August 2, 2012

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Dear Mr. Rubin, Mr. Marra and Ms. Miller:

This letter is to document the issues we described for Mr. Marra and Ms. Miller in our recent phone call about the Peace Corps Manual's Section on Volunteer Pregnancy. It was a pleasure discussing these matters with you, and we appreciate your receptivity.

As we explained, we are concerned that several of the rules within this Manual Section run afoul of the requirements of the Pregnancy Discrimination Act (PDA) and the other sex discrimination provisions in Title VII of the Civil Rights Act of 1964.[1] These laws prohibit employers from singling out pregnant employees for worse treatment than other employees, and require that pregnant employees be treated the same as other employees who are similarly situated in their ability or inability to work. These laws also prohibit employers from treating mothers differently from fathers based on stereotypical assumptions about mothers' primary role in raising children.

Below we describe the federal law prohibiting sex and pregnancy discrimination in further detail and its application to the sections of the manual we believe are problematic. We also make recommendations about how these manual sections could be revised to comply with the applicable law.

[1] Title VII was extended to the Peace Corps applicants and Volunteers by section 12 of the Domestic Volunteer Service Act Amendments of 1979. *See* 42 U.S.C. § 5057 (2012).

I. Applicable nondiscrimination law

Title VII prohibits adverse treatment on the basis of pregnancy, childbirth, or related medical conditions[2] and prohibits an employer from "singl[ing] out pregnancy-related conditions for special procedures for determining an employee's ability to work."[3] Title VII explicitly states that women affected by pregnancy must be treated at least as well as other workers "not so affected but similar in their ability or inability to work . . ."[4]

As the Supreme Court noted two decades ago, "[w]ith the PDA, Congress made clear that the decision to become pregnant or to work while being either pregnant or capable of becoming pregnant was reserved for each individual woman to make for herself."[5] Employers "may not require a pregnant woman to stop working at any time during her pregnancy unless she is unable to do her work,"[6] nor can an employer "discriminate against a pregnant employee simply because it believes pregnancy *might* prevent the employee from doing her job."[7]

II. Analysis and Recommendations

As we discussed, a number of the provisions of the Peace Corps Manual's Section on Volunteer Pregnancy are inconsistent with Title VII and PDA requirements. We outline our concerns with specific provisions and our recommendations below.

MS 263 Volunteer Pregnancy – Rules 3.1 and 3.2

Rule 3.1 states: "A V/T [volunteer/trainee] expecting a child may not continue her Peace Corps Service unless she is given both medical and programmatic approval to do so."

Rule 3.2 states: "In order to ensure that all V/Ts are familiar with the policy and procedures set out in this manual section, Peace Corps Medical Officers (PCMOs) shall include discussion of the pregnancy policy and procedures during the V/Ts initial health orientation/training, and V/Ts shall be told that pregnancy could lead to a medical separation."

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[2] 42 U.S.C. § 2000e(k) (2012).
[3] 29 C.F.R. pt. 1604 app. (2011).
[4] 42 U.S.C. § 2000e(k).
[5] *Int'l Union v. Johnson Controls*, 499 U.S. 187, 206 (1991).
[6] *Johnson Controls*, 499 U.S. at 205 (citing S. Rep. No. 95-331, pp. 4-6 (1977)).
[7] *Maldonado v. U.S. Bank*, 186 F.3d 759, 761 (7th Cir. 1999).

Concerns: These rules single out pregnancy, a condition only experienced by women, as requiring presumptive termination. In contrast, there is no rule stating that Peace Corps volunteers who develop other medical conditions while serving in the Peace Corps will be subject to presumptive termination. Sex-based rules singling out pregnant women for adverse treatment violate Title VII and the PDA. Further, the rules are grounded in outmoded assumptions that expectant mothers and new mothers will be unable to continue working. In particular, the statement in Rule 3.1 that programmatic approval is required for a pregnant worker to continue presumes that becoming a mother will be inconsistent with a Peace Corps' volunteer's responsibilities; expectant birth fathers are not subject to the same assumption.

In *Price Waterhouse v. Hopkins,* the Supreme Court made it abundantly clear that decisions based on outmoded sex stereotypes violate Title VII.[8] The lower courts have since held that assumptions that mothers are less committed to work are exactly the sort of sex-based stereotypes that are prohibited under Title VII.[9]

Recommendation: We recommend striking these rules. If a Peace Corps volunteer's pregnancy presents medical issues that cannot be medically accommodated, the rules on Medical Separation provide a gender-neutral means of making this determination. Specifically, MS 284 "Early Termination of Service" Sections 3.0, 3.1 and 3.2 all apply to pregnancy and are stated in a gender-neutral way. Under these sections, if an employee develops a medical condition that cannot be medically accommodated, she will be separated within 45 days. Because these general early termination provisions already encompass pregnancy-related medical conditions, they render the problematic Volunteer Pregnancy Rules 3.1 and 3.2 unnecessary.

We caution that if a pregnant employee does have a pregnancy-related physical restriction that requires an accommodation, the Peace Corps may well be required by law to provide the accommodation, unless it can prove that doing so would impose an undue hardship on the Peace Corps, or that even with the accommodation, the pregnant employee would still be unable to perform the essential functions of her job. The Peace Corps already applies a similar standard to determining whether applicants meet the requirements for medical clearance by requiring a determination of whether, with or

[8] 490 U.S. 228, 251 (1991).

[9] *Chadwick v. Wellpoint, Inc.*, 561 F.3d 38 (1st Cir. 2009) (holding that assumptions that mothers of young children will neglect their jobs in favor of child care responsibilities may constitute sex discrimination); *see also Back v. Hastings on Hudson*, 365 F.3d 107 (2d Cir. 2004) (holding that assumptions about a woman's inability to combine work and motherhood constitute sex-based stereotyping*); Lust v. Sealy*, 383 F.3d 580 (7th Cir. 2004) (holding that assumptions that mothers will not want to relocate their families when necessary for a job promotion can be the basis for a sex discrimination claim).

without reasonable accommodation, the applicant can perform the essential functions of the job.[10]

Since the 2008 ADA Amendments Act (ADAAA)[11] employers have been legally required to accommodate a range of permanent and temporary disabilities that are comparable to typical pregnancy symptoms and restrictions. The ADAAA has expanded employers' accommodations duty to reach impairments such as temporary back injuries that leave employees unable to lift more than 20 pounds or conditions that cause individuals to experience shortness of breath and fatigue when walking reasonable distances. Since the ADAAA has expanded the universe of impairments that must be accommodated, employers must also accommodate these types of impairments when they occur in pregnant women in order to comply with the PDA's requirement to treat pregnant workers the same as others who are similar in their ability or inability to work.

The Peace Corps has applied a gender-neutral rule to determine whether to permit volunteers who adopt children to remain in the Peace Corps after becoming parents. It should apply the same sort of gender-neutral inquiry to both men and women who become parents during their Peace Corps service through childbirth. We discuss this issue further in the section below on Rule 4.2 Programmatic Approval.

MS 263 Volunteer Pregnancy – Rule 4.1 Medical Approval

Rule 4.1 states: "In order for a pregnant V/T to continue service, the PCMO, in consultation with OMS, must determine that:

(a) Health facilities in-country are adequate for the delivery, given the V/T's general health and any potential complications;
(b) Host country facilities are adequate for prenatal, obstetric, postnatal, and infant care according to the OMS Technical Guidelines; and
(c) The V/T's project location presents no health hazards that would prevent the V/T from remaining there during pregnancy or after the birth of a child, or, if hazards do exist, an in-country transfer to a safer location is feasible."

[10] Rule 4.3 Standard for Medical Clearance states: "The Peace Corps regulatory standard for medical clearance is whether the applicant, with or without reasonable accommodation, has the physical and mental capacity required of a Volunteer to perform the essential functions of the Peace Corps assignment for which he or she is otherwise eligible, and be able to complete a 27-month tour without unreasonable disruption due to health problems." PEACE CORPS, PEACE CORPS MANUAL: MS 262, PEACE CORPS MEDICAL SERVICES PROGRAM (Dec. 7, 2006).

[11] Pub. L. No. 110-325, 122 Stat. 3553 (2008). The Domestic Volunteer Service Act prohibits discrimination against people with disabilities and uses the same definition of "qualified individual with a disability" as the Americans with Disabilities Act. 42 U.S.C. § 5057(a)(2) (2012). Title V of The Rehabilitation Act of 1973, 29 U.S.C. § 791 et seq. (2012), which was amended by the ADA Amendments Act of 2008, also applies to members of the Peace Corps. 22 C.F.R. § 305.1 (2012).

Concerns: Title VII prohibits employers from having rules that single out pregnancy for different treatment than other medical conditions, which Rule 4.1 does. Additionally, the Supreme Court has prohibited employers from taking into account fetal health in making decisions about women's employment.[12] Nor may an employer engage in sex discrimination to promote the safety of the employee herself.[13]

We recognize that the Peace Corps is required to ensure adequate health care for all of its volunteers[14] and that when volunteers develop medical conditions for which health care cannot be provided they may be subject to "medical separation" from the Peace Corps. Our recommendations below suggest how the Peace Corps can enforce this requirement in a gender-neutral way.

Recommendations: We recommend striking this rule and integrating any pregnancy assessments with general policies on medical conditions. The gender-neutral statements to this effect in various other provisions apply with equal force to pregnancy and are adequate to address the Peace Corps' concerns about retaining the ability to medically separate volunteers for whom adequate medical care cannot reasonably be provided.

Whether a pregnant woman can be provided adequate health care both pre and post-natally is a determination that should be made on case by case basis, by reviewing the health care services that are available and the individual pregnant volunteer's health care needs. The existing gender-neutral medical separation provisions allow for such an individualized inquiry.

MS 263 – Volunteer Pregnancy, Rule 4.2 Programmatic Approval

Rule 4.2 states: "To determine whether the pregnant V/T may continue in service, the DC shall determine that the V/T will be able to continue to serve effectively after the birth of a child."

[12] *See Int'l Union v. Johnson Controls*, 499 U.S. 187 (1991).
[13] *See, e.g.*, *Johnson Controls*, 499 U.S. at 202 (citing *Dothard v. Rawlinson*, 433 U.S. 321, 335 (1977)) ("danger to a woman herself does not justify discrimination"); *Crane v. Vision Quest Nat'l*, No. 98-4797, 2000 U.S. Dist. LEXIS 12357 (E.D. Pa. 2000); *Weeks v. S. Bell Tel. & Tel. Co.*, 408 F.2d 228, 236 (5th Cir. 1969) (stating, "Title VII rejects just this type of romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.").
[14] *See* 22 U.S.C. § 2504(e) (2012).

Concerns: The presumption that being a mother is incompatible with volunteer service, while no similar presumption is applied to men who father children during their volunteer service, violates Title VII's prohibition on sex discrimination by singling out mothers for worse treatment. While the section on paternity does not contain such a presumption, that rule unnecessarily singles out fathers. MS-204 Rule 3.16 Paternity states: if it is determined that the volunteer has "impaired his ability to perform in his assignment or the credibility of the Peace Corps program, or has violated host country law or custom" by fathering a child with a woman to whom he is not married, he may be administratively separated.

Recommendations: Both of these rules should be revised to follow the language set forth in MS-206, Adoption of Children by Volunteers: "Country Directors may permit the Volunteer(s) to continue in service after the adoption of a child if they are satisfied that the adoption is not likely to preclude continued satisfactory service[.]"[15] A similar gender-neutral rule could be written to cover birth children by substituting the word "birth" for "adoption." This would allow for an individualized inquiry into whether a volunteer with an infant child is still able to perform the functions of his or her job.

However, we note that if women are disproportionately affected by a gender-neutral policy of this nature, the Peace Corps could be subject to a legal challenge alleging that the neutral policy has a disparate impact on women, in violation of Title VII. To survive such a challenge, the Peace Corps would have to show that having such a policy is a "business necessity."

MS 263 – Volunteer Pregnancy, Rule 6.1 Early Termination as A Result of Pregnancy

Rule 6.1 states: "If the considerations set forth in Section 4.0 are not satisfied and the V/T does not wish to resign, she shall be medically separated in accordance with MS 284, Early Termination of Service. If, however, in the judgment of the PCMO, adequate prenatal care is available and if the CD concurs, the V/T may be allowed to continue service until the fourth month of pregnancy."

Concerns: Mandatory leave at an arbitrary point during pregnancy was found to be unconstitutional in *Cleveland Board of Education v. LaFleur*.[16] The Supreme Court further held in *Johnson Controls* that under Title VII an employer "may not require a pregnant woman to stop working at any time during her pregnancy unless she is unable to

[15] *See* PEACE CORPS, PEACE CORPS MANUAL: MS 206, ADOPTION OF CHILDREN BY VOLUNTEERS (Nov. 1, 1982).
[16] 414 U.S. 632 (1974).

do her work."[17] In fact, since the PDA outlawed these types of categorical exclusions on women's work during pregnancy, more and more women have worked during their pregnancies. For example, two-thirds of women who had a first child between 2006 and 2008 worked during pregnancy, and 88 percent of these worked into their last trimester.[18]

Recommendations: This rule should be stricken. The Peace Corps should examine a pregnant volunteer's ability to remain in country only if the pregnant employee shows signs of being unable to do her job, or health facilities are determined to be inadequate after an individualized assessment taking into account the volunteer's particular health circumstances. Such an assessment should follow the same guidelines in place for assessment of other medical conditions. In addition, the Peace Corps would need to carefully consider its obligations to provide pregnancy accommodations to the pregnant volunteer, in accordance with the PDA.

III. Conclusion

Current Peace Corps policy discriminates on the basis of sex because it requires only expectant mothers, not expectant fathers, to be analyzed for approval to remain in the Peace Corps,[19] and it singles out pregnant volunteers for worse treatment than other volunteers similar in their ability or inability to work.

The Peace Corps can easily satisfy its objective of ensuring that adequate health care is available to pregnant employees in a gender-neutral way. The Peace Corps should simply apply the same standards and procedures in evaluating whether health facilities are adequate to meet a pregnant volunteer's actual medical needs as it does with any other medical condition developed while a volunteer is serving.

Likewise, employers may not base decisions about the compatibility of parenting and work on assumptions about the greater responsibilities associated with being a mother than a father. Policies on parenting, such as determinations about whether volunteers can serve effectively after having children, must be sex neutral, as is the current policy on adoption.

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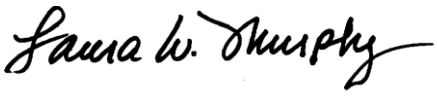
[17] 499 U.S. at 205 (citing S. Rep. No. 95-331, pp. 4-6 (1977)).

[18] National Women's Law Center's calculations from U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS SURVEY: 2011, Tables FG1, FG5 One parent, FG5 Two parent, and UC3, *available at* http://www.census.gov/population/www/socdemo/hh-fam/cps2011.html (last visited Feb. 7, 2012).

[19] *Compare* PEACE CORPS, PEACE CORPS MANUAL: MS 263, VOLUNTEER PREGNANCY (Mar. 12, 2012) *with* PEACE CORPS, PEACE CORPS MANUAL: MS 204, VOLUNTEER CONDUCT, subsection 3.16 on paternity (Aug. 29, 2011).

As organizations dedicated to advancing equal opportunity for women in employment, we are pleased to assist you in these efforts, and appreciate your consideration of these issues as you continue to revise the Manual. We look forward to continuing to work with you. For more information, please contact Sarah Lipton-Lubet, Policy Counsel, ACLU, slipton-lubet@dcaclu.org or (202) 675-2334, and Emily Martin, Vice President and General Counsel and Liz Watson, Senior Advisor, National Women's Law Center, lwatson@nwlc.org or (202) 588-5180.

Sincerely,



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