E-MEMO

RE: Whether Ms. Davis Can Show That Her Employer Accommodated Others "Similar in Their Ability or Inability to Work"

You asked whether Ms. Davis will be able to show that her employer, Ms. Karolek, accommodated others "similar in their ability or inability to work." Yes. Based on *Durham v. Rural/Metro Corp.*, 955 F.3d 1279 (11th Cir. 2020), and *Legg v. Ulster County*, 820 F.3d 67 (2d Cir. 2016), the short answer is that Ms. Davis can make a plausible argument that she and Mr. Berto were similarly limited in their work abilities but treated unequally.

Statement of the Law and Analysis

1. **"Similar in Their Ability or Inability to Work."** Both *Durham* and *Legg* confirm that under the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e(k), a pregnant employee must be treated the same as non-pregnant employees whose work limitations are comparable. In *Durham*, the Eleventh Circuit held that a policy accommodating injuries on the job but not accommodating pregnancy could suffice for a claim if pregnant employees were denied the same treatment as non-pregnant employees with like work restrictions. *Durham*, 955 F.3d at 1285. Similarly, *Legg* explained that a plaintiff meets her prima facie burden by showing that, while pregnant, she sought an accommodation that was given to others with similar restrictions. *Legg*, 820 F.3d at 74.
2. **Application to Ms. Davis's Facts.**
    - Ms. Davis asked not to travel to Panama due to medical advice – from her doctor – about the Zika virus risk to her fertility and childbearing, particularly bearing in mind Ms. Davis's advanced maternal age classification. R.9-10 (Davis Dep.)
    - Mr. Berto asked to remain in Illinois because of a knee infection that might worsen in a "tropical" environment. R.7-8 (Berto Aff.)
    - Under *Legg* and *Durham*, even if the reasons for their travel restrictions differ, what matters is whether they were similarly limited in their ability to perform the key job function (i.e., travel and on-site work). *Durham*, 955 F.3d at 1285-1288; *Legg*, 820 F.3d at 75-76. *Durham* cautions that an employer who accommodates one set of employees for medical concerns cannot categorically exclude pregnant workers if the limitations are of comparable seriousness. *Id*. at 1288.
    - Ms. Davis contends that neither she nor Mr. Berto could safely perform the on-site work in Panama, yet he was permitted to remain in Illinois while she was not. R.10 (Davis Dep.); R.8 (Berto Aff.). If she shows they were effectively equally restricted from traveling, she can argue they were "similar in their inability to work" but treated unequally.
3. **Conclusion on the Issue.** Given that *Legg* and *Durham* both stress examining whether the employer "accommodated a large percentage of non-pregnant employees while failing to accommodate pregnant employees," Ms. Davis has a reasonable claim that her limitations (related to Zika) were functionally comparable to those of Mr. Berto (post-knee surgery), yet she was denied similar consideration. *Legg*, 820 F.3d at 75.

Recommendation: Ms. Davis's factual showing should focus on how her travel restriction paralleled Mr. Berto's inability to travel. If she can demonstrate the employer was willing to excuse a non-pregnant worker from travel but not a pregnant worker with an equal inability to travel, she can satisfy the requirement under the PDA. I will be prepared to provide further research or answer additional questions as needed.

Best,

Jeremy Klein