Newsletter of the

WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

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Peter Oppeneer Named Clerk of Court for Western District

By Jennifer Sloan Lattis

Chief Judge Barbara Crabb has selected Peter Oppeneer to serve as the new Clerk of Court replacing Theresa Owens who left to take a position with Chief Justice Abrahamson of the Wisconsin Supreme Court. Peter will serve both as the court's chief administrative officer and as the court's case mediator, available to work with parties to settle their cases before trial.

Peter brings a wealth of experience to the position. For twenty years he served in the courthouse as the career law clerk for Judge Shabaz where he specialized in the areas of commercial litigation and intellectual property—making use of his business degree and honing his case evaluation skills in this motion laden area of the law. Over the years, Peter learned well the Western District's highly efficient case administration process otherwise known (for good or ill) as the "rocket docket." He also served as co-reporter, with former clerk Joseph Skupniewitz, on the Western District's response to the Civil Justice Reform Act of 1990. Members may recall that the 1991 response resulted in, among other things, the creation of the Western District Bar Association.

As a frequent client of the clerk's office, Peter knows that he is stepping into management of a first-rate organization known both for its efficiency and friendly public face. Much of the staff responsible for the office's excellent reputation remain there today and are assisting Peter in learning the range of the clerk's duties.

Among Peter's goals is to take back a bit of the personal contact the court has lost with the advent of efiling and other technological advancements. Peter would like to see that the benefits of face-to-face contact are not lost with these changes. He hopes to do this by maintaining close contact with the Western District Bar Association and developing opportunities for public outreach such as reaching out to school or civic groups with court tours and similar activities.

Peter is married to Lawrie Kobza whom he met in his small group at the University of Wisconsin Law School from where both graduated in 1985. Lawrie is a partner at the Boardman, Suhr, Curry & Field Law Firm specializing in municipal and water law. The couple have three children: a son who is graduating from the University of Wisconsin-Madison in December with a joint degree in English and economics, a son who is studying at the University of Minnesota Carlson Business School, and a daughter who is a junior at Madison East High School.

Western District of Wisconsin Bar Association 2008-09

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A Message from the President

One of the purposes of the Western District of Wisconsin Bar Association is to be of service to the Court. We provide service in many ways including by finding volunteers to handle cases on a pro bono basis, communicating with our members about our Court's procedures and practices, providing continuing legal education for our members, and more recently assisting the Court in screening applicants for the Clerk of Court position.

Some times we overlook the high quality service that the Court's staff provides to the Court, to us, and to our clients. As busy practitioners, it is easy for us to take for granted the professional, competent, and courteous service the Court staff provides to attorneys who practice in the Western District. Most of us have probably had experiences in other jurisdictions which sharply contrast with the pleasures of practice in the Western District.

Chief Deputy Clerk, Joel Turner, deserves special appreciation from the Association for his outstanding service to the Court, the Association, and the members of the bar this year. Last spring, when former Clerk of Court/Magistrate Judge Theresa Owens began handling more preliminary matters in criminal cases, Joel took over responsiblity for much of the day-to-day management of the Clerks office. Then, after Theresa Owens resigned, Joel served as Acting Clerk of Court from July until the new Clerk of Court was appointed in November.

One might expect that an "Acting Clerk of Court" might be satisfied with maintaining the status quo and keeping his head above water, but the service that Joel provided to the Association, members of the bar, and to the Court was extraordinary. Under Joel's leadership, for example, the Court provided extensive training on electronic filing at multiple locations throughout the District, including at the State Bar Center and in individual law firms. As Acting Clerk of Court, Joel served as an ex officio member of the WDBA's Board of Governors and assisted the Association in many ways.

As practitioners, we are fortunate to have Peter Oppeneer as our new Clerk of Court. We are also fortunate to have a highly professional staff as exemplified by Joel Turner and many others.

- Robert E. Shumaker

Seventh Circuit: Termination Of Female Employee For Undergoing In Vitro Fertilization Constitutes Sex Discrimination

By
Timothy D. Edwards, Axley Brynelson, LLP

Introduction

Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act ("PDA"), prohibits discrimination "because of or on the basis of pregnancy, child birth, or related medical conditions." In Hall v. Nalco Company, the Seventh Circuit Court of Appeals held that the PDA prohibits discrimination against a female employee who undergoes in vitro fertilization.[1] In reaching this issue of first impression, the Court rejected the employer's argument that infertility is a "gender neutral condition" and concluded that female employees terminated for taking time off to undergo in vitro fertilization are no different than employees who are terminated for taking time off to give birth or receive other pregnancy-related care.

Factual Background

The Nalco Company hired Cheryl Hall in 1997. Three years later, she took on the role of sales secretary. In that position, Hall reported to a district sales manager in the Chicago area office. In March of 2003, Hall requested a leave of absence to undergo in vitro fertilization, which is an assisted reproductive technology that involves administration of fertility drugs to the woman, surgical extraction of her eggs, fertilization in a laboratory, and surgical implantation of the resulting embryos into the woman's womb. Each treatment takes weeks to complete and multiple treatments are sometimes needed to achieve a successful pregnancy. Hall's supervisor approved a leave of absence from March 24 to April 21, 2003.

After Hall returned to work, she informed her supervisor that she intended to undergo in vitro fertilization again because the first procedure had been unsuccessful. She filed for another leave of absence which was scheduled to begin on August 18th. Shortly before this second leave of absence, Nelco informed Hall that her position had been terminated as part of a consolidation process. When asked why, Hall's supervisor told Hall that her termination was in her "best interest" due to her "health condition." The secretary who was retained during the consolidation was incapable of becoming pregnant.

Following her termination, Hall filed a timely discrimination charge with the Equal Employee Opportunity Commission ("EEOC"), followed by a lawsuit in federal court alleging sexual discrimination in violation of the Pregnancy Discrimination Act. In her complaint, Hall alleged that she was fired because she was a female with a pregnancy related condition, namely, infertility. The district court dismissed Hall's claim, concluding that infertile women are not a "protected class" under the Pregnancy Discrimination Act because infertility is a "gender-neutral condition." Hall appealed this decision to the Seventh Circuit Court of Appeals.

The Analysis

In deciding this appeal, the Seventh Circuit was confronted with an issue of "first impression," namely, whether it is a violation of the Pregnancy Discrimination Act to terminate a female employee for undergoing in vitro fertilization. In addressing this question, the Court outlined the history of the Pregnancy Discrimination Act, which clarified the scope of Title VII by recognizing certain inherently gender-specific characteristics that may not form the basis for selective, discriminatory treatment of employees. According to the Court, the basic test in any Title VII sex discrimination claim is whether the employer action in question treats an employee in a manner that, but for that person's sex, would be different. The Pregnancy Discrimination Act, which did not change this basic approach, made it clear that discrimination based on a woman's pregnancy is, by definition, discrimination because of her sex. The same is true for disparate treatment based on child birth and medical conditions related to pregnancy or child birth. In applying this test, the lower court concluded that Ms. Hall's allegations were insufficient to state a claim for discrimination because infertility is a gender-neutral condition entitled to no protection under the language of the Pregnancy Discrimination Act.

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Sex Discrimination

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The Seventh Circuit reversed. While the Court acknowledged that infertility, standing alone, is insufficient to state a claim under the Pregnancy Discrimination Act, the Court made it clear that any classification based on fertility or infertility must be gender-neutral to survive scrutiny. Nelco's conduct failed to satisfy this basic test. According to the Court, employees terminated for taking time off to undergo in vitro fertilization are no different than employees who are terminated for taking time off to give birth or receive other pregnancy-related care: these employees will always be women. Accordingly, the Court rejected the district court's conclusion, noting that Hall was terminated for the "gender specific quality of child bearing capacity." In reaching this conclusion, the Court made clear that an adverse employment action based on child bearing capacity will always result in differential treatment based on the person's sex.

Conclusion

Cheryl Hall's case is unique in many obvious respects. From a legal perspective, the Seventh Circuit reinforced the principle that employment actions taken because of an employee's child bearing capacity will, by definition, only affect women, thereby triggering the protections of the Pregnancy Discrimination Act. As a result, employers must carefully scrutinize every medical condition before making an adverse decision in order to determine whether the condition can be directly traced to the employee's child bearing capacity. If the answer to this question is yes, the employee may be entitled to the protection of the Pregnancy Discrimination Act.

(Endnotes)

[1] Hall v. Nalco Company, 534 F.3d 644 (7th Cir. 2008).

Seventh Circuit Overrules Precedent – Separate Appeal May Be Required for Review of Attorney Fee Awards

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Many federal statutes have fee-shifting provisions permitting or entitling prevailing parties to recover reasonable attorney fees incurred in successfully litigating their claim. In a typical case, a litigant prevails, either after a trial or on dispositive motion, then subsequently files a fee petition substantiating the attorney fees incurred for consideration by the district court. The issue of attorney fees – i.e. how much should be recovered – is finally resolved only after briefing and due consideration by the court.

Often, the losing party in these cases will file a notice of appeal with the U.S. Court of Appeals for the Seventh Circuit before the issue of attorney fees is resolved, that is, before the trial court issues an order fixing the amount of attorney fees that must be paid. Until this year, an appellant could appeal the issue of attorney fees along with the merits of the case as part of one proceeding, initiated by a single notice of appeal. See, e.g., *Bittner v. Sadoff & Rudoy Indust*., 728 F.2d 820 (7th Cir. 1984); *Lorillard Tobacco Co. v. A&E Oil, Inc*., 503 F.3d 588 (7th Cir. 2007). Should the district court's judgment and attorney fee award be affirmed, the matter is typically remanded to the district court simply for the entry of an order fixing the amount of the attorney fee award.

In a case decided in September of 2008, the Seventh Circuit reversed prior precedent permitting an appeal of the attorney fee issue before the district court determines the final amount of attorney fees to be awarded. See *McCarter v. Retirement Plan for the District Managers of the American Family Ins. Group*, 540 F.3d 649 (7th Cir. 2008). Instead, the law of the Seventh Circuit now commands that decisions on the merits and decisions about attorney fees are to be treated as separate final decisions, which can only be appealed after each has become "final." In the case of the decision on attorney fees, that decision only becomes final for purposes of appeal once the district court fixes the amount of attorney fees to be awarded.

The *McCarter* Decision

The *McCarter* case is a purported class action brought pursuant to the Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq*. The plaintiffs contended that a lump sum distribution provision in the defendants' defined benefit pension plans violated ERI SA's prohibitions on immediate distributions. The trial court disagreed, going on to find that the plaintiffs' lawsuit "cannot be characterized as non-frivolous" and "rests upon a wholly unsubstantiated premise." The court concluded that "[t]he absence of any case law, statute or regulation to support plaintiffs' claim reinforces the conclusion that this is precisely the kind of case for which [an award of attorney fees under 29 U.S.C.] § 1132(g) was intended."

After receiving the district court's decision, the defendants submitted an affidavit and other material substantiating the attorney fees incurred in defending against the suit. However, before the plaintiffs filed any objections, they instead filed a notice of appeal purporting to appeal not only the merits of the ERISA dispute, but also the district court's decision to award attorney fees to the defendant plans. The parties subsequently briefed each issue before the Seventh Circuit.

The Seventh Circuit modified and affirmed the district court's judgment on the merits, finding that the plaintiffs' ERISA claims lacked merit. The court went on to find, however, that the attorney fee issue was not properly before it. Relying on one old and one new U.S. Supreme Court opinion, the court found that decisions on the merits and decisions addressing recovery of attorney fees are separate decisions for appellate purposes:

> The upshot of [the Supreme Court's] approach is that decision on the merits and decisions about attorneys' fees are treated as separate final decisions, which must be covered by separate notices of appeal—each filed after the subject has independently become "final."

Id. at 652, citing *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445 (1982), *Riley v. Kennedy*, 1287 S.Ct. 1970 (2008).

The Court was unconcerned that this rule could involve multiple appeals arising out of the same litigation, even if its analysis is somewhat contradictory:

> There is no urgent need for haste, and a substantial reason to wait—for most awards are likely to be affirmed, and then a second appeal will follow from the district judge's order specifying the amount of fees. Judicial economy cannot be achieved by dividing one dispute across two appeals. All that results from multiple appeals is delay and expense. That's precisely why appeal usually must await a final decision.

Id. at 653.

Accordingly, the rule resulting from the *McCarter* case is that an "appeal may be taken from an award of attorneys' fees only after that award is independently final—which means, after the district judge has decided how much must be paid." *Id*. at 654. Attorneys litigating cases in federal court should be advised of this new rule. Failure to follow it may result in needless appellate expenses for your client, not to mention a rebuke from the Seventh Circuit.

Todd G. Smith is a former WDBA President whose practice entails complex civil litigation, including ERISA and other suits filed in federal court. Todd is a shareholder in the Madison office of Godfrey & Kahn, S.C. and was counsel for the defendant ERISA plans in the *McCarter* case.

Western District News

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MISSION STATEMENT

It is the mission of the Western District of Wisconsin Bar Association to promote the just, speedy, respectful and efficient determination of every action filed in the District Court: by acting as an effective liaison among the District Court, federal practitioners, litigants and the public; by encouraging, fostering and supporting educational opportunities that improve the practice of law in this District; and by serving the needs of the District Court, federal practitioners, litigants and the public.