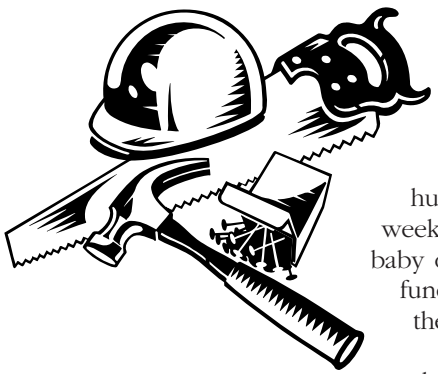
MICHAEL J. NEWMAN AND FAITH C. ISENHATH

Recent Litigation Under the Pregnancy Discrimination Act

In a recent case of first impression—*Doe v. C.A.R.S. Protection Plus Inc.*—the U.S. Court of Appeals for the Third Circuit held that the Pregnancy Discrimination Act protects an employee from discrimination based on her exercising her right to have an abortion.[1] In 1978, Congress enacted the Pregnancy Discrimination Act (PDA), an amendment to Title VII, to protect women against discrimination based on pregnancy.[2] The PDA states that

> [T]he terms "because of sex" or "on the basis of sex" 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 benefits programs, as other persons not so affected but similar in their ability or inability to work.[3]

C.A.R.S. Protection Plus Inc. (CARS) hired Doe as a graphic artist in June 1999, and in May 2000, she learned she was pregnant.[4] On Aug. 9, 2000, Doe's physician discovered that her baby had severe deformities and therefore recommended that she terminate her pregnancy. Doe's husband called Fred Kohl, Doe's supervisor, and informed him that Doe would not attend work that day, and Kohl approved the absence. Doe's husband testified that he called his wife's office the next day, told Kohl that Mrs. Doe's pregnancy would be terminated, and requested a week vacation for her. Kohl approved vacation leave for Doe. Doe terminated her pregnancy on Aug. 11, 2000, and neither she nor her husband called Kohl over the weekend. Doe had a funeral for her baby on Aug. 16, 2000, and after the funeral, Kohl discharged Doe over the telephone.



Thereafter, Doe sued CARS under the PDA, alleging that CARS had discharged her because she had an abortion.[5] The district court found that Doe could not make a prima facie case and therefore granted summary judgment in favor of CARS. The Third Circuit reversed the district court's ruling. In deciding whether or not the PDA covers women who elect to terminate their pregnancies, the Third Circuit first looked to guidelines provided by the Equal Employment Opportunity Commission (EEOC), which provide the following:

> The basic principle of the [PDA] is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. A woman is therefore protected against such practices as being fired … merely because she is pregnant or has had an abortion.[6]

In addition, the circuit court looked to the legislative history of the PDA for guidance, which stated: "Because [the PDA] applies to all situations in which women are 'affected by pregnancy, childbirth, and related medical conditions,' its basic language covers women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion."[7]

The Third Circuit found that "the plain language of the statute, together with the legislative history and the EEOC guidelines, support a conclusion that an employer may not discriminate against a woman employee because she has exercised her right to have an abortion," and therefore held that the term "related medical conditions" includes having an abortion.[8]

The Third Circuit next analyzed Doe's claim that she had been discriminated against based on her pregnancy. The only element of Doe's prima facie case that the parties disputed was whether a causal nexus existed between her discharge from work and her pregnancy to infer unlawful discrimination. The court looked at CARS' leave policies and found that the employer did treat its employees disparately because not all employees were expected to call the office each day that they were absent, but CARS terminated Doe for that exact reason. For example, Alivia Babich, Kohl's secretary, testified that another employee had suffered a heart attack, and neither he nor his wife called the office, and that at least two other employees were not required to call the company every day when they were absent.

The court also determined that a remark Kohl had made raised a reasonable inference that the abortion was a factor in terminating Doe. Leona Dunnett, an employee who left CARS, testified that she was in the room when Kohl told another employee that "she didn't want to take responsibility" when referring to Doe. Also, the court found that the temporal proximity between the

abortion and the adverse action raised an inference of discrimination, because Doe's termination took place only three days after her abortion. Therefore, the circuit court decided that Doe had met her prima facie case of discrimination and also that Doe had presented enough evidence to defeat summary judgment in favor of CARS.[9]

In deciding *Doe*, the Third Circuit found a Sixth Circuit PDA case that was persuasive on the subject. In *Turic v. Holland Hospitality Inc.*, the U.S. Court of Appeals for the Sixth Circuit held that an employer may not discriminate against a woman employee for exercising her right to have an abortion.[10] In *Turic*, a former restaurant busser and room service attendant sued Holland Hospitality Inc. under the PDA. Holland appealed the district court's finding that the company had terminated Turic "because she had become the subject of controversy among the hotel staff as a result of her perpended abortion" and therefore had violated Title VII.[11] Holland thereafter appealed the decision.

As in *Doe*, the Sixth Circuit found the EEOC guidelines relevant as well as the PDA's legislative history and the statute's plain language. The court held that an employer who discriminates against a female employee for exercising her right to have an abortion violates the PDA. Turic's claim was slightly different, because she did not actually exercise her right to have an abortion and ended up carrying the pregnancy to term. Turic claimed that Holland had terminated her for contemplating having an abortion, not for actually having one. The court ruled that a woman's right to have an abortion includes the contemplation of having one as well.[12] Therefore, the Sixth Circuit affirmed the district court's holding in favor of Turic.

In another recent case, the U.S. Court of Appeals for the Third Circuit also discussed abortion rights under the PDA.[13] In *Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware*, the Ursuline Academy, a private Catholic school, discharged Michele Curay-Cramer, a teacher at the school, after she signed her name to a pro-choice advertisement in the local newspaper. The advertisement read as follows:

> Thirty years ago today, the U.S. Supreme Court in *Roe v. Wade* guaranteed a woman's right to make her own reproductive choices. That right is under attack. We, the undersigned individuals and organizations, reaffirm our commitment to protecting that right. We believe that each woman should be able to continue to make her own reproductive choices, guided by her conscience, ethical beliefs, medical advice and personal circumstances. We urge all Delawareans and elected officials at every level to be vigilant in the fight to ensure that women now and in the future have the right to choose.

After her dismissal, Curay-Cramer filed suit against Ursuline Academy alleging that the school had violated Title VII because it terminated her for opposing the school's supposedly illegal employment practices. The district court granted Ursuline Academy's motion to dismiss the case, and the Third Circuit affirmed that decision.

Curay-Cramer argued that the opposition clause in Title VII protects any employee who supports the rights of women to have an abortion, just as the law protects employees who have an abortion or contemplate having one. The Third Circuit found that, because the advertisement did not identify the employer or the specific illegal practice, Curay-Cramer's signing of the advertisement was not protected under Title VII. Therefore, the circuit court upheld the district court's decision in favor of Ursuline Academy and ruled that "Curay-Cramer did not engage in protected activity when she signed a[n] … advertisement that did not mention employment, employers, pregnancy discrimination, or even gender discrimination."[14]

As the recent cases illustrate, the highly charged and sensitive issue of abortion is now being litigated under the Pregnancy Discrimination Act. Regardless of one's personal view on the issue of abortion, employment counsel needs to be aware of, and pay attention to, this emerging area of case law as the federal courts continue to develop and define employee rights under the PDA. **TFL**

LABOR *continued on page 15*

considered both the song's commercial nature and the social benefit of transforming the song for humor and criticism; the Court concluded that parody can be a fair use, despite its commercial nature.

In subsequent years, courts have grappled with the notion of transformative use. In 2001, the Eleventh Circuit had overturned an injunction against publication of *The Wind Done Gone*, an unauthorized novel that re-told *Gone With the Wind* from the perspective of the slaves in the story;[4] the executors of Margaret Mitchell's estate subsequently settled a claim against the publisher of the derivative work. In examining the purpose of the new novel, the circuit court noted that the work was unmistakably commercial, was published for profit, and was not "on the Internet free to all the world to read." But the court also noted that fair use goes beyond the financial, and found that, although "*TWDG*'s success as a pure work of fiction depends heavily on copyrighted elements appropriated from *GWTW* to carry its own plot forward," it certainly added new expression, meaning, and message to the copyrighted portions of *GWTW*. The Eleventh Circuit commented that *TWDG*'s author could not have effectively offered her literary criticism of *GWTW* without depending heavily on its copyrighted elements.

On the other end of the spectrum, the Second Circuit rejected a fair use defense that argued the defendant had transformed a television series into an unauthorized trivia book, where story lines from episodes of "Seinfeld" had been turned into multiple-choice, matching, and short-answer questions.[5] And the Sixth Circuit also denied the argument the defense used in a case in which the defendant hired a band to record copyrighted songs without changing the words or music and compiled those recordings into karaoke CDs.[6]

The defining thread of transformative use—a purpose that is lacking in the cases described above—is a sense that the new work takes copyrighted elements and says something new about them. Mere homage is not enough, nor is the effort that one puts into the creation. Following this line of authority about derivative works, transformative use, and the purpose of copyright law is likely to yield good news for Harry Potter's creator and bad news for the story's number one fan. **TFL**

Lisa DeJaco is a litigator whose practice includes trademark, trade secrets, and copyright disputes. She practices in the Louisville office of Wyatt Tarrant and Combs, LLP, and can be reached at ldejaco@wyattfirm.com.

Endnotes

[1]*Warner Bros. Entm't v. RDR Books*, No. 07-cv-09667 (S.D.N.Y. filed Oct. 31, 2007).

[2]*Campbell v. Acuff-Rose Music Inc.*, 510 U.S. 569 (1994).

[3]*Id.* at 579.

[4]*Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1269, and n.24 (11th Cir. 2001).

[5]*Castle Rock Entm't, Inc., v. Carol Publ'g Group Inc.*, 150 F.3d 132 (2nd Cir. 1998).

[6]*Zomba Enter. Inc. v. Panorama Records Inc.*, 491 F.3d 574 (6th Cir. 2007).

LABOR *continued from page 13*

Michael Newman is a partner in the Labor and Employment Department of the Cincinnati-based firm, Dinsmore & Shohl LLP, where he serves as chair of the Labor and Employment Appellate Practice Group. He is an FBA vice president of the Sixth Circuit. Faith Isenhath is an associate at Dinsmore & Shohl, where she also practices labor and employment law. She is a member of the FBA Cincinnati-Northern Kentucky Chapter. They may be reached at michael.newman@dinslaw.com and faith.isenhath@dinslaw.com, respectively.

Endnotes

[1]*Doe v. C.A.R.S. Protection Plus Inc.*, No. 06-3625, 2008 U.S. App. LEXIS 11519, *8 (3d Cir. May 30, 2008).

[2]42 U.S.C. § 2000e(k).

[3]*Id.* The subsection also states, "[t]his 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*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion." *Id.*

[4]*Doe*, 2008 U.S. App. LEXIS at *2.

[5]*Doe*, 2008 U.S. App. LEXIS at *5.

[6]*Id.* at *7 (quoting Appendix 29 C.F.R. pt. 1604 App. (1986)).

[7]*Id.* at *7–8 (quoting H.R. Conf. Rep. No. 95-1786 at 4 (1978) as reprinted in 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766).

[8]*Id.* at *8.

[9]*Doe*, 2008 U.S. App. LEXIS at *22–23; *but see Doe v. First Nat'l Bank of Chicago*, 668 F. Supp. 1110, 1116 (N.D. Ill. 1987) (finding the plaintiff did not prove that her employer discriminated against her for having an abortion because the evidence indicated that the decisionmaker authorizing her termination did not have knowledge of the abortion, and the employer successfully showed that the plaintiff was not meeting the employer's performance expectations).

[10]*Turic v. Holland Hospitality Inc.,* 85 F.3d 1211, 1214 (6th Cir. 1996).

[11]*Id.*

[12]*Turic*, 85 F.3d at 1214.

[13]*Curay-Cramer v. Ursuline Acad. of Wilmington, Del.*, 450 F.3d 130 (3d Cir. 2006).

[14]*Id.* at 134.