



Women's Law Project

May 9, 2022

Delivered electronically to ra-hrregscomment@pa.gov
 Pennsylvania Human Relations Commission
 333 Market Street, 8th Floor
 Harrisburg, PA 17101-2210

RECEIVED

MAY 11 2022

**Independent Regulatory
 Review Commission**

Re: Proposed Rulemaking No. 52-013
Protected Classes Under the PHRA and PFEOA

Dear Members of the Pennsylvania Human Relations Commission;

Thank you for the opportunity to comment on the Commission's proposed rulemaking on definitions under the Pennsylvania Human Relations Act (PHRA) and the Pennsylvania Fair Educational Opportunities Act (PFEOA). The Women's Law Project (WLP) agrees with the Community Justice Project's positive responses to those proposals and proposed recommendations as set forth in its May 9, 2022 comment to which WLP has signed on. We write separately to recommend additional changes that will further the purpose of the PHRA to eliminate all forms of pregnancy-related discrimination in the workplace.

The WLP is a nonprofit, legal advocacy organization based in Pennsylvania that seeks to advance the legal status of women, girls, and LGBTQ+ people through litigation, public policy advocacy, community education, and direct representation. At WLP, we are contacted by pregnant, lactating, and soon-to-be pregnant workers across Pennsylvania who have experienced negative, discriminatory outcomes at work because of their pregnancy or lactation status, or a related medical condition.

WLP welcomes the PHRC proposal to amend the definition of sex to explicitly include pregnancy, childbirth, and breastfeeding at 16 Pa. Code §§ 41.206(a)(1)-(3), and we particularly support the proposed inclusion of "related medical conditions." Defining sex to include pregnancy, childbirth, and breastfeeding will benefit pregnant workers and their families. As the Commission's proposed rulemaking notes, the change would be consistent with Title VII of the Civil Rights Act of 1964 as amended by the Pregnancy Discrimination Act of 1978 (PDA).¹

Recommendation

We recommend that §41.206(a) and (b) also include a definition of "related medical conditions" both for clarity and for the purposes of ensuring that *all* pregnancy-related medical conditions—even those that occur before conception—are covered. The PHRA should protect individuals undergoing In Vitro Fertilization (IVF) or relying on other assisted reproductive

¹ 42 U.S.C. 2000e(k).

MAIN OFFICE

Sheridan Building
 125 South 9th Street, Suite 300
 Philadelphia, PA 19107

215.928.5761 t • 215.928.9848 f
www.womenslawproject.org
info@womenslawproject.org

WESTERN PENNSYLVANIA OFFICE

The Pittsburgher
 428 Forbes Avenue, Suite 1710
 Pittsburgh, PA 15219

412.281.2892 t • 215.928.9848 f
www.womenslawproject.org
infopitt@womenslawproject.org

technologies (ART).² The additional language we propose to accomplish this goal, set forth below, is borrowed in part from 2019 amendments to Pittsburgh’s anti-discrimination ordinance.³

§41.206(a)(4): For purposes of this section, “*related medical condition*” includes any medical condition that is related to or caused by pregnancy or childbirth or recovery therefrom, which occurs before, during, or after the gestation period, or after childbirth, whether or not it results in a live birth, including being the partner of a person affected by any such related medical condition or event.

Bases for Recommendation

The rate of reliance on ART, including procedures like IVF that help individuals overcome infertility or other health risks associated with natural conception, has steadily increased since its first successful use decades ago. In 2019, ART accounted for 2.1% of live births in the United States.⁴ Pennsylvania is one of 16 states with a higher rate than the national average.⁵ Infertility, defined as the inability to become pregnant after 12 months of trying, is a prevalent condition.⁶ One in five heterosexual women (19%) are infertile. One in four (26%) women experience difficulty getting pregnant or carrying to term.⁷

IVF and other ART methods are associated with staggering costs; care is time consuming (averaging 125 hours of total fertility care), financially draining, and often, stressful.⁸ IVF treatment can include separate appointments for egg retrieval(s), ultrasound and fluid drainage, and egg transfer(s).⁹ Workers undergoing ART treatments should be entitled to the same benefits as their pregnant and postpartum counterparts as they are similarly situated in relevant ways.

Unfortunately, workers undergoing ART have faced employment discrimination despite being similarly situated to pregnant and postpartum workers. In 2011, for example, a female employee in New York filed a lawsuit after she was fired because of her decision to undergo IVF

² “ART includes all fertility treatments in which either eggs or embryos are handled outside a woman’s body...ART includes but is not limited to in vitro fertilization (IVF), gamete intrafallopian transfer (GIFT), and zygote intrafallopian transfer (ZIFT)” See Center for Disease Control and Prevention, *State Specific Assisted Reproductive Technology Surveillance, United States, 2019* (October 2021) <https://www.cdc.gov/art/state-specific-surveillance-2019.pdf> State-Specific-ART-Surveillance-U.S.-2019-Data-Brief-h.pdf

³ Pgh. Code § 651.04(pp), defines “related medical conditions and events” as: “[a]ny medical condition and events that are related to or caused by pregnancy or childbirth, which can occur before, during, or after the gestation period, or after childbirth, whether or not it results in a live birth, including being the partner of a person affected by any such related medical condition or event.”

⁴ See Center for Disease Control and Prevention, *supra* note 1.

⁵ *Id.*

⁶ See Center for Disease Control and Prevention, *Infertility FAQs*, <https://www.cdc.gov/reproductivehealth/infertility/index.htm>

⁷ *Id.*

⁸ See Katz, Showstack, Smith, et al. *Costs of infertility treatment: results from an 18-month prospective cohort study*. 95 FERTIL STERIL 915 (Dec. 4, 2010) (financial costs for IVF regularly figure in tens of thousands, or more); Wu, Elliott, Katz, Smith, *Time costs of fertility care: the hidden hardship of building a family* 99 FERTIL STERIL 2025 (June 1, 2013) (average treatment time, including traveling, appointments, picking up medication, AND recovery accounts for approximately 125 hours—or 15.6 eight-hour workdays—of fertility care).

⁹ See *Victoriana v. Internal Med. Clinic of Tangipahoa*, No. CV 15-2915, 2016 WL 5404653, *1 (E.D. La. Sept. 28, 2016).

treatments.¹⁰ In 2014, an employee in Michigan sued after her employer fired her on the justification that hormones from IVF treatments altered the employee's mood.¹¹ Most recently, in 2020, a Pennsylvania employee notified her employer of her IVF treatments and sought temporary leave and other accommodations, but promptly thereafter the employer fired her for "personal reasons."¹² That experience is not unique as employees struggle to secure reasonable accommodations or FMLA leave for treatment.¹³

WLP's proposed language is consistent with the definition of "sex discrimination" adopted by some federal courts that have addressed the issue under Title VII. In *Hall v. Nalco Co.*, the Seventh Circuit Court of Appeals held that firing an employee because of her decision to take time off to undergo IVF "constituted discrimination on the basis of sex" and therefore, the plaintiff had a cognizable claim under Title VII.¹⁴ In holding that the employer's action constituted sex discrimination, the court analogized leave to undergo IVF treatments with leave for childbirth. WLP's suggested addition to proposed § 41.206(a)(4) is also consistent with the local Pittsburgh ordinance. Unfortunately, other courts have taken the view that conditions occurring before conception are not covered as "pregnancy related medical conditions" under the (PDA).¹⁵ The PHRC should expressly adopt inclusive language in its definition to codify this protection.

In light of the Commission's proposed changes coupled with our recommendation, we recommend that the existing definition of *Pregnancy* at § 41.101, which defines pregnancy as "the state of being in gestation," be removed as inconsistent.

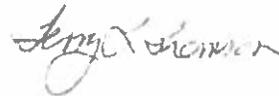
For many of the reasons stated above, adult students will benefit from the proposed inclusive definition of "related medical conditions" under the PFEOA at § 41.206(b)(4).

Thank you for proposing important changes to the PHRA regulations and considering WLP's recommendations.

Sincerely,



Sophia Elliot
Staff Attorney



Terry L. Fromson
Managing Attorney

¹⁰ See generally *Govori v. Goat Fifty, LLC*, 2011 WL 1197942 (S.D.N.Y. Mar. 30, 2011).

¹¹ See generally *Ingarra v. Ross Educ., LLC*, No. 13-CV-10882, 2014 WL 688185 (E.D. Mich. Feb. 21, 2014).

¹² See *Sinico v. Barry*, No. 1:18-CV-01259, 2020 WL 528765 at *8 (M.D. Pa. Feb. 3, 2020).

¹³ See *Victoriana*, No. CV 15-2915, 2016 WL 5404653 at *2 (employee went out of town for her IVF procedures and was fired upon her return. While out of town, the employee visited her doctor three times over the course of one week. The court held the employee was not entitled to FMLA leave).

¹⁴ *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008) (overturning summary judgment in favor of defendant). Other federal courts have held childbearing capacity outside of the gestation period is sex discrimination. Cf. *Flores v. Virginia Dep't of Corr.*, No. 5:20-CV-00087, 2021 WL 668802, *6 (W.D. Va. Feb. 22, 2021) (employee was terminated for menstruation, court relied on *Hall* reasoning to hold discrimination based on childbearing capacity was sex discrimination and menstruation discrimination was similarly linked to childbearing capacity, and therefore, sex discrimination).

¹⁵ See, e.g., *Saks v. Franklin Covey Co.*, 316 F.3d 337, 349 (2d Cir. 2003) (court declined to require insurance companies to cover infertility treatments as long as treatments for both sexes were not covered).