PARK POLICE PREGNANCY DISCRIMINATION CLAIM

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Title VII of the federal Civil Rights Act of 1964 makes it unlawful to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. §2000e-2. In 1978, Title VII was amended by the Pregnancy Discrimination Act ("PDA"), 42 U.S.C. § 2000e(k), to clarify that pregnancy discrimination is a form of gender discrimination prohibited by Title VII. In pertinent part, the PDA provides that "a woman affected by pregnancy 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." 42 U.S.C. § 2000e(k).

In 2001, six female police officers in Suffolk County, New York commenced a pregnancy discrimination lawsuit against the County (Lochren v. Suffolk County). The lawsuit challenged a county police department policy that excluded pregnant officers from light-duty assignments. At the time, eligibility for light-duty assignments was limited to county police officers suffering from a work-related injury.

At trial, a jury found this policy had a "disparate impact on pregnant police officers" in violation of Title VII and the PDA. In light of the jury's decision, the County subsequently entered into a consent decree with the female police officers, effectively ending the litigation. The Lochren consent decree stated that Suffolk County and the Suffolk County Police Department would provide no fewer than six months of limited duty during the period of their pregnancies to pregnant officers who presented a doctor's note requesting limited duty. Aside from the police department, no other county departments were specified in the consent decree, including the county parks department.

In the case of *Germain v. County of Suffolk* (E.D. N.Y. 5/29/2009), plaintiff Tara Germain, a county parks department police officer, alleged that defendant Suffolk County had once again violated the PDA of Title VII when the County refused her request to be assigned to light duty during the course of her pregnancy.

FACTS OF THE CASE

Germain was hired by Suffolk County as a Park Department police officer on April 15, 2002. On April 23, 2007, Germain met with the chief of police for the parks department to inform him that she was pregnant. Germain provided the police chief with a note from her physician stating that, "in light of her pregnancy, Germain would not be able to perform full-duty assignments." Accordingly, Germain requested to be assigned to light-duty.

At the meeting, the police chief indicated that there was light-duty work available and that he would try to accommodate Germain. He noted, however, that Germain's request would have to be approved by the county director of labor relations.

The county labor relations director subsequently denied Germain's request for a light duty assignment. According to the director, Germain was "ineligible for light-duty because such assignments were reserved only for Park Department police officers who suffered from injuries sustained on the job." After her request for light duty was denied, Germain took a leave of absence from her park police position.

From April 24, 2007 until August 5, 2007, Germain exhausted all of her accrued leave time. From August 6, 2007 until Germain returned to full-duty on April 22, 2008, she was forced to take unpaid leave. Germain was also without health benefits and did not accrue seniority for this time period.

While she was on leave, Germain's husband, a county police officer, had requested permission to transfer his accrued sick leave to his wife so that she would not have to take unpaid leave. The labor relations director denied the request. According to the director, "it would be extremely complicated to transfer sick leave between County employees of different bargaining units," in this case county police to park police. Moreover, the director told Germain's husband that he would not consider his request while his wife's lawsuit was pending. On the other hand, the labor relations director indicated that he would attempt to accommodate the husband's request for a transfer of his sick leave to his wife if Germain withdrew her Title VII lawsuit.

DISPARATE IMPACT

According to the federal district court, a discrimination claim under Title VII may be based upon "disparate impact." As cited by the court, disparate impact claims under Title VII "involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity." 42 U.S.C. § 2000e-2(k)(1)(A). Further, to proceed with a Title VII claim, the court noted that a plaintiff had to "identify a particular policy that causes a disparate impact on a protected class." In this particular instance, Germain alleged that "the Park Department's policy of limiting light-duty assignments only to those officers who suffer from occupational injuries has a disparate impact on pregnant women,"

Once Germain established herself as a member of a protected class a protected class (i.e., pregnant women under the PDA), the burden would shift to the County as employer "to demonstrate that the challenged practice or policy is job related for the position in question and consistent with business necessity." Assuming the County could show that the policy was "consistent with business necessity," the burden would then shift back to Germain to "establish the availability of an alternative policy or practice that would also satisfy the asserted business necessity, but would do so without producing the disparate effect."

In response to Germain's claim of disparate impact on pregnant women, Suffolk County had argued that "the policy does not offend the PDA because the Park Department has applied the policy consistently to all officers, whether pregnant or not, who have sought light-duty assignments because of non-occupational injuries." The federal district court rejected this argument. In the opinion of the federal district court, the County was "mistaken" in comparing "the Park Department's treatment of Germain to that of other non-pregnant officers who

requested light-duty because of a non-occupational injury." Under the PDA, the issue is whether the impact of the challenged policy is disparate or more onerous on pregnant women than other similarly situated employees, not the nature of the condition which gave rise to an inability to work.

SIMILAR INABILITY TO WORK

According to the federal district, "the PDA only requires Germain to show that non-pregnant Park Department officers similarly unable to perform full-duty assignments were treated more favorably than her." In so doing, however, the PDA would not require Germain to "demonstrate that the employee who received more favorable treatment be similarly situated in all respects."

> [T]he Supreme Court has recognized that the second clause of the PDA could not be clearer: it mandates that pregnant employees "shall be treated the same for all employment-related purposes as non-pregnant employees similarly situated with respect to their ability to work."

Accordingly, the court found "the PDA requires only that the employee be similar in his or her "ability or inability to work."

Applying these principles to the facts of the case, the court found that "non-pregnant Park Department officers who are incapable of full-duty because of occupational injuries are eligible for light-duty assignments." In contrast, the court noted that "a pregnant officer unable to perform full-duty because of her pregnancy could never be eligible for a light-duty assignment" under the challenged Park Department policy.

Accordingly, the court found "the distinction the Park Department's policy draws between occupational and non-occupational injuries necessarily excludes pregnant women from light-duty." Most significant, the court found further that "the pregnant officer and the non-pregnant officer are similarly situated in their inability to perform full-duty work." Under such circumstances, the federal district court concluded that Germain had "established a prima facie case[i.e. sufficient pretrial evidence "on its face"] that the Park Department's light-duty policy has a disparate impact on pregnant women" in violation of the PDA.

Having found that Germain had demonstrated "disparate impact," the court noted that the burden would ordinarily shift to the employer County to show that the challenged policy was consistent with "business necessity." Based on the pretrial record, however, the court found the County had not sufficiently developed this "critical issue" to determine whether Germain's "disparate impact" claim should be dismissed based on business necessity. As a result, the federal district court concluded that there were "material factual issues with regard to Germain's disparate impact claim that must be resolved by a trier-of-fact [i.e., jury]. The federal district court, therefore, denied the County's motion for summary judgment which would have effectively dismissed Germain's disparate impact claim without a trial.

DISPARATE TREATMENT

In addition, to "disparate impact," the federal district court acknowledged that a discrimination claim under the PDA of Title VII could also be based upon "disparate treatment." Within this context, "disparate treatment" would occur "where an employer treats some people less favorably than others on the basis of their gender, or where a facially neutral policy merely serves as a pretext for intentional employment discrimination."

In this particular case, the court found the Park Department's policy was neutral and "applied even-handedly to deny both pregnant and non-pregnant officers who seek light-duty assignments due for non-occupational injuries." Germain, however, claimed the Park Department's facially neutral policy regarding light-duty assignments was a mere pretext for a form of intentional employment discrimination against pregnant officers.

As noted by the court, Germain had established that she was a member of a protected class under the PDA (pregnant women). Further, Germain had shown she was qualified for assignment to light-duty work because she was unable to work full-duty and there was light-duty work available in the park police department.

Accordingly, to establish her discrimination claim under the PDA, Germain would have to demonstrate that she "suffered an adverse employment action" and "the adverse employment action was taken under circumstances giving rise to an inference of unlawful discrimination." In response, the County employer would then have an opportunity to "articulate a legitimate, non-discriminatory reason for taking the adverse employment action." Germain, however, could still proceed with her PDA claim if she could "demonstrate that the legitimate reasons offered by the defendant County were not its true reasons, but were a pretext for discrimination."

In this particular instance, Germain contended that "the Park Department's refusal to amend its policy in the wake of the Lochren consent decree reflected its animus [i.e., prejudiced ill will] towards pregnant women." According to Germain, in the Lochren consent decree, "Suffolk County acknowledged that a light-duty policy identical to the one enforced by the Park Department had a disparate impact on pregnant women." After Suffolk County entered into the Lochren consent decree, Germain maintained that "all County agencies with similar light-duty policies should have amended their policies accordingly." While characterizing it as a "close question," the federal district court agreed with Germain.

> [I]n light of the fact that an identical County policy was found to have a disparate impact on pregnant women [in the police department], the Park Department's continued enforcement of such a policy does raise at least an inference of intentional discrimination against pregnant women.

In light of such evidence, the federal district court found that a jury should also determine "whether Suffolk County's failure to amend the Park Department's light-duty policy reflects the County's animus toward women." As a result, the federal district court denied the County's motion for summary judgment to dismiss Germain's PDA claim based on "disparate treatment."

RETALIATION

Germain also alleged that "Suffolk County's refusal to permit her husband to transfer his accrued sick leave time to her was an act of retaliation within the meaning of Title VII." To establish a retaliation claim pursuant to Title VII, the federal district court noted that Germain would have to show the following:

> (1) she engaged in a protected activity; (2) the employer was aware of that protected activity; (3) she suffered an adverse employment action; and (4) there is a causal connection between the protected activity and the adverse employment action.

In the opinion of the court, "Germain easily satisfies all four elements":

> First, Germain participated in a protected activity when she filed the instant lawsuit. Second, there is no question that Suffolk County was aware of the lawsuit. Third, Suffolk County took an adverse employment action against Germain when it denied her husband's request to transfer his sick leave time to her. Fourth, Tempera's letter [the county labor relations director] to Germain's husband evidences a causal connection between this lawsuit and Suffolk County's decision to deny her husband's request.
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> In particular, Tempera stated in his letter that he would not consider Germain's request while his wife's lawsuit was pending but noted that he would attempt to accommodate the request if Germain consented to withdrawing her lawsuit.

Accordingly, in the opinion of the federal district court, there was sufficient evidence, in particular the letter from the county's director of labor relations, for a reasonable jury to conclude that "Suffolk County's stated reason for denying Germain's request was a pretext for unlawful retaliation." As a result, the federal district court also denied the County's motion for summary judgment to dismiss Germain's retaliation claims.

Having denied the County's motions for summary judgment, Geramin would have an opportunity to prove her PDA claims in a jury trial.