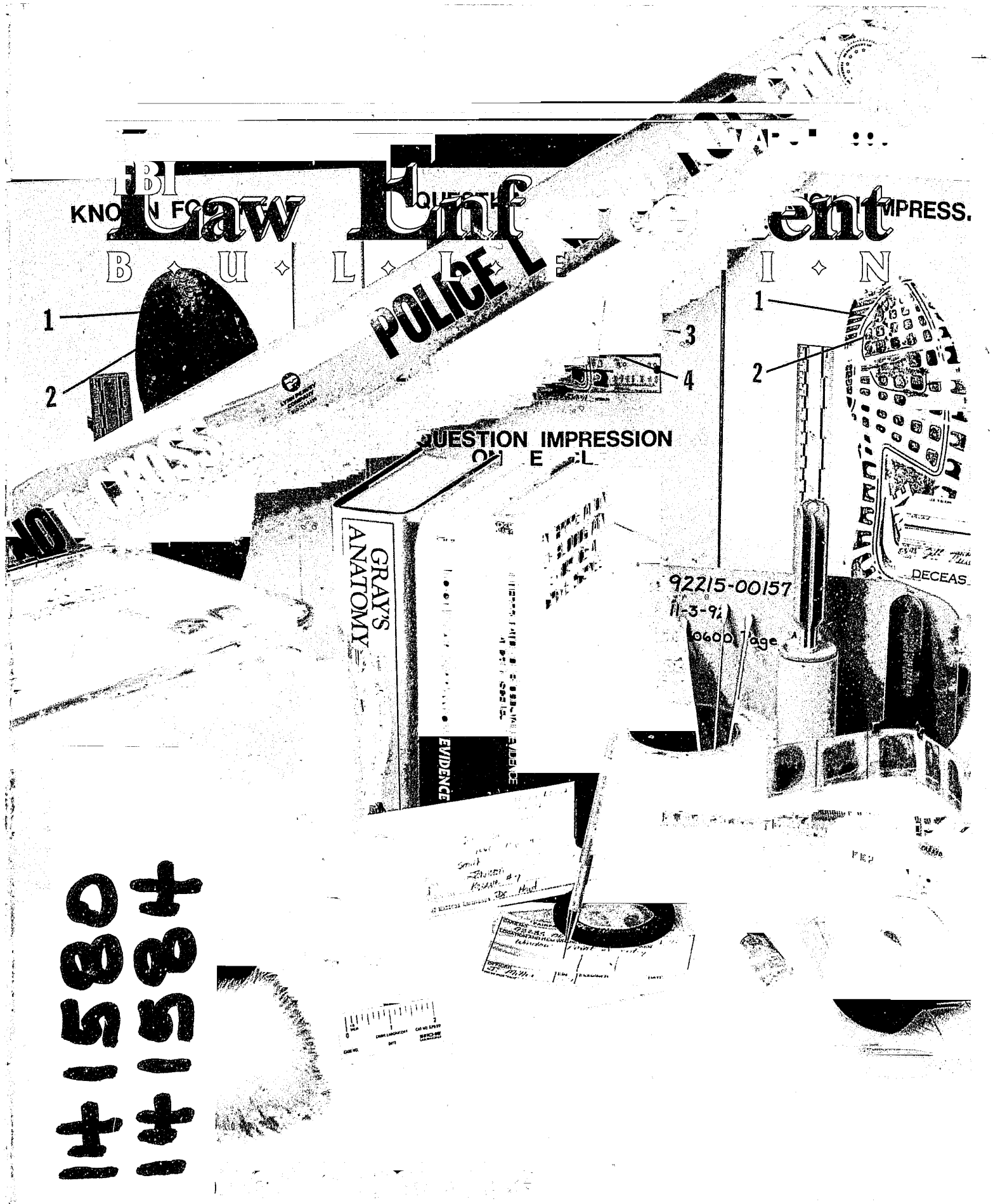

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Pregnancy and Maternity Leave Policies

The Legal Aspects

By
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As more women join the ranks of law enforcement, administrators must ensure that policies concerning assignment, promotion, leave, and benefits adequately address the possibility of pregnancy. Many women choose to have both a family and career, and policies should be in place to accommodate both. This article discusses the legal aspects of pregnancy and maternity leave policies.

Pregnancy Discrimination Under Federal Law

In 1978, the U.S. Congress amended Title VII of the Civil Rights Act of 1964 expressly to provide protection against pregnancy discrimination.[1] In a piece of legislation known as the Pregnancy Discrimination Act, the amendment expanded the existing prohibition against discrimination "because of sex" or "on the basis of sex" to also bar discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."[2] Congress explained that the "entire thrust...behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."[3]

The Pregnancy Discrimination Act guarantees that "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 not so affected but similar in their ability or inability to work...."[4] In other words, no provision in Federal law requires pregnant women to be treated more favorably than other employees.[5] Rather, an employer is obligated only to ensure that employees who are not pregnant and who possess similar abilities or disabilities are not treated more favorably.

Since passage of the Pregnancy Discrimination Act, courts have addressed various issues relating to

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> ***"...a law enforcement employer is obligated by Federal law not to discriminate against female employees based on pregnancy, childbirth, or related medical conditions."***

its implementation. These issues include the scope of the protection against discrimination, inequitable treatment of pregnant workers and those who are not pregnant, and specific employment practices.

Scope of the Pregnancy Discrimination Act

Several cases have been litigated where the issue concerned the female employee's desire to take or extend leave for post-childbirth reasons. For example, in *Wallace* v. *Pyro Mining Co.*,[6] a female employee requested that she be granted personal leave after exhausting maternity leave because she could not wean her child from breastfeeding. When her employer denied her the requested personal leave, the employee sued, claiming that the Pregnancy Discrimination Act's proscription against discrimination on the basis of pregnancy, childbirth, or related medical conditions included her need to continue breastfeeding her infant. The court disagreed, however, finding that "[w]hile it may be that breastfeeding and weaning are natural concomitants of pregnancy and childbirth, they are not 'medical conditions' related thereto...[R]elated medical conditions [must] be limited to incapacitating conditions for which medical care or treatment is usual and normal."[7]

Similarly, courts have held that child-rearing needs are not within the protection of the law. In *Fleming* v. *Ayers and Associates*,[8] the court noted that the scope of the act was limited to "medical conditions of the pregnant woman, not conditions of the resulting offspring"[9] because an offspring's medical condition affects both men and women. As such, adverse employment actions based on child-rearing needs would not be discrimination based on or because of one's sex.[10]

This rule is expressly incorporated in guidance provided by the Equal Employment Opportunity Commission (EEOC) in its regulations, with one additional caution. According to the regulations, although the Pregnancy Discrimination Act does not cover childcare, "leave for childcare purposes [must] be granted on the same basis as leave which is granted to employees for other non-medical reasons."[11] Thus, where employees are allowed to take accrued annual, sick, or personal leave, or leave without pay for reasons that are not job-related, the same type of leave must be granted to employees who wish to remain on leave for child-rearing purposes, even if that employee is medically able to return to work.

Moreover, the Pregnancy Discrimination Act limits protection to conditions actually associated with pregnancy and childbirth to the exclusion of conditions unique to females. In *Jirak* v. *Federal Express Corp.*,[12] a court held that an employee dismissed for absences associated with menstrual cramps was not the victim of illegal discrimination, because the scope of the act was expressly limited to pregnancy, childbirth, and related medical conditions.

As these cases demonstrate, a law enforcement employer is obligated by Federal law not to discriminate against female employees based on pregnancy, childbirth, or related medical conditions. However, needs or medical conditions that arise prior to or after the pregnancy or childbirth may be beyond the scope of the act's protection.

Equal Treatment of All Employees

As noted earlier, the Pregnancy Discrimination Act requires that

women affected by pregnancy, childbirth, or related medical conditions be treated the same in all aspects of employment as other employees with similar abilities to work. This requirement of equal treatment has resulted in several court cases raising claims of both intentional and unintentional discrimination.

For example, in *E.E.O.C.* v. *Ackerman, Hood and McQueen, Inc.*,[13] an advertising firm hired a woman, who was told that her job would require frequent overtime. Sometime later, when she became pregnant, the employee presented her employer with a doctor's certificate recommending that she not work overtime because of the condition of her pregnancy. When the employee refused to work the overtime demanded by the employer, she was fired.

The employee's dismissal was held to be in violation of the Pregnancy Discrimination Act when it was proved that although the employer had no formal policy regarding medical or personal leave, the employer historically accommodated such requests when similar situations arose that involved employees who were not pregnant. The court held that the act requires the employer to treat all workers equally, pregnant or not, who are similar in their ability or inability to work. Because the employer previously accommodated the personal medical needs of other employees who were not pregnant, its failure to do so here violated the Federal requirement of equal treatment of pregnant women.[14]

Similarly, courts have held that it is a violation of the Pregnancy Discrimination Act for an employer to do the following:

> 1) Refuse to hold a job open while an employee is on maternity leave when it protects the jobs of other employees who are temporarily disabled[15]
>
> 2) Deny an employee seniority upon return from pregnancy leave when others are not similarly treated upon return from disability leave,[16] or
>
> 3) Refuse retirement credit for time spent on maternity leave when service time is credited for nonpregnancy disabilities.[17]

> **"...child-rearing needs are not within the protection of the law."**

This is not to say, however, that an employee's job must be protected simply based on her pregnancy. In fact, an employee may be terminated while on maternity leave for documented performance deficiencies, or her job may be filled by another employee, if other similarly disabled workers are treated in the same fashion.[18]

While the above discussion demonstrates the legal peril of an employer who intentionally treats pregnant employees differently from those who are not pregnant, an employer is also legally vulnerable for using leave and benefit plans that have an inadvertent adverse impact on pregnant women. *E.E.O.C.* v. *Warshawsky & Co.*[19] is illustrative.

Here, the employer had a policy that required all employees to work for 1 year prior to earning any sick leave. When a pregnant employee was fired for violating that sick leave policy, she sued, claiming a violation of the Pregnancy Discrimination Act. The employer defended by arguing that the policy was in place to ensure an efficient operation, to reward long-term employees, and to discourage turnover, but not to discriminate against pregnant employees.

The court rejected this argument, finding that in a "disparate impact suit, proof of discriminatory intent is not required. The focus is on the consequences of the employment practice, not the motivation."[20]

The court then examined the consequences of the policy, which denied sick leave during the first year of employment, and found that it resulted in the discharge of pregnant women at a significantly higher rate than first-year workers who were not pregnant. The court concluded that this policy did not treat pregnant employees and those who were not pregnant equally.

Commenting on the inequitable dismissal rate of pregnant employees, the court stated:

> "This occurs *because* pregnant employees need more time off from work than non-pregnant employees. Because only women can get pregnant, if an employer denied adequate disability leave across the board, women will be disproportionately affected."[21]

It then offered a statistical model to be used to determine whether employment practices adversely impact on pregnant employees. First, divide the number of female employees affected by the employment practice by the total number of female employees; then, divide the number of male employees similarly affected by the total number of male employees; finally, compare the ratios. If the women's ratio is not at least 80% of that of the men, prima facie proof of disparate impact exists.

Law enforcement employers must recognize that it is illegal to either intentionally or unintentionally apply leave or benefit plans to women in a fashion that treats or impacts them differently based on pregnancy, childbirth, or related medical conditions. Existing and proposed policies should be reviewed to eliminate any such illegal effect.

Specific Employment Practices

Just as the courts have addressed issues concerning the scope of the Pregnancy Discrimination Act and its equitable application to similarly situated employees, they have also decided cases in which specific employment practices have been challenged. Two such issues of particular interest to law enforcement are forced leave/termination and light duty.

Because the duties of law enforcement officers require them to be prepared to confront dangerous situations that may demand strenuous physical exertion, the question arises whether female officers, particularly in their latter months of pregnancy, can be forced to take leave or be terminated when that necessary physical exertion may be impossible or poses a threat to the safety of the pregnant officer or unborn child. *O'Loughlin* v. *Pinchback*[22] is instructive.

Pinchback, a female correctional officer who was responsible for booking and releasing male and female inmates, taking mug shots, obtaining fingerprints, delivering food and mail, and providing general security, was dismissed after she became pregnant. Despite her physician's opinion that she could continue working until the time of birth, Pinchback was notified that she was being discharged because her work assignments endangered her health and that of her unborn child and because she could no longer perform her duties and responsibilities.

The court found her termination to be in violation of the law because there was inadequate proof that her pregnancy rendered her less able to respond to security threats to any greater degree than other nonpregnant employees who did not possess the strength or prowess to cope with such situations. Additionally, the court rejected concerns for the safety of the fetus as a basis for the discharge because the employer did not present any medical or scientific evidence to justify such a policy or show the absence of a less discriminatory alternative.

Though not a law enforcement case, a similar result can be found in *Carney* v. *Martin Luther Home*.[23] There, the plaintiff was a nurse who was placed on unpaid leave because it was believed her pregnancy would prevent her from lifting patients or heavy objects, thereby interfering with the performance of her duties. The court referred to the legislative history of the act and quoted the Senate Report:

> "Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working."[24]

The court concluded that the employer violated the Pregnancy Discrimination Act, which the court said "was enacted to ensure that pregnant women are judged on their actual ability to work...."[25]

In short, the Pregnancy Discrimination Act "prohibits employers from forcing pregnant women

who remain able to work to take leave unless the employer can show that the leave is necessary because the condition of pregnancy is incompatible with continued employment."[26] Moreover, this approach has been endorsed by the EEOC, which stated that "[a]n employee must be permitted to work at all times during pregnancy when she is able to perform her job."[27]

The second issue of particular concern to law enforcement employers—light-duty assignments—centers on two issues. Can a police agency force a pregnant officer to take a light-duty assignment? Is a pregnant officer entitled to be placed in a light-duty position based solely on her pregnancy or related condition? The answer to both questions focuses on the officer's ability to perform the essential functions of her job.

In *Fields* v. *Bolger*,[28] it was held that a policy that forced employees not capable of performing their normal functions to apply for light-duty assignments was lawful, so long as that policy was applied equally to all disabilities, whether related to pregnancy or not.[29] More importantly, however, the court upheld the policy because it was applied only when an employee was incapable of performing normal job functions. Therefore, if a pregnant employee is not disabled from performing her duties and responsibilities, the employer cannot force that employee into a light-duty assignment.

Fields also addressed the question of whether a pregnant employee is entitled to a light-duty assignment. The court in *Fields* held that nothing in the Pregnancy Discrimination Act "compels an employer to prefer for alternative employment an employee, who because of pregnancy, is unable to perform her full range of duties."[30]

The guidance provided by the EEOC echoes this approach. In response to the question of whether an employer must provide an alternative job to a pregnant employee unable to perform the functions of her job, the EEOC responded:

> "An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay...."[31]

> ***"...no provision in Federal law requires pregnant women to be treated more favorably than other employees."***

Thus, the answer to the question lies in the normal practice of the employer. Where the employer permits temporarily disabled employees to take light-duty assignments, it must also offer similar accommodation to employees temporarily disabled by pregnancy, childbirth, or related conditions.[32] Conversely, an agency that does not permit officers to work in light-duty assignments during periods of disability has no legal obligation to provide such an assignment based on pregnancy, childbirth, or related medical conditions.[33]

Conclusion

To provide women the right to work in law enforcement and have children, law enforcement administrators must ensure their policies embody three basic protections. First, no policy may discriminate against an employee because of or based on her pregnancy, childbirth, or related medical conditions. Second, women are entitled to equal treatment in the conditions, benefits, and privileges of employment, including the use of leave for pregnancy or related conditions. Third, pregnant women who can perform the essential functions of their jobs must be allowed to continue in employment, and when disabled from performing those functions, must be treated the same as other temporarily disabled employees. A law enforcement agency's policies that accomplish these objectives will be legally sound and will provide a fairer workplace.✦

Endnotes

[1] 42 U.S.C. §2000e(k).

[2] *Id.*

[3] 123 Cong. Rec. 29658 (1977), cited in *California Federal Savings and Loan Association* v. *Guerra*, 479 U.S. 272, 289 (1987).

[4] 42 U.S.C. §2000e(k). The statute does permit the denial of health benefits in the case of elective abortion. *Id.*

[5] There are, however, certain State law provisions that may grant pregnant women expanded legal protection and which do not violate the Federal Pregnancy Discrimination Act. *See, California Federal Savings and Loan Association* v. *Guerra*, 479 U.S. 272 (1987); *Harness* v. *Hartz Mountain Corp.*, 877 F.2d 1307 (6th Cir. 1989), *cert. denied*, 493 U.S. 1024 (1990). However, favored treatment of pregnant employees by a public employer could be subject to a constitutional attack on equal protection grounds. *United States* v. *City of*

Philadelphia, 573 F.2d 802 (3d Cir. 1978), *cert. denied,* 439 U.S. 830 (1978). Accordingly, in the absence of such a State law provision, police employers should ensure pregnant employees and those who are not pregnant are treated equally, with no preferential treatment granted to either group.

[6] 789 F.Supp. 867 (W.D. Ky. 1990).

[7] *Id.* at 869. *See also, Barrash* v. *Bowen,* 846 F.2d 927 (4th Cir. 1988).

[8] 948 F.2d 993 (6th Cir. 1991).

[9] *Id.* at 997.

[10] *See also, Record* v. *Mill Neck Manor Lutheran School,* 611 F.Supp. 905 (E.D.N.Y. 1985).

[11] 29 C.F.R. Pt. 1604, Appendix.

[12] 61 U.S.L.W. 2331, 60 F.E.P. Cases 287 (S.D.N.Y. 1992).

[13] 956 F.2d 944 (10th Cir.), *cert. denied,* 113 S.Ct. 60 (1992).

[14] *See also, E.E.O.C.* v. *Protek of Albuquerque,* 49 F.E.P. Cases 1110 (D.N.M. 1988) (failure to accommodate pregnant employee's request not to be officed near noxious fumes where the employer had previously changed office assignments for other temporarily disabled employees violated Federal law).

[15] *Allen* v. *County of Montgomery, Alabama,* 788 F.2d 1485 (11th Cir. 1986); *Lunsford* v. *Leis,* 686 F.Supp. 181 (S.D. Ohio 1988); *Felts* v. *Radio Distributing Co., Inc.,* 637 F.Supp. 229 (N.D. Ind. 1985). *See also,* 29 C.F.R. Pt. 1604, Appendix.

[16] *Nashville Gas Co.* v. *Satty,* 434 U.S. 136 (1977).

[17] *Pallas* v. *Pacific Bell,* 940 F.2d 1324 (9th Cir. 1991), *cert. denied,* 112 S.Ct. 916 (1992).

[18] *Bowen* v. *Valley Camp of Utah, Inc.,* 639 F.Supp. 1199 (D. Utah 1986). *Cf., Garner* v. *Wal-Mart Stores, Inc.,* 807 F.2d 1536 (11th Cir. 1987).

[19] 768 F.Supp. 647 (N.D. Ill. 1991).

[20] *Id.* at 651.

[21] 768 F.Supp. at 654.

[22] 579 So.2d 788 (Fla. App. 1 Dist. 1991).

[23] 824 F.2d 643 (8th Cir. 1987).

[24] Senate Report 95-331, 1978 U.S. Code Cong. and Admin. News 4750, cited in 824 F.2d at 646.

[25] *Id.* at 649.

[26] *Maganuco* v. *Leyden Community High School Dist.,* 939 F.2d 440, 445 (7th Cir. 1991).

[27] 29 C.F.R. Pt. 1604, Appendix. *See also, United States* v. *City of Philadelphia, supra,* note 5.

[28] 723 F.2d 1216 (6th Cir. 1984).

[29] *Cf., Adams* v. *Nolan,* 962 F.2d 791 (8th Cir. 1992) (employer guilty of pregnancy discrimination for refusing a pregnant officer a light-duty assignment pursuant to departmental policy that restricted such assignments to disabilities resulting from line-of-duty injuries, where other employees who were not pregnant had been granted such assignments, even though their disability was the result of off-duty activity).

[30] 723 F.2d at 1220.

[31] 29 C.F.R. Pt. 1604, Appendix.

[32] E.E.O.C. regulations also require employers to treat pregnant employees and temporarily disabled employees who are not pregnant equally in determining eligibility for such assignments. 29 C.F.R. Pt. 1604, Appendix, states: "[I]f an employer requires its employees to submit a doctor's statement concerning their inability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statement. Similarly, if an employer allows its employees to obtain doctor's statements from their personal physicians for absences due to other disabilities or return dates from other disabilities, it must accept doctor's statements from personal physicians for absences and return dates connected with pregnancy-related disabilities."

[33] *Atwood* v. *City of Des Moines,* 485 N.W.2d 657 (Iowa 1992).

Law enforcement officers of other than Federal jurisdiction who are interested in this article should consult their legal advisor. Some police procedures ruled permissible under Federal constitutional law are of questionable legality under State law or are not permitted at all.