Question and Answer #9. [aaa1]

***3** I trust that this information adequately addresses your questions.
Sincerely,

Vance J. Bettis
Assistant Attorney General

Footnotes

a1 Of course, the school district may not require pregnant school teachers to report their pregnancies to school officials immediately upon learning of them and then use the disclosed pregnancy information as the sole basis for declining to renew pregnant teachers' teaching contracts. Such a policy has been held to constitute a prima facie violation of Title VII. Mitchell v. Board of Trustees of

Pickens County, 599 F.2d 582 (4th Cir. 1979), cert. den. 44 U.S. 965. See also Thompson v. Board of Education of Remeo Community Schools, 526 F.Supp. 1035 (W.D.Mich. 1981).

aa1 A caveat is in order on LaFleur's approval of a medical verification requirement. The School District should be aware that the Equal Employment Opportunity Commission has construed the Pregnancy Discrimination Act of 1978 (about which more in part II hereof) as prohibiting an employer from singling out pregnancy-related conditions for special procedures for determining an employee's ability to work. See 29 C.F.R. § 1604 (Appendix, Question and Answer #6). As LaFleur predated the 1978 Act, the Supreme Court had no occasion to deal with this issue.

aaa1 The Pregnancy Discrimination Act, P.L. 95-555, 92 Stat. 2076 (1978), amended Title VII by adding the following provision, codified as 42 U.S.C. § 2000e(k):

The terms 'because of sex' or 'on the basis of sex' [as used in Title VII] include but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes including receipt of benefits under fringe benefit programs, as other persons no so affected but similar in their ability or inability to work, and nothing in section 200 e-2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

The Questions and Answers on the Pregnancy Discrimination Act found at 29 C.F.R. § 1604 (Appendix) represent the Equal Employment Opportunity Commission's interpretation of what that Act allows and what it prohibits. Question #9 and its Answer are as follows:

Q. Must an employer hold open the job of an employee who is absent on leave because she is temporarily disabled by pregnancy-related conditions?

A. Unless the employee on leave has informed the employer that she does not intend to return to work, her job must be held open for her return on the same basis as jobs are held open for employees on sick or disability leave for other reasons.

As the State Human Affairs Law ('HAL') has incorporated the Pregnancy Discrimination Act of 1978 verbatim (see § 1-13-30(l), Code of Laws of South Carolina, 1976 (Cum.Supp. 1981)), any policy that violates the federal law would be violative of the HAL. See Orr v. Clyburn, 277 S.C. 536, 290 S.E.2d 804, 806 (1982).

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