

KEY CHANGES IN EMPLOYEE ACCOMMODATIONS: PWFA AND *GROFF V.* *DEJOY*

HR, Safety & Environmental Conference

November 16, 2023

Whitney Brown, Esq.

Lehr Middlebrooks Vreeland & Thompson

Copyright 2023 Lehr Middlebrooks Vreeland & Thompson, P.C. All rights reserved. Reproduction or use of these materials, *including for in-house training*, without authorization of the authors is prohibited.



LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • IMMIGRATION

ABOUT ME

Education

Vanderbilt University Law School, J.D.
Birmingham-Southern College, B.A.

Bar Admissions

Alabama, Mississippi, and related federal admissions

Selected Awards

Rising Stars, Super Lawyers; Top Women Attorneys, B-Metro Magazine; Top Attorneys, Birmingham Magazine; Up and Coming, Chambers.

Recent Presentations

Staying Afloat: Navigating Transitions in Employment Law, Alabama SHRM, Fall 2023 (with Lauren Smith)

Pay, Pregnancy, DEI and Policy, Alabama Council on Behavioral Health, Fall 2023 Conference

The PWFA and PUMP: What's New for Pregnant Workers, Alabama State Bar, Labor and Employment Section, Fall 2023 (with Charles Guerrier)



205-323-9274

wbrown@lehrmiddlebrooks.com

TOPICS

New Reasonable Accommodation Standard for Employee Religious Practices

New Legislation and Regs for Pregnant Women and Pumping Moms

Interesting ADA Cases

Q&A

Religious Accommodation

- *TWA v. Hardison* (1977): “Undue hardship” standard for religious accommodation means anything more than a *de minimis* employer cost.
- *Groff v. DeJoy* (June 29, 2023) (9-0): “Undue hardship” requires a substantial increased cost in relation to the conducting of the employer’s overall business, not just anything more than a *de minimis* cost.
 - Rejected invitation to adopt ADA standard, but unclear on practical differences

Post-Groff case of note:

- *Hebrew v. Tex. Dep't of Crim. Just.*, 80 F.4th 717 (5th Cir. Sept. 2023): E’ee had taken Nazarite vow to keep hair and beard long. Rejected from TDCJ as a correctional officer. TDJC failed to prove undue hardship or uniform safety rationales.

Religious Accommodation



Key Takeaways & Reminders:

- Interactive process and individual assessment required.
- Religious practice needs to be based on sincerely-held belief and spiritual (not political, social, or legal), but doesn't have to come from a religious organization.

“...Title VII requires that an employer reasonably accommodate an employee’s practice of religion, not merely that it assess the reasonableness of a particular possible accommodation or accommodations.”



COMING SOON TO A CONFERENCE ROOM NEAR YOU: AN ARMCHAIR THEOLOGIAN WITH A GOOGLE LAW DEGREE:

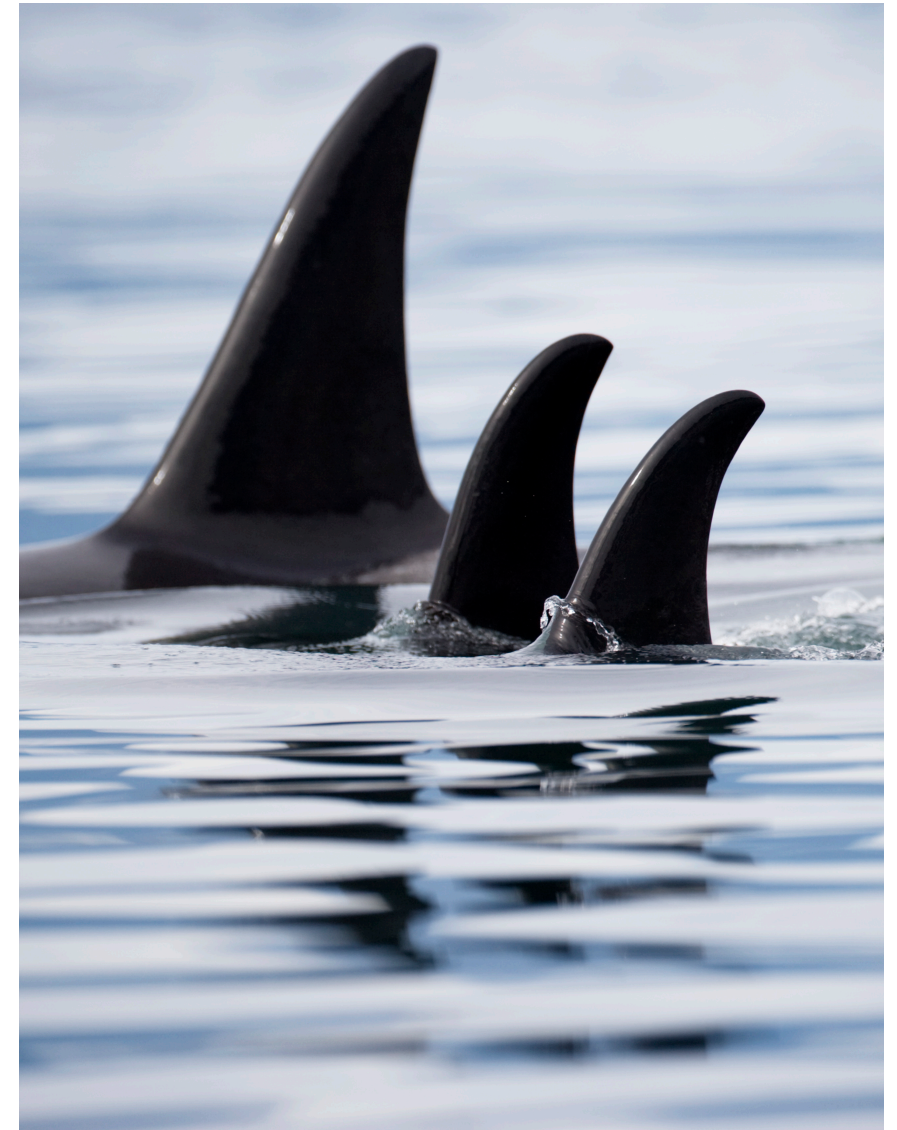
EEOC Charge Filing Statistics

	FY 2019	FY 2020	FY 2021	FY 2022
Total	72,675	67,448	61,331	73,485
Religion	2,725	2,404	2,111	13,814
	3.7%	3.6%	3.4%	18.8%



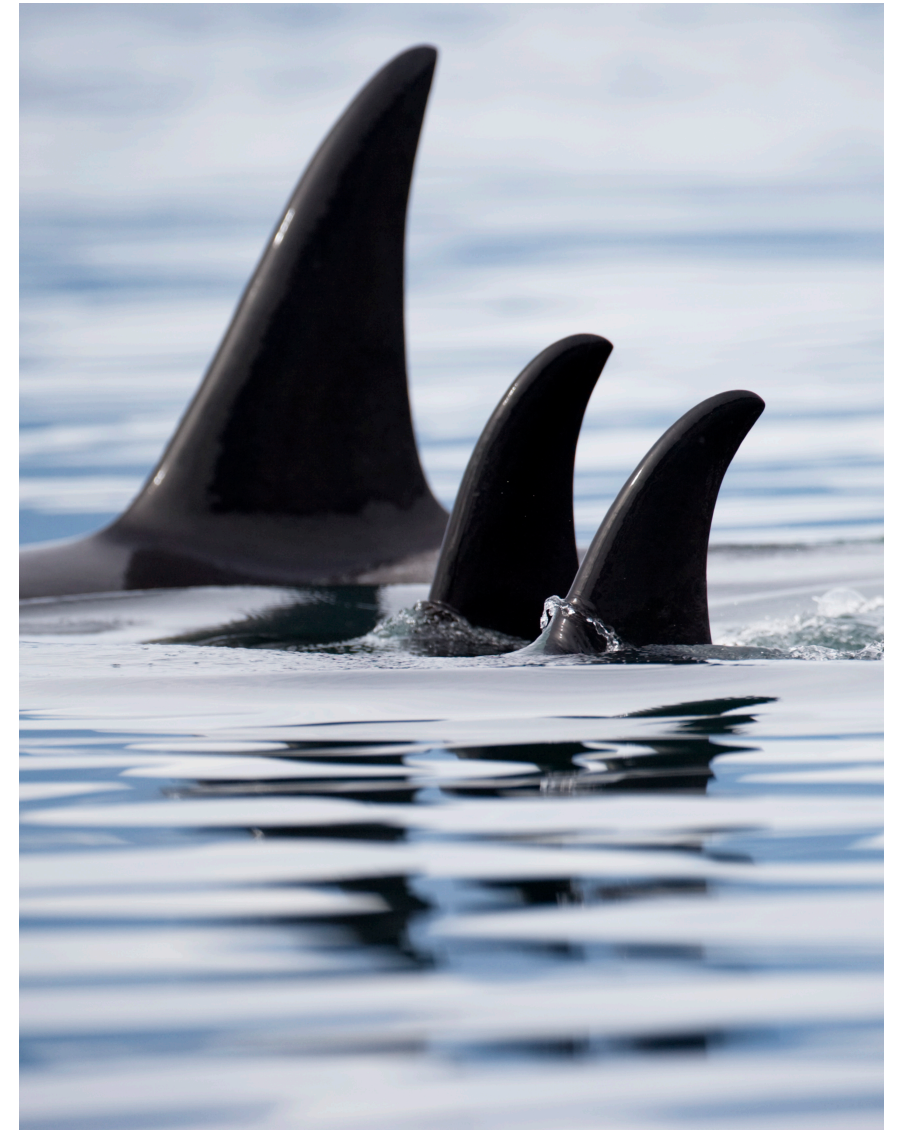
Pregnant Workers Fairness Act

- Reasonable accommodation required for known limitations caused by pregnancy, childbirth, or related medical conditions, except where it would impose undue hardship.
- Interactive process.
- Leave—paid or not—cannot be required if another accommodation could be provided.
- Opportunities can't be denied because of anticipated need for accommodation.
- No retaliation.



Pregnant Workers Fairness Act

- Good faith defense against damages if employer engaged in good faith efforts (including interactive process) to identify an accommodation that provided an “equally effective opportunity” but does not impose undue hardship.
- Effective 6/27/2023.
- EEOC regs published 8/11/2023, kicking off a 60-day review and comment period (ended 10/10/2023).
- Coverage and Charge Filing process = Title VII.



Pregnant Workers Fairness Act

Examples of Accommodations

- Ability to sit
- Closer parking space
- Flexible hours
- Appropriately sized uniforms and safety equipment
- **Additional break time** for restrooms and rest.
- Excused from strenuous activity or dangerous substances, at employee's request.
- **Leave**
- **Task Reassignment**

Pregnant Workers Fairness Act

5 Surprising Differences Between ADA and PWFA or the PWFA statute and Proposed Regulations = 5 Traps For The Unwary Employer

1. No severity threshold to trigger obligation to accommodate.
2. The breadth of “pregnancy-related” conditions under the regs.
3. Definition of qualified employees includes temporarily “unqualified” employees.
4. PWFA isn’t a leave statute; PWFA proposed regulations are leave regulations.
5. Under PWFA proposed regulations, employers will be more limited in seeking medical information/verification than under the ADA.

Pregnant Workers Fairness Act



Surprise #1: No Severity Threshold

- Under ADA, employers are used to looking for a *substantial* impairment. But PWFA is not a disability statute.
- Qualifying impairments may also be more generic than expected; like “pain” or “I need to pee every hour.”

Four Presumptive Accommodations

- Toting water/drinks on person;
- Additional bathroom use;
- Posture breaks;
- Additional eating/drinking breaks.

Pregnant Workers Fairness Act

Surprise #2: That's "pregnancy related"?

- Use of birth control
- Menstruation
- Infertility
- Endometriosis
- Miscarriage
- Stillbirth
- Having abortion or choosing not to have one.
- Low back pain
- UTIs
- Obesity/Weight gain
- Postpartum depression or anxiety
- Infection
- Sleep deprivation
- Lactation (breastfeeding and pumping)
- Mastitis

Proposed 29 C.F.R. 1636.3(b)

Pregnant Workers Fairness Act

Surprise #3: Employees Who Can't Perform Job Functions for Over 6 Months? Still Qualified!!

PWFA (Statute):

“the term ‘qualified employee’ means an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position, except that an employee or applicant shall be considered qualified if –

- (A) any inability to perform an essential function is for a temporary period;
- (B) the essential function could be performed in the near future; and
- (C) the inability to perform the essential function can be reasonably accommodated[.]”

PWFA Proposed Regulations:

“an employee or applicant shall be considered qualified if they cannot perform one or more essential functions if ...

- (i) Any inability to perform an essential function is for a temporary period, where “temporary” means lasting for a limited time, not permanent, and may extend beyond “in the near future”;
- (ii) The essential function(s) could be performed in the near future, where “in the near future” means the ability to perform the essential function(s) will generally resume within forty weeks...

Pregnant Workers Fairness Act



Surprise #4: Emphasis on Leave as Accommodation (Prop. Regs.)

- # of times “leave” appears in statute?
 - 1 (One, uno, un, etc.). And it tells employers they can’t force leave.
- # of times “leave” appears in proposed regs?
 - 22. Not counting the Appendix, where it appears ~165 times.

Pregnant Workers Fairness Act

Surprise #4: Emphasis on Leave as Accommodation (Prop. Regs.)

PWFA Proposed Regulations, **1636.3(f)(1)(i):**

With respect to leave as an accommodation, the relevant inquiry is whether the employee is reasonably expected to perform the essential functions, with or without reasonable accommodation, at the end of the leave...or if the employee is qualified as set out in paragraph (f)(2) *after returning from leave.*

[(f)(2) details that an employee who is temporarily (<40 weeks) unable to perform an essential job function is not unqualified, if the inability can be accommodated.]

PWFA Proposed Regulations, **Appendix:**

The Commission notes that leave related to recovery from pregnancy, childbirth, or related medical conditions does not count as a time when an essential function is suspended and thus is not relevant for the ... definition of qualified.

Pregnant Workers Fairness Act

PWFA Proposed Regulations, Appendix:

Example 1636.3 #24/Unpaid Leave for Medical Appointments:

Taylor, a newly hired member of the waitstaff, requests time off to attend therapy appointments for postpartum depression. As a new employee, Taylor has not yet accrued sick or personal leave and is not covered by the FMLA. Taylor asks her manager if there is some way that she can take time off.

....

The employer must grant the accommodation of unpaid leave (or another reasonable accommodation) absent an undue hardship.

PWFA Proposed Regulations, Appendix:

Example 1636.3 #25/Unpaid Leave or Schedule Change:

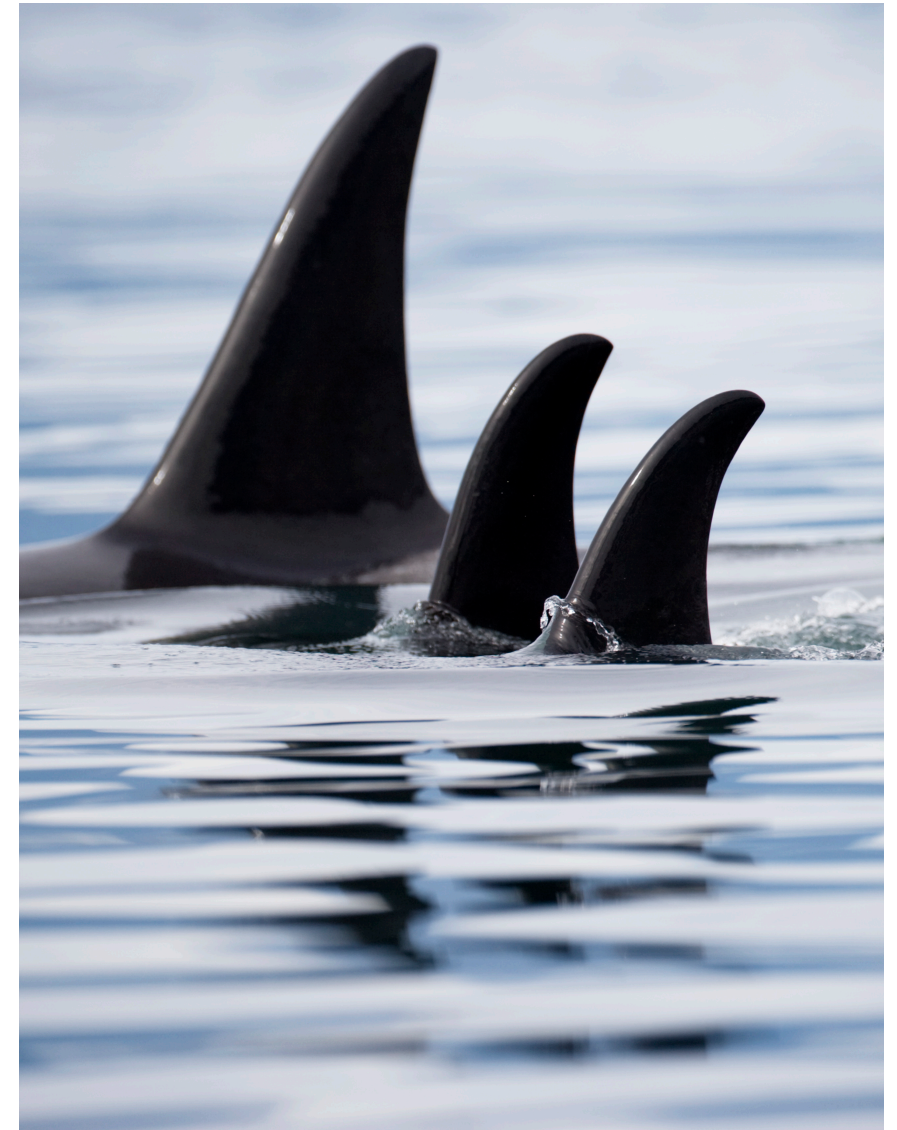
Claudine is six months pregnant and needs to have regular checkups. The clinic where Claudine gets her health care is an hour drive away, and they frequently get backed up and she has to wait for her appointment. Depending on the time of day, between commuting to the appointment, waiting for the appointment, and seeing her provider, Claudine may miss all or most of an assigned day at work. Claudine is not covered by the FMLA and does not have any sick leave left. Claudine asks human resources for a reasonable accommodation such as time off or changes in scheduling so she can attend her medical appointments.

.... The employer must grant the accommodation of time off or a schedule change (or another reasonable accommodation) absent undue hardship.

Pregnant Workers Fairness Act

Surprise #5: Limits on Authority and Leverage to Obtain Medical Confirmation

- Under ADA: employers have pretty broad authority to obtain medical examination or information to determine if a disability and accommodation-related information.
- The PWFA statute is silent as to this.
- PWFA proposed regs: Employer violates PWFA if it *delays* or denies implementing an accommodation due to an unreasonable request for documentation.



Pregnant Workers Fairness Act

Surprise #5: Limits on Authority and Leverage to Obtain Medical Confirmation (PWFA Proposed Regs)

Reasonable Requests

Requests for documentation describing or confirming:

- Physical or mental condition;
- That condition related to pregnancy, childbirth, or related condition;
- That change at work needed.

Unreasonable Requests

- Requests where need and pregnancy-relatedness are obvious.
- Requests where employee has already provided “sufficient *information*” to substantiate need.
- Four presumptively reasonable accommodations are requested.
- Lactation-related requests.



PUMP Act

- Expanded break obligation to FLSA exempt employees.
- Unpaid breaks to pump; but cannot dock pay of exempt employees.
- Must provide private, non-bathroom space.
- For first year of child's life.
- Undue hardship exemption for employers of fewer than 50 employees.
- Posting requirement.
- No retaliation.
- DOL already filed an enforcement action against a Whataburger Restaurant in San Antonio, Texas.



Americans with Disabilities Act

Interesting cases from Dec. 1, 2022-Nov. 1, 2023

- *EEOC v. Drivers Management, LLC and Werner Enterprises* (D. Neb. Aug. 2023): jury awarded \$75,000 in back pay and \$36,000,000 in punitive damages [later remitted to \$300,000] against Company that failed to accommodate driver's deafness. Driver had an exemption from DOT FMCSA.
 - *EEOC v. United Parcel Service*, 1:23-cv-14021 (N.D. Ill.) (filed Sept. 2023): basically the same thing.
- *Cooke v. Carpenter Tech. Corp.*, 2022 U.S. App. LEXIS 34825 (11th Cir.): Dist. Ct. (N.D. Ala.) and Eleventh Circuit found rotating shift not an essential function in the particular workforce.

QUESTIONS?





LEHR MIDDLEBROOKS
VREELAND & THOMPSON, P.C.

LABOR • EMPLOYMENT • IMMIGRATION

THANK YOU

Whitney Brown

wbrown@lehrmiddlebrooks.com

205-323-9274

MANUFACTURE
ALABAMA

ALABAMA'S TRADE ASSOCIATION FOR ALABAMA'S MANUFACTURERS