



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

August 7, 1990

Mr. Ron Lindsey
Commissioner
Texas Department of Human
Services
P. O. Box 149030
Austin, Texas 78714-9030

Opinion No. JM-1203

Re: Sick leave for adopting
parents (RQ-1829)

Dear Mr. Lindsey:

You ask whether the employee leave provisions in the General Appropriations Act require or authorize a state agency to grant sick leave to an employee adopting a child. The appropriations act contains a provision setting out circumstances under which sick leave with pay may be taken:

Sick leave with pay may be taken when sickness, injury, or pregnancy and confinement prevent the employee's performance of duty or when the employee is needed to care and assist a member of his immediate family who is actually ill. For purposes relating to regular sick leave, immediate family is defined as those individuals related by kinship, adoption, marriage or foster children who are so certified by the Department of Human Services who are living in the same household or if not in the same household are totally dependent upon the employee for personal care or services on a continuing basis.

Acts 1989, 71st Leg., ch. 1263, art. V, § 8(3), at 5764. That provision authorizes use of sick leave for medical conditions related to pregnancy and childbirth. Attorney General Opinion JM-337 (1985). It does not authorize use of sick leave for adoption of a child. Id.

You ask, however, whether the following appropriations act provision mandates or authorizes leave for adoptive parents:

Pregnancies . . . shall be treated as any other temporary disability. Each case shall be evaluated on its own merit.

Acts 1989, 71st Leg., ch. 1263, art. V, § 8(6), at 5766. That language is enigmatic since adoption of a child would not normally be considered a disability.

The language in question first appeared in the appropriations act adopted in 1985. General Appropriations Act, Acts 1985, 69th Leg., ch. 980, art. V, § 8f, at budget 483. A version of the appropriations act for that year proposed by the House Committee on Appropriations contained more specific language regarding leave for adoptive parents:

A male or a female employee who adopts a child younger than three years of age is entitled to use his or her accrued sick leave for the purpose of establishing a family environment for the child and for bonding that relationship during any period not to exceed six weeks and beginning within a one-month period after the date that the child is placed in the home of the adoptive parent.

House Committee on Appropriations, C.S.H.B. 20, art. V, § 8n (April 15, 1985). The Conference Committee deleted that language and added the provision stating that pregnancies or adoption of a child under three years of age should be treated as any other temporary disability. Conference Comm. Report, H.B. 20, 69th Leg. (1985).

The only statement we have found in the legislative history of the 1985 appropriations act in regard to that provision was part of a resolution adopted to allow the House to act upon certain matters in the Conference Committee Report:

This change would bring state regulations into conformance with federal law which requires maternity to be treated as any other temporary disability.

H.C.R. 257, 69th Leg. (1985). The relevant federal law, 42 U.S.C. § 2000e(k), provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." See also 29 C.F.R. § 1604.10(b). In other words, the federal law requires employers to treat pregnancy and related medical conditions

the same as other medical disabilities. See 29 C.F.R. Pt. 1604, Appendix - Questions and Answers on the Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2076 (1978). It does not require leave for new parents who did not give birth.¹ Because the language in the appropriations act regarding adoption was not necessary to achieve the stated purpose of bringing the state into compliance with the federal law, the federal law provides no guidance in interpreting that language.

Even though the language regarding adoption seems misplaced in a provision addressed to treatment of disabilities, the legislature obviously intended that the language about adoption mean something. We conclude therefore, that a state employee who adopts a child under three years of age is entitled to use sick leave. The difficult question is how much leave an adoptive parent is entitled to. The plain language of the rider approaches the ridiculous. It states that adoption is to be treated as "any other temporary disability" and then directs the agency to evaluate each case on its own merits. While there might be little difficulty in evaluating an actual temporary disability "on its own merits," it is manifestly impossible to apply temporary disability standards to something which is not in fact a disability. In our opinion, the soundest approach is to disregard the "temporary disability" language and apply the standard that each case should be evaluated on its merits.

The specific amount of sick leave permitted should be determined by the head of the specific agency, but we believe that a standard of reasonableness must be applied in each case. Ordinarily, it would not seem reasonable to grant to adoptive parents a greater amount of sick leave than is allowed by that agency to natural mothers for pregnancy and childbirth. Until the legislature has provided more guidance in this matter, the amount of leave granted will of necessity vary, based on the individual case and on the liberality of the policies of a particular agency.

You also ask whether adoptive or natural fathers may use sick leave in order to form an emotional bond with a child. In regard to leave for adoptive fathers, the

1. Pending federal legislation would require some employers to provide unpaid leave for all new parents. H.R. 770, 101st Cong., 2d Sess., 136 Cong. Rec. 2218 (1990) (passed in the House).

appropriations act rider providing for adoptive leave applies to an employee of either sex who adopts a child. By contrast, nothing in the appropriations act however, authorizes natural parents to use sick leave to care for a healthy newborn.² Natural mothers, of course, may use sick leave for their recovery.

You then ask whether allowing disability leave for pregnancy and childbirth to natural mothers but not natural fathers is in conflict with Title 42, section 2000e-2 of the United States Code, which prohibits discrimination in the conditions of employment on the basis of sex. The United States Supreme Court has made clear that it does not. California Fed. Sav. & Loan Ass'n. v. Guerra, 479 U.S. 272 (1987); see also Record v. Mill Neck Manor Lutheran School for the Deaf, 611 F. Supp. 905 (E.D.N.Y. 1985) (act does not protect people wishing to take child-rearing leave as opposed to women wishing to take pregnancy leave). See generally Strimling, The Constitutionality of State Laws Providing Employment Leave for Pregnancy: Rethinking Geduldig after Cal Fed, 77 Cal. L. Rev. 171 (1989).

You also ask about chapter 106 of the Civil Practices and Remedies Code, which prohibits the state from denying a benefit because of sex.³ We think that a Texas court would adopt the analysis of the United States Supreme Court and conclude that allowing disability leave for pregnancy and childbirth does not constitute denial of a benefit to men because of their sex.⁴ See Geduldig v. Aiello, 417 U.S. 484

2. A parent may use sick leave to care for a sick child of any age. Acts 1989, 71st Leg., ch. 1263, art. V, § 8(3), at 5764.

3. The Texas act, unlike the federal act, does not explicitly prohibit discrimination based on pregnancy.

4. The difference in treatment here is between natural parents and adoptive parents. That is a distinction based not on gender, but on parental status. You do not ask, and we do not consider, whether such disparate treatment violates the equal protection clause. See generally Geduldig v. Aiello, 417 U.S. 484 (1974) (pregnancy-based classification is not sex based classification for purposes of equal protection clause because it divides potential beneficiaries into two groups: pregnant women and non-pregnant women). Nor do we address whether the Texas Equal Rights Amendment, Tex. Const. art. I, § 3a, requires

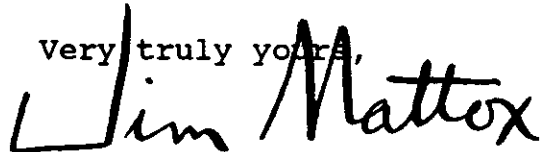
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(1974); General Elec. Co. v. Gilbert, 429 U.S. 125, 135-36
(1976) (pregnancy based discrimination is not discrimination
based on sex).

S U M M A R Y

An appropriations act provision stating that pregnancy and adoption of a child under three years of age are to be treated as any other disability means that a state employee who adopts a child under three years of age is to be treated as if he or she had undergone pregnancy and childbirth. Therefore, an employee who adopts a child under three years of age may use the amount of sick leave that would be necessary to recover from pregnancy and childbirth.

Very truly yours,



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(Footnote Continued)
that some type of leave be made available to natural
fathers.