SUPREME COURT OF NEW JERSEY
NO. 084022 (A-68-19)

KATHLEEEN J. DELANOY, Plaintiff-Respondent, v. **TOWNSHIP OF OCEAN, ANDREW BRANNEN, STEVEN PETERS, NEIL INGENITO, WILLIAM LARKIN, CHRISTOPHER SICILIANO, W. MICHAEL EVENS, WILLIAM GAROFALO AND DONNA SCHEPIGA**, Defendants-Petitioners.	**Civil Action** **On Appeal from the Superior Court of New Jersey, Appellate Division** App. Div. Docket No. A-2899-17T4 Sat Below: Hon. Jack M. Sabatino, P.J.A.D. Hon. Thomas W. Summers, J.A.D. Hon. Richard J. Geiger, J.A.D.

BRIEF AND APPENDIX OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION, AMERICAN CIVIL LIBERTIES UNION OF NEW JERSEY, A BETTER BALANCE, GARDEN STATE EQUALITY, GLOUCESTER COUNTY NAACP, NATIONAL COUNCIL OF JEWISH WOMEN, ESSEX COUNTY SECTION, NATIONAL ORGANIZATION FOR WOMEN OF NEW JERSEY, NEW JERSEY ABORTION ACCESS FUND, PLANNED PARENTHOOD ACTION FUND OF NEW JERSEY, SPEAKING OF BIRTH, STANTON STRONG INC., WOMEN FOR PROGRESS

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Delanoy v. Twp. of Ocean, 462 N.J. Super. 78 (App. Div. 2020) 3, 26

Delaware River Port Auth. v. Fraternal Order of Police Penn-Jersey Lodge No. 30, No. A-3324-17T2, 2019 N.J . Super. Unpub. LEXIS 694 (App. Div. 2019) 31

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Ensley-Gaines v. Runyon, 100 F. 3d 1220 (6th Cir. 1996) 8

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General Electric Corp. v. Gilbert, 429 U.S. 125 (1976) 22

Gerety v. Atlantic City Hilton Casino Resort, 184 N.J. 391 (2005) 13

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Lehmann v. Toys 'R' Us, 132 N.J. 587 (1993).....5

Martinez v. NBC, 49 F. Supp. 2d 305 (S.D.N.Y. 1999).....8

Nashville Gas Co. v. Satty, 434 U.S. 136 (1977).....21, 22

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Peper v. Princeton Univ. Bd. of Trs., 77 N.J. 55 (1978).....4

Raspa v. Gloucester County Sheriff's Office, 191 N.J. 323 (2007).....17

Reeves v. Swift Transp. Co., 446 F. 3d 637 (6th Cir. 2006).....8

Rendine v. Pantzer, 141 N.J. 292 (1995).....13

Serednyj v. Beverly Healthcare, LLC, 656 F. 3d 540 (7th Cir. 2011).....8

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Spivey v. Beverly Enterprises, Inc., 196 F. 3d 1309 (11th Cir. 1999).....8

Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994).....8

Urbano v. Continental Airlines, Inc., 138 F. 3d 204 (5th Cir. 1998).....8

Viscik v. Fowler Equip. Co., 173 N.J. 1 (2002).....5

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Young v. United Parcel Service, Inc., 575 U.S. 206 (2015).....9

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42 U.S.C. § 2000e-2(a)(2).....21

Hearing on A4486 Before the N.J. Assemb. Comm. on Women and Children, 215th Sess. (Dec. 16, 2013) (testimony of Dina Bakst & Phoebe Taubman, Co-Founder & Co-President and Senior Staff Attorney, A Better Balance), at 4-5, https://www.abetterbalance.org/ wp-content/uploads/2020/08/NJ-Pregnancy-bill-ABB-testimony.pdf.....32

Hearing on Senate Bill 2995 Before N.J. Senate Labor Comm., 215th Sess. (Nov. 7, 2013) (testimony of Ari Rosmarin, ACLU of New Jersey), https://www.aclu-nj.org/files/5713/8383/9960/2013_11_07_TestimonyS2995.pdf 13

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N.J.S.A. 10:5-3.1(a) 15

N.J.S.A. 10:5-12(a) 15

N.J.S.A. 10:5-12(s) 14, 16, 17, 19

N.J.S.A. 26:8-40.12.....15

P.L. 2013, c.220., https://www.njleg.state.nj.us/2012/Bills/PL13/220_.PDF 14

*R.*1:36-3.....9, 10, 31, 32

Senate Labor Committee Statement to Senate, No. 2995, Nov. 7, 2013, https://repo.njstatelib.org/handle/10929.1/ 24717?show=full.....16

OTHER AUTHORITIES

Amanda Hoover, *Police chief played hooky, discriminated against pregnant cop, union claims*, NJ.com, Aug. 3, 2017, https://www.nj.com/burlington/2017/08/police_chief_on_leave_for_accusations_of_discrimin.html 31

Amara Omeokwe, *Women Overtake Men as Majority of U.S. Workforce*, Wall Street Journal (Jan. 10, 2020), https://www.wsj.com/articles/women-overtake-men-as-majority-of-u-s-workforce-11578670615 18

Andrew Ford, *NJ Police Tests Fail Women Recruits. Here's How It Hurts Your Safety and Your Wallet*, Asbury Park Press (Feb. 25, 2020), https://www.app.com/in-depth/news/investigations/2019/07/29/new-jersey-failing-its-women-police-recruits/1819867001 .....26, 28

Chris Marr, *Tennessee Enacts Pregnant Worker Accommodation Law*, Bloomberg Law (June 23, 2020), https://news.bloomberglaw.com/daily-labor-report/tennessee-enacts-pregnant-worker-accommodations-law 5

Christina Asquith, *Why Aren't U.S. Police Departments Recruiting More Women?*, The Atlantic (Aug. 30, 2016), https://www.theatlantic.com/politics/archive/2016/08/police-departments-women-officers/497963 27

Cromwell Cop Settles Pregnancy Bias Suit after Being Forced to Take Unpaid Leave, Middletown Press (Sept. 7, 2018), https://www.middletownpress.com/middlesex-county/article/Cromwell-cop-wins-pregnancy-bias-suit-after-being-13209796.php 29

D. Hollander, *Improving Work Situations During Pregnancy May Help Improve Outcome*, 32 *Int'l Fam. Plan. Persp.* 156 (2006).....11

Daniel LeDuc, *Gays Get Florio's Support*, Philadelphia Inquirer, Jan. 20, 1992.....4

Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 *Harv. C.R.-C.L. L. Rev.* 415 (2011) 6

Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 *Stetson L. Rev.* 1 (1995).....11

Dina Bakst, Elizabeth Gedmark, & Sara Brafman, *Long Overdue: It is Time for the Federal Pregnant Worker Fairness Act*, A Better Balance (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf 10, 13

Emily Martin, *Law Would Ensure Fairness for Pregnant Workers*, Asbury Park Press (Jan. 10, 2014).....14

Erik Larsen, *Office duty for pregnant policewoman*, Asbury Park Press (May 15, 2008) 32

Fabrice Czarnecki, *The Pregnant Officer*, 3 *Clinics Occupational & Envtl. Med.* 641 (2003).....12

Federal Bureau of Investigation, *Crime in the U.S. 2002* (Oct. 27, 2003), https://ucr.fbi.gov/crime-in-the-u.s/2002/02sec6.pdf 27

Fertility of Women in the United States: 2016, Table 6. Completed Fertility for Women age 40 to 50 Years Old – Selected Characteristics: June 2016, U.S. Census Bureau. (May 4, 2017). https://www.census.gov/data/tables/2016/demo/fertility/women-fertility.html#par_list_62 18-19

Heath Fogg Davis, *Sex-Classification Polices as Transgender Discrimination: An Intersectional Critique*, 12 Persp. on Pol. 45, (2014).....15

Jan Hefler, *Officer returns to work after settling pregnancy suit*, Philadelphia Inquirer (Nov. 29, 2015).....31

Jessica Schieder & Elise Gould, *"Women's Work" and the Gender Pay Gap*, Economic Policy Institute (July 20, 2016), https://www.epi.org/publication/womens-work-and-the-gender-pay-gap-how-discrimination-societal-norms-and-other-forces-affect-womens-occupational-choices-and-their-pay/ 12

Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N. Y. Times (Oct. 21, 2018), https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html 10

Joanna Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 *Geo. L.J.* 567 (2010).....6

Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as it Approaches Full Term*, 52 *Idaho L. Rev.* 825 (2016).....7

Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 *Yale J.L. & Feminism* 15 (2009).....7

Joanna L. Grossman & Gillian Thomas, *Making Sure Pregnancy Works: Accommodation Claims after* Young v. United Parcel Service, Inc., 14 *Harv. L. & Pol'y Rev.* 301 (2020) (forthcoming).....10

Julie Compton, *Trans Dads Tell Doctors: "You can be a man and have a baby,"* NBCNews.com (May 19, 2019), https://www.nbcnews.com/feature/nbc-out/trans-dads-tell-doctors-you-can-be-man-have-baby-n1006906.....15

Karen J. Kruger, *Pregnancy & Policing: Are They Compatible? Pushing the Legal Limits on Behalf of Equal Employment Opportunities*, 22 *Wis. Women's L.J.* 61 (2007).....12, 31

Kate King, *N.J. Struggles for Diversity in Police*, Wall Street Journal, Apr. 5, 2016 27

Kathleen Ramunni, *Wallingford to Pay Police Officer Who Filed Discrimination Complaint*, Patch.com (Mar. 27, 2013), https://patch.com/connecticut/wallingford/wallingford-to-pay-police-officer-refused-light-duty. 29-30

Michelle Fox, *The 'Motherhood Penalty' is Real, and It Costs Women $16,000 a Year in Lost Wages*, CNBC.com (Mar. 25, 2019), https://www.cnbc.com/2019/03/25/the-motherhood-penalty-costs-women-16000-a-year-in-lost-wages.html.....11

Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination is Rampant Inside America's Biggest Companies*, N. Y. Times (June 15, 2018), https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html.....10

National Institute of Justice, Women in Policing: Breaking Barriers and Blazing a Path (2019).....27

National Partnership on Women and Families, *Listening to Mothers: The Experiences of Expecting and New Mothers in the Workplace* (Jan. 2014), available at http://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf 7

New Jersey Senate Democrats, *Bill to Protect Pregnant Women from Discrimination in the Workplace Gains Senate Approval*, Nov. 18, 2013, https://www.njsendems.org/bill-to-protect-pregnant-women-from-discrimination-in-the-workplace-gains-senate-approval/.....13, 16

Peggy Wright, *Morris Twp. Cop claims job discrimination over pregnancy*, Daily Record, Dec. 2. 2015 30

Press Release, *A.G. Grewal: On the 75th Anniversary of the New Jersey Law Against Discrimination, Our Division on Civil Rights Is More Critical Than Ever*, N.J. Off. of the Att'y Gen. (Apr. 16, 2020), https://www.nj.gov/oag/newsreleases20/pr20200416a.html..... 3-4

Reva Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 *Wm. & Mary L. Rev.* 971 (2019).....10

Ron Marisco, *Sharing Services Has Saved Money for NJ Local Governments: Wall Street Analysis*, NJ Spotlight (Dec. 20, 2019), https://www.njspotlight.com/2019/12/sharing-services-has-saved-money-for-nj-local-governments-wall-street-analysis/ 24

Sarah Jane Glynn, *Breadwinning Mothers Continue to be the U.S. Norm*, Center for American Progress (May 10, 2019), https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/.....11

Sergio Bichao, *NJ lesbian cop sues, alleges discrimination during pregnancy*, Asbury Park Press (Apr. 4, 2013).....31

Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 *Geo. J. on Poverty L. & Pol'y* 1 (Winter 2012)..... 8-9

The Comm. on Obstetric Practice, *Committee Opinion: Employment Considerations During Pregnancy and the Post-Partum Period, American College of Obstetricians & Gynecologists*, No. 733, No. 73 (April 2018), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period.....18

U.S. Census Bureau, *Quick Facts*, July 1, 2019, https://www.census.gov/quickfacts/NJ.....26

Unif. Crime Reporting, State of N.J., Uniform Crime Report 174 (2016).....26

Wendy Chavkin, *Walking a Tightrope: Pregnancy, Parenting, and Work, in* Double Exposure: Women's Health Hazards on the Job and at Home (Wendy Chavkin ed., 1984).....11

Interest of *Amici*

Proposed *amici* are twelve organizations that work with a broad range of New Jersey residents on issues that promote gender equity and reproductive health, rights, and justice through policy change and advocacy. As further set forth in the certification accompanying this brief, *amici* support the goals of the New Jersey Pregnant Workers Fairness Act, and advocate to ensure that people are empowered to make decisions about their pregnancies and families free from discrimination.

The organizations signing on to the brief include: the American Civil Liberties Union ("ACLU"); the American Civil Liberties Union of New Jersey; A Better Balance, Garden State Equality; Gloucester County NAACP; National Council of Jewish Women, Essex County Section; National Organization for Women of New Jersey; New Jersey Abortion Access Fund; Planned Parenthood Action Fund of New Jersey; Speaking of Birth; Stanton Strong Inc; and Women for Progress.

Preliminary Statement

The New Jersey Pregnant Workers Fairness Act ("NJPWFA") was enacted to expand New Jersey's anti-discrimination protections in order to remedy the persistent and significant harms that pregnant workers faced from employers unwilling to provide them the temporary job adjustments they needed to continue

working safely. The NJPWFA amended the New Jersey Law Against Discrimination ("LAD") to address shortcomings in federal law by requiring that employers affirmatively accommodate pregnancy, thereby ensuring that pregnant workers are not forced to leave the workplace and risk their economic security in order to maintain a healthy pregnancy. (Point 1)

The Defendants-Petitioners created a separate policy for pregnant officers that treated them differently than other officers eligible for light duty and required Plaintiff to use up her accrued paid time off in advance of her due date. Even under federal law, which lacks NJPWFA's affirmative accommodation mandate, such, a policy arguably would be unlawful. But coupled with the mandate, as well as the directive that the accommodation be "reasonable" and not result in a "penalty" against pregnant workers, Defendants-Petitioners disparate policy unquestionably violates the NJPWFA. (Point II.A-C).

Moreover, because preventing discrimination is New Jersey's unambiguous public policy, municipalities and other public employers should be held to the highest standards when assessing the burden a given accommodation places on an employer. In line with this policy, the LAD should prevent police officers and other public employees from being treated differently solely because they work for a smaller political subdivision. (Point II.D).

Finally, the NJPWFA and the protections it provides to pregnant police officers is critical to addressing the extreme gender disparities in New Jersey law enforcement agencies. Plaintiff's experience as one of three women officers in a department of more than fifty is not an aberration and she is one of many New Jersey officers who have experienced pregnancy discrimination. The NJPWFA should be read expansively to ensure that officers – as well as any other worker in New Jersey whose pregnancy necessitates some modification of their job duties – can trust that they will not be forced to choose between their job and a healthy pregnancy. (Point III).

Statement of Facts/Procedural History

Amici accept the facts and procedural history set forth by the Appellate Division in its opinion below. *Delanoy v. Twp. of Ocean*, 462 N.J. Super. 78 (App. Div. 2020).

Argument

The purpose of the New Jersey Law Against Discrimination is "nothing less than the eradication 'of the cancer of discrimination.'" *Fuchilla v. Layman*, 109 N.J. 319, 334 (1988) (quoting *Jackson v. Concord Co.*, 54 N.J. 113, 124 (1969)). [1]

[1] This year marks the 75th anniversary of the New Jersey Law Against Discrimination. Signed into law in April 1945, it became the first modern civil rights law to take effect. Press Release, *AG Grewal: On the 75th Anniversary of the New Jersey Law Against Discrimination, Our Division on Civil Rights Is More*

In the decades since its enactment, the LAD has been amended dozens of times "as part of a gradual legislative response directed toward eliminating forms of discrimination not theretofore banned by statute." *Peper v. Princeton Univ. Bd. of Trs.*, 77 N.J. 55, 68 (1978). The NJPWFA is just one recent example of our state being on the forefront of expanding the reach and protections offered by the LAD.[2]

Through the LAD and its amendments, the New Jersey legislature has made clear time and again that New Jersey has a strong public policy against discrimination because it "menaces the institutions and foundation of a free democratic State." N.J.S.A. 10:5-3. This Court has pointed out that "prevention of unlawful discrimination vindicates not only the rights of individuals but also the vital interests of the State." *David v. Vesta Co.*, 45 N.J. 301, 327 (1965) (describing such discrimination as "a public wrong and not merely the basis of a private grievance"). To ensure that these twin harms are adequately remedied, the Court has instructed that the LAD be "construed with that high degree of liberality which comports with the preeminent social significance of its purposes and objects." *Andersen v. Exxon Co.*, 89 N.J. 483, 495 (1982) (internal citation and quotation

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Critical Than Ever, N.J. Off. of the Att'y Gen. (Apr. 16, 2020), https://www.nj.gov/oag/newsreleases20/pr20200416a.html

[2] New Jersey was also a national leader on protecting people based sexual orientation (fifth state in 1992), Daniel LeDuc, *Gays Get Florio's Support*, Philadelphia Inquirer, Jan. 20, 1992 at B.1, and gender identity (ninth state in 2006).

marks omitted); *see also Viscik v. Fowler Equip. Co.*, 173 N.J. 1, 13 (2002) (holding that the overarching goals of the LAD are to be achieved through a liberal construction of its provisions); *Lehmann v. Toys 'R' Us*, 132 N.J. 587, 609 (1993) (rejecting narrow application of the LAD "[g]iven the breadth of individual and societal harms that flow from discrimination and harassment").

This history, and the generous rules of construction that have emerged from it, should inform this Court's evaluation of the NJPWFA.

I. The New Jersey Pregnant Workers Fairness Act Was Intended to Ensure that Pregnant Workers Remain in the Workforce and Have Healthy Pregnancies.

Like the 29 other states[3] that have a pregnant worker fairness statute on the books, New Jersey enacted the NJPWFA to strengthen protections for pregnant workers who need temporary "accommodations" to keep working safely. Such laws fill critical gaps in coverage caused by negative precedent under the federal Pregnancy Discrimination Act ("PDA") which has resulted in far too many employers denying pregnant workers the accommodations they need, even when routinely providing them to non-pregnant comparators.

[3] *See* Chris Marr, *Tennessee Enacts Pregnant Worker Accommodation Law*, Bloomberg Law (June 23, 2020), https://news.bloomberglaw.com/daily-labor-report/tennessee-enacts-pregnant-worker-accommodations-law.

As discussed further below, the Appellate Division correctly held that Defendants-Petitioners' policy facially violates the NJPWFA. The arguments to the contrary put forward by Defendants-Petitioners are unavailing; indeed some even are reminiscent of employer arguments traditionally deployed under the PDA, which lacks the NJPWFA's express protection for accommodation. In so doing, Defendants-Petitioners seek to render the NJPWFA as a second-tier civil rights statute – a favor granted to pregnant workers that demands a "trade-off" – a view that is wholly antithetical to the statute's unequivocal text and expansive purpose and should be rejected.

A. The NJPWFA fills critical gaps in federal law created by narrow judicial interpretations of the Pregnancy Discrimination Act.

Congress enacted the Pregnancy Discrimination Act ("PDA") in 1978 to dismantle the stereotype that pregnant women's labor force participation is contingent, temporary, and dispensable, and to outlaw the employer policies based on that assumption.[4] The statute comprises two clauses: First, it makes explicit that discrimination "because of sex" includes discrimination "because of . . . pregnancy, childbirth, and related medical conditions," and second, it expressly

[4] *See, e.g.*, Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 *Harv. C.R.-C.L. L. Rev*. 415, 484 (2011); Joanna Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 *Geo. L.J.* 567 (2010).

mandates that pregnant workers "be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." *Id.* Accordingly, the PDA offers only a comparative right of accommodation: Did the employer accommodate non-pregnant workers, such as by offering light duty? If so, are those individuals "similar" enough to the pregnant worker that the employer is obligated to accommodate the pregnancy-related needs, too?

The PDA advanced women's workplace equality in myriad ways,[5] but in the context of pregnancy accommodation, beginning in the mid-1990s courts routinely ruled against women who brought such claims.[6] In one line of cases, courts ruled against pregnant workers who could not point to a non-pregnant peer treated better than they were; that is, if an employer did not accommodate non-pregnant workers, then it could treat pregnant workers equally poorly without running afoul of the

[5] *See, e.g.*, Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as it Approaches Full Term*, 52 *Idaho L. Rev*. 825, 831-50 (2016).
[6] *Id.* at 850-52; Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 *Yale J.L. & Feminism* 15 (2009). Indeed, in 2014, the same year that New Jersey enacted the NJPWFA, one study estimated that as many as 250,000 women a year did not receive the accommodations they needed to remain on the job. National Partnership on Women and Families, *Listening to Mothers: The Experiences of Expecting and New Mothers in the Workplace* (Jan. 2014), http://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf.

PDA.[7] But, the most common fact pattern concerned an employer that maintained a policy of accommodating only employees whose impairments arose from on-the-job injuries – a definition that necessarily excluded pregnant workers. In most cases, courts determined that such workers were insufficiently "similar" to pregnant workers to warrant the "same" treatment.[8]

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[7] *See, e.g., Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 735-36, 738 (7th Cir. 1994) (affirming summary judgment against department store clerk fired for excessive tardiness due to morning sickness, because she could not identify any non-pregnant employee whose comparable lateness was excused; "The [PDA] does not . . . require employers to offer maternity leave or take other steps to make it easier for pregnant women to work . . . . Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees . . . .").

[8] *Compare Ensley-Gaines v. Runyon*, 100 F. 3d 1220, 1226 (6th Cir. 1996) (reversing summary judgment for employer, finding favorable treatment of employees with on-the-job injuries sufficient to satisfy fourth prong of *prima facie* case) *with Serednyj v. Beverly Healthcare, LLC*, 656 F. 3d 540, 547, 552 (7th Cir. 2011) (affirming summary judgment where policy accommodated only workers injured on the job or workers qualifying for accommodation under the ADA; plaintiff could not make out fourth prong); *Reeves v. Swift Transp. Co.*, 446 F. 3d 637, 640, 643 (6th Cir. 2006) (affirming summary judgment; reserving accommodations for employees with occupational injuries showed no intent to discriminate); *Spivey v. Beverly Enterprises, Inc.*, 196 F. 3d 1309, 1312, 1314 (11th Cir. 1999) (affirming summary judgment where on-the-job injuries accommodated; plaintiff neither was "qualified" nor could show she was treated less well than co-workers with impairments incurred off-the-job); *Urbano v. Continental Airlines, Inc.*, 138 F. 3d 204, 206, 208 (5th Cir. 1998) (same).

Additionally, with respect to lactating workers' need to pump breast milk at work, several courts even declined to find lactation a "medical condition" that is "related" to pregnancy under the PDA. *See, e.g., Ames v. Nationwide Mutual*, No. 4:11-cv-00359, 2012 U.S. Dist. LEXIS 197045 (S.D. Iowa Oct. 16, 2012), *aff'd* 747 F.3d 509 (8th Cir. 2014); *Martinez v. NBC*, 49 F. Supp. 2d 305, 309-10 (S.D.N.Y. 1999); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869-70 (W.D. Ky. 1990), *aff'd*, 951 F.2d 351 (table), No. 90-6259, 1991 U.S. App. LEXIS 30157 (6th Cir. 1991) (*per curiam*); *see also* Stephanie Bornstein, *Work*,

The Supreme Court's decision in *Young v. United Parcel Service, Inc.*, 575 U.S. 206 (2015), rejected such prohibitively narrow interpretations of the PDA's comparator requirement. It announced a new burden-shifting framework that lowered the evidentiary bar for plaintiffs in identifying more-favored comparators, and increased employers' burden to justify their denials of pregnancy accommodation. As the Court put it, the inquiry should be driven by both feasibility and fairness: "[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?" *Id.* at 231.

Since *Young*, courts' reflexive approval of employer policies favoring workers with occupational injuries has largely ended, and many have applied *Young*'s more generous evidentiary standards to the benefit of pregnant plaintiffs, as well as breastfeeding plaintiffs needing to pump at work.[9] But several other

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Family, and Discrimination at the Bottom of the Ladder, 19 Geo. J. on Poverty L. & Pol'y 1, 8, 11 (Winter 2012). And even when a landmark appellate decision rejected such precedent, it still stopped short of finding that the PDA required employers to *accommodate* lactating employees. *E.E.O.C. v. Houston Funding II Ltd.*, 717 F.3d 425, 429 n.6 (5th Cir. 2013).

Pursuant to *R.*1:36-3, *amici* include the unpublished opinions cited here in their Appendix (Aa01- Aa28). Counsel cites the opinions to illustrate the existence of particular fact patterns and knows of no contrary precedent.

[9] *See, e.g.*, *Durham v. Rural/Metro Corp.*, 955 F.3d 1279, 1286-87 (11th Cir. 2020); *Legg v. Ulster Cty.*, 820 F.3d 67, 74 (2d Cir. 2016) ; *Bray v. Town of Wake Forest*, No. 5:14-CV-276, U.S. Dist. LEXIS 44731, at *13-16 (E.D.N.C. Apr. 6, 2015); *Bonner-Gibson v. Genesis Eng'g Grp.*, No. 3:18-cv-298, U.S. Dist. LEXIS 137446, at *31 (M.D. Tenn. Aug. 14, 2019) (quoting *Huffman v. Speedway LLC*, 21 F. Supp. 3d 872, 877 (E.D. Mich. 2014)); *Brown v. Aria Health*, No. 17-1827, 2019 U.S. Dist. LEXIS 66266, at *14-16 (E.D. Pa. Apr. 17, 2019); *Boyne v. Town*

courts, from multiple circuits, continue to scrutinize the plaintiff's comparator evidence to a degree that contravenes *Young*, still deferring to employers' own definitions as to who is sufficiently "similar in the ability or inability to work" to pregnant workers.[10] Indeed, a recent review of post-*Young* precedent found that more than two-thirds of relevant court rulings since *Young* was handed down have resulted in adverse rulings against pregnant workers, including those denied accommodations.[11] News reports also confirm that some of the nation's largest employers still continue to refuse to extend even the most basic job modifications.[12]

& Country Pediatrics & Family Med., No. 3:15-CV-1455, 2017 U.S. Dist. LEXIS 17321, at *9-11 at *4 (D. Conn. Feb. 7, 2017); *Allen-Brown v. District of Columbia*, 174 F. Supp. 3d 463, 480 (D.D.C. 2016).

Pursuant to *R*.1:36-3, *amici* include the unpublished opinions cited here in their Appendix (Aa29-Aa77). Counsel cites the opinion to illustrate the existence of particular fact patterns and knows of no contrary precedent.

[10] *See*, *e.g.*, Joanna L. Grossman & Gillian Thomas, *Making Sure Pregnancy Works: Accommodation Claims after* Young v. United Parcel Service, Inc., 14 *Harv. L. & Pol'y Rev*. 301 (2020) (forthcoming); *cf*. Reva Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 *Wm. & Mary L. Rev*. 971 (2019).

[11] Dina Bakst, Elizabeth Gedmark, and Sarah Brafman, *Long Overdue: It is Time for the Federal Pregnant Workers Fairness Act*, A Better Balance (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf.

[12] *See*, *e.g.*, Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. Times (Oct. 21, 2018), https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html; Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination is Rampant Inside America's Biggest Companies*, N.Y. Times (June 15, 2018), https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html.

The pregnant worker who is denied accommodation faces a Hobson's choice: continue working under conditions that violate their health provider's directives, or leave the job temporarily or permanently. Both of these alternatives harm women's health and equality. For women forced to stay on the job without accommodation, they face a wide range of negative outcomes, including miscarriage, preterm delivery, and low birth weight.[13] And for women coerced into taking unpaid leave or quitting altogether, a loss of income at a time of increased financial need can have catastrophic economic consequences. These occur in the immediate term – particularly in light of women's role as sole or primary breadwinner in over 60 percent of families, a figure that is even higher for women of color[14] – and over the course of a woman's life.[15]

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[13] *See generally* Wendy Chavkin, *Walking a Tightrope: Pregnancy, Parenting, and Work, in* Double Exposure: Women's Health Hazards on the Job and at Home 196, 200 (Wendy Chavkin ed., 1984); Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 *Stetson L. Rev*. 1, 3–8 (1995) (discussing scientific research about the maternal and fetal hazards in the workplace); D. Hollander, *Improving Work Situations During Pregnancy May Help Improve Outcome*, 32 *Int'l Fam. Plan. Persp*. 156, 156 (2006).

[14] *See, e.g*., Sarah Jane Glynn, *Breadwinning Mothers Continue to be the U.S. Norm*, Center for American Progress (May 10, 2019), https://www.americanprogress.org/issues/women/reports/2019/05/10/469739/breadwinning-mothers-continue-u-s-norm/.

[15] *See, e.g*., Michelle Fox, *The 'Motherhood Penalty' is Real, and It Costs Women $16,000 a Year in Lost Wages*, CNBC.com (Mar. 25, 2019), https://www.cnbc.com/2019/03/25/the-motherhood-penalty-costs-women-16000-a-year-in-lost-wages.html.

The consequences of a failure to accommodate pregnancy are especially severe where, as here, the job in question is dangerous – and therefore, the need for accommodation is especially urgent[16] – and where the failure to accommodate may reinforce workforce sex segregation by causing women to exit fields in which they already were vastly underrepresented.[17]

Given these severe consequences, and given the mixed federal legal landscape both before and after *Young*, over the past decade a majority of states responded by enacting statutes that affirmatively mandate on-the-job accommodation of pregnancy. As discussed further below, New Jersey was not only one of the first to do so; the law it adopted also is one of the most expansive.

B. The NJPWFA is one of the most expansive laws of its kind.

Although 30 states now maintain a pregnancy accommodation statute of

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[16] *See*, *e.g.*, Karen J. Kruger, *Pregnancy & Policing: Are They Compatible? Pushing the Legal Limits on Behalf of Equal Employment Opportunities*, 22 *Wis. Women's L.J.* 61, 70–71 (2007); Fabrice Czarnecki, *The Pregnant Officer*, 3 *Clinics Occupational & Envtl. Med*. 641 (2003) (citing hazards to pregnant police officers, including exposure to lead through contact with bullets, noise toxicity, and chemicals).

[17] Sex segregation in the workforce not only perpetuates stereotypes that certain jobs are inherently "women's work" or "men's work," but also has severe, systemic economic consequences. *See* Jessica Schieder & Elise Gould, *"Women's Work" and the Gender Pay Gap*, Economic Policy Institute (July 20, 2016), https://www.epi.org/publication/womens-work-and-the-gender-pay-gap-how-discrimination-societal-norms-and-other-forces-affect-womens-occupational-choices-and-their-pay/.

some kind, in early 2014, when New Jersey's law was enacted, that number stood at just six; moreover, some of those were extremely limited, applying only to public employers and/or merely mirroring the federal standard rather than imposing an affirmative right of accommodation, irrespective of the accommodation policies extended to non-pregnant workers.[18]

Though not explicitly mentioned in the LAD, claims for pregnancy discrimination under that statute had been recognized for decades. *See, e.g., Gerety v. Atlantic City Hilton Casino Resort*, 184 N.J. 391, 403 (2005) (explicitly holding that employers "may not discriminate against a female employee because she becomes pregnant"); *Rendine v. Pantzer*, 141 N.J. 292, 298 (1995) (affirming LAD liability for employer who terminated pregnant employees). Unfortunately, as was – and continues to be – the case in much of the country, existing legal protections were not sufficient to prevent unfair treatment of workers due to their pregnancies. With much public support and the backing of many advocates, Senate Bill 2995 was introduced on September 30, 2013. *See, e.g., Hearing on Senate Bill 2995 Before N.J. Senate Labor Comm.*, 215th Sess. (Nov. 7, 2013) (testimony of Ari Rosmarin, ACLU of New Jersey), https://www.aclu-nj.org/files/5713/8383/9960/2013_11_07_TestimonyS2995.pdf; New Jersey Senate Democrats, *Bill to Protect Pregnant Women from Discrimination in the*

[18] *See, e.g.*, Bakst, et al. *supra* note 11 at 30.

Workplace Gains Senate Approval, Nov. 18, 2013, https://www.njsendems.org/bill-to-protect-pregnant-women-from-discrimination-in-the-workplace-gains-senate-approval/ (referring to the discriminatory treatment pregnant workers face in employment that forces them to choose between economic stability and their health); Emily Martin, *Law Would Ensure Fairness for Pregnant Workers*, Asbury Park Press, Jan. 10, 2014, at A14 (describing how employers across the country refuse to provide temporary accommodations for pregnant workers).

The NWJFA amended the LAD to address the wide range of pregnancy discrimination that workers experience. The bill, which passed the Senate unanimously and had only one dissenting vote in the Assembly, was signed by Governor Christie on January 17, 2014. *See* Martin, *Law Would Ensure Fairness*. In it, the Legislature used broad language to describe the scope of the discrimination targeted by the bill and the types of accommodations that would now be available to pregnant workers. *See generally*, P.L. 2013, c.220, https://www.njleg.state.nj.us/2012/Bills/PL13/220_.PDF).

The bill's opening line and definitions make clear its purpose to consider pregnancy broadly, including "childbirth, or medical conditions related to pregnancy or childbirth, including recovery from childbirth." *Id.*; *see also* N.J.S.A. 10:5-12(s) (which has since been amended to include breastfeeding via P.L. 2017

c.263). The Legislature explicitly stated its intent to ensure that pregnant workers not be forced to choose between a healthy pregnancy and a paycheck. N.J.S.A. 10:5-3.1(a) (noting that "pregnant women are vulnerable to discrimination in the workplace in New Jersey, as indicated in reports that women who request an accommodation . . . are being removed from their positions, placed on unpaid leave, or fired").[19] In addition to prohibiting pregnancy discrimination, then, the intention of the Legislature was to place new, additional, and affirmative

[19] *Amici* observe that while the NJPWFA explicitly names women as those being vulnerable to pregnancy discrimination and afforded its protections, N.J.S.A. 10:5-3.1, -12(s), all genders are entitled to the full protections of the NJPWFA in accordance with the LAD's existing protections on the basis of gender identity. *See, e.g.*, N.J.S.A. 10:5-12(a). Some transgender men and non-binary people, like cisgender women, are also capable of becoming pregnant. *See, e.g.*, Heath Fogg Davis, *Sex-Classification Polices as Transgender Discrimination: An Intersectional Critique*, 12 Persp. on Pol. 45, 48 (2014) (rejecting the ability to become pregnant as relevant to classifying a person's sex because "some transgender men who have ovaries and uteruses can become pregnant, and some non-transgender women cannot become pregnant."); Julie Compton, *Trans Dads Tell Doctors: "You can be a man and have a baby,"* NBCNews.com (May 19, 2019), https://www.nbcnews.com/feature/nbc-out/trans-dads-tell-doctors-you-can-be-man-have-baby-n1006906 (debunking medical myth that transgender men and nonbinary people who take testosterone are effectively sterilized and noting the absence of data because medical systems do not track their pregnancies); *see also Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518, 522 (3d Cir. 2018) (providing gender identity terminology and defining cisgender as referring to "a person who identifies with the sex that person was determined to have at birth"). As New Jersey begins to modify its systems to recognize more than two genders, *see, e.g.*, N.J.S.A. 26:8-40.12 (authorizing birth certificates to include "undesignated/non-binary" gender marker in addition to "female" and "male"), *amici* respectfully request that the Court take the opportunity to clarify to the lower courts that pregnant workers include all genders.

obligations on employers to accommodate pregnant and postpartum workers to keep working. *Id*.; *see also* New Jersey Senate Democrats, *Bill to Protect Pregnant Women from Discrimination in the Workplace Gains Senate Approval*, (quoting sponsor Senator Weinberg as modeling the NJPWFA on the Americans with Disabilities Act and noting the benefits to employers when pregnant workers can continue in their jobs, including increased retention, morale, and productivity and reduction in training costs).

While in the Senate Labor Committee, the bill was amended to provide clarifying language about the remedies available to pregnant workers. Notably, the amendments put employers on notice that reasonable accommodations included "job restructuring or modified work schedules, and *temporary transfers to less strenuous or hazardous work*." Senate Labor Committee Statement to Senate, No. 2995, Nov. 7, 2013, https://repo.njstatelib.org/handle/10929.1/ 24717?show=full (emphasis added). The amendments also specified that employers who can demonstrate "undue hardship" on their business operations will not be required to provide an accommodation. *Id*. The amendments did not define when a burden becomes "undue," but instead provided a non-exhaustive list of factors to be considered. *Id*. Relevant to the matter at bar, the amendments make clear that the waivers of job requirements are only one factor in the hardship analysis and do not make the accommodation unreasonable. N.J.S.A. 10:5-12(s).

II. Defendants-Petitioners' Maternity Assignment Standard Operating Procedure Discriminates Against Pregnant Workers.

The disparate terms of Defendants-Petitioners' Maternity Assignment Standard Operating Procedure ("Maternity SOP") facially violate the LAD's requirements that pregnant workers receive "equal treatment," that the accommodation be "reasonable" and further, that the proffered accommodation not impose a "penalty." *Id*.

A. Defendants-Petitioners were obligated to accommodate Plaintiff-Respondent when she temporarily could not safely perform the essential functions of patrol officer.

As a threshold matter, Defendants-Petitioners' contention that they were not even obligated to accommodate Plaintiff-Respondent because she could not perform the "essential functions" of the job of police officer ignores both the NJWPFA's text – which approves "temporary transfers to less strenuous or hazardous work" and considers a waiver of essential functions as one factor in the undue burden analysis, N.J.S.A. 10:5-12(s) – and this Court's precedent in the disability context. While a permanent inability to perform police officer functions would not trigger a duty to accommodate, where, as here, the temporary transfer enables the employee to return to full duty and perform those functions, such accommodation is reasonable. *Raspa v. Office of Sheriff of County of Gloucester*, 191 N.J. 323, 340 (2007). Indeed, it is well-settled that if a temporary leave of

absence from the workplace altogether will enable the employee to return to full duty, such an accommodation can be reasonable, too. *See, e.g., Soules v. Mount Holiness Mem'l Park*, 354 N.J. Super. 569, 573-75 (App. Div. 2002).

The grave practical implications of Defendants-Petitioners' argument here cannot be ignored. If temporary reprieve from a job's essential functions is not approved under the NJPWFA, women working a wide swath of hazardous jobs – from law enforcement to firefighting to any job involving exposure to dangerous toxins[20] – will risk outright ejection from their jobs. The same fate would await women experiencing pregnancy complications that inhibit their ability to perform a wide variety of strenuous tasks, from prolonged standing to repetitive lifting.[21] This is precisely the result the NJPWFA is meant to avoid. The statute recognizes the twin realities that women comprise more half the workforce,[22] and also, that roughly 85 percent of them will become pregnant at least once in their lives.[23] It

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[20] The Comm. on Obstetric Practice, *Committee Opinion: Employment Considerations During Pregnancy and the Post-Partum Period, American College of Obstetricians & Gynecologists*, No. 733 (Apr. 2018), https://www.acog.org/clinical/clinical-guidance/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period.

[21] *Id.*

[22] Amara Omeokwe, *Women Overtake Men as Majority of U.S. Workforce*, Wall Street Journal (Jan. 10, 2020), https://www.wsj.com/articles/women-overtake-men-as-majority-of-u-s-workforce-11578670615.

[23] *Fertility of Women in the United States: 2016*, Table 6. Completed Fertility for Women age 40 to 50 Years Old – Selected Characteristics: June 2016, U.S. Census

treats pregnancy for what it is – a normal condition of employment – and demands that employers do the same.

B. The Maternity Assignment SOP subjects pregnant officers to "unequal treatment" as compared to officers accommodated under the Light/Modified Duty SOP.

The NJPWFA's equal treatment mandate mirrors the PDA's requirement that pregnant workers be treated the "same" as others similarly situated. That phrase cannot be read in isolation, but instead, must be read in concert with the statute's other directive, *i.e.*, that, "in addition," employers "shall make available" reasonable accommodations – an express requirement not contained in the PDA. N.J.S.A. 10:5-12(s).

Where, as here, the employer has taken the step of affording accommodation to *all* employees – *i.e.*, by implementing a Light/Modified Duty SOP in addition to the Maternity Assignment SOP – it may not afford accommodations to the pregnant officers on lesser terms.[24] That the Light/Modified Duty SOP's exemption from the loss-of-leave-time provision is discretionary rather than

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Bureau (May 4, 2017) https://www.census.gov/data/tables/2016/demo/fertility/women-fertility.html#par_list_62.

[24] The fact that Defendants-Petitioners amended the Light/Modified Duty SOP in September 2016 to eliminate the waiver provision, does not diminish the importance of this Court's affirming what constitutes "equal treatment" under the NJPWFA. Moreover, even with such an amendment, the Maternity Assignment SOP still violates the statute's provisions requiring "reasonable accommodation" and prohibiting a "penalty" for workers who avail themselves of the NJPWFA's protections, as discussed further *infra*.

universal does not render it a "neutral" policy. Aside from the fact that Plaintiff-Respondent has identified two individuals who in fact benefited from the discretionary exemption, even if she had not, under the plain terms of the policy, a pregnant officer *never* will have the opportunity to seek, let alone receive that benefit. For this reason, the Maternity Assignment SOP arguably would not even satisfy the PDA, in that the two policies are facially not the "same." *See Legg*, 820 F.3d at 76 (employer county jail's policy of providing light duty to correctional officers injured on the job contributed to triable issue of pretext, even where evidence unclear as to how many non-pregnant officers had benefited from the policy; "Although it is unclear from the record whether the County accommodated a large percentage of non-pregnant employees in practice, they at least were eligible. By contrast, as one would expect, the County failed to accommodate 100% of its pregnant employees.").

C. The Maternity SOP is not a "reasonable accommodation" because it demands pregnant officers incur a "penalty" for utilizing it.

Demanding that pregnant workers deplete their accrued leave before being permitted to continue to work for Defendants-Petitioners is indisputably a "penalty," and therefore does not qualify as a "reasonable accommodation." Each hour of paid leave used up during the months leading up to an officer's due date is one fewer hour of paid leave available to that officer when she is at home recovering from childbirth. In this way, Defendants-Petitioners' Maternity

Assignment SOP helps assure that pregnancy will, in fact, result in a loss of income – a result wholly at odds with the NJWPFA's purpose. Moreover, pregnant officers are just as susceptible as others to injuries and illnesses that may require time away from work to recover. If an officer has been forced to deplete her accrued paid leave during pregnancy, such leave, too, will be unpaid.

Defendants-Petitioners are advancing an argument that the Supreme Court rejected more than four decades ago, even before enactment of the PDA. In *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), the Court considered an employer's policy of erasing a woman's accrued seniority when she took a leave of absence to give birth. It concluded that such a policy violated Title VII of the Civil Rights Act of 1964 by both depriving pregnant employees of "employment opportunities" and "adversely affect[ing] [their] status as an employee." *Id.* at 141 (quoting 42 U.S.C. § 2000e-2(a)(2)) ("It is apparent from the previous recitation of the events which occurred following respondent's return from pregnancy leave that petitioner's policy denied her specific employment opportunities that she otherwise would have obtained. . . . [P]etitioner has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed on women a substantial burden that men need not suffer.").[25]

[25] After rejecting the employer's seniority policy, the Court went on to approve its policy of withholding sick leave pay from workers absent due to pregnancy, while paying such benefits to workers absent due to a wide range of other health

Defendants-Petitioners' assertion that they are entitled to ask pregnant officers to sacrifice their accrued leave during accommodation as a "trade-off" for the loss of their patrol services – purportedly on behalf of New Jersey's taxpayers – reflects precisely the sort of "archaic or stereotypical notions about pregnancy and the abilities of pregnant workers" that the NJPWFA, and the PDA before it, disavowed. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 290 (1987). Defendants-Petitioners fall short of stating outright that pregnant officers should be grateful to have a paycheck during their temporary period of limitation, but that implication is clear from their submission.

The Supreme Court long ago recognized that state laws that favor pregnancy over other physical limitations are acceptable, even necessary, tools to overcome the barrier it poses to economic equality. More than 30 years ago in *Cal. Fed.*, the Supreme Court approved California's statute requiring employers to provide pregnant workers with up to four months of job-protected leave, at a time when neither state nor federal law provided such protection for others. 479 U.S. at 292. In rejecting a challenge to the statute as discriminatory against non-pregnant

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conditions, relying on its recent decision in *General Electric Corp. v. Gilbert*, 429 U.S. 125 (1976). *Satty*, 434 U.S. at 146 (citing *Gilbert*). Like *Gilbert*, however, this portion of the *Satty* holding was superseded by the enactment of the PDA. *See Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) ("When Congress amended Title VII in 1978 [by passing the PDA], it unambiguously expressed its disapproval of both the holding and reasoning of the Court in the *Gilbert* decision.").

workers, the Court approved expansive state action that "takes pregnancy into account," *id*. at 289, concluding that "Congress intended the PDA to be a 'floor beneath which [protections for pregnant workers] may not drop – not a ceiling above which they may not rise." *Id*. at 285 (internal citation omitted).

Defendants-Petitioners' contention that sacrificing accrued paid leave is an appropriate price for pregnant officers to pay ignores the Legislature's intention that pregnancy should not place workers in a worse position than they were in prior to having a baby. Fulfilling that legislative purpose is not a favor to be repaid.

D. Under the "undue hardship" standard, public employees should not have access to inferior accommodations because of the size of the political subdivision that employs them.

Because preventing and eradicating discrimination is New Jersey's unequivocal public policy, the State and its political subdivisions should be held to the highest standards in upholding and modeling anti-discriminatory practices. As the Court has explained, "[e]mployment discrimination is not just a matter between employer and employee. The public interest in a discrimination-free work place infuses the inquiry." *Fuchilla*, 109 N.J. at 335. This public interest is at its apex when the employer is a public entity.

To that end, when a local government take the position that accommodating a pregnant worker is an "undue hardship," courts should place "size" and related factors outlined in N.J.S.A. 10:5-12(s) into the appropriate context. That is, local

governments are political subdivisions of the State and their specific headcount or the size of their budget should not dictate the outcome of whether a worker's accommodation is "reasonable" under the NJPWFA. As the Court is aware, New Jersey has many layers of local government. With 565 municipalities, 21 counties, and more than 600 school boards, plus various authorities, boards, and commissions, New Jersey's public workers are employed by a wide variety of public entities.[26] With the state's history of resistance to sharing services or consolidating,[27] local governments should not be able to undermine the State's public policy of supporting pregnant workers by comparing their own budgets to those of larger entities. The LAD's commandment for a liberal construction requires that all of the state's political subdivisions accommodate their pregnant workers similarly and not seek to shirk responsibilities by pointing to their budgets or department sizes. Simply put, a pregnant police officer in Seaside Park in need of the same job modifications as one in Jersey City should not enjoy fewer statutory protections solely because she works for a smaller community.

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[26] For decades, New Jersey policymakers have recognized that the volume of local government has created "duplication and inefficiency" as well as "administrative redundancy." Ron Marisco, *Sharing Services Has Saved Money for NJ Local Governments: Wall Street Analysis*, NJ Spotlight (Dec. 20, 2019), https://www.njspotlight.com/2019/12/sharing-services-has-saved-money-for-nj-local-governments-wall-street-analysis/ (quoting the 1994 outgoing address of then-Governor Florio who advocated for regionalization).

[27] *Id.*

The LAD can no longer countenance public employers that place pregnant police officers in the untenable position of choosing between their livelihood and their health. This Court should make clear that when a pregnant officer's health provider has recommend modified job duties, police departments are required to provide them. While a municipality may incur additional expenses related to these accommodations, they are expenses that can be anticipated and budgeted for, just as municipalities can anticipate other commitments and obligations to its workforce, *e.g.*, accommodating modified assignments for officers who experience an injury while on duty.

III. The NJPWFA is a Tool to Combat Extreme Gender Disparities in New Jersey Police Departments.

The broad remedial aims of the LAD and the NJPWFA are particularly important in the context of professions that historically have excluded women from their ranks. As discussed below, in New Jersey police departments, the disparities are sharp, recruitment and training standards have regressed, and the work environment can be difficult. If women officers manage to make it through these hurdles, the NJPWFA provides them assurances that their employers will respect their health and economic stability during and following their pregnancies – and further, that officers will not be pushed out of a field into which they only have begun to make inroads.

As the Appellate Division noted, Plaintiff was one of three women in a department of more than 50 patrol officers. *Delanoy*, 462 N.J. Super. at 84. A department comprised of six percent women is staggeringly low, considering that women make up more than half of the New Jersey's population and participate in the work force at a rate of 60 percent. U.S. Census Bureau, *Quick Facts*, July 1, 2019, https://www.census.gov/quickfacts/NJ. The Ocean Township Police Department's low number of women officers (six percent) proves even lower when placed in a statewide context: women comprise only ten percent of New Jersey's police officers. *See* Unif. Crime Reporting, State of N.J., Uniform Crime Report 174 (2016). Yet, it is unfortunately not an outlier: in 2016, one-third of police departments in New Jersey had no women officers at all. *See* Andrew Ford, *NJ Police Tests Fail Women Recruits. Here's How It Hurts Your Safety and Your Wallet*, Asbury Park Press (Feb. 25, 2020), https://www.app.com/in-depth/news/investigations/2019/07/29/new-jersey-failing-its-women-police-recruits/1819867001. When comparing the percentage of women in the law enforcement profession, New Jersey ranks behind 31 states and the District of Columbia. *Id*.

The number of women police officers in New Jersey falls below the low bar set nationally. Despite legislative efforts to encourage the participation of women in the workforce, the rate of female sworn officers in U.S. law enforcement has

stagnated at the extraordinarily low rate of approximately 11–12 percent. *See* Federal Bureau of Investigation, *Crime in the U.S. 2002* at 322-23 (Oct. 27, 2003), https://ucr.fbi.gov/crime-in-the-u.s/2002/02sec6.pdf; National Institute of Justice, Women in Policing: Breaking Barriers and Blazing a Path 3 (2019), https://www.ncjrs.gov/pdffiles1/nij/252963.pdf ("[T]he percentage of women in policing has remained relatively stagnant over the past 30 years . . . ."). The presence of women among positions of leadership is even more meager: fewer than 10 percent of first-line supervisory and 3 percent of chief-level positions are filled by women. National Institute of Justice, *supra*, at iii n.2. Experts believe there is little reason to see improvement on the horizon. Christina Asquith, *Why Aren't U.S. Police Departments Recruiting More Women?*, The Atlantic (Aug. 30, 2016), https://www.theatlantic.com/politics/archive/2016/08/police-departments-women-officers/497963 (quoting the vice president of the International Association of Women Police Officers belief that "[t]here's no energy about doing anything to recruit women or show any effort to do your best to recruit women").

As New Jersey continues to struggle with recruiting and retaining racially and ethnically diverse officers, Kate King, *N.J. Struggles for Diversity in Police*, Wall Street Journal, Apr. 5, 2016, at A.15, it must also contend with its troubling results in recruiting women officers. New Jersey's management of police academies recently has turned back the clock on women's participation in policing

through troubling recruitment practices. From 2009 through 2014, only two to four percent of women failed physical fitness tests. Andrew Ford, *NJ Police Tests Fail Women Recruits. Here's How It Hurts Your Safety and Your Wallet*. After New Jersey instituted a change in 2017 cutting the amount of time recruits have to improve test scores from five months to only two to three weeks, *31 percent of women failed*. *Id*.

Through the affirmative accommodations required by NJPWFA, pregnant law enforcement officers can continue in their career paths without the distraction, or derailment, of discrimination. Unfortunately, Officer Delanoy's experiences with both of her pregnancies is not unique. Over the decade, as direct counsel or *amicus*, *Amicus* ACLU Women's Rights Project ("WRP") has represented several police officers whose pregnancies were not accommodated by their departments, even though these same departments routinely accommodated other officers temporarily unable to perform all of their duties.

- *Lochren v. Suffolk County*[28]: In one of the earliest PDA accommodation cases and one of the few pre-*Young* victories, ACLU WRP and the New York Civil Liberties Union represented Sandra Lochren and five other police officers in a lawsuit against the Suffolk County Police Department (SCPD) for refusing to temporarily reassign pregnant officers to desk work and other non-patrol jobs, even though it did so for officers injured on the job. But for those officers who opted to keep working patrol, SCPD also failed to provide bullet-proof vests or gun belts that would fit pregnant officers. As a result, pregnant officers' only safe option was to go on unpaid leave long before

[28] No. 08-2723-cv (E.D.N.Y.).

their due date. In 2006, a federal court found SCPD's policy discriminatory. As a result, it changed its policy to cover pregnant officers.

- *Panattoni v. Village of Frankfort*[29]: ACLU WRP and ACLU of Illinois represented Jennifer Panattoni, a police officer with the Village of Frankfort Police Department (FPD). In November 2015, she became pregnant with her first child and shortly thereafter, due to the FPD's failure to accommodate her pregnancy – despite offering modified duties to officers injured on the job – she was forced to go on unpaid leave. While the litigation was pending, Officer Panattoni became pregnant again, but again was denied a full-time alternative assignment that would allow her to work safely. In April 2019, the parties reached a settlement agreement in which the Village agreed to change its policies
- *Alicea v. Cromwell Police Department*: ACLU WRP and the ACLU of Connecticut represented police officer Sarah Alicea, who sought a temporary transfer to a light duty job during her pregnancy. The department denied her request, and instead forced her to take unpaid leave for the last four months of her pregnancy. After ACLU WRP filed an E.E.O.C. administrative charge of discrimination, the parties settled. Under the settlement, the department changed its police to accommodate pregnant officers. *Cromwell Cop Settles Pregnancy Bias Suit after Being Forced to Take Unpaid Leave*, Middletown Press (Sept. 7, 2018), https://www.middletownpress.com/middlesex-county/article/Cromwell-cop-wins-pregnancy-bias-suit-after-being-13209796.php.
- *Balcastro v. Town of Wallingford*: The ACLU and ACLU of Connecticut represented Annie Balcastro, a police officer with the Town of Wallingford. In January 2012, Balcastro learned that she was pregnant and unable to continue on patrol as a police officer. Instead of making a reasonable effort to transfer her to a suitable temporary position, the Town gave her no other option than to take unpaid leave. After filing an E.E.O.C. administrative charge, the ACLU reached a settlement with the Town, which included changes in its light duty policy for pregnant officers. Kathleen Ramunni, *Wallingford to Pay Police Officer Who Filed Discrimination Complaint*, Patch.com (Mar. 27, 2013), https://patch.com/connecticut/wallingford/wallingford-to-pay-police-officer-refused-light-duty.

[29] No. 17-cv-06710 (N.D. Ill.)

- *Legg v. Ulster County*[30]: Corrections Officer Ann Marie Legg was denied temporary assignment to light duty during her pregnancy, even though Ulster County gave such assignments to guards injured on the job. In her third trimester, Legg had to intervene in an inmate fight, prompting her to go on leave rather than face future risks. After a trial, a federal judge in 2017 refused to find that the County's policy imposed a discriminatory disparate impact on pregnant workers, even though he acknowledged that under the County's policy, a pregnant officer never will qualify for light duty. On appeal, the ACLU drafted an *amicus* brief with the Center for WorkLife Law, urging reversal. The case remains pending.

- *Hicks v. City of Tuscaloosa*: Stephanie Hicks, a narcotics investigator with the Tuscaloosa Police Department in Alabama, wanted to breastfeed her new baby, but her bulletproof vest was restrictive, painful, and prone to causing infection in her breasts. She asked for a desk job so that she would not need to wear a vest for protection, but her employer refused, even though it routinely granted desk jobs to officers unable to fulfill all of their patrol duties. Instead, her employer only offered her an ill-fitting vest that put her at risk. Hicks quit her job rather than perform it unsafely. She won at trial, but her employer appealed. ACLU WRP, along with the Center for WorkLife Law, submitted an *amicus* brief arguing that accommodation of the need to pump was covered by *Young*. The Eleventh Circuit agreed, affirming the jury verdict for Hicks and becoming the first appellate court to extend *Young* to employees who are breastfeeding. *See* 870 F.3d 1253 (11th Cir. 2017).

Amici were able to identify several instances in which New Jersey police departments refused to accommodate officers with modified job responsibilities[31]:

[30] No. 17-2861 (2d Cir.).

[31] This list does not include cases alleging discrimination that do not include requests for job modifications. *See, e.g.*, Peggy Wright, *Morris Twp. Cop claims job discrimination over pregnancy*, Daily Record, Dec. 2. 2015 (The chief allegedly told [the plaintiff] he didn't want her walking around the school 'looking' four months pregnant and made a comment about not wanting to drive in a car with 'a pregnant, hormonal female,' the lawsuit said.").

- A Delaware River Port Authority officer who requested light duty per her doctor's advice "was denied because no light duty was available." *Delaware River Port Auth. v. Fraternal Order of Police Penn-Jersey Lodge No. 30*,No. A-3324-17T2 , 2019 N.J . Super. Unpub. LEXIS 694 (App. Div. 2019).[32]

- A Florence Township officer who was granted modified duty was allegedly penalized and subject to a hostile environment by the police chief. Amanda Hoover, *Police chief played hooky, discriminated against pregnant cop, union claims*, NJ.com, Aug. 3, 2017 (linking to union complaint).[33]

- A Pemberton patrol officer was denied light duty and ordered to stay home and exhaust all of her accrued time and family leave after her third month of pregnancy. Jan Hefler, *Officer returns to work after settling pregnancy suit*, Philadelphia Inquirer (Nov. 29, 2015).

- A Raritan police officer pregnant with twins alleged denial of grant of reasonable accommodations including a temporary assignment to the Police Academy, where she had been approved to teach. Sergio Bichao, *NJ lesbian cop sues, alleges discrimination during pregnancy*, Asbury Park Press (Apr. 4, 2013).

- A Wyckoff police officer was given an irregular schedule and alleged disparate treatment, harassment and discrimination because of her

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Because many workers fear that filing a complaint will derail their careers, Kruger, *supra* note 16 at 62 ("[A]n EEOC spokesperson noted that many women fear that filing complaints and initiating litigation can be a 'career killer.'"), this list only includes cases in which the officer felt secure enough to publicly share their experience. *Amici* are unaware of data collected that would provide information about the number of police officers in New Jersey that request modified job responsibilities due to pregnancy and the result of those requests.

[32] Pursuant to *R*.1:36-3, *amici* include this opinion in their Appendix (Aa78-Aa87). Counsel cites the opinion to illustrate the existence of particular fact patterns and knows of no contrary precedent.

[33] https://www.nj.com/burlington/2017/08/police_chief_on_leave_for_accusations_of_discrimin.html; union complaint available at https://drive.google.com/file/d/0B66z M58TlOVKazVfd2Fsdm1FVzA/view

pregnancy. *Groslinger v. Twp. of Wyckoff*, No. A-5861-07T2, 2010 N.J. Super. Unpub. LEXIS 125 (App. Div. 2010).[34]

- Another Ocean Township Police Department officer requested an accommodation of modified duty due to pregnancy and was initially denied. After national negative media attention about the township's position, the township reversed course. Erik Larsen, *Office duty for pregnant policewoman*, Asbury Park Press (May 15, 2008).

- A Branchburg patrol officer was denied a request for temporary light duty as advised by her doctor and forced to take unpaid leave. The department had eliminated its light duty policy the year before and the appellate division found that the department was not required to provide an accommodation for pregnant officers that it did not provide to others. The court further found that because the officer had an uncomplicated pregnancy, she could not establish disability discrimination. *Larsen v. Twp of Branchburg*, No. A-0190-05T2, 2007 N.J. Super. Unpub. LEXIS 2808 (App. Div. 2007).[35]

Each of these instances describes pregnant officers who sought to maintain a healthy pregnancy while remaining in the workforce. Instead of continuing to work, they were forced by their departments to take leave earlier than they had planned – often without pay. This Court should make clear to law enforcement

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[34] Pursuant to *R*.1:36-3, *amici* include this opinion in their Appendix (Aa88-Aa96). Counsel cites the opinion to illustrate the existence of particular fact patterns and knows of no contrary precedent.

[35] Pursuant to *R*.1:36-3, *amici* include this opinion in their Appendix (Aa96-Aa104). Counsel cites the opinion to illustrate the existence of particular fact patterns and knows of no contrary precedent.

Notably, this case was brought to the attention of the New Jersey Assembly during hearings on the NJWPFA. *See Hearing on A4486 Before the N.J. Assemb. Comm. on Women and Children*, 215th Sess. (Dec. 16, 2013) (testimony of Dina Bakst & Phoebe Taubman, Co-Founder & Co-President and Senior Staff Attorney, A Better Balance), at 4-5, https://www.abetterbalance.org/ wp-content/uploads/2020/08/NJ-Pregnancy-bill-ABB-testimony.pdf.

agencies across the state that the NJPWFA requires an affirmative, inclusive approach to including pregnant officers in the workplace.

Conclusion

The NJPWFA was designed to ensure that pregnant workers would not be forced out of the workforce prematurely or forced to choose between their health and economic well-being. Because Defendants-Petitioners' policy treated pregnant workers unequally, and penalized them for seeking job modifications, and because public employers should be held to the highest standards in service of the goal of preventing discrimination, this Court should affirm the decision below.

Respectfully submitted,

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Dated: August 5, 2020

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Ames v. Nationwide Mut. Ins. Co.

United States District Court for the Southern District of Iowa, Central Division

October 16, 2012, Decided; October 16, 2012, Filed

4:11-cv-00359 RP-RAW

Reporter
2012 U.S. Dist. LEXIS 197045 *

ANGELA AMES, Plaintiff, v. NATIONWIDE MUTUAL INSURANCE CO., NATIONWIDE ADVANTAGE MORTGAGE CO., and KARLA NEEL, Defendants.

Prior History: *Ames v. Nationwide Mut. Ins. Co., 2012 U.S. Dist. LEXIS 192010 (S.D. Iowa, Sept. 18, 2012)*

Core Terms

lactation, pregnancy, maternity, resign, milk, sex, fact-finder, discriminatory, Resistance, breast, intolerable, baby, genuine, gender, breast-feeding, foreseeable, Mitigation, childbirth, undisputed, facie, co-workers, pregnant, waiting, circumstantial, accommodate, overtime, birth, conversation, grievances, paperwork

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Judges: ROBERT W. PRATT, UNITED STATES DISTRICT JUDGE.

Opinion by: ROBERT W. PRATT

Opinion

MEMORANDUM OPINION AND ORDER

Before the Court is Nationwide Mutual Insurance Company's, Nationwide Advantage Mortgage Company's (collectively "Nationwide"), and Karla Neel's ("Neel") (collectively the "Nationwide Defendants" or "Defendants") Amended Motion for Summary Judgement and Request for Oral Argument ("MSJ"), filed July 24, 2012.[1] Clerk's No. 46. On August 20, 2012, Plaintiff Angela Ames ("Ames") timely resisted the Motion. Clerk's No. 62. Defendants replied on August 30, 2012. Clerk's No. 70. This matter is fully submitted.[2]

I. FACTUAL BACKGROUND

Ames's at-will employment as a loss mitigation specialist at Nationwide lasted from October 2008[3] to July 19, 2010. Nationwide's Statement of Undisputed Facts **[*2]** in Supp. of MSJ ("Nationwide's Facts") ¶¶ 1-3, 43; Pl.'s Resp. to Nationwide's Facts ("Ames's Facts") ¶¶ 1-4. Following the birth of her first child on May 2, 2009, Ames took eight weeks of maternity leave. *See* Nationwide's Facts ¶ 52; Ames's Facts ¶ 52; Ames's Statement of Add'l Material Facts ("Ames's Add'l Facts") ¶ 2. In October 2009, Ames found out that she was pregnant again. *See* Ames's Add'l Facts ¶ 3. Due to pregnancy complications, she began her maternity leave on April 11, 2010 prior to giving birth to her second child. *See id.* ¶¶ 5-6. Initially, Nationwide advised Ames that her maternity leave would expire on August 2, 2010.[4] *See id.* ¶¶ 16-17; Nationwide's Facts ¶ 52. In a June 16, 2010[5] telephone call between Neel[6] and Ames, however, Neel advised Ames that there had been a mistake in calculating her maternity leave and that Ames's leave would expire on July 12, 2010 rather than on August 2, 2010.[7] *See* Ames's Add'l Facts ¶ 16; Nationwide's

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[1] On July 23, 2012, Defendants filed an MSJ that did not request oral argument. *See* Clerk's No. 44. The next day, on July 24, 2012, Defendants amended the Motion by including such a request. *See* Clerk's No. 46.

[2] On August 30, 2012, Ames requested an oral argument on the pending MSJ. Clerk's No. 69. The Court, however, does not believe that an oral argument would substantially aid it in ruling on the motion. *See* LR 7(c). Accordingly, Ames's Motion for Hearing/Oral Argument (Clerk's No. 69) is denied.

[3] The parties report different employment start dates. Ames states that she began work at Nationwide on or about October 1, 2008. *See* Pl.'s Resp. to Nationwide's Facts ("Ames's Facts") ¶ 1. Nationwide, on the other hand, states that Ames's employment began on October 20, 2008. *See* Nationwide's Statement of Undisputed Facts in Supp. of MSJ ¶ 1.

[4] Due to what the Court perceives to be a typographical error, Nationwide reports that Ames's maternity leave was to end on August 2, 2012. *See* Nationwide's Facts ¶ 52.

[5] In her Complaint, Ames alleges that the telephone call took place on June 21, 2010. *See* Am. Compl. ¶ 20.

[6] At all relevant times, Neel was an Associate Vice President, who was in charge of overseeing the Loss Mitigation Department. *See* Nationwide's Facts ¶ 5; App. to Nationwide's MSJ ("Nationwide's App.") at 54, p. 10:13-25.

[7] The parties disagree as to whether Nationwide allowed Ames to return to work on August 2, 2010. *Compare* Ames's Statement of Add'l Material Facts ¶ 20 (stating that, during the June 16, 2010 telephone call, "Neel[] insinuat[ed] that [Ames] would be disciplined (if not fired)

Facts ¶¶ 51-52; App. to Nationwide's MSJ ("Nationwide's App.") at 204. As agreed during this telephone call, Ames returned to work on July 19, 2010 at approximately 10:00 a.m.[8] *See* Ames's Add'l Facts ¶ 22. She resigned from her position three **[*3]** hours later. *See* Nationwide's Facts ¶¶ 43, 70. The parties disagree on what exactly transpired over those three hours.

Shortly after reporting to work on July 19, 2010, Ames needed to express milk.[9] *See* Pl.'s App. in Supp. of Her Resistance to Nationwide's MSJ ("Ames's App.") at 4-5. When Ames told Sara Sagers, presently Sara Hallberg ("Hallberg"),[10] that she had to express milk immediately, Hallberg responded that Ames had to fill out paperwork[11] before being able to use one of the lactation rooms.[12] *See id.* at 7, p. 82:13-19. To accommodate Ames's need to immediately express milk, Hallberg suggested that she use one of the wellness rooms[13] or Hallberg's office.[14] *See* Nationwide's App. at 72:5-21; 73:4-8. Ames chose a wellness room that was going to become available shortly.[15] *See id.* at 73:21-25; Ames's App. at 91 ¶ 9.

While waiting on the wellness room, Ames met with Brian Brinks[16] ("Brinks") "to catch up on the status of [her] work." Ames's App. at 91 ¶ 11. Ames asserts that Brinks had promised to take over her work while she was on maternity leave, but that nothing had been done. *See id.* at 43. Ames also claims that, during the meeting, Brinks told her that she had two weeks to catch up, **[*4]** that she had to work overtime to accomplish that, and that if she failed to catch up within two weeks, she would be disciplined.

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if she did not return to work on July 19, 2010") *with* Nationwide's Facts ¶ 53 (stating that Nationwide allowed Ames to take until August 2, 2010 before returning to work).

[8] Ames reported to work around 10:00 a.m. because she had to take her newborn son to a routine doctor's appointment. *See* Ames's Add'l Facts ¶ 22.

[9] Ames states that, at the time, she was nursing her baby every three hours. *See* Pl.'s App. in Supp. of Her Resistance to Nationwide's MSJ at 4, p. 68:21-5, p. 69:2. On July 19, 2010, her first day following her maternity leave, Ames expressed milk around 6:30 a.m. *See id.* at 4, p. 68:16-20. Therefore, more than three hours had gone by when Ames reported to work.

[10] Hallberg was employed by Nationwide as a nurse. *See* Ames's App. at 30:9-11.

[11] There was a three-day waiting period before the paperwork could be processed and Ames given access to a lactation room. *See* Ames's App. at 7, p. 81:16-19; Nationwide's App. at 150-51. Ames claims that no one had ever advised her of this waiting period. *See* Ames's App. at 7, p. 82:20-24. Nationwide disagrees and points out that its lactation policy was available to Ames online, that Ames did not ask any questions regarding the lactation policy, and that she did not attend any of the quarterly maternity meetings although she knew about them. *See* App. Nationwide's App. at 84:14-85:16; 93:14-23; 81:5-14.

When, on July 19, 2010, it became clear that Ames had not filled out the paperwork requesting access to a lactation room, Hallberg sent two emails. The first one was addressed to Ames and contained Nationwide's lactation policy, which consists of approximately three pages. *See* Nationwide's App. at 148-51. With her second email, Hallberg requested expedited processing of Ames's application for access to a lactation room. *See id.* at 152.

[12] Nationwide had three lactation rooms at that time. *See* Nationwide's Facts ¶ 65.

[13] Ames asserts that Hallberg advised her not to express milk in a wellness room because her milk may be exposed to germs. *See* Ames's App. at 7, p. 81:19-23. Nationwide denies this allegation. *See id.* at 31:1-13.

[14] Ames disputes that Hallberg ever suggested that Ames could use her office to pump milk. *See* Ames's App. at 91 ¶ 15.

[15] Ames alleges that Hallberg told her that the available wellness room was currently occupied by a sick person and "the lock . . . was broken, so if [Ames] wanted any semblance of privacy, [she] would need to put a chair against the door and sit in it while [she] pumped, so that anyone trying to come in would strike [her] chair with the door and hopefully be discouraged from entering. " *See* Ames's App. at 91 ¶¶ 9-10. Nationwide denies these allegations. *See id.* at 31:14-20.

[16] Brian Brinks was Ames's immediate supervisor. *See* Nationwide's App. at 47, p. 10:16-19.

See id.; see also id. at 91 ¶ 12; Nationwide's App. at 52, pp. 80:15-82:25. Nationwide agrees that such a meeting took place, but disagrees with Ames's account of the conversation between her and Brinks. Specifically, Nationwide asserts that Ames's "work queue was up to date" when she came back to work on July 19, 2010.[17] *See* Nationwide's App. at 52, p. 79:5-11. Furthermore, Brinks testified that "[o]vertime was voluntary," and that Ames was not required to work overtime. *See id.* at 52, p. 79:12-21. Finally, Brinks denies telling Ames that he would start writing her up if she did not get caught up on her work within two weeks. *See id.* at 52, pp. 80:15-81:5.

The unavailability of a lactation room, her urgent need to express milk, and Nationwide's "unrealistic and unreasonable expectations about her work production" caused Ames to resign from her position because she "felt like she had no other choice." *See* Am. Compl. ¶ 44. Ames sued the Nationwide Defendants alleging: (1) sex and pregnancy discrimination under the Iowa Civil Rights Act ("ICRA"), *see* Am. Compl. ¶¶ 51-54; (2) pregnancy and sex discrimination under *Title VII of the Civil Rights Act of 1964 ("Title VII")*, **[*5]** *see* Am. Compl. ¶¶ 55-58; and (3) violation of *§ 207* of the Fair Labor Standards Act ("FLSA"),[18] *see* Am. Compl. ¶¶ 59-64. Ames contends that Hallberg, Neel, Brinks, and Somphong Baccam ("Baccam")[19] discriminated against her on the basis of sex, pregnancy, and nursing. *See* Nationwide's App. at 86-93.

Specifically, Ames states that Hallberg discriminated against her by "providing a letter . . . stat[ing] there was a three-day waiting period . . . to access a lactation room," by offering her a wellness room, and by advising Ames that her "milk could not be guaranteed" if she used a wellness room. *See id.* at 87:11-23. Neel subjected Ames to discrimination by "eye-rolling," by telling Ames that Neel did not have to go on bed rest during her pregnancy,[20] by stating that Neel would never have a baby shower before her baby is born because the baby could die, and because "[t]here was always a negative innuendo from [Neel] to [Ames.]" *See id.* at 88:17-89:16. With respect to Brinks, Ames complains that he viewed her pregnancy as an inconvenience, refused to help her lift a filing cabinet on one occasion, and made certain comments concerning Ames's maternity leave.[21] *See id.* at 89:17-90:20. Lastly, Ames contends **[*6]** that Baccam discriminated against her because Baccam had more information about Nationwide's lactation policy but did not share her knowledge with Ames, nor did she advise Ames to review the lactation policy on her own. *See id.* at 93:14-23.

II. STANDARD FOR SUMMARY JUDGMENT

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[17] Actually, Nationwide states that Ames's "queue" was in much better condition when she returned to work as compared to when she went on maternity leave. *See* Nationwide's Facts ¶ 74; Nationwide's App. at 52, p. 79:10-11; 213-58.

[18] Ames calls this alleged violation of *section 207 of the FLSA* "nursing discrimination." *See* Am. Compl. ¶ 1.

[19] Baccam was the Nationwide disability case nurse assigned to Ames's case. *See* Nationwide's Facts ¶ 61.

[20] Ames testified that Neel made the following comments regarding Ames's pregnancy: "'I never had this many problems when I was pregnant. All I needed was a pocketful of Tums, and I was good to go.'" Nationwide's App. at 92:15-17. Ames also claims that Neel "comment[ed] on [her] size, about [her] carrying more than one baby because [she] was so big." *Id.* at 92:17-19.

[21] With respect to Brinks's alleged comments, Ames testified as follows:

> "Oh, yeah, I'm teasing her about only taking a week's worth of maternity leave. We're too busy for her to take off that much work." And everyone would chime in with "Oh, yeah," you know, "she can only be gone for a week. She already took her eight weeks with Henry."

Nationwide's App. at 90:13-18.

The term "summary judgment" is something of a misnomer. *See* D. Brock Hornby, *Summary Judgment Without Illusions*, *13 Green Bag 2d 273 (Spring 2010)*. It "suggests a judicial process that is simple, abbreviated, and inexpensive," while in reality, the process is complicated, time-consuming, and expensive.[22] *Id. at 273, 281*. The complexity of the process, however, reflects the "complexity of law and life." *Id. at 281*. "Since the constitutional right to jury trial is at stake," judges must engage in a "paper-intensive and often tedious" process to "assiduously avoid deciding disputed facts or inferences" in a quest to determine whether a record contains genuine factual disputes that necessitate a trial. *Id. at 281-82*. Despite **[*7]** the seeming inaptness of the name, and the desire for some in the plaintiffs' bar to be rid of it, the summary judgment process is well-accepted and appears "here to stay."[23] *Id. at 281*. Indeed, "judges are duty-bound to resolve legal disputes, no matter how close the call." *Id. at 287*.

Federal Rule of Civil Procedure 56(a) provides that "[a] party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought." "[S]ummary judgment is an extreme remedy, and one which is not to be granted unless the movant has established his right to a judgment with such clarity as to leave no room for controversy and that the other party is not entitled to recover under any discernible circumstances." *Robert Johnson Grain Co. v. Chem. Interchange Co., 541 F.2d 207, 209 (8th Cir. 1976)* (citing *Windsor v. Bethesda Gen. Hosp., 523 F.2d 891, 893 n.5 (8th Cir. 1975)*). The purpose of summary judgment is not "to cut litigants off from their right of trial by jury if they really have issues to try." *Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 467, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)* (quoting *Sartor v. Ark. Natural Gas Corp., 321 U.S. 620, 627, 64 S. Ct. 724, 88 L. Ed. 967 (1944)*). Rather, it is designed to avoid "useless, expensive and time-consuming trials where there is actually no genuine, factual issue remaining to be tried." *Anderson v. Viking Pump Div., Houdaille Indus., Inc., 545 F.2d 1127, 1129 (8th Cir. 1976)* (citing *Lyons v. Bd. of Educ., 523 F.2d 340, 347 (8th Cir. 1975)*). Summary judgment can be entered against a party if that party fails to make a showing sufficient to establish the existence of an element essential to its case, and on which that **[*8]** party will bear the burden of proof at trial. *See Celotex Corp. v. Catrett, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*.

Federal Rule of Civil Procedure 56 mandates the entry of summary judgment upon motion after there has been adequate time for discovery. Summary judgment is appropriately granted when the record, viewed in the light most favorable to the nonmoving party and giving that party the benefit of all reasonable inferences, shows that there is no genuine issue of material fact, and that the moving party is therefore entitled to judgment as a matter of law. *See Fed. R. Civ. P. 56(a)*; *Harlston v. McDonnell Douglas Corp., 37 F.3d 379, 382 (8th Cir. 1994)*. The Court does not weigh the evidence, nor does it make credibility determinations. The Court only determines whether there are any disputed issues and, if so, whether those issues are both genuine and material. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*; *Wilson v. Myers, 823 F.2d 253, 256 (8th Cir. 1987)* ("Summary judgment

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[22] Indeed, Judge Hornby, a District Court judge for the District of Maine, convincingly suggests that the name "summary judgment" should be changed to "motion for judgment without trial." *13 Green Bag 2d at 284*.

[23] Judge Hornby notes that over seventy years of Supreme Court jurisprudence gives no hint that the summary judgment process is unconstitutional under the *Seventh Amendment*. *Id. at 281* (citing *Parklane Hosiery Co. v. Shore, 439 U.S. 322, 336, 99 S. Ct. 645, 58 L. Ed. 2d 552 (1979)* and *Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627, 64 S. Ct. 724, 88 L. Ed. 967 (1944)*). While he recognizes that not much can be done to reduce the complexity of the summary judgment process, he nonetheless makes a strong case for improvements in it, including, amongst other things, improved terminology and expectations and increased pre-summary judgment court involvement. *See id. at 283-88*.

is not designed to weed out dubious claims, but to eliminate those claims with no basis in material fact.") (citing *Weightwatchers of Quebec, Ltd. v. Weightwatchers Int'l, Inc., 398 F. Supp. 1047, 1055 (E.D.N.Y. 1975))*.

In a summary judgment motion, the moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact based on the pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, if any. *See Celotex, 477 U.S. at 323*; *Anderson, 477 U.S. at 248*. If the moving party has carried its burden, the nonmoving party must then go beyond its original pleadings and designate **[*9]** specific facts showing that there remains a genuine issue of material fact that needs to be resolved by a trial. *See Fed. R. Civ. P. 56(c)*. This additional showing can be by affidavits, depositions, answers to interrogatories, or the admissions on file. *Id.; Celotex, 477 U.S. at 322-23*; *Anderson, 477 U.S. at 257*. "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat a motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson, 477 U.S. at 247-48*. An issue is "genuine" if the evidence is sufficient to persuade a reasonable jury to return a verdict for the nonmoving party. *See id. at 248*. "As to materiality, the substantive law will identify which facts are material . . . . Factual disputes that are irrelevant or unnecessary will not be counted." *Id.*

Courts do not treat summary judgment as if it were a paper trial. Therefore, a "district court's role in deciding the motion is not to sift through the evidence, pondering the nuances and inconsistencies, and decide whom to believe." *Waldridge v. Am. Hoechst Corp., 24 F.3d 918, 920 (7th Cir. 1994)*. In a motion for summary judgment, the Court's job is only to decide, based on the evidentiary record that accompanies the moving and resistance filings of the parties, whether there really is any material dispute of fact that still requires **[*10]** a trial. *See id.* (citing *Anderson, 477 U.S. at 249* and 10 Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 2712 (3d ed. 1998)).

III. LAW AND ANALYSIS

Defendants move for summary judgment on all three counts of Ames's Amended Complaint: (1) sex and pregnancy discrimination in violation of the ICRA, *see* Am. Compl. ¶¶ 51-54; (2) sex and pregnancy discrimination in violation of *Title VII*, *see* Am. Compl. ¶¶ 55-58; and (3) violation of *29 U.S.C. § 207*, *see* Am. Compl. ¶¶ 59-64. *See* Br. in Supp. of Defs.' MSJ ("Nationwide's Br.") at 8-35.

A. *29 U.S.C. § 207(r)*

Returning to work promptly after childbirth, coupled with the desire to continue breastfeeding, exposes women to a unique and often challenging set of circumstances. To many, expressing breast milk in the workplace is incompatible with the desire to pursue a successful career. With respect to these challenges and the resulting social response, the Honorable Lewis A. Kaplan commented as follows:

> The transformation in the role of women in our culture and workplace in recent decades and the civil rights movement perhaps will be viewed as the defining social changes in American society in this century. Both have resulted in important federal, state and local legislation protecting those **[*11]** previously excluded from important roles from discrimination in pursuit of the goal of equality. Nevertheless, few would deny that the problems facing women who wish to bear children while pursuing challenging careers at the same time remain substantial.

Martinez v. MSNBC, 49 F. Supp. 2d 305, 306 (S.D.N.Y. 1999). In *Martinez*, the plaintiff sued her employer for being "insufficiently accommodating of [her] desire to pump breast milk in the workplace so that she could breast[-]feed her child while also returning to work promptly after childbirth." *Id.*

In the present case, Ames makes similar allegations. Specifically, she claims that the Nationwide Defendants violated *29 U.S.C. § 207(r)* by failing to provide her, on July 19, 2010, "with reasonable time to express breast milk in a private location, free from intrusion and shielded from the view of the public or other employees, at the time necessary to express breast milk." Am. Compl. ¶ 60. Defendants respond by arguing that the FLSA does not provide a private cause of action to redress alleged violations of *29 U.S.C. § 207(r)*.[24] *See* Nationwide's Br. at 9. The Court agrees.

Although *§ 207(r)* is relatively new,[25] at least one court has wrestled with the issue presently before the Court—whether the FLSA provides a private cause of action for **[*12]** violations of *§ 207(r)*. *See Salz v. Casey's Mktg. Co., No. 11-cv-3055, 2012 U.S. Dist. LEXIS 100399, at *6-7 (N.D. Iowa July 19, 2012)*. In holding that the FLSA does not provide a private cause of action, the Honorable Donald E. O'Brien reasoned as follows:

> The express breast milk provisions are codified at *29 U.S.C. § 207(r)*. *29 U.S.C. § 207(r)* provides: *216(b)*. In pertinent part, *29 U.S.C. § 216(b)* provides,
>
> > (r)(1) An employer shall provide—
> > (A) a reasonable break time for an employee to express breast milk for her nursing child for 1 year after the child's birth each time such employee has need to express the milk; and
> > (B) a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public, which may be used by an employee to express breast milk.
> >
> > (2) An employer shall not be required to compensate an employee receiving reasonable break time under *paragraph (1)* for any work time spent for such purpose.
>
> The enforcement [provision] for violations of *29 U.S.C. § 207* [is] 29 U.S.C. §
>
> > Any employer who violates the provisions of *section . . . 207* of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.
>
> Since *Section 207(r)(2)* provides that employers are not required to **[*13]** compensate employees for time spent express milking [*sic*], and *Section 216(b)* provides that enforcement of *Section 207* is limited to unpaid wages, there does not appear to be a manner of enforcing the express breast milk provisions. A recent notice from the Department of Labor corroborates Defendant's interpretation and limits an employee to filing claims directly with the Department [of] *Labor. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. 80073, 80078 (Dec. 21, 2010)*. The Department of Labor may then "seek injunctive relief in federal district court . . . ."

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[24] Even if there was a private cause of action, the Nationwide Defendants maintain that they complied with *29 U.S.C. § 207(r)*. *See* Nationwide's Br. at 9.

[25] *29 U.S.C. § 207(r)* was enacted on March 23, 2010.

Id. Although *Salz* does not constitute binding authority, the Court finds its logic irrefutable and, accordingly, adopts its holding.[26] Therefore, since Ames cannot bring a claim for any alleged violation of *29 U.S.C. § 207(r)*, the Court grants summary judgment for Defendants.

B. *Sex, Pregnancy,*[27] *and Nursing*[28] *Discrimination*

Ames argues that the record in this case contains direct and circumstantial evidence that the Nationwide Defendants illegally discriminated against her in violation of *Title VII* and the ICRA. *See* Pl.'s Br. in Supp. of Resistance to Defs.' MSJ ("Pl.'s Resistance Br.") at 14-30. Defendants disagree and assert that, on the present record, summary judgment is appropriate because: (1) Ames has not presented direct evidence of sex, pregnancy, or nursing discrimination; and (2) Ames has not presented sufficient circumstantial evidence to establish a prima facie case of sex, pregnancy, or nursing discrimination. *See generally* Nationwide's Br. at 13-35; Defs.' Reply Br. in Supp. of MSJ ("Nationwide's Reply Br.") at 7-19.

Federal case law supplies the basic framework for deciding cases under the ICRA. *Quick v. Donaldson Co., Inc., 90 F.3d 1372, 1380 (8th Cir. 1996)* (citing *Iowa State Fairgrounds Sec. v. Iowa Civil Rights Comm'n, 322 N.W.2d 293, 296 (1982)*). Iowa courts "traditionally turn to federal law for guidance on

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[26] Since the Court holds that the FLSA does not provide a private cause of action to remedy alleged violations of *§ 207(r)*, the Court need not decide whether, on July 19, 2010, the Nationwide Defendants complied with this provision.

[27] Under the Pregnancy Discrimination Act ("PDA"), pregnancy discrimination falls within the scope of, and is a type of, gender discrimination. *See Falk v. City of Glendale, No. 12-cv-00925, 2012 U.S. Dist. LEXIS 87278, at *8 n.5 (D. Colo. June 25, 2012)*. Therefore, the Court will analyze Ames's claims for pregnancy and gender discrimination as a single claim. *See id.*

[28] Ames argues that she is a member of a protected class—that of lactating mothers. *See* Pl.'s Resistance Br. at 17-23. In support, Ames argues that lactation is a medical condition related to her pregnancy. *See id.* at 17-18 (citing *42 U.S.C. § 2000e(k)*). Several courts, however, have considered and rejected the argument that terminating an employee due to lactation is gender or pregnancy discrimination. *See EEOC v. Houston Funding II, Ltd., et al., No. H-11-2442, 2012 U.S. Dist. LEXIS 13644, at *3-4 (S.D. Tex. Feb. 2, 2012)* ("Firing someone because of lactation or breast-pumping is not sex discrimination.") (collecting cases).

In disputing the soundness of these cases' legal analyses, Ames relies primarily on *Falk. See* Pl.'s Resistance Br. at 19-20. After providing an overview of existing case law surrounding lactation, the *Falk* court summarized:

> As it stands, no existing case law correctly excludes lactation or other conditions experienced by the mother as a result of breast-feeding from Title VII protection under the PDA. *A plaintiff could potentially succeed on a claim if she alleged and was able to prove that lactation was a medical condition related to pregnancy, and that this* ***[*14]*** *condition, and not a desire to breastfeed, was the reason for the discriminatory action(s) that she suffered.*

*Falk, 2012 U.S. Dist. LEXIS 87278, at *13 n.7* (emphasis added). Ames has not presented sufficient evidence that lactation is a medical condition related to pregnancy. Indeed, as the Nationwide Defendants point out, "lactation can be induced by stimulating the body to produce milk even though the person has not experienced a recent birth or pregnancy." Defs.' Reply Br. in Supp. of MSJ ("Nationwide's Reply Br.") at 12 n.9. Additionally, the Court takes judicial notice of the fact that adoptive mothers can also breast-feed their adoptive babies. *See* Defs.' App. at 323-25 (stating that adoptive mothers can breast-feed their adoptive babies and describing what adoptive mothers should do to stimulate milk production). Furthermore, it is a scientific fact that even men have milk ducts and the hormones responsible for milk production. *See* Nikhil Swaminathan, *Strange but True: Males Can Lactate*, SCI. AM., Sept. 6, 2007, *available at* *http://www.scientificamerican.com/article.cfm?id=strange-but-true-males-can-lactate&sc=rss*. Accordingly, lactation is not a physiological condition experienced exclusively by women who have recently given birth.

Assuming, *arguendo*, that Ames had presented sufficient evidence that lactation was a medical condition related to pregnancy, the Court is doubtful that she has presented enough facts to establish that her alleged constructive discharge was due to her medical condition (lactation) rather than due to her desire to breast-feed. *See Falk, 2012 U.S. Dist. LEXIS 87278, at *13 n.7*. Indeed, Ames's Amended Complaint contains several references to her desire to pump milk as a form of nutrition for her newborn son. *See* Am. Compl. ¶¶ 22-23, 32, 42, 45. As Falk held, however, "*Title VII* does not extend to breast-feeding as a child care concern." *Falk, 2012 U.S. Dist. LEXIS 87278, at *10*.

evaluating the ICRA, but federal law . . . is not controlling." *Vivian v. Madison, 601 N.W.2d 872, 873 (Iowa 1999)* (citations omitted). Neither party posits any separate legal arguments regarding Ames's **[*15]** ICRA claim. The Court, therefore, will address Ames's federal and state law claims of sex, pregnancy, and nursing discrimination together.

The analytical framework for discrimination claims under *Title VII* uses two separate frameworks to determine whether a plaintiff was subject to discrimination. The choice between the two analyses depends on whether a plaintiff presents direct evidence of the alleged discrimination, thereby warranting a "mixed motive" theory of analysis as explained in *Price Waterhouse v. Hopkins, 490 U.S. 228, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989)*, or indirect or circumstantial evidence of the alleged discrimination which requires a "burden-shifting" framework of analysis under *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*.

1. *Direct evidence.*

If a plaintiff produces direct evidence of the alleged discrimination, the plaintiff must persuade the fact-finder under the "mixed motive" theory of analysis. The plaintiff must persuade the fact-finder that, more likely than not, discrimination was "a motivating part in an employment decision." *Price Waterhouse, 490 U.S. at 254*. The burden then "shifts to the employer to prove that the employment decision would nevertheless have been made for legitimate, nondiscriminatory reasons." *Yates v. Douglas, 255 F.3d 546, 548 (8th Cir. 2001)*. Direct evidence of discrimination has been defined by the Eighth Circuit as "evidence or conduct **[*16]** or statements by persons involved in the decision-making process that is sufficient for the fact-finder to find that a discriminatory attitude was more likely than not a motivating factor in the employers' decision." *Kerns v. Capital Graphics, Inc., 178 F.3d 1011, 1017 (8th Cir. 1999)*. The Eighth Circuit goes on to state that "such evidence might include proof of an admission that gender was the reason for an action, discriminatory references to the particular employee in a work context, or stated hostility to women being in the workplace at all." *Id.; see also Beshears v. Asbill, 930 F.2d 1348, 1354 (8th Cir. 1991)* ("[D]irect evidence may include evidence of actions or remarks of the employer that reflect a discriminatory attitude[,] . . . [c]omments which demonstrate a 'discriminatory animus in the decisional process[,]' . . . or those uttered by individuals closely involved in employment decisions." (citations omitted)). "[S]tray remarks in the workplace, statements by nondecisionmakers, [and] statements by decisionmakers unrelated to the decisional process itself are not, however, direct evidence of discrimination." *See Beshears, 930 F.2d at 1354* (citing *Price Waterhouse, 490 U.S. at 277* (O'Connor, J., concurring)) (internal quotation marks omitted).

In 1976, the U.S. Supreme Court held that pregnancy discrimination was not gender discrimination. *See Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976)*. In response to *Gilbert*, in 1978, **[*17]** Congress passed the Pregnancy Discrimination Act ("PDA"). *See Falk, 2012 U.S. Dist. LEXIS 87278, at *9*. The PDA amended *Title VII* by extending gender discrimination to include discrimination on the basis of pregnancy, childbirth, or related medical conditions. *See id. at *10* (citing *42 U.S.C. § 2000e(k)*); *see also Piantanida v. Wyman Ctr., Inc., 116 F.3d 340, 341 (8th Cir. 1997)*. Currently, the relevant section reads, in part, as follows:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.

42 U.S.C. § 2000e(k).

Ames argues that she has direct evidence of gender discrimination. *See* Pl.'s Resistance Br. at 14-17. This direct evidence is the following comment that Neel allegedly made to Ames "at the exact same time she was handing [Ames] a piece of paper and telling her what she needed to write down in order to resign": "'Maybe you should just stay home with your babies.'" *See id.* at 15. Neel denies making this comment. *See* App. to Defs.' MSJ ("Nationwide's **[*18]** App.") at 287, pp. 87:25-88:12. Assuming, *arguendo*, that Neel did indeed make this comment, the Court finds that, under Eighth Circuit law, it does not constitute direct evidence of discrimination.

In arguing to the contrary, Ames relies primarily on *Sheehan v. Donlen Corp., 173 F.3d 1039 (7th Cir. 1999)*. *See* Pl.'s Resistance Br. at 16. In *Sheehan*, contemporaneously with telling the plaintiff that she was terminated, her supervisor added: "Hopefully this will give you some time to spend at home with your children." *See Sheehan, 173 F.3d at 1043*. The next day, the supervisor also told the plaintiff's co-workers that she had been terminated because "'we felt that this would be a good time for [Sheehan] to spend some time with her family.'" *Id.* The *Sheehan* court held that a reasonable jury could conclude that these comments were direct evidence of pregnancy discrimination. *See id. at 1044*.

Sheehan does not automatically compel the conclusion that Ames has mounted direct evidence of discrimination, however. To determine whether the comment at issue in this case constitutes direct evidence of sex discrimination, under Eighth Circuit law, the Court must analyze the speaker, the comment's content, and the causal connection between the comment and the adverse employment action. ***[*19]*** *See Wensel v. State Farm Mut. Auto. Ins. Co., 218 F. Supp. 2d 1047, 1059 (N.D. Iowa 2002)* (citing *Bauer v. Metz Baking Co., 59 F. Supp. 2d 896, 901-06 (N.D. Iowa 1999))*.

a. *The speaker*.

To constitute direct evidence of prohibited discrimination, the comment must be made by someone "involved in the decisionmaking process" and must concern the adverse employment action. *See Wensel, 218 F. Supp. 2d at 1059* (internal citations and quotation marks omitted). It is not necessary, however, that the speaker be the "final decisionmaker." *See id.* At all relevant times, Neel was the Associate Vice President, who oversaw the Loss Mitigation Department, where Ames worked. *See* Nationwide's Facts ¶ 5; Nationwide's App. at 54, p. 10:13-25. Therefore, a reasonable fact-finder could infer that Neel was certainly involved in the alleged decision to force Ames into resigning from her position.

b. *The content of the comment*.

Only comments by decision-makers that are "*sufficient for a fact[-]finder to find that a discriminatory attitude was more likely than not a motivating factor in the employer's deicion*" would rise to the level of direct evidence of discrimination. *See Wensel, 218 F. Supp. 2d at 1059-60* (citing *Metz Baking Co., 59 F. Supp. 2d at 904*) (internal quotation marks omitted) (emphasis in original).

The Court finds that, under Eighth Circuit law, "Maybe you should just stay home with your babies" does not constitute direct evidence of sex discrimination. Rather, this comment **[*20]** is based on Ames's gender-neutral status as a new parent. *See Piantanida, 116 F.3d at 342*. "[D]iscrimination based on one's status as a new parent is not prohibited by the PDA." *Id. at 341*. In *Piantanida*, the court held, in the context of demoting the plaintiff, that the employer's statement that "she was being given a position 'for a

new mom to handle'" was not direct evidence of gender discrimination.[29] *Id.* Similarly, in *Wensel*, the court held that the defendant's statements[30] regarding the effect of child-rearing on insurance agents' productivity were gender-neutral and, therefore, not direct evidence of gender discrimination. *See* *Wensel, 218 F. Supp. 2d at 1061-62*.

In light of *Piantanida* and *Wensel*, the Court must conclude that "Maybe you should stay home with your babies" is, at best, evidence of discrimination on the basis of Ames's status as a new parent. Being a parent is not gender-specific as this class also includes men and women who will never become pregnant. *See* *Piantanida, 116 F.3d at 342*. Accordingly, since discriminating against Ames on account of her status as a parent would not be discrimination "because of or on the basis of [her] pregnancy, childbirth, or related medical conditions," the Court **[*21]** finds that no reasonable fact-finder could conclude that the alleged comment constitutes direct evidence of gender discrimination.

c. *Causal connection*.

Since the Court has determined that no reasonable jury could conclude that the comment Ames cites is direct evidence of sex discrimination, the Court need not decide whether there was causation between the alleged comment and Ames's alleged constructive discharge.

Accordingly, since no reasonable fact-finder could conclude that the comment at issue, assuming it was uttered by Neel, constitutes direct evidence of sex discrimination, the Court now turns to the *McDonnell Douglas* framework to analyze any purported circumstantial evidence of sex discrimination.

2. *Circumstantial evidence.*

Where a plaintiff relies on circumstantial, rather than direct, evidence of intentional discrimination, the court applies the three-stage burden shifting approach developed by the Supreme Court in *McDonnell Douglas*, and later refined in *Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)*; *see also* *St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 506-07, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993)*; *Dammen v. UniMed Med. Ctr., 236 F.3d 978, 980 (8th Cir. 2001)*.

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[29] During her deposition, the *Piantanida* plaintiff conceded that her demotion was not related to her pregnancy or maternity. *See* *Piantanida, 116 F.3d at 341*. Thus, the district court analyzed her Title VII claim as a gender discrimination claim "on the basis of her status as a 'new mother.'" *See* *Piantanida, 927 F. Supp. at 1230 n.1*. Although it is axiomatic that only women can be "new mom[s]," the Eighth Circuit nevertheless held that the comment at issue was gender-neutral. *See* *Piantanida, 116 F.3d at 342*.

Ames, however, argues that "Maybe you should just stay home with your babies" is not a gender-neutral comment, but rather one that "invoke[s] widely understood stereotypes the meaning of which is hard to mistake." *See* Pl.'s Resistance Br. at 16 (citing *Sheehan, 173 F.3d at 1044-45* (internal quotation marks omitted)). The *Sheehan* court held that the following two comments constituted direct evidence of gender discrimination because they invoked "widely understood stereotypes" regarding women's ability to balance work and child-rearing: (1) "Hopefully this will give you some time to spend at home with your children"; and (2) "we felt that this would be a good time for [the plaintiff] to spend some time with her family." *See* *Sheehan, 173 F.3d at 1043*. Indeed, on the authority of *Sheehan*, one would be hard-pressed to argue that either the comment in *Piantanida* or Neel's alleged comment in this case do not invoke such stereotypes. *Sheehan*, however, is not binding on the Court while *Piantanida* is. Accordingly, the Court is compelled to follow *Piantanida* and hereby holds that "Maybe you should just stay home with your babies" is a gender-neutral comment that does not support Ames's claim for gender discrimination.

[30] There were two statements at issue in *Wensel*: "(1) that Wensel should wait at least five years before starting a family; and (2) that pregnancy and child-rearing harm an agent's ability to meet his or her productivity goals." *Wensel, 218 F. Supp. 2d at 1060*.

Under the *McDonnell Douglas* framework, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. *See* McDonnell Douglas, 411 U.S. at 802. If the plaintiff establishes a prima facie case, the burden of production **[*22]** shifts at the second stage to the defendant, who must articulate some legitimate, nondiscriminatory reason for the adverse employment action. *See* Burdine, 450 U.S. at 253. If the defendant carries this burden of production, the presumption raised by the prima facie case is rebutted and "drops from the case." *Id. at 255 n.10*. The burden then shifts back at the third and final stage to the plaintiff, who is given the opportunity to show that the employer's proffered reason was merely a pretext for discrimination. *Id. at 253*. The ultimate burden remains with the plaintiff at all times to persuade the trier of fact that the adverse employment action was motivated by intentional discrimination. *Id.*

To establish a prima facie case of sex discrimination, Ames must show that: (1) she is a member of a protected class;[31] (2) she met applicable job qualifications; (3) despite her qualifications, she suffered an adverse employment action; and (4) the circumstances permit an inference of discrimination. *See* Lewis v. Heartland Inns of Am., LLC, 591 F.3d 1033, 1038 (8th Cir. 2010). "The burden of establishing a prima facie case of disparate treatment is not onerous." Burdine, 450 U.S. at 253. The *McDonnell Douglas* framework for establishing a prima facie case of illegal discrimination "was never intended to be rigid, mechanized, or ritualistic." **[*23]** Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577, 98 S. Ct. 2943, 57 L. Ed. 2d 957 (1978). This framework's central focus is to determine whether the employer has treated some employees less favorably than others for an impermissible reason. *See id.*

The Nationwide Defendants concede, for purposes of summary judgment, that Ames was qualified for her position as a loss mitigation specialist. *See* Nationwide's Br. at 15. They dispute, however, that Ames suffered an adverse employment action under circumstances permitting an inference of discrimination.

a. *Adverse employment action.*

Constructive discharge is a type of an adverse employment action. *See* Smith v. Lake Ozark Fire Dist., No. 10-cv-4100, 2011 U.S. Dist. LEXIS 64722, at *22-23 (W.D. Mo. June 13, 2011) (citing Fercello v. County of Ramsey, 612 F.3d 1069, 1083 (8th Cir. 2010)). "The bar to relief [in constructive discharge cases], however, is high." Fercello, 612 F.3d at 1083 (citing O'Brien v. Dep't of Agric., 532 F.3d 805, 810-11 (8th Cir. 2008)). To prevail on her constructive discharge claim, Ames must establish that: (1) a reasonable person would find her working conditions at Nationwide intolerable; and (2) Nationwide intended to force her to resign from her employment or could have "reasonably foreseen" that she would resign. *See id.* (internal citation omitted). Ames must also establish that she gave the Nationwide Defendants a reasonable chance to resolve the issues. *See* West v. Marion Merrell Dow, Inc., 54 F.3d 493, 498 (8th Cir. 1995) ("Part of an employee's obligation **[*24]** to be *reasonable* is an obligation not to assume the worst and not to jump to conclusions too fast . . . . An employee who quits without giving her

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[31] Defendants dispute that Ames is a member of a protected class. *See* Nationwide's Br. at 16-18. Although this Order does not specifically address this prong of Ames's prima facie case, the Court finds Defendants' argument persuasive. Ames appears to assert a protected status on the basis of her pregnancy and lactation. *See* Pl.'s Resistance Br. at 17-23. To the extent that Ames asserts a protected status on the basis of lactation, the Court finds she has failed to show that she belongs to a protected class because lactation is not pregnancy, childbirth, or a related medical condition. *See supra* n. 28; *see also* 42 U.S.C. § 2000e(k). To the extent that she claims a protected status on the basis of her pregnancy, the Court notes that Ames has not put forth sufficient evidence that there was a connection between Defendants' alleged discriminatory comments and conduct and Ames's alleged constructive discharge. *See* Neessen v. Arona Corp., 708 F. Supp. 2d 841, 850 (N.D. Iowa 2010) (stating that the PDA does not apply "exclusively to women who are pregnant or suffer from a pregnancy-related disability" but that the alleged discrimination must be "because of or on the basis of pregnancy").

employer a reasonable chance to work out a problem is not constructively discharged.") (emphasis in original) (internal quotation marks omitted)).

Whether an employee has been constructively discharged is judged by an objective standard. *See* Buboltz v. Residential Advantages, Inc., 523 F.3d 864, 869 (8th Cir. 2008) ("[A] constructive discharge takes place only when a reasonable person would find [the] working conditions intolerable."). "Unpleasant [or] unprofessional [work] environment" is insufficient to establish a constructive discharge. Jones v. Fitzgerald, 285 F.3d 705, 716 (8th Cir. 2002) (declining to find that the plaintiff had been constructively discharged even though two of her co-workers had called her a "skank," made harsh comments concerning her cohabitation with a man to whom she was not married, exhibited hostile attitudes, stuck their tongues out at her, "whisper[ed] in hushed voices in her presence, abruptly ceas[ed] conversations in her presence," and socially isolated her). Work atmosphere that is less than ideal will not, by itself, support a successful constructive discharge claim because such atmosphere would not compel a reasonable person to resign. *See* Breeding v. Arthur J. Gallagher & Co., 164 F.3d 1151, 1160 (8th Cir. 1999).

i. ***[*25]*** *Intolerableness of working conditions.*

At trial, Ames would bear the burden of showing that a reasonable person[32] would have found her working condition intolerable, thus leaving her no choice but to quit. *See* Wensel, 218 F. Supp. 2d at 1064 (internal citations omitted). In support of her claim of intolerable conditions, Ames relies on the following factors: (1) she was not given *immediate* access to a lactation room on July 19, 2010; (2) at the time she resigned, "it had been over *five hours* since she had last expressed milk and [she] was in considerable physical pain"; and (3) during her meeting with Brinks, he allegedly told her that none of her work had been done during her maternity leave, that she had to work overtime to get caught up, and that if Ames did not catch up within two weeks, she would be disciplined. *See* Pl.'s Resistance Br. at 24-27. Although not specifically set forth in her resistance brief, in arguing that she was constructively discharged, Ames seems to also rely on the following allegations: (4) Neel asked her to return to work on July 19, 2010 rather than the originally provided date of August 2, 2010; (5) Defendants did not provide her with information regarding Nationwide's lactation policy; **[*26]** and (6) Neel, Brinks, Baccam, and Hallberg discriminated against her during and after her pregnancy. *See* Nationwide's Br. at 16.

After analyzing the substance of these factors, the Court finds that they revolve around four common themes: (1) the alleged discrimination; (2) the revised return-to-work date; (3) Nationwide's lactation policy; and (4) the job expectations following Ames's return from maternity leave. Even if all of these factors were present, as Ames insists, the Court finds that they would still be insufficient to induce a reasonable fact-finder to conclude that Ames's working conditions were intolerable.

a) *Alleged discrimination.*

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[32] Ames urges that the reasonable person standard applicable to her constructive discharge claim must account for the following factors: (1) the day she resigned was her first day back to work following the birth of her second child; (2) "she [was] battling the array of hormones common in a woman eight weeks post-partum"; (3) she was lactating and her breasts were engorged "from not being allowed to express milk"; and (4) she was excited to return to work but also sad to leave her newborn in somebody else's care. *See* Pl.'s Resistance Br. at 24. The Court disagrees with Ames's contention as adopting it would effectively transform the objective test into a subjective one. *See* Bristow v. Daily Press, Inc., 770 F.2d 1251, 1255 (4th Cir. 1985) ("[T]he law does not permit an employee's subjective perceptions to govern a claim of constructive discharge."); Angier v. Henderson, No. 00-215, 2001 U.S. Dist. LEXIS 15310, at *18 n.3 (D. Minn. Aug. 3, 2010) ("[W]hen analyzing the merits of a constructive discharge claim, the fact[-]finder does not evaluate the workplace from the subjective viewpoint of the plaintiff.").

Ames maintains that Neel, Brinks, Hallberg, and Baccam subjected her to discrimination. Neel allegedly discriminated against Ames by "eye-rolling," by telling Ames that she did not have to go on bed rest during her pregnancy, by stating that she would never have a baby shower before her baby is born because the baby could die, and because "[t]here was always a negative innuendo from her to [Ames.]" *See* Nationwide's App. at 88:17-89:16. Ames testified that Neel also commented regarding Ames's pregnancy as follows: "'I never had this many problems when I was pregnant. **[*27]** All I needed was a pocketful of Tums, and I was good to go.'" *Id.* at 92:15-17. Furthermore, Neel allegedly "comment[ed] on [Ames's] size, about [Ames's] carrying more than one baby because [she] was so big." *Id.* at 92:17-19.

With respect to Brinks, Ames complains that he viewed her pregnancy as an inconvenience, refused to help her lift a filing cabinet on one occasion, and made certain comments concerning her maternity leave. *See id.* at 89:17-90:20. Specifically, at her deposition, Ames testified as follows regarding Brinks's alleged comments:

> "Oh, yeah, I'm teasing her about only taking a week's worth of maternity leave. We're too busy for her to take off that much work." And everyone would chime in with "Oh, yeah," you know, "she can only be gone for a week. She already took her eight weeks with Henry."

Id. at 90:13-18.

Next, Ames alleges that Hallberg discriminated against her by "providing a letter . . . stat[ing] there was a three-day waiting period . . . to access a lactation room," by offering her a wellness room to pump milk, and by advising Ames that her "milk could not be guaranteed" if she uses a wellness room. *See id.* at 87:11-23. Lastly, Ames contends that Baccam discriminated against her because **[*28]** Baccam had more information about Nationwide's lactation policy, but did not share her knowledge with Ames and did not advise Ames to review the lactation policy on her own. *See id.* at 93:14-23.

The Court finds that a reasonable fact-finder would conclude that, objectively, these instances of alleged discrimination would not cause a reasonable person in Ames's position to believe that she had no choice but to resign. Applying the reasonable person standard, the Court concludes that, at most, the comments and conduct at issue created a less than ideal and, arguably, unpleasant work environment for Ames. As held by the *Jones* and *Breeding* courts, however, this is insufficient to cause a reasonable person to believe that she has no choice but to resign. Furthermore, the Court notes that the facts of the present case paint a picture far less reprehensible than the one in *Jones*, where the Court declined to find that the plaintiff had been constructively discharged.

Although a reasonable fact-finder would conclude that Neel's and Brinks's comments were insufficient for a successful constructive discharge claim, the Court believes that these comments at least allow Ames to raise a colorable **[*29]** constructive discharge claim. The same cannot be said for Hallberg's and Baccam's alleged discriminatory conduct. Ames complains that Hallberg discriminated against her by providing her with a letter stating that there was a three-day waiting period before obtaining access to a lactation room and by offering Ames use of a wellness room in the meantime. What Ames finds objectionable and discriminatory in Baccam's conduct is her failure to voluntarily and on her own initiative inform Ames of the contents of Nationwide's lactation policy. A reasonable fact-finder would not conclude that this constitutes culpable conduct. Therefore, the Court holds, as a matter of law, that neither Hallberg nor Baccam contributed to the alleged intolerable working conditions.

b) *Revised return-to-work date*.

Ames contends that having to report back to work two weeks prior to the originally scheduled return date of August 2, 2010 created or at least contributed to creating intolerable work conditions. The Court disagrees. It is undisputed that Ames was originally told that she could remain on maternity leave[33] until August 2, 2010. *See* Nationwide's App. at 204. On June 16, 2010, however, Neel informed her in a telephone call that the **[*30]** August 2, 2010 date had been incorrectly calculated.[34] *See id.* Before ending the phone call, Ames and Neel agreed that Ames would return to work on July 19, 2010. *See id.* Notably, Ames acknowledged that returning to work on July 19, 2010 would be "fine."[35] *See id.*

There is no doubt that reporting back to work sooner than expected came as a shock to Ames. *See id.* The Nationwide Defendants, however, had a legitimate reason for requiring Ames to do so—the length of her maternity leave had been miscalculated. *See id.* Defendants did not deprive Ames of her rights under the Family Medical Leave Act (the "FMLA"). To the contrary, they extended Ames's maternity leave by one week. *See id.* In light of this extension, the fact that Defendants did not prejudice Ames's rights under the FMLA, and the fact that Ames had more than thirty days to prepare for returning to work on July 19, 2010, the Court concludes that, in the eyes of a reasonable fact-finder, the June 16, 2010 telephone call would not lead a reasonable person in Ames's position to believe that she had no choice but to resign.

c) *Lactation policy and lactation room access.*

It is undisputed that Ames could not have been given access **[*31]** to a lactation room on July 19, 2010 because she had not filled out the required paperwork beforehand. *See supra* n.11. It is also undisputed, however, that Ames was able to use one of the wellness rooms to pump milk that day.[36] *See* Nationwide's App. at 73:4-8. Even if Ames did not consider the wellness rooms a satisfactory accommodation, using a wellness room was only a temporary solution until she was granted access to a lactation room. *See* Ames's App. at 7, p. 81:16-19 ("[T]here was a three-day waiting period for [Ames] to access a lactation room.").

Furthermore, although Ames refuses to accept any blame for not familiarizing herself with Nationwide's lactation policy, the fact remains that the policy was readily available to her. *Compare* Nationwide's App. at 87, p. 93:11-23 (Ames stating that Baccam discriminated against her by not explaining Nationwide's lactation program) *with* Nationwide's App. at 81:5-14; 84:14-85:16; 93:14-23 (Ames admitting that Nationwide's lactation policy was available on the company intranet, that she could have obtained information regarding the lactation policy during one of the quarterly maternity meetings but never attended any of those meetings because of her workload, and that she could have asked Baccam how to arrange for a lactation room **[*32]** access before returning to work). Even if Ames's workload was indeed so heavy that she could not attend any of the quarterly maternity meetings, she certainly could have reviewed Nationwide's lactation policy at some time during her pregnancy or during her maternity leave following the birth of her second child.[37] Similarly, prior to returning to work, Ames could have asked

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[33] The Court refers to the leave provided to new mothers by the Family Medical Leave Act ("FMLA") as maternity leave.

[34] Neel explained that the maternity leave authorized by the FMLA is calculated on a rolling twelve-month basis. *See* Nationwide's App. at 204. Ames was not entitled to the full FMLA leave following the birth of her second child because she had already used some FMLA leave during the preceding twelve months due to the birth of her first child. *See id.*

[35] The Court notes that Ames agreed to return to work on July 19, 2010 before Neel stated that remaining on maternity leave until August 2, 2010 would "cause[] red flags . . . and problems like that." *See* Nationwide's App. at 204.

[36] Prior to creating the three lactation rooms, nursing mothers used the wellness rooms to express milk. *See* Ames's App. at 31:1-4.

[37] The Court notes that Nationwide's lactation policy is approximately three pages long. *See* Nationwide's App. at 148, 150-51.

Baccam any questions concerning Nationwide's lactation policy, including how to obtain access to a lactation room, but did not do so.

A reasonable person in Ames's position would have done what is necessary to familiarize herself with Nationwide's lactation policy before returning to work. After all, going back to work did not come as a surprise to Ames; she knew on June 16, 2010 that she had to report back to work on July 19, 2010. Thus, she had over a month to prepare. The Court is not insensitive to the burdens and stresses associated with parenthood, particularly those experienced by new mothers. Being under stress, however, does not excuse Ames from doing what any reasonable person in her position would have done. Therefore, the Court concludes that no reasonable fact-finder would determine that the unavailability **[*33]** of a lactation room on July 19, 2010 would lead a reasonable employee in Ames's position to believe that her only option was to resign. *See* *Jerkovich v. Freson-Madera of Am. Red Cross, No. CV-F-04-5811, 2005 U.S. Dist. LEXIS 44827, at *52 (E.D. Cal. Aug. 23, 2005)* ("Plaintiff was provided a secure and private place for her lactation needs[, albeit an unsanitary computer room]; even if less than ideal, this accommodation would not prompt a reasonable employee to believe that her only option was to quit.").

d) *Job expectations*.

Similarly, regardless of the contents of the July 19, 2010 conversation between Ames and Brinks, no reasonable jury would find that a reasonable employee in Ames's position would believe that her only option was to resign. Ames alleges that, during that meeting, Brinks told her that none of her work had been done while she was on maternity leave,[38] that she had two weeks to catch up, and that she had to work overtime to do so. *See* Ames's App. at 91 ¶¶ 11-12. Also, Brinks allegedly told Ames that she would be formally disciplined unless she was completely caught up on her work in two week's time. *See id.* ¶ 12. Even assuming that Brinks indeed made these statements, the Court determines that no reasonable jury would conclude that these job expectations created intolerable working conditions, such that a **[*34]** reasonable person in Ames's position would believe that she had no option but to quit. Completing work assignments in a timely manner is not an unique job requirement; rather, it is central to the proper functioning of any business, including Nationwide's. *See* Nationwide's App. at 48, p. 15:11-19. Indeed, timely completion of the work tasks was a key characteristic of the position of loss mitigation specialist, and was "a high priority" within the entire Loss Mitigation Department. *See id.* at 48, p. 15:11-19. Thus, the mere expectation that Ames must timely perform her job duties, without more, cannot convince a reasonable fact-finder that Ames endured intolerable work conditions forcing her to resign.

ii. *Foreseeability of Ames's resignation*.

Ames has not put forth any evidence, other than her self-serving and unsupported assertion, that the Nationwide Defendants intended for her to resign on July 19, 2010. *See* Pl.'s Resistance Br. at 27 ("[The Nationwide Defendants *intended* for [Ames] to resign on July 19, 2010." (emphasis in original)).

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[38] Ames asserts that Brinks told her that none of her work had been done while she was on maternity leave and that she had two weeks to catch up on all the work that had been piling up. *See* Ames's App. at 43. Brinks disputes that none of Ames's work had been done. *See* Ames's App. at 27, pp. 79:22-80:10. Ames's assertion is also contradicted by Nationwide's reports showing that, as of July 19, 2010, Ames's work queue was in a better condition than when she took her maternity leave. *See* Nationwide's App. at 213-58. The parties' disagreement on this issue does not create a genuine dispute. *See* *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)* (stating that a "metaphysical doubt" does not create a genuine dispute); *see also* *Middleton v. Am. Standard Cos., No. 06-2205, 2007 U.S. Dist. LEXIS 69733, at *28 (W.D. Ark. Sept. 20, 2007)* ("When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.").

Accordingly, on this record, the Court must conclude that no reasonable fact-finder would determine that Defendants intended for Ames to quit. Thus, the relevant **[*35]** inquiry becomes whether it was reasonably foreseeable to Defendants that Ames would resign. The Court must answer this question in the negative.

No reasonable jury would agree that it was reasonably foreseeable to Defendants that the alleged discriminatory comments and conduct of Neel, Brinks, Hallberg, and Baccam would cause Ames to resign. As articulated in § III.B.2.a.i.a), the Court has determined that no reasonable jury would find Hallberg's and Baccam's conduct even remotely objectionable. Furthermore, for the reasons stated in that section, the Court finds that, although a reasonable fact-finder may conclude that Neel's and Brinks's comments were distasteful and inappropriate, it was nevertheless not reasonably foreseeable that those comments would force Ames to resign.

Similarly, no reasonable jury would find it reasonably foreseeable that changing Ames's return-to-work date would promote her ultimate resignation. Defendants asked Ames to report back to work earlier than expected because they had miscalculated the length of the maternity leave to which she was entitled. Therefore, all that they expected of Ames was to comply with the applicable FMLA provisions.

With respect to **[*36]** Ames's assertion that she was not given access to a lactation room, the Court notes that she had not filled out the required paperwork prior to reporting back to work on July 19, 2010. Her failure to do so is the *sole* reason for not getting access to a lactation room on that day. By not requesting such access, Ames failed to notify the Nationwide Defendants of her intentions to continue breast-feeding past the expiration of her maternity leave. Accordingly, it was not reasonably foreseeable that Ames would resign simply because she could not have access to a lactation room on July 19, 2010, or because she had to wait three days before getting access to such a room. The Court also finds that it was similarly not reasonably foreseeable that Ames would resign because she had to use a wellness room to express milk until obtaining access to a lactation room. Finally, for the reasons articulated in § III.B.2.a.i.d), a reasonable jury would not find that it was reasonably foreseeable that Ames would resign because of the expectation that she needed to maintain her work queue current.

iii. *Opportunity to respond.*

To prevail on her constructive discharge claim, Ames must show that she refrained **[*37]** from "assum[ing] the worst" and provided Defendants with an opportunity to address her grievances. *See West, 54 F.3d at 498*; *Coffman v. Tracker Marine, L.P., 141 F.3d 1241, 1247 (8th Cir. 1998)*. Ames argues, and the Court will assume for purposes of this Order, that she did so when she "tried to discuss her feelings of despair with Ms. Neel and explore any options that might be available to her to accommodate her need to provide breast milk for her son." *See* Am. Compl. ¶ 45; *see also* Pl.'s Resistance Br. at 29. It is undisputed that Ames did not lodge a complaint with Nationwide's Human Resources department, the Office of Ethics, or the Office of Associate Relations.[39] *See* Nationwide's App. at 96:2-18. For this reason, the Court

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[39] Nationwide's Compliance Statement reads as follows:

> If you have reason to believe that Nationwide is not in compliance with the law, contact your local HR professional, the Office of Ethics, or the Office of Associate Relations to report the circumstances immediately. All complaints will be investigated and handled in as confidential a manner as possible. You are assured that there will be no retaliation against you for participating in an investigation or making a complaint with the reasonable belief that non-compliance **[*38]** with the law has occurred.

Nationwide's App. at 105. Ames was undoubtedly aware of this policy. *See id.* at 195.

concludes, as a matter of law, that Ames did not give Defendants an opportunity to respond to her grievances.

Sowell v. Alumina Ceramics, Inc. presents a similar to this case's fact pattern. *See* 251 F.3d 678 (8th Cir. 2001). The plaintiff in *Sowell*, who had recently given birth to her child, complained to her supervisor regarding the newly-instituted pager policy but "failed to avail herself of the channels of communication provided by [the employer] to deal with such complaints." *See* Sowell, 251 F.3d at 685-86 (internal citation omitted). The Eighth Circuit affirmed the district court's grant of summary judgment for the employer, in part, due to Sowell's failure to utilize the grievance process established by the employer. *See id.*

Using similar reasoning, in *Coffman*, the Eighth Circuit reversed the jury's finding that the plaintiff had been constructively discharged. *See* Coffman, 141 F.3d at 1247-48. In concluding that there was insufficient evidence to support such a finding, the court took into account the fact that the plaintiff had available avenues for redress within the company but failed to use them. *See id.* The court explained that the rationale behind requiring an employee to attempt to resolve her grievances internally is that "society and the policies underlying Title VII will be best served if, wherever possible, unlawful discrimination **[*39]** is attacked within the context of existing employment relationships." Id. at 1247 (internal citations and quotation marks omitted).

The Court sees no reason to depart from *Sowell*'s and *Coffman*'s analyses. To the contrary, the Court believes that Sowell and Coffman control the present case. It is undisputed that Ames knew about Nationwide's internal processes allowing any employee to launch a complaint with the Human Resources department, the Office of Ethics, or the Office of Associate Relations. It is also undisputed that she did not do so. Rather, similar to the *Sowell* plaintiff, Ames only complained to Neel about not having immediate access to a lactation room, but did not avail herself of the established channels of communication within Nationwide. Dissatisfied with Neel's alleged indifference, Ames felt that she had no alternative but to resign.

Relying on *Sowell* and *Coffman*, the Court holds that Ames's claim of constructive discharge must fail. Ames did not follow known internal grievance procedures to lodge her complaint. Indeed, she did not even attempt to do so. Instead, she assumed the worst and surmised that her only reasonable option was to tender her resignation. Under existing law, **[*40]** Ames cannot prevail on her constructive discharge claim. Therefore, on this record, no reasonable jury could conclude that Ames has presented sufficient evidence to establish the existence of a genuine issue of material fact precluding summary judgment for Defendants on her constructive discharge claim.

b. *Inference of discrimination.*[40]

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[40] "[T]he most straight-forward manner to give rise to an inference of sex discrimination" is for Ames to compare her treatment to that of other similarly-situated employees outside the protected class, or "comparators." *See* Lewis v. Heartland Inns of Am., L.L.C., 585 F. Supp. 2d 1046, 1064 (S.D. Iowa 2008), *rev'd on other grounds*, 591 F.3d 1033 (8th Cir. 2010). In this case, such "comparators" would be men with children, not women without children. *See* Johnston v. U.S. Bank Nat'l Ass'n, No. 08-CV-0296, 2009 U.S. Dist. LEXIS 79125, at *31, 32 n.13 (D. Minn. Sept. 2, 2009). Since Ames has presented no evidence showing that Defendants treated her comparators more favorably, "the Court will appl[y] the slightly more expansive standard which allows [Ames] to meet the fourth prima facie element if she demonstrates that the [constructive] discharge occurred under circumstances giving rise to an inference of discrimination." *See* Lewis, 585 F. Supp. 2d at 1063.

Ames argues that "a reasonable jury could find that the circumstances surrounding [Ames's] constructive discharge permit an inference of discrimination." Pl.'s Resistance Br. at 30. In support, Ames asserts that Neel's and Brinks's "barrage of comments . . . about her pregnancy and upcoming maternity leave" made it clear to her that her pregnancy was viewed as an inconvenience. *Id.* "[F]orcing [Ames] to come back to work earlier than she had expected" was yet another attempt "to get her to quit." *Id.* When Ames did not resign, Defendants made sure that she would "resign *the same morning she returned from maternity leave*." *Id.* (emphasis in original). For reasons that follow, the Court finds that Ames has not established the existence of circumstances surrounding her alleged constructive discharge, such that, when considered together **[*41]** or in isolation, they warrant an inference of discrimination.

i. *Alleged discrimination.*

The Court has already detailed and will not recount Defendants' alleged discriminatory comments and conduct. *See supra* § III.B.2.a.i.a. Rather, the Court finds it helpful to compare the facts of the present case to previous cases where the facts were found sufficient to support a discrimination claim.

In *Walsh v. Nat'l Computer Sys., Inc., 332 F.3d 1150, 1160 (8th Cir. 2003)*, the plaintiff sued her employer alleging gender discrimination on the basis of pregnancy. She claimed that she had been discriminated against "not because she was a new parent, but because she [was] a woman who had been pregnant [and] had taken a maternity leave."[41] *Id.* In concluding that there was ample support for the jury's finding that the plaintiff had been discriminated against on the basis of her pregnancy, the *Walsh* court relied primarily on the following factors: (1) the plaintiff was required to provide advance notice and documentation of her doctor's appointments while she was pregnant, and her co-workers did not have to do that, *see id.*; (2) the plaintiff was denied the opportunity to change her schedule by leaving at 4:30 p.m., instead of 5:00 p.m., so that she could pick up her son from **[*42]** daycare, even though some of her co-workers left work at 3:45 p.m., and her supervisor told her that she should probably look for another job, *see id. at 1155*; (3) the plaintiff's supervisor placed signs saying "Out—Sick Child" outside the plaintiff's cubicle whenever she was caring for her sick son when such signs were not placed outside absent co-workers' cubicles, *see id.*; and (4) the plaintiff was required to make up "every minute" that she was absent due to doctor's appointments for herself or her son when no other employees were required to do so, *see id.*

Although the Court does not condone the discriminatory treatment that the *Walsh* plaintiff had to endure, it did not rise to the level of the disparate treatment accorded the plaintiff in *Snyder v. Yellow Transportation, Inc., 321 F. Supp. 2d 1127 (E.D. Mo. 2004)*. While on maternity leave, Snyder's employment as a sales representative was terminated as a part of an announced reduction in force. *See id.* The court denied the employer's summary judgment motion, holding that there was sufficient evidence in the record to support a finding that the plaintiff's "sex and recent pregnancy were factors considered in the decision to terminate her employment." *Id.* For instance, while she was on maternity leave, her employer **[*43]** permanently realigned the territory lines assigning Snyder to an undesirable territory. *See id.* Furthermore, one of Snyder's managers had made derogatory remarks about female sales representatives calling them "a pain in the ass." *See id.* Another manager had stated that male account

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[41] Walsh also claimed that she had been discriminated against because she "might become pregnant again." *See Walsh, 332 F.3d at 1160* (citing *Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 680 (8th Cir. 1996)* (holding that potential pregnancy was a sex-related medical condition)). Ames has not presented any evidence that she had been discriminated against because of her potential to become pregnant again. Accordingly, the Court will not examine this issue.

managers were more capable than their female counterparts because women took time off to care for children. *See id. at 1132*. These comments, however, were not the most egregious conduct that Snyder's superiors engaged in. Following her discharge, one of her former managers asked a colleague of hers to fabricate a letter "for her file" outlining alleged customer complaints regarding Snyder's job performance. *See Snyder, 321 F. Supp. 2d at 1132*.

A "milder" case of pregnancy discrimination is *Vosdingh v. Qwest Dex, Inc., No. 03-4884, 2005 U.S. Dist. LEXIS 6866 (D. Minn. Apr. 21, 2005)*. Although the comments directed at the plaintiff were not as harsh as those in *Snyder*, the court found that they were nevertheless sufficient to give rise to an inference of discrimination. *See Vosdingh, 2005 U.S. Dist. LEXIS 6866, at *60*. When Nicholls, one of the *Vosdingh* plaintiffs, informed her manager that she was pregnant for the second time, the manager asked her what she was going to do about her job. *See id. at *59*. The manager also added that it was hard to come back to work after having a child and that **[*44]** it was hard to keep "this job with two kids." *See id.* When Vosdingh returned to work and told her manager about her need to express milk, he made derogatory comments concerning her decision to come back to work and to continue breast-feeding. *See id.* The manager also told Vosdingh that he knew it was hard for her to come back to work and asked if there was any way she could stay home. *See id.*

The Court finds that *Dams v. City of Waverly, No. C04-2077, 2006 U.S. Dist. LEXIS 19237 (N.D. Iowa Mar. 2, 2006)* is also useful in deciding whether Ames has presented evidence sufficient to give rise to an inference of discrimination. After Dams became pregnant, she and her supervisor, Buls, had several discussions regarding the length of her upcoming FMLA leave. *See Dams, 2006 U.S. Dist. LEXIS 19237, at *2*. Buls took the position that eight, rather than ten, weeks of maternity leave would be more appropriate. *See id. at *2-3*. The court held that the inquiries as to the length of the leave and the statement that eight weeks of leave would be preferable were "perfectly appropriate." *See id. at *14*. Buls's "attempt[] to condition granting Dams'[s] unrelated vacation time on [her] taking only eight weeks of leave" was, however, inappropriate and illegal. *See id.*

The inquiry into whether a plaintiff has presented evidence sufficient to give rise to **[*45]** an inference of discrimination is case-specific. *See McDonnell Douglas, 411 U.S. at 802 n.13* ("The facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations."). Thus, there are no particular comments or conduct that have to be present in a given case to permit an inference of discrimination. *See id.* With this in mind, the Court views *Walsh*'s, *Snyder*'s, *Vosdingh*'s, and *Dams*'s analyses as relevant and instructive, but in no way dispositive to the present case. After analyzing the record, the Court does not agree that the evidence in this case permits an inference of sex discrimination.

Assuming, *arguendo*, that Neel and Brinks made the comments at issue, the Court must still conclude that they are insufficient to warrant an inference of discrimination.[42] Unlike the employer's statements and

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[42] The Court notes that all of the comments at issue occurred prior to Ames taking her maternity leave, which began on April 12, 2010. *See* Nationwide's App. at 88:17-93:23. Some of them were made when Ames was pregnant with her first child in 2008-09. *See id.* at 91:19-92:6. Considering the lack of temporal proximity between these comments and the alleged constructive discharge, the Court is less inclined to find a connection between the comments and the adverse employment action. *Cf. Quick v. Wal-Mart Stores, Inc., 441 F.3d 606, 610 (8th Cir. 2006)* ("[W]e have been hesitant to find pretext or discrimination on temporal proximity alone." (internal citation and quotation marks omitted)); *Snelson v. Mo. Transp. Comm'n, No. 06-4073, 2009 U.S. Dist. LEXIS 14456, at *13-14 (W.D. Mo. Feb. 24, 2009)* ("[C]lose temporal proximity between an employer's discovery of a protected characteristic and an adverse employment action may, on rare occasions, suffice to create an inference of discrimination." (internal citation and quotation marks omitted)).

actions in *Walsh*, *Snyder*, *Vosdingh*, and *Dams*, none of the comments or conduct at issue here indicates Defendants' negative attitude towards pregnancy or the likelihood that Ames would suffer an adverse employment action as a result of her pregnancy or maternity leave. Viewing the alleged discriminatory **[*46]** comments and conduct in the light most favorable to Ames, the Court finds that, at most, they are marginally inappropriate. They are not, however, indicative of Nationwide's negative attitude towards pregnancy, the feminine gender, or maternity leave.

Notably, unlike in *Dams*, here there is no evidence that Nationwide attempted to discourage Ames from taking the entire FMLA leave to which she was entitled. To the contrary, she was actually given an extra week of maternity leave following the birth of her second child. It is also undisputed that Ames did not experience a disparate treatment resembling, even remotely, the one that the *Walsh* plaintiff had to endure. Unlike the *Snyder* plaintiff, Nationwide did not change the essential responsibilities of Ames's position while she was on maternity leave or upon her return to work. Most importantly, unlike the *Vosdingh* plaintiffs, Ames did not have to put up with any derogatory comments on account of her pregnancy, maternity leave, or desire to continue breast-feeding. Indeed, the evidence suggests that Defendants were quite accommodating and understanding of Ames's decisions to take all the FMLA leave to which she was entitled **[*47]** and to continue breast-feeding after coming back to work. Furthermore, Defendants did not, at any point, suggest or imply that Ames's pregnancies, maternity leave, or desire to continue breast-feeding somehow jeopardized her continued employment.

As with Neel's and Brinks's comments and conduct, the Court does not agree that the remaining instances of alleged discrimination by Hallberg and Baccam are sufficient to give rise to an inference of discrimination. Baccam's failure to advise Ames on the specifics of Nationwide's lactation policy does not constitute discriminatory conduct. Indeed, Ames has not presented any evidence that she informed Defendants of her plans to continue breastfeeding following her return to work. At the same time, Ames admits that the lactation policy was readily available to her on the company intranet and that she could have, but did not, ask Baccam any questions regarding the policy. In light of these circumstances, the Court cannot conclude that Baccam engaged in any discriminatory behavior against Ames.

Similarly, the Court must conclude that Hallberg did not discriminate against Ames either. Providing a letter explaining the procedure for obtaining access **[*48]** to a lactation room is not an act of discrimination. When, on July 19, 2010, Ames found out that she would not be able to use a lactation room on that day, Hallberg offered her use of one of the wellness rooms instead. Hallberg also sent an email requesting that Ames's request for access to a lactation room be expedited. *See* Nationwide's App. at 152. The Court cannot agree that these actions exhibit any of the inherent characteristics of discriminatory behavior. To the contrary, Hallberg's actions portray her as someone who was exceptionally sensitive to Ames's recent childbirth and breastfeeding concerns.

ii. *Revised return-to-work date*.

Based on the analysis in § III.B.2.a.i.b, the Court concludes that changing the end date of Ames's maternity leave does not give rise to an inference of discrimination. Although asking Ames to report back to work approximately two weeks earlier than she had expected came as a surprise, it did not prejudice her rights under the FMLA. To the contrary, Defendants allowed Ames to take an extra week of maternity leave over and above what she was entitled to under the law. This is not the type of conduct giving rise to an inference of discrimination.

iii. *Events of July 19, 2010* **[*49]** .

The Court hereby incorporates by reference the analysis in §§ III.B.2.a.i.c and III.B.2.a.i.d. Ames asserts that, on July 19, 2010, two factors prompted her to believe that she had no choice but to resign—not being able to use a lactation room to express milk and her conversation with Brinks concerning the status of her work. With respect to the lactation room, the Court notes that Ames was denied access *solely* due to her failure to fill out the required paperwork. While waiting for this paperwork to be processed, Ames was offered a wellness room where she could express breast milk. Neither the lack of lactation room access nor the need to use a wellness room to express milk belongs to the category of circumstances warranting an inference of discrimination, however. For that matter, neither does the July 19, 2010 conversation between Brinks and Ames.

During that meeting, Brinks communicated Nationwide's expectation that Ames must not fall behind on her work tasks and could use overtime if she needed it. The Court cannot agree that these were unreasonable expectations; to the contrary, timely completion of the work tasks was central to the loss mitigation specialist position. *See* Nationwide's App. at 48, p. **[*50]** 15:11-19. When asked about the importance of "stay[ing] on top of the work" in the Loss Mitigation Department, Brinks testified as follows:

> Q. And is that because that was a busy department?
> A. Yes.
> Q. And one where it was important to stay on top of the work?
> A. Yes.
> Q. Would you say that was probably a No. 1 priority for that department?
> A. It was a high priority.

Id. Furthermore, the record establishes that Ames was not treated differently than her co-workers in the Loss Mitigation Department. *See id.* "It was a high priority [that everyone] stay[ed] on top of the work." *Id.* at 48, p. 15:14-19. Even if Nationwide's expectations regarding Ames's timely completion of work tasks were unrealistic in light of her recent childbirth and three-month maternity leave, that alone does not give rise to an inference of discrimination. *See* *Standridge v. Union Pac. R.R. Co., 479 F.3d 936, 944 (8th Cir. 2007)* ("While an employer must treat its employees similarly, it does not have to treat employees in a protected class more favorably than other employees.").

IV. CONCLUSION

For the reasons discussed above, Defendants' MSJ (Clerk's No. 46) is hereby GRANTED. In light of this ruling, the following motions are DENIED AS MOOT: (1) Motion for Summary Judgment (Clerk's No. 44); (2) Motion to Exclude Testimony **[*51]** of Plaintiff's Experts and Request for Oral Argument (Clerk's No. 31); (3) Motion to Strike (Clerk's No. 72); (4) Motion to Strike Section II of Defendants' Response to Plaintiff's Statement of Additional Material Facts (Clerk's No. 75); (5) Motion to Continue the Trial and Request for Expedited Ruling (Clerk's No. 85); and (6) Plaintiff's Motion in Limine (Clerk's No. 87). Additionally, for the reasons articulated in n.2 above, the Court DENIES Plaintiff's Motion for Hearing/Oral Argument (Clerk's No. 69).

IT IS SO ORDERED.

Dated this 16th day of October, 2012.

/s/ Robert W. Pratt

ROBERT W. PRATT

U.S. DISTRICT JUDGE

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Wallace v. Pyro Mining Co.

United States Court of Appeals for the Sixth Circuit

December 19, 1991, Filed

No. 90-6259

Reporter
1991 U.S. App. LEXIS 30157 *

MARTHA RENE WALLACE, Plaintiff-Appellee, v. PYRO MINING COMPANY, Defendant-Appellant.

Notice: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

Subsequent History: Reported as Table Case at *951 F.2d 351, 1991 U.S. App. LEXIS 32310*.

Prior History: On Appeal from the United States District Court for the Western District of Kentucky, 89-00016. Simpson, Judge

Core Terms

disparate impact, request for leave, district court, pregnancy, woman's, baby, sex, grant summary judgment, discriminatory motive, basis of sex, disparate

Case Summary

Procedural Posture

Plaintiff employee appealed an order from the United States District Court for the Western District of Kentucky, which granted summary judgment in favor of defendant employer dismissing the employee's employment discrimination claim brought under Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000(e)(2)(a)(1).

Overview

The employee refused to return to work from maternity leave and sick leave because she feared for her baby's health and the employer fired her. The employee commenced an action against the employer alleging discrimination on the basis of sex. The trial court granted the employer's motion for summary judgment on the grounds that Title VII of the Civil Rights Act of 1964 did not protect a woman who must leave work to care for a child. The trial court's order was affirmed. The court held that the employee failed to produce evidence supporting her contention that breastfeeding her child was a medical necessity, and the court did not need to reach the issue of the Pregnancy Discrimination Act's applicability. The employee failed to demonstrate that her employer treated women less favorably than men, either intentionally or unintentionally, with respect to requests for leaves of absence.

Outcome

The court affirmed the trial court's order granting summary judgment in favor of the employer dismissing the employee's employment discrimination claim brought under Title VII.

LexisNexis® Headnotes

Business & Corporate Compliance > ... > Discrimination > Gender & Sex Discrimination > Federal & State Interrelationships

Labor & Employment Law > Discrimination > General Overview

HN1[] **Discrimination, Statutory Prohibition of Gender & Sex Based Discrimination**

Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer to discriminate against any person with respect to the terms and conditions of employment because of, or on the basis of, the person's sex, pursuant to *42 U.S.C.S. § 2000e-2(a)(1)*.

Labor & Employment Law > Discrimination > Disparate Treatment > General Overview

Labor & Employment Law > ... > Gender & Sex Discrimination > Scope & Definitions > Parental Rights & Pregnancy

HN2[] **Discrimination, Disparate Treatment**

Under a disparate treatment theory, a plaintiff must simply show that the employer treats women less favorably than men because of their sex. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.

Labor & Employment Law > ... > Disparate Impact > Evidence > Burdens of Proof

Labor & Employment Law > Discrimination > Disparate Impact > General Overview

Labor & Employment Law > Discrimination > Disparate Impact > Scope & Definitions

Labor & Employment Law > ... > Disparate Impact > Defenses > Business Necessity & Job Relatedness

Labor & Employment Law > ... > Disparate Impact > Employment Practices > General Overview

Labor & Employment Law > ... > Employment Practices > Selection Procedures > General Overview

Labor & Employment Law > ... > Employment Practices > Selection Procedures > Neutral Factors

Labor & Employment Law > Discrimination > Disparate Treatment > Scope & Definitions

Labor & Employment Law > ... > Disparate Treatment > Evidence > Burdens of Proof

HN3[] **Evidence, Burdens of Proof**

Disparate impact claims 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.

Judges: BEFORE: KENNEDY and JONES, Circuit Judges, and HARVEY, Senior District Judge. *

Opinion by: PER CURIAM

* The Honorable James Harvey, Senior Judge of the United States District Court for the Eastern District of Michigan, sitting by designation.

Opinion

PER CURIAM. This is an appeal from a district court order granting summary judgment for the defendant, Pyro Mining Company (Pyro), in this employment discrimination case brought by Martha Rene Wallace (Wallace) under Title VII of the Civil Rights Act of 1964 (Title VII), *42 U.S.C. § 2000e-2(a)(1)*. We AFFIRM.

Pyro employed Wallace as an accounting clerk. After becoming pregnant, Wallace took a disability leave on January 16, 1987, because of complications with her pregnancy. On February 10, 1987, she gave birth.

Wallace's doctor **[*2]** released her to work on March 27, 1987. Yet, because her baby would only breast-feed, refusing bottles, Wallace asked Pyro on March 23, 1987 whether it would allow her to take six weeks of leave without pay. Pyro refused the request on March 26, 1987, and directed her to return to work on March 30, 1987. On March 28, 1987, Wallace severely sprained her ankle. Her doctor did not release her to work until April 13, 1987. When Wallace refused to return to work because she feared for her baby's health, Pyro fired her.

Eventually, after receiving a right-to-sue letter from the Equal Employment Opportunity Commission, Wallace brought suit against Pyro in the district court alleging discrimination on the basis of sex. Pyro filed a motion for summary judgment, which the district court granted, first characterizing Wallace's claim as a disparate impact claim, then holding that Title VII does not protect a woman who must leave work to care for a child.

HN1[↑] Title VII makes it unlawful for an employer to discriminate against any person with respect to the terms and conditions of employment because of, or on the basis of, the person's sex. *42 U.S.C. § 2000e-2(a)(1)*. The federal courts have developed **[*3]** two methods for showing discrimination on the basis of sex.

First, a plaintiff may assert a disparate treatment claim. ***HN2***[↑] Under this theory, a plaintiff must simply show that the employer treats women less favorably than men because of their sex. "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment." *International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977)*. Wallace argues that the Pregnancy Discrimination Act, which states that discrimination based on "pregnancy, childbirth, or related medical conditions" is discrimination based on sex under Title VII, applies to this situation. Wallace has failed to produce evidence supporting her contention that breastfeeding her child was a medical necessity. Thus, this Court does not need to reach the issue of the Pregnancy Discrimination Act's applicability.

Second, a plaintiff may assert a disparate impact claim. ***HN3***[↑] Disparate impact claims "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 **[*4]** necessity." *Id.* The plaintiff in a disparate impact case need not prove discriminatory motive. Thus, whether Wallace sought to recover under the disparate treatment theory or the disparate impact theory, she had to show that Pyro treated women less favorably than men, either intentionally or unintentionally, with respect to requests for leaves of absence. She failed to make such a showing.

At her deposition, Wallace testified that Pyro had previously granted one woman's request for a leave of absence to nurse her baby, and had granted another woman's request for a leave because her son had been hospitalized. moreover, Pyro's manager of employee relations indicated in an affidavit that only three employees--two women and one man--had received unpaid leaves of absence of thirty days or longer from January 1, 1982 to April 13, 1987. Hence, because Wallace fails to cite evidence showing that Pyro treated women less favorably than men with respect to requests for leaves of absence, she does not meet her burden.

Accordingly, the district Court's order granting summary judgment is AFFIRMED.

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Bray v. Town of Wake Forest

United States District Court for the Eastern District of North Carolina, Western Division

April 3, 2015, Decided; April 6, 2015, Filed

NO. 5:14-CV-276-FL

Reporter
2015 U.S. Dist. LEXIS 44731 *; 32 Am. Disabilities Cas. (BNA) 182; 2015 WL 1534515

ERIN ELIZABETH BRAY, Plaintiff, v. TOWN OF WAKE FOREST, a political sub-division of the State of North Carolina; MARK WILLIAMS, Town Manager of the Town of Wake Forest, in his official capacity; VIRGINIA JONES, Director of Human Resources for the Town of Wake Forest, in her official capacity; and JEFFREY M. LEONARD, Chief of Police for the Town of Wake Forest, in his official capacity, Defendants.

Core Terms

disability, pregnancy, lifting, impairment, disparate, sex, temporary, terminated, conspiracy, exhaust, jumping, Memo, entity, pounds, pregnant, revised, hired

Counsel: **[*1]** For Erin Elizabeth Bray, Plaintiff: Mikael Ray Gross, LEAD ATTORNEY, Law Offices of Mikael R. Gross, Raleigh, NC.

For Town of Wake Forest, a political sub-division of the State of North Carolina, Mark Williams, Town Manager of the Town of Wake Forest, in his official capacity, Virginia Jones, Director of Human Resources for the Town of Wake Forest, in her official capacity, Jeffrey M. Leonard, Chief of Police for the Town of Wake Forest, in his official capacity, Defendants: Alka Srivastava, LEAD ATTORNEY, Katie Weaver Hartzog, Cranfill Sumner & Hartzog, LLP, Raleigh, NC.

Judges: LOUISE W. FLANAGAN, United States District Judge.

Opinion by: LOUISE W. FLANAGAN

Opinion

ORDER

This matter comes before the court on the motion to dismiss filed by defendants pursuant to *Federal Rules of Civil Procedure 12(b)(1)* and *12(b)(6)* (DE 10). Plaintiff has responded, and defendants filed reply. In this posture, the issues raised are ripe for ruling. For the reasons that follow, the court grants in part and denies in part the motion.

STATEMENT OF THE CASE

Plaintiff filed complaint in state court April 15, 2014, alleging claims for sex discrimination in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act ("PDA"), *42 U.S.C. §§ 2000e(k)*, *2000e-2(a)(1)* and *(k)*; discrimination **[*2]** under the Americans with Disabilities Act ("ADA"), *42 U.S.C. §§ 12101 et seq.*; wrongful discharge in violation of public policy pursuant to *N.C. Gen. Stat. § 143-422.2*; and civil conspiracy. (Compl., p. 9, 19) (DE 1-1).

Defendants removed the case to this court May 12, 2014. On June 17, 2014, defendants filed the instant motion to dismiss, asserting that 1) plaintiff's complaint fails to state a claim on which relief may be granted; 2) plaintiff's ADA claim should be dismissed for lack of subject matter jurisdiction based on plaintiff's failure to exhaust administrative remedies; and 3) plaintiff's claims against defendants Mark Williams ("Williams"), Virginia Jones ("Jones"), and Chief Jeffrey M. Leonard ("Leonard") (collectively, "Individual Defendants") in their official capacities should be dismissed as duplicative of claims against defendant Town of Wake Forest ("the Town"). (Mot. To Dismiss, 1-2) (DE 10). Following issuance of the court's initial order on June 18, 2014, defendants filed a motion to stay further proceedings pending resolution of the instant motion to dismiss. The court ordered stay on July 9, 2014.

Plaintiff filed her response to the motion to dismiss on September 11, 2014. Two weeks later, defendants filed **[*3]** reply, along with a motion to strike the response as untimely. The court denied the motion to strike via text order issued October 30, 2014.

STATEMENT OF FACTS

The facts alleged in the complaint may be summarized as follows: Plaintiff, a resident of Franklin County, North Carolina, was hired as a police officer to a six month term of probationary employment by defendants beginning April 23, 2013, and assigned to patrol duties. She was scheduled to become a permanent employee on October 23, 2013. On September 4, 2013, plaintiff discovered she was pregnant. She informed her superiors, and was advised to contact the Town's Human Resources ("HR") Department and continue working unless a doctor's note advised otherwise. The following day, plaintiff obtained a note from her doctor, who was at that time a practitioner with Village Family Care. She presented the doctor's note to Mitzi Franklin ("Franklin"), an employee of the Town's HR Department, who directed plaintiff to obtain an additional doctor's note indicating the specific job functions that plaintiff could or could not perform. Franklin advised plaintiff to use sick leave until she could obtain the second doctor's note.

On September **[*4]** 9, 2013, plaintiff received the second doctor's note, stating that plaintiff "should be placed in a light duty position, preferably clerical or administrative for the duration of her pregnancy." (Compl., ¶ 24). Defendant Jones wrote an e-mail to defendant Leonard, asking if the Police Department had "a light duty assignment (administrative/clerical preferred)" for plaintiff, further stating that "[t]his is a non-workers' compensation event." (Compl., p. 33). Defendant Leonard replied, "[a]t this time I have no light duty that fits." (Id.). Franklin and defendant Jones then contacted plaintiff, stating that no light duty positions were available, and that plaintiff would be "placed on short-term disability." (Compl., ¶ 25). Plaintiff was further told that she would be ineligible for "vacation hours" until she had been employed for six consecutive months. (Id., ¶ 27).

On September 21, 2013, defendant Jones sent plaintiff a letter requesting that plaintiff provide a "Fitness for Duty" evaluation. (Id., ¶ 31). Three days later, Franklin and defendant Jones called plaintiff and reiterated their request for a "Fitness for Duty" evaluation. (Id., ¶¶ 36-37). Plaintiff alleges that she expressed confusion **[*5]** as to what information was needed for this evaluation, and that defendant Jones "was very vague and said she needed them [plaintiff's medical providers] to answer the question she put in the request; whether Plaintiff could perform the duties of a police officer." (Id., ¶ 38). Plaintiff alleges defendant Jones "mentioned that it sounded like Plaintiff would not [be] able to perform her duties as a police officer and 'that's what [Plaintiff] was hired to do.'" (Id., ¶ 39).

That same day, Dr. Amantia Kennedy, plaintiff's obstetrician/gynecologist at Wake Medical Center Women's Center, faxed a note to the Town's HR Department, stating:

> Due to her current pregnancy state patient is limited to no running or jumping activities. She may return to work with limitations of no running, jumpin [sic] or heavy lifting > 25 lbs. As the pregnancy progresses the limitations may be lifting if condition resolves [sic].

(Compl. ¶ 35); (Pl's. Memo. In Supp. Re: Pl's. Resp., Ex. 4) (DE 22-4). Plaintiff alleges that the other doctors' notes she provided to the Town's HR Department imposed similar restrictions to "not lift more than 20 to 25 pounds, run, jump, or have any potential physical altercations." **[*6]** (Compl., ¶ 87). The complaint alleges that, under her doctors' restrictions, plaintiff was "substantially limited in the major life activities of lifting, bending, running, or jumping." (Id., ¶ 86).

The day after the fax was received, September 25, 2013, defendant Jones called plaintiff to request a meeting between plaintiff, defendants Jones and Leonard, and plaintiff's supervisor, Captain Darren Abbachi ("Abbachi"). At the meeting, plaintiff was informed that she was being terminated immediately, based on her "inability to perform the essential functions of her position as a police officer." (Id., ¶ 58). On October 1, 2013, plaintiff appealed her termination to defendant Williams, asserting that the action violated the PDA and ADA. Defendant Williams denied the appeal on the ground that plaintiff could not appeal her termination because she was only a probationary employee.

Plaintiff attaches and incorporates by reference a position statement which defendants provided to the EEOC January 7, 2014 ("Position Statement"). (Id., pp. 24-33). The Position Statement alleges that:

> The Town of Wake Forest does not have a light duty policy. However, the Town has attempted to place employees who have been injured **[*7]** on the job (in-service) in temporary light duty assignments. The Town seeks light duty assignments (when possible) for employees who are injured on the job since they would otherwise receive workers' compensation benefits. The Town of Wake Forest seeks to get these employees back to work and limit or end the wage replacement benefits

> available through workers' compensation. Therefore the Town reserves light duty work/assignments for those employees who are coming back from workers' compensation leave. The Town does not provide light duty for personal/temporary medical conditions.

(Compl., p. 26). The Position Statement further alleges that the decision to terminate plaintiff was made on the grounds that 1) she "was not able to perform the essential functions of a Police Officer;" 2) she "was a probationary employee;" 3) she "was not eligible for the [Family Medical Leave Act];" and 4) "[n]o light duty assignments were available for employees with temporary medical conditions." (Id., p. 29).

The Position Statement discloses that two male officers had received limited duty assignments during the time of plaintiff's employment. Officer John VanNess ("VanNess"), who was hired March 14, 1998, and suffered **[*8]** injury in September 2012, was assigned to one limited duty assignment. VanNess remained on limited duty assignment at the time of the Position Statement. The other officer, Jon-Ta Pulley ("Pulley"), was hired with plaintiff on April 23, 2013. Pulley was injured in May 2013, and returned to full duty in July 2013.

COURT'S DISCUSSION

A. Standard of Review

1. *Rule 12(b)(1)*

A *Rule 12(b)(1)* motion challenges the court's subject matter jurisdiction, and the plaintiff bears the burden of showing that federal jurisdiction is appropriate when challenged by the defendant. *McNutt v. Gen. Motors Acceptance Corp., 298 U.S. 178, 189, 56 S. Ct. 780, 80 L. Ed. 1135 (1936)*; *Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982)*. Such a motion may either 1) assert the complaint fails to state facts upon which subject matter jurisdiction may be based, or 2) attack the existence of subject matter jurisdiction in fact, apart from the complaint. *Adams, 697 F.2d at 1219*. Under the former assertion, the moving party contends that the complaint "simply fails to allege facts upon which subject matter jurisdiction can be based." Id. In that case, "the plaintiff, in effect, is afforded the same procedural motion as he would receive under a *Rule 12(b)(6)* consideration." Id. "[A]ll facts alleged in the complaint are assumed true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." **[*9]** *Kerns v. United States, 585 F.3d 187, 192 (4th Cir. 2009)*. When the defendant challenges the factual predicate of subject matter jurisdiction, a court "may then go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations" without converting the matter to summary judgment. *Adams, 697 F.2d at 1219*; *Kerns, 585 F.3d at 192*.

2. *Rule 12(b)(6)*

A motion to dismiss under *Rule 12(b)(6)* tests the legal sufficiency of the complaint but "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party v. Martin, 980 F.2d 943, 952 (4th Cir. 1992)*; see also *Edwards v. City of Goldsboro, 178 F.3d 231, 243-44 (4th Cir. 1999)*. A complaint states a claim under 12(b)(6) if it contains "sufficient factual matter,

accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)* (quoting *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)*). "Asking for plausible grounds . . . does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal [the] evidence" required to prove the claim. *Twombly, 550 U.S. at 556*. In evaluating the complaint, "[the] court accepts all well-pled facts as true and construes these facts in the light most favorable to the plaintiff," but does not consider "legal conclusions, elements of a cause of action, . . . bare assertions devoid of further factual enhancement[,] **[*10]** . . . unwarranted inferences, unreasonable conclusions, or arguments." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc., 591 F.3d 250, 255 (4th Cir. 2009)* (citations omitted).

B. Analysis

1. Claims Against Individual Defendants

"An official-capacity suit is, in all respects other than name, to be treated as a suit against the entity." *Kentucky v. Graham, 473 U.S. 159, 166, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985)*. As such, suits against individuals in their official capacities should be dismissed as duplicative when the entity that those individuals serve is also named as a defendant. See *Love-Lane v. Martin, 355 F.3d 766, 783 (4th Cir. 2004)* ("The district court correctly held that the § 1983 claim against Martin in his official capacity as Superintendent is essentially a claim against the Board and thus should be dismissed as duplicative."). North Carolina courts likewise have held redundant claims under state law brought against both an entity and employees of that entity in their official capacities. *Wright v. Town of Zebulon, 202 N.C. App. 540, 543, 688 S.E.2d 786 (2010)*; *Hobbs ex rel. Winner v. N.C. Dep't of Human Res., 135 N.C. App. 412, 420, 520 S.E.2d 595 (1999)*; see also *Mullis v. Sechrest, 347 N.C. 548, 554-55, 495 S.E.2d 721 (1998)* (recognizing that "official-capacity suits are merely another way of pleading an action against the governmental entity").

Individual Defendants are all officials of the Town. See *Harrison v. Chalmers, 551 F. Supp. 2d 432, 437 (M.D.N.C. 2008)* (finding claim for punitive damages against police chief and police officer in their official capacities was equivalent to a suit against the municipality); *Moore v. City of Creedmoor, 345 N.C. 356, 367, 481 S.E.2d 14 (1997)* (holding that claim against police chief acting **[*11]** in his official capacity was redundant where city had been named as defendant); *Wright, 202 N.C. App. at 543* (affirming dismissal of suit against police officers as duplicative of suit against town). Accordingly, because the Town is named as a defendant, plaintiff's claims against Individual Defendants in their official capacities are dismissed. Furthermore, because plaintiff has only sued these defendants in their official capacities, they are dismissed from this case.

2. PDA

Passed in 1978, the PDA amended Title VII's definitions subsection to include new language addressing pregnancy. *Young v. United Parcel Serv. Inc., 135 S. Ct. 1338, 191 L. Ed. 2d 279, 2015 U.S. LEXIS 2121, 2015 WL 1310745, at *5 (2015)* (citing *42 U.S.C. § 2000e(k)*). Consequently, courts analyze a PDA claim as a sex discrimination claim under Title VII. *Young v. United Parcel Serv., Inc., 707 F.3d 437, 445 (4th Cir. 2013)*, vacated and remanded on other grounds, *135 S. Ct. 1338, 2015 U.S. LEXIS 2121, 2015 WL 1310745*; *DeJarnette v. Corning, Inc., 133 F.3d 293, 297 (4th Cir. 1998)*.

In Title VII cases, a complaint need not allege specific facts establishing a prima facie case of discrimination in order to survive a motion to dismiss. *McCleary-Evans v. Md. Dep't of Transp., State Highway Admin., 780 F.3d 582, 2015 U.S. App. LEXIS 3987, 2015 WL 1088931, at *2 (4th Cir. 2015)*; *Coleman v. Md. Court of Appeals, 626 F.3d 187, 190 (4th Cir. 2010)*. Nevertheless, the complaint is still required to allege facts sufficient to state a plausible claim for relief under the Title VII statute. *McCleary-Evans, F. 3d. , 2015 U.S. App. LEXIS 3987, 2015 WL 1088931, at *3*.

"Title VII prohibits both intentional discrimination (known as 'disparate treatment') as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately **[*12]** adverse effect . . . (known as 'disparate impact')." *Ricci v. DeStefano, 557 U.S. 557, 577, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009)*. With respect to "disparate treatment," Title VII provides that employers may not "discharge any individual, or otherwise . . . discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." *42 U.S.C. § 2000e-2(a)(1)*. With respect to "disparate impact," the statute prohibits the "use" of an "employment practice" that causes a "disparate impact on the basis of . . . sex." *42 U.S.C. § 2000e-2(k)(1)(A)(i)*; *Lewis v. City of Chicago, Ill., 560 U.S. 205, 213, 130 S. Ct. 2191, 176 L. Ed. 2d 967 (2010)*.

In relevant part, the PDA amendments to the definitions subsection of Title VII consist of two clauses. The first specifies that the terms "because of sex" and "on the basis of sex," both of which appear in the "disparate treatment" and "disparate impact" statutory provisions above, also refer to pregnancy and childbirth conditions: "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions." *42 U.S.C. § 2000e(k)*. The second clause provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits **[*13]** under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ." Id.

Thus to show disparate treatment on the basis of pregnancy, a complaint must allege facts sufficient to show that defendants discharged or otherwise discriminated against plaintiff "because of" her "pregnancy, childbirth, or related medical conditions." *42 U.S.C. §§ 2000e(k)*; *2000e-2(a)(1)*; see *McCleary-Evans, F. 3d. , 2015 U.S. App. LEXIS 3987, 2015 WL 1088931, at *3*. "Liability in a disparate-treatment case depends on whether the protected trait actually motivated the employer's decision." *Young, 135 S. Ct. 1338, 2015 U.S. LEXIS 2121, 2015 WL 1310745, at *5* (quoting *Raytheon Co. v. Hernandez, 540 U.S. 44, 52, 124 S. Ct. 513, 157 L. Ed. 2d 357 (2003)*.

The complaint is sufficient to state a claim for disparate treatment under Title VII. Plaintiff alleges that defendants terminated her after learning of her pregnancy and receiving her doctor's notes that she be restricted to limited duty, clerical work, lifting less than 20 to 25 pounds, running, jumping, or being involved in physical altercations. After hearing of these limitations, Jones allegedly stated that it "sounded like Plaintiff would not [be] able to perform her duties as a police officer." (Compl., ¶ 39). Defendants' Position Statement indicates that plaintiff was terminated after defendants received plaintiff's doctor's notes and concluded, **[*14]** based on plaintiff's physical limitations, that she "was not fit for her job" and was "not able to perform the essential functions of a Police Officer." (Compl., 29). Meanwhile, two male officers received light duty assignments when they experienced physical limitations as a result of injury. Officer VanNess received light duty for almost two years, a period of time that would appear to be longer than the light duty assignment which plaintiff might have required for her condition. (Compl., ¶ 79). Officer Pulley, who was hired the same date as plaintiff, was assigned light duty for three months. (Id.).

Construing these facts in the light most favorable to plaintiff, they are sufficient to set forth a plausible claim that defendants discharged plaintiff because of her pregnancy or related medical conditions.

Defendants assert that the Town reserves light duty work for employees injured on the job, and that, because its policy treats pregnant women the same as other persons with temporary medical conditions, plaintiff's claim must fail. (Def's. Memo. In Supp. Re: Mot. To Dismiss, 7-8). The basis of defendants' allegations is not found within the complaint itself, but in defendants' Position **[*15]** Statement, attached to plaintiff's complaint. (Compl., p. 26). However, the court does not read plaintiff's reference and incorporation of defendants' Position Statement to amount to an adoption of the allegations which defendants make in that document, to the extent those allegations pertain to the existence or nature of the Town's policy. Moreover, defendants' allegation that they have such a policy may be undermined by the email exchange between defendants Jones and Leonard, which suggests that the Town does not have a strict policy of reserving light duty assignments only for employees injured on the job. The existence, nature, and implementation of defendants' light duty policy is not clear from the complaint itself. Accordingly, without reaching the question of whether defendants' allegations regarding their light duty policy, if true, would be sufficient to defeat a disparate treatment claim, the court finds plaintiff's allegations of discrimination regarding disparate treatment are sufficient to survive the instant motion to dismiss.

Plaintiff has also alleged that defendants' "practice of denying accommodation requests by pregnant workers while granting them to other similarly **[*16]** temporarily disabled male police officers has a disparate impact on pregnant women." (Compl., ¶ 81). A disparate impact claim focuses "on the *effects* of an employment practice, determining whether they are unlawful irrespective of motivation or intent." *Young, 135 S. Ct. 1338, 2015 U.S. LEXIS 2121, 2015 WL 1310745, at *6*; see also *Ricci, 557 U.S. at 578*. Where defendants' arguments for dismissal do not reach plaintiff's disparate impact theory, the court does not separately analyze whether plaintiff's allegations are sufficient to state a claim on this ground.

3. ADA

a. Exhaustion of Administrative Remedies

i. Exhaustion Requirement

The ADA incorporates the enforcement procedures of Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e et seq.*, including the requirement that a plaintiff exhaust administrative remedies before filing suit in federal court. *42 U.S.C. §§ 2000e-5(b)*, *(f)(1)*; *12117(a)*; *Sydnor v. Fairfax Cnty., Va., 681 F.3d 591, 593 (4th Cir. 2012)*. Thus, the ADA requires a plaintiff to file a charge with the Equal Employment Opportunity Commission. Id. *§§ 2000e-5(b)*, *(f)(1)*; *Sydnor, 681 F.3d at 593*. A failure to exhaust administrative remedies deprives the court of subject matter jurisdiction. *Balas v. Huntington Ingalls Indus., Inc., 711 F.3d 401, 409 (4th Cir. 2013)*; *Jones v. Calvert Grp., Ltd., 551 F. 3d 297, 300-01 (4th Cir. 2009)*. Accordingly, the issue is properly analyzed under *Rule 12(b)(1)*. *Agolli v. Office Depot, Inc., 548 F. App'x 871, 875 (4th Cir. 2013)*.

The exhaustion requirement serves two principal purposes: 1) it notifies the charged party of the asserted violation, and 2) it brings the charged party before **[*17]** the EEOC to secure voluntary compliance with

the law. *Balas, 711 F.3d at 406-07*. Both of these purposes offer a benefit of encouraging quicker, less expensive resolution of disputes. Id.; *Sydnor, 681 F.3d at 593*.

In order to exhaust remedies, an employee must first contact the EEOC and present it with information supporting the allegations. *Balas, 711 F.3d at 407* (citing *29 C.F.R. § 1601.6*). Typically, the EEOC will then assist the individual in preparing a charge, send a notice and copy of the charge to the employer. *Id. at 407*. This gives the employer an opportunity to voluntarily investigate and resolve concerns internally as the EEOC conducts its own investigation. Id. If the EEOC finds "reasonable cause to believe that the charge is true," it may seek to eliminate unlawful employment practices through conference, conciliation, and persuasion. Id.; see *42 U.S.C. § 2000e-5(b)*. The EEOC may file a lawsuit or issue the employee a Notice-of-Right-to-Sue in the event the EEOC fails to reach a voluntary settlement with the employer, or if the EEOC does not find "reasonable cause to believe that the charge is true," or when the employee requests a right to sue. *Balas, 711 F.3d at 407*; see *29 C.F.R. §§ 1601.27-28*).

In any subsequent lawsuit, the court "may only consider those allegations included in the EEOC charge" in order to determine whether plaintiff **[*18]** has exhausted her remedies. *Balas, 711 F.3d at 407*. If the claims "exceed the scope of the EEOC charge and any charges that would naturally have arisen from an investigation thereof, [the claims in the civil action] are procedurally barred." *Id. at 407-08* (quoting *Chacko v. Patuxent Inst., 429 F.3d 505, 506 (4th Cir. 2005)*). "[I]f the factual foundation in the administrative charge is too vague to support a claim that is later presented in subsequent litigation, that claim will also be procedurally barred." *Chacko, 429 F.3d at 509*. Moreover, "[a] claim in formal litigation will *generally* be barred if the EEOC charge alleges discrimination on one basis, such as race, and the formal litigation claim alleges discrimination on a separate basis, such as sex." *Jones, 551 F.3d at 300* (emphasis added).

However, the administrative charge "does not strictly limit a . . . suit which may follow; rather, the scope of the civil action is confined only by the scope of the administrative investigation that can reasonably be expected to follow the charge of discrimination." *Chisholm v. United States Postal Serv., 665 F.2d 482, 491 (4th Cir. 1981)*; see also *Dennis v. County of Fairfax, 55 F.3d 151, 156 (4th Cir. 1995)* (holding claims barred which "exceed the scope of the EEOC charge and any charges that would naturally have arisen from an investigation thereof."). "[I]f the factual allegations in the administrative charge are reasonably related to the factual allegations in **[*19]** the formal litigation, the connection between the charge and the claim is sufficient." *Chacko, 429 F.3d at 509*. Finally, "EEOC charges must be construed with utmost liberality since they are made by those unschooled in the technicalities of formal pleading." *Alvarado v. Bd. of Trs. of Montgomery Cnty. Cmty. Coll., 848 F.2d 457, 460 (4th Cir. 1988)*.

ii. Conduct Prohibited by ADA and EEOC Regulations

Before proceeding to consider the allegations in plaintiff's Charge of Discrimination, the court first considers the conduct prohibited by the ADA and the EEOC's regulations. The ADA prohibits employers from "discriminat[ing] against a qualified individual on the basis of disability in regard to . . . the . . . discharge of employees." *42 U.S.C. § 12112(a)*. Discrimination also includes "the failure to make reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee." *Wilson v. Dollar Gen. Corp., 717 F.3d 337, 344 (4th Cir. 2013)* (citing *42 U.S.C. § 12112(b)(5)(A)*). A plaintiff may establish a "disability" through "(A) a physical or mental impairment that substantially limits one or more major life activities of such

individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." *42 U.S.C. § 12102(1)*.

Congress broadened the definition of "disability" with passage of the ADA Amendments Act of 2008, *Pub. L. No. 110-325*, in response to a series of Supreme Court **[*20]** decisions it believed had improperly restricted the act. See *Pub. L. No. 110-325, §§ 2*, 4; *Summers v. Altarum Inst., Corp., 740 F.3d 325, 329 (4th Cir. 2014)*. Among its purposes, the ADA Amendments Act sought to convey Congressional intent "that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and to convey that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis." *Pub. L. No. 110-325, § 2(b)(5)*.

"Disability" is to be "construed in favor of broad coverage of individuals under this chapter [Chapter 126, 'Equal Opportunity for Individuals with Disabilities'] to the maximum extent permitted by [its] terms." *42 U.S.C. § 12102(4)(A)*. The 2008 amendments included amendments to the terms "major life activities" and "substantial limitation" for the purposes of defining "disability" under *section 12102(1)*. As amended, the ADA provides that "major life activities include, but are not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." *42 U.S.C. § 12102(2)(A)*. In addition, "major life activities" include "the operation of a major bodily function, including but not **[*21]** limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." Id., *§ 12102(2)(A)(B)*. The ADA, as amended, also directs that "[s]ubstantially limits" is to be "interpreted consistently with the findings and purposes" of the ADA Amendments Act. Id., *§ 12102(4)(B)*. Congress expressly directed the Equal Employment Opportunity Commission ("EEOC") to revise its regulations defining the term "substantially limits" to render them consistent with the broadened scope of the statute. *Summers, 740 F.3d at 329* (citing *Pub. L. No. 110-325, § 2(b)(6)*)

The EEOC revised its regulations to in 2011. See Regulations To Implement the Equal Employment Provisions of the Americans with *Disabilities Act, as Amended, 76 Fed. Reg. 16978*-01 (March 25, 2011).[1] These regulations note that the ADA amendments "expressly made [the] statutory list of examples of major life activities non-exhaustive." *29 C.F.R. Pt. 1630*, App. *§ 1630.2(i)*. In addressing "major life activities," the regulations also added to the non-exclusive list of "major bodily functions" which could constitute "major life activities," including "cardiovascular" and "musculoskeletal functions." *29 C.F.R. § 1630.2(i)*. The regulations further provide that the EEOC "anticipates that courts will recognize other major life activities, consistent with the ADA Amendments Act's mandate **[*22]** to construe the definition of disability broadly." *29 C.F.R. Pt. 1630*, App. *§ 1630.2(i)*.

Acting under its Congressional directive, the EEOC revised regulations interpreting substantial limitations as well, noting that "[t]he term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA" and that the term "is not meant to be a demanding standard." *29 C.F.R. § 1630.2(j)(1)(i)*. Elsewhere, the regulations specifically address whether temporary limitations could be "substantial" for purposes of disability. *29 C.F.R. Pt. 1630*, App. *§ 1630.2(j)(1)(ix)*. These regulations provide that the "duration of an impairment is one factor that is

[1] Although the EEOC again revised its regulations in 2014, these revisions did not alter regulations discussed below.

relevant in determining whether the impairment substantially limits a major life activity." Id. App. § 1630.2(j)(1)(ix). Furthermore, although "impairments that last only for a short period of time are typically not covered . . . they may be covered if sufficiently severe." Id. As an example of a "sufficiently severe" temporary impairment, the regulations provide that, "if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, **[*23]** he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability." Id.

The regulations specifically address pregnancy, providing that "conditions, such as pregnancy, that are not the result of a physiological disorder are . . . not impairments." 29 C.F.R. Pt. 1630, App., § 1630.2(h). Nevertheless, the EEOC's regulations further state that a "pregnancy-related impairment that substantially limits a major life activity is a disability . . . . Alternatively, a pregnancy-related impairment may constitute a 'record of' a 'substantially limiting impairment,' or may be covered under the 'regarded as' prong if it is the basis for a prohibited employment action and is not 'transitory and minor.'" 29 C.F.R. Pt. 1630, App. § 1630.2(h) (effective May 24, 2011 to present).

iii. Plaintiff's EEOC Charge

On November 18, 2013, plaintiff signed a "Charge of Discrimination," EEOC Form 5. (Def's. Memo. in Supp. Re: Mot. to Dismiss, Ex. 1) (DE 1). In a section requesting the basis for discrimination, plaintiff checked a box marked "SEX." (Id., 1). Plaintiff left unchecked a box marked "DISABILITY." (Id.). The allegations appearing on the form provide as follows:

> I. On September 26, 2013, I was **[*24]** discharged from the position of Law Enforcement Officer. Wake Forest Police Department employs more than fifteen (15) persons.
> II. I informed the Wake Forest Police Department that I was pregnant. Chief Jeffrey Leonard informed me that I was discharged because there were no light duty assignments available.
> III. I believe I have been discriminated against because of my sex, pregnancy, in violation of Title VII of the Civil Rights Act of 1964, as amended.

(Id.).

The facts alleged in the formal Charge of Discrimination, while scant, are reasonably related to the facts alleged in plaintiff's ADA claim. Reasonable investigation of this charge would have inquired into the reasons for plaintiff's termination, the nature of the Town's light duty policy, and whether plaintiff should have qualified for that light duty policy. That investigation would further have discovered the physical restrictions that plaintiff's doctors had recommended for her.

Plaintiff alleges that her doctors' restrictions included a complete restriction from running, jumping, or lifting more than 20-25 pounds. (Compl., ¶ 88). One of the notes from plaintiff's doctors allegedly stated that plaintiff "should be placed in a **[*25]** light duty position, preferably clerical or administrative for the duration of her pregancy." (Id., ¶ 24). The note from Dr. Kennedy faxed September 24, 2013, states that "[a]s the pregnancy progresses the limitations may be lifting if condition resolves. [sic]" (Pl's Memo. In Supp. of Resp., Ex. 4). Construing the facts in the light most favorable to plaintiff, her lifting restriction could have lasted for at least several months.[2] In light of the revisions to the ADA and the EEOC's own regulations, promoting an expansive definition of disability to include temporary limitations, these

[2] As noted, plaintiff alleges that she discovered she was pregnant through a home pregnancy test on September 4, 2013. (Compl., ¶ 18). It is unclear how long plaintiff had been pregnant at the time of her discovery, or when plaintiff's date of delivery was **[*26]** expected.

physical limitations were sufficient to apprise the EEOC that plaintiff had a disability. Given that plaintiff was terminated when defendants learned of her physical limitations, and defendants' statements indicate that these physical limitations were the basis of her termination, an ADA charge would naturally have arisen from investigation of these facts.

Plaintiff's allegations regarding discrimination on the basis of pregnancy are sufficiently intertwined with her allegations of discrimination on the basis of disability such that investigation of the former would reasonably and naturally give rise to charges under the latter. Accordingly, plaintiff adequately exhausted her remedies regarding her ADA claim.

b. Failure to State a Claim

Not only do these facts indicate that a charge of ADA discrimination would naturally have arisen from plaintiff's EEOC Charge of Discrimination, they are also sufficient to state a plausible claim of relief. The Fourth Circuit recently had occasion to consider the new ADA Amendments Act and the ensuing EEOC regulations. *Summers, 740 F.3d at 328-33*. There, the court considered whether Summers had alleged sufficient facts to establish disability in alleging broken bones and torn tendons in his legs which left him unable to walk for seven months. *Id. at 327, 330*. The Fourth Circuit surveyed the revised EEOC regulations, including the regulation that a 20-pound lifting restriction for several months constituted a substantial limitation in the major life activity of lifting. *Id. at 329*. The court took noted expressly that the ADA Amendments Act had abrogated pre-amendments case law. *Id. at 331*. It went **[*27]** on to hold that the EEOC regulations regarding temporary impairments were reasonable, and applied those regulations to the facts alleged to find that Summers had sufficiently alleged disability on the basis of a substantial limitation to his musculoskeletal system. *Id. at 331-32*.

Plaintiff alleges that she had three doctors' notes instructing that she "lift not more than 20 to 25 pounds, run, jump, or have any potential physical altercations." (Compl., ¶ 87). Under the new regime enacted by amendments to the ADA and the EEOC's regulations, plaintiff's allegations as to her restrictions of lifting, running and jumping are sufficient to establish that she had a substantial impairment, or had a record of such impairment.

The court acknowledges well-established federal court precedent that pregnancy alone is not a "disability" for purposes of the ADA. *Young v. United Parcel Serv., Inc., 707 F.3d at 443* ("With near unanimity, federal courts have held that pregnancy is not a 'disability' under the ADA.") (quoting *Wenzlaff v. NationsBank, 940 F. Supp. 889, 890 (D. Md. 1996))*, vacated and remanded on other grounds, *135 S. Ct. 1338, 2015 U.S. LEXIS 2121, 2015 WL 1310745*. Moreover, the Fourth Circuit has held that a temporary 20 pound lifting restriction on account of pregnancy is insufficient to show disability. *Young, 707 F.3d at 445*, vacated and remanded on other grounds, *135 S. Ct. 1338, 2015 U.S. LEXIS 2121, 2015 WL 1310745 (2015)*. In so holding, **[*28]** however, the court relied upon prior cases holding that "temporary impairments usually do not fall within the ADA's limitation of 'disability,'" *Pollard v. High's of Baltimore, 281 F.3d 462, 468 (4th Cir. 2002)*, and also holding "as a matter of law, that a twenty-five pound lifting limitation . . . does not constitute a significant restriction on one's ability to lift, work, or perform any other major life activity," *Williams v. Channel Master Satellite Sys., Inc., 101 F.3d 346, 349 (4th Cir. 1996)*, abrogated on other grounds by *Baird ex rel. Baird v. Rose, 192 F.3d 462, 470 (4th Cir. 1999)*.

However, Young had only presented evidence regarding a lifting restriction, not other evidence regarding an inability to run or jump. More significantly, Young, Pollard, and Williams all involved interpretations

of the ADA as it existed prior to the 2008 amendments. See *Young, 707 F.3d at 443, n.7* ("Because Young filed her claim before the effective date of the amendments, which Congress did not make retroactive, we do not consider how, if at all the . . . amendments would affect Young's ADA claims."). In light of these differences, coupled with the ADA amendments and the Fourth Circuit's approval of the EEOC's temporary impairment regulations in Summers, *Young*, *Pollard* and *Williams* are inapposite.

Separately from their argument that plaintiff was not disabled under the ADA, defendants also assert that they tried to accommodate **[*29]** plaintiff by checking to see whether a light duty position within plaintiff's restrictions was available, but that no such position was available. (Def's. Memo. In Supp. Re: Mot. To Dismiss, 12). As with defendants' arguments under the PDA, however, this argument again asserts facts that lie beyond the scope of the complaint; in particular, whether a light duty position was in fact available or could have been created for plaintiff. While defendants cite to the complaint for support, the cited paragraphs simply allege what plaintiff had been told by defendant Jones and others; the truth of those statements is not conceded. The email exchange between defendants Jones and Leonard is likewise insufficient, at the motion to dismiss stage, to establish that no light duty positions existed or could have been made available for plaintiff.

Having found the complaint sufficiently alleges disability, and where defendants do not raise arguments concerning remaining elements of an ADA claim other than those addressed above, dismissal of the claim is unwarranted.

4. Wrongful Discharge in Violation of Public Policy

Under North Carolina law, an employment relationship is generally presumed to be terminable **[*30]** at the will of either party at any time and without reason. *Coman v. Thomas Mfg. Co., Inc., 325 N.C. 172, 175, 381 S.E.2d 445 (1989)*. However, *section 143-422.2 of the North Carolina General Statutes* provides that

> [i]t is the public policy of this State to protect and safeguard the right and opportunity of all persons to seek, obtain and hold employment without discrimination or abridgement on account of race, religion, color, national origin, age, sex or handicap by employers which regularly employ 15 or more employees.

N.C. Gen. Stat. § 143-422.2.

The statute itself does not include a private right of action. Nevertheless, North Carolina courts have held that North Carolina would recognize a common law claim for wrongful discharge in violation of public policy based on allegations that a plaintiff was fired because of her sex, or handicap. *Hughes v. Bedsole, 48 F.3d 1376, 1383, n. 6 (4th Cir. 1995)*; *Sidhu v. Cancer Ctrs. of N.C., P.C., No. 5:12-CV-603-FL, 2013 U.S. Dist. LEXIS 69751, 2013 WL 2122958, at *4 (E.D.N.C. May 15, 2013)*; *Rishel v. Nationwide Mut. Ins. Co., 297 F. Supp. 2d 854, 875 (M.D.N.C. 2003)*.

It remains unclear whether North Carolina's general public policy against discrimination based on sex or handicap would include the nature of the discrimination alleged here, regarding pregnancy or related medical conditions. See *Leonard v. Wake Forest Univ., 877 F. Supp. 2d 369, 374 (M.D.N.C. 2012)* (deferring decision on whether plaintiff's pregnancy discrimination claim was cognizable until after discovery, due to "the absence of settled state court precedent or a clearly expressed public policy in either the general **[*31]** statutes or constitution of North Carolina," as well as "the important policy considerations involved," and the possibility that discovery would disclose an alternate ground for

dismissal); *Blount v. Carlson Hotels, Inc., No. 3:11-CV-452-MOC-DSC, 2012 U.S. Dist. LEXIS 40480, 2012 WL 1021735, at *8 (W.D.N.C. March 1, 2012)* (noting that "[n]o North Carolina court has addressed whether [*N.C. Gen. Stat. § 143-422.2*] encompasses a claim of pregnancy discrimination," but assuming that such claim would be cognizable and recommending denial of motion to dismiss), memo. and rec. adopted, *2012 U.S. Dist. LEXIS 40484, 2012 WL 1019507 (W.D.N.C. March 26, 2012)*. Defendants here do not expressly ask the court to resolve this issue, but rather assert that plaintiff's claim should be dismissed because her Title VII/PDA claim is also subject to dismissal. (Memo. In Supp. of Mot. To Dismiss, 13). Because the court has denied defendants' motion to dismiss plaintiff's PDA claim, it denies defendants' motion to dismiss plaintiff's wrongful discharge claim as well.

5. Civil Conspiracy

In North Carolina, a civil conspiracy consists of 1) an agreement between two or more individuals, 2) to do an unlawful act or to do a lawful act in an unlawful way, 3) resulting in injury to the plaintiff inflicted by one or more of the conspirators, 4) pursuant to their common scheme. *Iglesias v. Wolford, 539 F. Supp. 2d 831, 835 (E.D.N.C. 2008)*. Concerning the first **[*32]** element, the intracorporate immunity doctrine provides that "[a] corporation cannot conspire with itself any more than a private individual can, and it is the general rule that the acts of the agent are the acts of the corporation." *Buschi v. Kirven, 775 F.2d 1240, 1251 (4th Cir. 1985)* (quoting *Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (5th Cir. 1952))*. The doctrine applies to municipalities as well as corporations. *Fox v. City of Greensboro, 807 F. Supp. 2d 476, 499 (M.D.N.C. 2011)*; *Iglesias, 539 F. Supp. 2d at 835-36 (E.D.N.C. 2008)*.

Plaintiff asserts that the doctrine of intracorporate immunity does not apply here because "the benefit of the outcome of the conspiracy is to the advantage of the conspirators rather than the Town of Wake Forest," arguing that Individual Defendants stood to benefit "by not having to deal with pregnancy claims and disability claims related to pregnancy by a female employee." (Pl's. Resp., 16-17). While an exception to intracorporate conspiracy exists where an agent has an "independent personal stake" in the conspiracy, that exception has been limited to require a personal *financial* stake. *Oksanen v. Page Mem'l Hosp., 945 F. 2d 696, 705 (4th Cir. 1991)*; *Iglesias, 539 F. Supp. 2d at 837*; *Mbadiwe v. Union Mem'l Regional Med. Ctr., Inc., No. 3:05-CV-49, 2005 U.S. Dist. LEXIS 31674, 2005 WL 3186949, at *3 (W.D.N.C. Nov. 28, 2005)*; *Culver v. JBC Legal Grp., P.C., No. 5:04-CV-389-FL, 2005 U.S. Dist. LEXIS 45426, 2005 WL 5621875, at *7 (E.D.N.C. June 28, 2005)*; *Turner v. Randolph Cnty., N.C., 912 F. Supp. 182, 186 (M.D.N.C. 1995)*. The incentives that plaintiff attributes to Individual Defendants do not fall within the limited scope of this exception.

Because the intracorporate immunity doctrine applies **[*33]** to the civil conspiracy alleged here, and plaintiff has not alleged facts to show an exception, plaintiff's civil conspiracy claim is dismissed.

CONCLUSION

Based on the foregoing, defendant's motion to dismiss (DE 10) is GRANTED in part, and DENIED in part. The court GRANTS defendants' motion to dismiss as it pertains to defendants Williams, Jones, and Leonard, and as it pertains to plaintiff's claim for civil conspiracy. Defendant Town of Wake Forest's motion is DENIED as it pertains to plaintiff's claims under the PDA and ADA, and plaintiff's claim for wrongful discharge. The stay on further proceedings is hereby LIFTED. The parties are to file a joint

supplemental Rule 26(f) report within twenty-one (21) days of this order, providing the information specified in the initial order entered in this case June 18, 2014.

SO ORDERED, this the 3rd day of April, 2015.

/s/ Louise W. Flanagan

LOUISE W. FLANAGAN

United States District Judge

End of Document

Bonner-Gibson v. Genesis Eng'g Grp.

United States District Court for the Middle District of Tennessee, Nashville Division

August 14, 2019, Filed

Case No. 3:18-cv-00298

Reporter
2019 U.S. Dist. LEXIS 137446 *; 2019 WL 3818872

RIKITA BONNER-GIBSON, Plaintiff, v. GENESIS ENGINEERING GROUP, Defendant.

Core Terms

email, pregnancy, termination, nexus, retaliation, pregnant, proximity, temporal, pretext, facie, sick, non-discriminatory, accommodation, licensure, genuine, exam, announcement, experiencing, disability, departure, maternity, deadline, woman

Counsel: **[*1]** For Rikita Bonner-Gibson, Plaintiff: Brian C. Winfrey, Morgan & Morgan (Nashville Office), Nashville, TN.

For Genesis Engineering Group, LLC, Defendant: Lisa M. Carson, Buerger, Moseley & Carson, PLC, Franklin, TN.

Judges: ALETA A. TRAUGER, United States District Judge.

Opinion by: ALETA A. TRAUGER

Opinion

MEMORANDUM

Genesis Engineering Group ("Genesis") has filed a Motion for Summary Judgment (Docket No. 32), to which Rikita Bonner-Gibson has filed a Response (Docket No. 45), and Genesis has filed a Reply (Docket No. 50). For the reasons stated herein, Genesis's motion will be granted in part and denied in part.

I. BACKGROUND

A. Bonner-Gibson's Time at Genesis Before Her Pregnancy

1. Bonner-Gibson's Hiring and Licensure Status

Genesis is an engineering firm founded in 2010 by Russell Skrabut. When Bonner-Gibson was an undergraduate student at Tennessee State University, Skrabut was one of her professors. In February 2012, after Bonner-Gibson had graduated, she began work for Genesis in an entry-level position as a structural engineer. (Docket No. 46 ¶¶ 2-8.)

The parties agree that Bonner-Gibson was expected, at least eventually, to obtain her Professional Engineering ("P.E.") license, which would allow her to oversee her **[*2]** own projects. Until she did so, a licensed engineer was required to supervise her closely and sign off on her work. (*Id.* ¶ 11.) Genesis concedes that Bonner-Gibson has testified that she was not given a formal or specific timeline for her licensure. (Docket No. 51 ¶ 11.) Skrabut has testified that it is "industry standard" that receiving one's P.E. "takes four years generally after you graduate from college with an accredited degree." (Docket No. 47-5 at 89.) Prior to taking the P.E. licensing exam, an applicant is required to pass one of two other exams—the Fundamentals of Engineering ("Fundamentals") exam or the Engineering Intern ("E.I.") exam. (Docket No. 46 ¶ 12.) Bonner-Gibson took the Fundamentals exam in 2015 but did not pass. She did not attempt the exam again during her time at Genesis. (*Id.* ¶¶ 13-14.)

2. Bonner-Gibson's Pre-Pregnancy Absences from the Office

Genesis requires its employees to work at least forty hours per week between the normal business hours of 7:00 a.m. and 6:00 p.m. The parties agree, however, that Genesis expressly maintained a policy of allowing employees to have a "flexible work schedule." In addition, employees were given fifteen days of paid time off **[*3]** to be used at their discretion. Bonner-Gibson claims that Genesis agreed to allow her to work from home in meeting her minimum work hours, and Genesis concedes that "there were occasions over the years" when Bonner-Gibson was given permission to work from home. (*Id.* ¶¶ 15-18; Docket No. 51 ¶ 18.)

Employee requests for time off or changes in schedule required the approval of Skrabut or Chou Wun Yong (another managing member of the company), depending on the nature of the request. (Docket No. 46 ¶¶ 5, 19.) Genesis maintains that Yong could approve minor scheduling adjustments, such as those needed for only a day, whereas only Skrabut could approve more substantial changes. (*Id.* ¶ 19.) The parties agree that, in practice, Bonner-Gibson communicated variously with either Skrabut, Yong, or both

about requested scheduling adjustments and both managers had approved adjustments for Bonner-Gibson in the past. (*Id.* ¶¶ 20-23; Docket No. 51 ¶ 21.)

a. January 6-7, 2015. On January 6, 2015, Bonner-Gibson emailed Skrabut, Yong, and another Genesis employee, Jacob Heltemes, explaining that she intended to work from home because her "bottom lip [was] swollen twice its normal size and [had] fever blisters **[*4]** all over it." (Docket No. 46 ¶ 24.) Skrabut forwarded the email to Genesis Director of Finance and Administration Lisa Haney, who handled the company's human resources (and whom the court will call "Ms. Haney" because there is another Haney involved in this case). Skrabut wrote to Ms. Haney, "Please document for me. This is becoming a problem with her." (*Id.* ¶ 25.) Ms. Haney responded to Skrabut, asking if there was a way to see what Bonner-Gibson was accomplishing while working from home. (*Id.* ¶ 27.) Later, another managing member of Genesis—Mike Haney—sent Ms. Haney an email agreeing that Bonner-Gibson's absences had become a problem and suggesting that the company begin keeping track of her sick days and absences. (*Id.* ¶ 28.)

On the morning of January 7, 2015, Bonner-Gibson sent Skrabut, Yong, and Heltemes an email, stating that she had spoken to her doctor, who had advised her not to drive because medications she was taking had made her "dizzy and disoriented." She said she would "still try to work from home today and pray my condition improves." (*Id.* ¶ 29.) Medical records from Bonner-Gibson's physician confirm that she had seen the physician the day before, but they do not show **[*5]** that she was placed on a driving restriction. (*Id.* ¶ 30.)

b. February 9, 2015. On February 9, 2015, Bonner-Gibson sent an email, informing Skrabut that she would be unable to come in to work because she was experiencing full-body pain and was unable to get out of bed. Skrabut responded with an email stating that he was concerned about the amount of sick time Bonner-Gibson was taking. He also suggested that, "[i]f you are sick to the degree you mention, you need to not be doing any work related tasks." (*Id.* ¶¶ 31-32; Docket No. 35-5 at 39.)

c. May 12, 2016. On May 12, 2016, Bonner-Gibson emailed Skrabut, telling him that she would be coming in to work late after having worked late on a project the night before. Skrabut responded with an email, stating the he needed her at work as soon as possible and explaining that she needed to be present and available to handle tasks that were necessary in order to keep projects moving. (Docket No. 46 ¶ 39.) Skrabut forwarded the email to Yong, stating, "I just don't understand this. I am again very inclined to find a replacement for her. The work is piling up on her desk and she is just not good [at] managing things to keep moving." (*Id.* ¶ 40.) Yong **[*6]** responded that he was "[n]ot sure how to react to this" and considered Bonner-Gibson "a great help," although he believed she did not have "much 'common sense' in work." (*Id.* ¶ 41.)

e. January 2-3, 2017. On January 2, 2017, Bonner-Gibson emailed Skrabut and Yong to inform them that she would be taking two days off from work because her cousin had died. (*Id.* ¶ 43.) Skrabut forwarded the email to Ms. Haney and Mr. Haney, indicating that he was considering a change to the company's policies for approving time off. (*Id.* ¶ 44.)

3. Other Alleged Pre-Pregnancy Issues with Bonner-Gibson's Performance

Skrabut testified that he had "hand picked," "coached," and "mentored" Bonner-Gibson and "tried to bring her along as long as I possibly could," but, "after several years, it just started to become clear that she wasn't progressing." (*Id.* ¶ 46.) Genesis has identified evidence of a number of incidents described in

Bonner-Gibson's own testimony in which Bonner-Gibson encountered mostly minor difficulties at work, such as, for example, being unable to complete a task as quickly as a client desired. (*Id.* ¶¶ 47-49.)

Genesis has also produced an affidavit from Richard Clem, a project manager for a Genesis **[*7]** client, who worked with Bonner-Gibson. Clem states that he was unhappy with aspects of Bonner-Gibson's work, particularly her failure to follow through with requested changes and her lack of responsiveness when Clem attempted to contact her. Clem states that he informed Skrabut of his displeasure with Bonner-Gibson on several occasions. (*Id.* ¶¶ 50-52; Docket No. 35-7 ¶¶ 3-6.) Dan Shehan, the director of construction for another Genesis client, also provided an affidavit detailing his problems with Bonner-Gibson. According to Shehan, Bonner-Gibson had refused to consider changes that Shehan had requested, and Shehan was forced to contact Yong to resolve the resulting problems on two different projects. (Docket No. 46 ¶¶ 53-54; Docket No. 35-8 ¶¶ 2-4.) Bonner-Gibson concedes, for the purposes of this motion, that another employee, a white male named John Wiseman, was terminated following client complaints. Bonner-Gibson testified, however, that Wiseman's errors were significantly more severe than hers. (Docket No. 46 ¶¶ 55-56; Docket No. 35-1 at 159.)

In December 2016, Skrabut gave Bonner-Gibson a performance evaluation. Genesis has produced what it alleges is a copy of the written evaluation **[*8]** she received. (Docket No 35-9 at 12-14.) The evaluation identifies numerous categories in which Bonner-Gibson's performance was rated "inconsistent" or "unsatisfactory" and none in which it was rated "exceptional" or "highly effective." (*Id.*) Bonner-Gibson concedes that she received an evaluation in December 2016 and met with Skrabut and Yong about it, but she testified that the evaluation presented by Genesis is inconsistent with her memory of how she had been rated. Specifically, she testified, "I don't remember having so many inconsistent and unsatisfactory [ratings] ever." (Docket No. 35-1 at 72.) Genesis has provided an affidavit from a proffered digital forensics expert purporting to establish the authenticity of the evaluation. (Docket No. 35-9.) Bonner-Gibson received a raise and a bonus shortly after the evaluation, but Skrabut testified that it was the minimum bonus and raise awarded to Genesis employees that year. (Docket No. 46 ¶ 62.)

B. Bonner-Gibson Informs Genesis She is Pregnant

In May 2017, Bonner-Gibson informed Genesis that she was pregnant. (*Id.* ¶ 63.) Bonner-Gibson has testified that, after the company learned she was pregnant, she was given an increased workload **[*9]** with "more work and faster deadlines than anyone." (*Id.* ¶ 64.) She also testified that, after Skrabut and Yong learned about her pregnancy, they began providing her less mentorship and assistance in learning how to solve engineering problems on clients' projects. (Docket No. 35-1 at 42-43.)

According to Bonner-Gibson, Skrabut told her that he "did his research and he found out that most first-time moms take off three to four years and he wanted to make sure that [she] was committed and coming back." (*Id.* ¶ 65.) When Skrabut voiced concern about first-time mothers losing interest in work, Bonner-Gibson told him that she loved her job and expected to return to the office after six weeks. (Docket No. 35-1 at 45-46.) She testified that Skrabut nevertheless continued to raise the issue, and, when she began experiencing complications related to her pregnancy, expressed concern about whether she would be able to "give a hundred percent" to her job. (Docket No. 46 ¶¶ 66-67.) Bonner-Gibson testified that Skrabut brought up the issue of her post-pregnancy return "weekly," in a manner that was "excessive and kind of . . . aggressive." (Docket No. 47-2 at 75-76.)

Bonner-Gibson requested some minor **[*10]** accommodations related to her pregnancy—such as having a parking spot near the door and being allowed to elevate her feet at work—which were granted. (Docket No. 46 ¶¶ 74-75.) She also, at times, missed work for pregnancy-related reasons. For example, on August 23, 2017, Bonner-Gibson texted Skrabut and Yong to inform them that she was experiencing bleeding and was going to receive an emergency ultrasound. That afternoon, she informed them that she and the baby were fine but that she had been placed on some physical restrictions. (*Id.* ¶¶ 77-78.) Bonner-Gibson has testified that, despite these occasional absences, she continued to work 50 to 60 hours per week and, for at least part of the pregnancy, also attended work-related licensure classes four nights a week. (Docket No. 47-2 at 136-37.)

C. Incidents of September 20-22

On September 20, 2017, Bonner-Gibson sent an email to Skrabut and Yong, informing them that she was experiencing symptoms that she believed might be false labor and she was going to call her doctor about what to do. She said, "If everything is ok, I will work from home this afternoon." (Docket No. 46 ¶ 86.) She called her doctor and ultimately determined it was unnecessary **[*11]** for her to come in for an examination. (*Id.* ¶ 87.) After receiving the email from Bonner-Gibson, Skrabut emailed Ms. Haney regarding the situation. He told Ms. Haney, "We need to ask for her doctor[']s note at this point. [Bonner-Gibson] is very difficult to deal with and still has 6-weeks to go." Skrabut has testified that, when he said Bonner-Gibson was "difficult to deal with," he was referring to her longer history of issues such as absences, not merely issues related to the pregnancy. (*Id.* ¶¶ 89-92.)

Ms. Haney responded that the company "still" could not require Bonner-Gibson to provide a doctor's note for absences if it did not also require notes for other employees missing work for medical reasons. She suggested that they instead request a note clearing her to work. Ms. Haney also suggested that Skrabut give Bonner-Gibson a measurable task to see if she was actually working at home. "I don't care how menial it is," wrote Ms. Haney, "but something that will occupy 4 or 5 hours and has to be sent to you so you can hold her to 'working." Ms. Haney also wrote, "We will need documentation and something tactile [sic] about her lack [of] performance in her file," although it is not **[*12]** clear what the company would need that documentation for. (Docket No. 47-2 at 45.)

Skrabut sent a response email to Bonner-Gibson based on Ms. Haney's advice. First, he requested that Bonner-Gibson complete a quick-turnaround project for his review. Next, he wrote:

> [Y]ou seem to be having a lot of difficulties right now with your health. If you are meeting with the doctor today, please have him give you something that says it is ok for you to return to work. I need to make sure that you are not exerting yourself beyond what your doctor thinks is best for your preganency [sic].

(Docket No. 46 ¶ 88.) Skrabut also wrote an additional email to Ms. Haney, complaining of Bonner-Gibson's behavior:

> When you get back, we need to talk with her. There are complaints about her attitude in the office and things she is doing. Examples are keeping lights shut off that provide light to other employees, time spent in the bathroom (30-minutes at times), laying her head down on the conference table during a scheduling meeting, and now I have found her sleeping in her car while it is running in our parking lot by the side door. She is out of control and I need help addressing it with her.

(*Id.* ¶ 96.)

That day, **[*13]** September 20, 2017, Bonner-Gibson forwarded a letter from her OB-GYN, stating that the symptoms Bonner-Gibson had been experiencing were due to a stomach virus and that she could return to work when the symptoms subsided. The next morning, Bonner-Gibson sent an email, stating that she was still feeling ill and could not come to work but could work from home. (*Id.* ¶¶ 97-98.) Bonner-Gibson and Skrabut had an email exchange about work that Skrabut needed from her, and Bonner-Gibson eventually wrote:

> I apologize for catching the stomach flu. If it were my choice, I wouldn't be sleeping on the couch for two days straight vomiting into bags, having hot and cold chills, severe stomach cramps, and diarrhea. If I were even able to drive, I'm sure you wouldn't want me doing all of this in the office. It is such a shame that I feel obligated to work even when I am ill. I can't help the fact that I am sick. I come into work [every day] and give 110% even on days when I don't feel well, but whenever I get sick, I feel like you expect me to work anyway. I just wish you were a little more understanding that things happen and people get sick. Although we never discussed a deadline for the steel barrel **[*14]** brewery mezzanine to be complete, I will be in tomorrow and leave a PDF on your steps.

(*Id.* ¶ 99.) Bonner-Gibson forwarded the email to another Genesis employee, Victoria Robertson, complaining that she was treated unfairly when she was sick, including that she would "always get phone calls and emails telling me what I should have gotten done [and] saying they need it now." (*Id.* ¶ 100.)

Bonner-Gibson returned to work the next day, September 22, 2017. At one point during the day, Skrabut approached her and asked to speak to her outside. Skrabut chastised her for having allegedly slept in her car when parked near the Genesis entrance during the day. Bonner-Gibson admits that she did rest in her car, but maintains that she did so only during her lunch break because she was feeling sick and weak. The argument expanded into a heated exchange about Bonner-Gibson's behavior and her treatment by Genesis. Bonner-Gibson has testified that she told Skrabut she believed she was being treated unfairly because she was a pregnant black woman. Skrabut has testified that he does not remember her making that remark. According to Bonner-Gibson, Skrabut yelled at her and told her that she "needed to reevaluate **[*15]** if [she] can work in this industry and if [she] can handle being an engineer." (*Id.* ¶¶ 104-08.) After the confrontation, Bonner-Gibson texted Robertson that "[n]one of these issues started popping up until [she] got pregnant." (*Id.* ¶ 110.)

D. Bonner-Gibson's Maternity Leave and Return to Work

Bonner-Gibson was induced into labor on October 17, 2017, causing her to begin her maternity leave earlier than anticipated. On November 21, 2017, Ms. Haney emailed Bonner-Gibson, asking if she was "on track for your return to work on Monday 12/4" and informing her that Skrabut wished to meet with her about the timeline for her P.E. licensure when she returned. It is now undisputed that Bonner-Gibson responded in a timely fashion to the email, confirming that she planned to return on December 4. Ms. Haney, however, claims that she did not see the response at the time. (*Id.* ¶¶ 113-16.) Ms. Haney now admits that she told Skrabut and Yong, falsely, that Bonner-Gibson had never responded to the email. (Docket No. 35-6 ¶ 4.) Bonner-Gibson returned to work, as discussed, on December 4. When she did, Yong complained to her that the company did not know when she was returning because she had supposedly **[*16]** failed to respond to Ms. Haney's email. (Docket No. 46 ¶ 119.)

That afternoon, Bonner-Gibson informed Yong that she did not yet have childcare arrangements in place and would need to leave work at approximately 2:30 p.m. every day for the next few weeks, in order for her to take over childcare from her husband before he went to work. Bonner-Gibson had not previously informed Genesis that she would need any scheduling accommodation related to childcare. (*Id.* ¶¶ 120-21.) According to her testimony, Bonner-Gibson assured Yong that she and her husband had child care in place starting in a bit under a month, at the beginning of 2018.[1] (Docket No. 47-2 at 98.) She also claims that she offered to work from home in the afternoons and complete projects as needed. (*Id.* at 99.) Yong's testimony and Bonner-Gibson's testimony differ with regard to how the issue was resolved. Bonner-Gibson testified that she believed that Yong had given her permission to leave at the desired time if she also came in early. (*Id.* at 99, 198.) Yong testified that he told Bonner-Gibson that the change to her schedule would have to be approved by Skrabut. (Docket No. 47-3 at 40, 60.) Yong has conceded, however, that he "did agree" to allow her **[*17]** to leave at 2:30 p.m. on the day of the initial request. (*Id.* at 46.) Yong testified that he told Skrabut, that day, about his conversation with Bonner-Gibson about leaving early. (*Id.* at 36.)

The next day, December 5, 2017, Bonner-Gibson was preparing to leave the office at around 2:30 when Yong approached her and asked if she and Skrabut had discussed the 2:30 departure time. She responded that they had not. Yong testified that he tried to get Skrabut to come and meet with them about it, but it was too late and Bonner-Gibson needed to leave to take over for her husband. Bonner-Gibson, accordingly, left for the day. (Docket No. 46 ¶¶ 127-28; Docket No. 47-3 at 36-37.)

The following day, December 6, 2017, would turn out to be Bonner-Gibson's last full day at Genesis. That day, Skrabut worked in a conference room behind Bonner-Gibson's desk. Neither Skrabut nor Bonner-Gibson approached the other about the issue of Bonner-Gibson's departure time, and Bonner-Gibson left at 2:30. (Docket No. 51 ¶ 129.) When asked why he did not approach Bonner-Gibson about any concerns during that day or before, Skrabut stated that it was Bonner-Gibson's responsibility to come to him and all he knew, at the time, was "hearsay **[*18]** between [Yong and Bonner-Gibson]." (Docket No. 47-5 at 171.)

E. Final Conflict with Skrabut and Termination

That evening, Skrabut wrote Bonner-Gibson a lengthy email, complaining about a number of issues, including the 2:30 departure time and Bonner-Gibson's supposed failure to respond to the company's attempts to confirm her return date. He concluded:

> You are obligated as an employee to gain approval prior to taking any action regarding your attendance at work. While we are all busy throughout the day, it is inexcusable for you to not have taken the time in the last three (3) business days to discuss your situation with us. This includes the number of hours I personally spent today working out of our conference room directly behind your workspace.
>
> Your recent actions, along with our discussions prior to your leave, continue a pattern of unprofessional behavior that will not be tolerated in our environment. It is your responsibility to correct this situation immediately.

[1] In her briefing, Bonner-Gibson contends that her lack of childcare immediately after the conclusion of her maternity leave was the result of two unexpected events: first, her having given birth—and, therefore, having begun and completed the maternity leave—ahead of schedule; and, second, her mother-in-law's last-second reneging on an agreement to provide childcare for the interim period before Bonner-Gibson's long-term childcare arrangements took effect. (Docket No. 45 at 9 & n.4.)

(*Id.* ¶ 131.)

The next morning, December 7, 2017, Bonner-Gibson responded with her own lengthy email. She explained that she thought she had received approval for the temporary change in her schedule from Yong. She offered **[*19]** to return to the office with her child after 2:30 if it was necessary. She also explained that she believed that the way she had handled the matter had been consistent with how absences had been dealt with at Genesis until that point. "In the past," she wrote, "all that was required is for me to communicate my whereabouts with either you or [Yong] if I was going to be out. This is not only the case with me, but with other employees as well. If this has changed and I now need to meet with each of you, then I will make this change." Bonner-Gibson complained that, if Skrabut had needed to talk to her about the issue, he could have approached her, adding, "I cannot read your mind[,] Russell." (*Id.* ¶ 133.)

Bonner-Gibson concluded the email with a general defense of her behavior in the period surrounding her maternity leave:

> I am not sure why your opinion and treatment of me has suddenly changed this year, but my behavior has been the same since I have been an employee at Genesis. I have not changed and I remained professional throughout my time here. I am polite and have not disrespected anyone in [any way]. While I was 7 months pregnant, I did lay down in my car during my lunch break. You **[*20]** can call it unprofessional but I was sick and did not know what was wrong with me. I felt extremely emaciated and feared I would pass out and cause harm to my unborn child. At the time, I did not know I had a viral stomach infection, but I knew I could not drive myself to the doctor or lay down in the middle of the office floor. If you see this as unprofessional, then I apologize but I see it as being dedicated because I did everything in my power to gain relief so I could finish my work and meet our project deadlines. Even with my declining health during the end of my pregnancy I still make it a priority to work over 40 hours per week to meet your deadline. As a result of this tedious work schedule, I was diagnosed with preeclampsia. I nearly lost my life due to this condition and I am still battling its [effects] today. I have dedicated my life to this company, and put my work before my family. No matter how much Genesis puts on my plate, I always get the job done even when other members of the team cannot meet the project schedule.
>
> In regards to responding to [Ms. Haney], I replied to her email the same day she sent it to me and a photo of the correspondence along with the date and **[*21]** time it was sent is attached.
> If you would like to speak to me further, just communicate when you are available and I will be there.

(*Id.*) She included a photo of her response to Ms. Haney. (*Id.*)

Bonner-Gibson forwarded copies of the email to her mother, her husband, and another Genesis employee, Chinh Cao. (*Id.* ¶ 134.) Skrabut has testified that he learned that Bonner-Gibson had forwarded the email around the time of her termination but was not sure if it was before or after. (*Id.* ¶ 135; Docket No. 35-2 at 71.) During a later telephone appeal regarding Bonner-Gibson's requested unemployment benefits, however, Ms. Haney claimed that the forwarding of the email was a factor in the termination. Genesis no longer claims that to be the case and admits that Ms. Haney "has indicated that she made such statement based on second-hand knowledge gained from a review of the documents she had in front of her at the time, including the forwarded email." (Docket No. 46 ¶ 136.)

The morning of December 7, 2017, after Bonner-Gibson's email, Skrabut requested that Bonner-Gibson meet with him and Yong. In the meeting, Skrabut informed Bonner-Gibson that she was terminated. In his explanation, he focused **[*22]** on her post-maternity leave schedule change. According to Bonner-Gibson, Skrabut stated, "The only reason why we're firing you is because you left three consecutive days in a row without approval from us." (*Id.* ¶¶ 141-42.) Bonner-Gibson also testified, however, that Skrabut stated that he was upset about the conversation the two had had in September, when Bonner-Gibson allegedly mentioned being treated differently because she was a pregnant black woman. According to Bonner-Gibson, Skrabut complained that she had made him sound like a racist. (*Id.* ¶¶ 144-45.) Skrabut and Yong deny that the September conversation came up at all in the meeting terminating Bonner-Gibson. (*Id.* ¶ 145.)

Yong has testified that the reason that Skrabut gave Bonner-Gibson for her termination was her insubordinate and disrespectful behavior surrounding the schedule change issue. (Docket No. 47-3 at 19.) After the termination, Bonner-Gibson received a written Separation Notice, confirming that the separation was "due to her leaving work early three consecutive days without prior notification and approval," which the Notice characterized as "unprofessional behavior" showing a "lack of respect for management." (Docket **[*23]** No. 46 ¶ 143.)

On March 21, 2018, Bonner-Gibson filed her Complaint against Genesis, pleading causes of action for discrimination and retaliation under *42 U.S.C. § 1981* ("*Section 1981*") and the Tennessee Human Rights Act, *Tenn. Code. Ann. § 4-21-101, et seq.* ("THRA"). (Docket No. 1 ¶¶ 50-60.) She expressly reserved her right to amend the Complaint to include additional federal claims that, at the time, had not been administratively exhausted. (*Id.* ¶ 61.) On May 21, 2018, she filed an Amended Complaint adding causes of action for discrimination and retaliation under Title VII of the Civil Rights Act of 1964, *42 U.S.C. §§ 2000e, et seq.* ("Title VII"), as amended by the Pregnancy Discrimination Act ("PDA"), *42 U.S.C. § 2000e(k)*, and the Americans with Disabilities Act ("ADA"), *42 U.S.C. § 12101 et seq.* (Docket No. 16 ¶¶ 61-67.)

II. LEGAL STANDARD

Rule 56 requires the court to grant a motion for summary judgment if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*. If a moving defendant shows that there is no genuine issue of material fact as to at least one essential element of the plaintiff's claim, the burden shifts to the plaintiff to provide evidence beyond the pleadings, "set[ting] forth specific facts showing that there is a genuine issue **[*24]** for trial." *Moldowan v. City of Warren, 578 F.3d 351, 374 (6th Cir. 2009)*; *see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. "In evaluating the evidence, the court must draw all inferences in the light most favorable to the non-moving party." *Moldowan, 578 F.3d at 374* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)*).

At this stage, "the judge's function is not . . . to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial." *Id.* (quoting *Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)*). But "[t]he mere existence of a scintilla of evidence in support of the [non-moving party's] position will be insufficient," and the party's proof must be more than "merely colorable." *Anderson, 477 U.S. at 249, 252*. An issue of fact is "genuine" only if a

reasonable jury could find for the non-moving party. *Moldowan, 578 F.3d at 374* (citing *Anderson, 477 U.S. at 252*).

III. ANALYSIS

Although Bonner-Gibson pleaded various theories of discrimination and retaliation, she has, in her briefing, indicated that she is now pursuing only "discrimination claims under Title VII (PDA) and retaliation claims under *Section 1981*, Title VII (PDA), and the THRA." (Docket No. 45 at 15.) The court will, accordingly, limit its analysis to those claims and grant Genesis's motion as uncontested with regard to Bonner-Gibson's other claims.

A. Prima Facie Case of Pregnancy Discrimination

"Under the Pregnancy Discrimination Act provisions of Title VII, discrimination because of **[*25]** or on the basis of pregnancy, childbirth, or related medical conditions is defined as a kind of sex discrimination and is prohibited." *Tysinger v. Police Dep't of City of Zanesville, 463 F.3d 569, 572 (6th Cir. 2006)* (citing *42 U.S.C. § 2000e(k)*). A plaintiff may prove a pregnancy discrimination case, like any other Title VII case, either by direct evidence or by circumstantial evidence. If a plaintiff does not have direct evidence of pregnancy-based discrimination, the court must analyze the case under "the familiar *McDonnell Douglas* burden-shifting framework." *Asmo v. Keane, Inc., 471 F.3d 588, 592 (6th Cir. 2006)*. In order to establish a prima facie case of pregnancy discrimination in a typical case, a plaintiff must show that: (1) she was pregnant, (2) she was qualified for her job, (3) she was subjected to an adverse employment decision, and (4) there is a nexus between her pregnancy and the adverse employment decision. *Prebilich-Holland v. Gaylord Entertainment Co., 297 F.3d 438, 442 (6th Cir. 2002)* (citation omitted). "If the employee is able to present such a case, then the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for its adverse employment decision." *Asmo, 471 F.3d at 592* (citation omitted). Once the employer provides a legitimate, non-discriminatory reason, "the burden shifts back to the employee, who, in order to defeat a motion for summary judgment, must show that the employer's articulated **[*26]** reason was a pretext for intentional discrimination." *Id.* (citation omitted).

It is undisputed that Bonner-Gibson can satisfy the first three elements of the prima facie case. With regard to the first element, it is enough that Bonner-Gibson was pregnant during the period relevant to the case, even if she was no longer pregnant when she was fired. "The PDA applies to 'women affected by pregnancy, childbirth, or related medical conditions,'—not just to women who *are* pregnant." *Canales v. Schick Mfg., Inc., No. 3:09CV253 (MRK), 2011 U.S. Dist. LEXIS 104568, 2011 WL 4345006, at *1 (D. Conn. Sept. 15, 2011)* (quoting *42 U.S.C. § 2000e(k)*); *see Kocak v. Cmty. Health Partners of Ohio, Inc., 400 F.3d 466, 469-70 (6th Cir. 2005)* (holding that district court erred in holding that the PDA did not protect a woman because she was not pregnant at the time). With regard to the second and third elements, Genesis concedes that Bonner-Gibson was at least generally qualified for her job—although she did need to complete her licensure—and that Genesis's firing her was an adverse employment action. Genesis argues, instead, that Bonner-Gibson cannot establish the fourth element of her prima facie case, a nexus between her pregnancy and Genesis's termination of her employment.

Bonner-Gibson argues first that she has established a nexus between her pregnancy and the loss of her job because **[*27]** she was fired so shortly after giving birth and returning to work. The Sixth Circuit has

recently suggested, in an unpublished opinion, that, "where an adverse action occurs soon after pregnancy, courts can infer a nexus from the temporal proximity." *Kubik v. Cent. Mich. Univ. Bd. of Trustees, 717 F. App'x 577, 582 (6th Cir. 2017)* (citing *Asmo, 471 F.3d at 594*). More typically, however, courts calculate temporal proximity for these purposes based the amount of time "between the employer's learning of an employee's pregnancy and an adverse employment action taken with respect to that employee." *Asmo, 471 F.3d at 594*; *see also DeBoer v. Musashi Auto Parts, Inc., 124 F. App'x 387, 391 (6th Cir. 2005)* (discussing temporal proximity relative to the employee's "announcement of her pregnancy"). In this case, Genesis was aware of Bonner-Gibson's pregnancy for several months before she was terminated. During those several months, moreover, Genesis and its personnel largely behaved as if operating under the assumption that Bonner-Gibson would return to work as normal following her maternity leave. The inference of a nexus based on the timing of her pregnancy announcement is, therefore, not as strong as it would be in a case where the announcement and adverse action were closer together in time. *See Bailey v. Oakwood Healthcare, Inc., No. 15-11799, 2017 U.S. Dist. LEXIS 134811, 2017 WL 3616478, at *14 (E.D. Mich. Aug. 23, 2017)* (noting that an inference of a nexus based on temporal proximity is usually based on **[*28]** a period of "less than six months") (quoting *Nguyen v. City of Cleveland, 229 F.3d 559, 566-67 (6th Cir. 2000))*, *aff'd*, *732 F. App'x 360 (6th Cir. 2018)*

That is not to say that the date of the employee's pregnancy announcement is necessarily the only date that matters. Admittedly, calculating temporal proximity based on the employer's notice is, generally speaking, consistent with the Sixth Circuit's approach in other areas. For example, when considering a claim for retaliation under the Family and Medical Leave Act (FMLA), the Sixth Circuit looks to "the 'time after an employer learns of a protected activity,' not the time after the plaintiff's FMLA leave expires." *Bush v. Compass Grp. USA, Inc., 683 F. App'x 440, 452 (6th Cir. 2017)* (quoting *Mickey v. Zeidler Tool & Die Co., 516 F.3d 516, 525 (6th Cir. 2008))*. The specific language of the PDA, however, complicates matters, because it forbids discrimination "on the basis of pregnancy, childbirth, *or* related medical conditions." *42 U.S.C. § 2000e(k)* (emphasis added). In other words, the PDA's "protection extends to the whole range of matters concerning the childbearing process." *Kocak, 400 F.3d at 469* (quoting H.R. Rep. 95-948, 1978 U.S.C.C.A.N. 4749, 4753) (emphasis omitted). As a result, the PDA reaches discrimination based on events that might occur after an employer learns of the employee's pregnancy. The date on which the pregnancy was announced, therefore, might not be the only important date for temporal **[*29]** proximity purposes.

In any event, as Bonner-Gibson points out, there is ample additional evidence from which a nexus can be inferred in this case, rendering the question of whether temporal proximity alone would be sufficient ultimately beside the point. For example, Skrabut complained, in response to what appeared, at the time, to be a pregnancy-related absence, that Bonner-Gibson was "very difficult to deal with and still ha[d] 6-weeks to go." (Docket No. 46 ¶ 89.) He was, moreover, not merely venting; he and Ms. Haney worked together to form a response, which included, at Ms. Haney's suggestion, creating an artificially demanding deadline for Bonner-Gibson's work and pretextually requiring a doctor's note clearing her to return to work, when the actual motivation was imposing the equivalent of a doctor's note requirement on her absences but not other employees'. Then, after Bonner-Gibson had given birth, Ms. Haney, fully knowing that Skrabut had already become frustrated, mishandled Bonner-Gibson's maternity leave and return date in a way that falsely gave the appearance that Bonner-Gibson was being unreasonable and unresponsive about the timing of her return. Aside from those two **[*30]** incidents, Skrabut allegedly voiced repeated concerns, to Bonner-Gibson, that she would no longer be sufficiently dedicated to her job following her pregnancy. *See Figgins v. Advance Am. Cash Advance Centers of MI, Inc., 476 F. Supp. 2d 675, 691*

(E.D. Mich. 2007) (relying on supervisor's pregnancy-related comments to establish nexus). Bonner-Gibson has also testified that Skrabut and Yong became less willing to mentor her after they learned she was having a child. These facts, considered alongside the timing of Bonner-Gibson's firing, are enough to establish the requisite nexus for the prima facie case.

The parties devote a substantial amount of briefing to whether Bonner-Gibson has established that similarly-situated non-pregnant employees were treated differently than she was. It is unclear to the court why such a showing would be strictly necessary in a case, such as this one, where the nexus requirement can be met with other evidence. *See* *Huffman v. Speedway LLC, 21 F. Supp. 3d 872, 877 (E.D. Mich. 2014)* (noting that the "similarly-situated employees" analysis is only one way to show nexus, and there are "other ways" to do so), *aff'd*, *621 F. App'x 792 (6th Cir. 2015)*. Regardless, insofar as it matters, Bonner-Gibson has identified employees who were "similarly situated in [their] ability or inability to work [and who] received" the benefit of the flexible leave policy for **[*31]** personal or family reasons without being fired.[2] *Latowski v. Northwoods Nursing Ctr., 549 F. App'x 478, 483 (6th Cir. 2013)* (quoting *Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996)*). Even if these employees' situations differed from Bonner-Gibson's in some respects, the Sixth Circuit has recognized that the PDA incorporates a relaxed version of the comparator inquiry that focuses on employees' similar abilities to work. *See* *Ensley-Gaines, 100 F.3d at 1226*; *see also* *Young v. United Parcel Serv., Inc., 575 U.S. 206, 135 S. Ct. 1338, 1354, 191 L. Ed. 2d 279 (2015)* ("[A] plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act's second clause may make out a prima facie case by showing, as in *McDonnell Douglas*, that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"). Bonner-Gibson has identified employees similar to her in their ability to work who received flexibility to their schedules that she, post-pregnancy, did not. That evidence, as well as all of the other circumstantial evidence discussed by the court, supports the inference of a nexus between Bonner-Gibson's pregnancy and her being fired, shifting the burden to Genesis to produce a legitimate, non-discriminatory reason for its decision.

B. Prima Facie [*32] Case of Retaliation

To establish a prima facie case of retaliation, a plaintiff must demonstrate that (1) she engaged in a protected activity, (2) her exercise of such protected activity was known by the defendant, (3) thereafter, the defendant took an action that was "materially adverse" to the plaintiff, and (4) a causal connection existed between the protected activity and the materially adverse action.[3] *Laster v. City of Kalamazoo, 746 F.3d 714, 730 (6th Cir. 2014)*.

Bonner-Gibson identifies two incidents that, she argues, constituted protected activity sufficient to support her retaliation claims. First, she relies on her September 22, 2017 argument with Skrabut, in which she allegedly informed him that she believed that she was being treated differently because she was a pregnant

[2] In particular, Bonner-Gibson identifies Dan Schafran and Jacob Heltemes, both of whom were allowed accommodations in their schedules in order to meet family commitments. (*See* Docket No. 46 ¶¶ 165, 176.)

[3] The same general framework applies for considering claims for retaliation under Title VII, *Section 1981*, and the THRA. *See* *Rogers v. Henry Ford Health Sys., 897 F.3d 763, 771 (6th Cir. 2018)*; *Wade v. Automation Pers. Servs., Inc., 612 F. App'x 291, 300 (6th Cir. 2015)*. Genesis has not premised its arguments on any differences between the cases for retaliation under the three statutes.

black woman. Second, she relies on her comments in her email of December 7, 2017. "Under Title VII, an employee is protected against employer retaliation for opposing any practice that the employee reasonably believes to be a violation of Title VII." *Johnson v. Univ. of Cincinnati, 215 F.3d 561, 579 (6th Cir. 2000)*. Although a "a vague charge of discrimination" is not sufficient to constitute a protected activity, a plaintiff's complaint is not required to have been made with "absolute formality, clarity, or precision." *Stevens v. Saint Elizabeth Med. Ctr., Inc., 533 F. App'x 624, 631 (6th Cir. 2013)* (quoting **[*33]** *Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1313 (6th Cir. 1989)*).

Genesis does not dispute that Bonner-Gibson's alleged September 22 complaint that she was being treating differently as a pregnant black woman is sufficient to meet the "protected activity" prong of the prima facie case. With regard to her comments of December 7, however, Genesis argues that the complaints raised in Bonner-Gibson's email were mere allegations of general unfairness, which would not be protected under any of the relevant statutes. It is true that that email, read in a vacuum, appears to not refer to pregnancy or race, in that Bonner-Gibson stated that she was "not sure why [Skrabut's] opinion and treatment of [her] ha[d] suddenly changed th[at] year." (Docket No. 146 ¶ 133.) By the time that the email was sent, however, Skrabut had already been informed, by Bonner-Gibson, that she was concerned that the reason for the change in her treatment was her pregnancy. In the context of that background fact, Bonner-Gibson's email can be fairly construed as her renewing her complaints about being treated differently due to her pregnancy. A reasonable juror could, therefore, construe the December 7 email as engaging in a protected activity.

As with her PDA claim, Bonner-Gibson **[*34]** argues that she can establish a causal nexus based on both temporal proximity alone and additional evidence. With regard to the December 7 email, the temporal proximity of less than a day is easily sufficient. Even if one ignores the December 7 email, however, the two- to three-month period between the September 22 incident and the decision to fire Bonner-Gibson is similar to the delays that courts in this circuit have typically found to support an inference of a nexus. *See Rogers v. Henry Ford Health Sys., 897 F.3d 763, 776-77 (6th Cir. 2018)* (citing *Seeger v. Cincinnati Bell Tel. Co., 681 F.3d 274, 283-84 (6th Cir. 2012)* (collecting cases)). Genesis argues that the temporal proximity of the September 22 remarks is insufficient to show nexus because Bonner-Gibson's comment was just one brief part of a larger workplace dispute. Insofar as that is relevant, however, it bears noting that the larger dispute was explicitly about Bonner-Gibson's dedication to her job, an issue that Skrabut allegedly repeatedly, in other conversations, tied to her pregnancy and her becoming a mother. Bonner-Gibson's remark, therefore, was not some inconsequential aside in the context of the larger dispute between the two.

Genesis, moreover, concedes that Skrabut's alleged later expression of concern that Bonner-Gibson's September 22 remarks had **[*35]** made him seem racist would be evidence of a retaliatory nexus. Genesis attempts to undermine Bonner-Gibson's testimony regarding those remarks by pointing out that Bonner-Gibson did not mention them until well into this litigation, despite having had earlier opportunities to do so. Unless Genesis can actually show that Bonner-Gibson is estopped from asserting a fact, or it obtains a discovery sanction to prevent her from doing so, Genesis's argument goes to credibility and is inappropriate for summary judgment. Bonner-Gibson has, therefore, shown a nexus between her termination and her protected activity, based on temporal proximity as well as additional evidence.

C. Legitimate Nondiscriminatory Reason/Pretext

Genesis claims that it terminated Bonner-Gibson "due to her decision to unilaterally alter her work schedule and for responding to her supervisor in an insubordinate fashion." (Docket No. 33 at 21.) Because Genesis has produced a legitimate, non-discriminatory reason for its actions, the burden shifts back to Bonner-Gibson to demonstrate that her employer's given reason was pretextual.

To establish pretext, a plaintiff can show that the employer's proffered reasons (1) have no basis **[*36]** in fact; (2) did not actually motivate the adverse action; or (3) were insufficient to explain the adverse action. *Loyd v. St. Joseph Mercy Oakland, 766 F.3d 580, 590 (6th Cir. 2014)* (citing *Wexler v. White's Fine Furniture, Inc., 317 F.3d 564, 576 (6th Cir. 2003)* (*en banc*)). "Pretext may be shown either directly by persuading the [trier of fact] that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Wright v. Murray Guard, Inc., 455 F.3d 702, 707 (6th Cir. 2006)* (quoting *Manzer v. Diamond Shamrock Chems. Co., 29 F.3d 1078, 1082 (6th Cir.1994))*. A plaintiff must produce "sufficient evidence from which the jury could reasonably reject [the employer's] explanation and infer that . . . the employer did not honestly believe in the proffered non-discriminatory reason for its adverse employment action." *Braithwaite v. Timken Co., 258 F.3d 488, 493-94 (6th Cir. 2001)* (citations and internal quotations marks omitted). "In keeping with the burden required at the summary judgment stage, a plaintiff 'need only identify genuine disputes of material fact regarding the legitimacy of the defendant's stated reasons.'" *Kirkland v. James, 657 F. App'x 580, 586 (6th Cir. 2016)* (quoting *Wheat v. Fifth Third Bank, 785 F.3d 230, 240 (6th Cir. 2015))*.

As evidence of pretext, Bonner-Gibson first identifies Genesis's allegedly shifting rationales for her termination. For example, in his initial email, Skrabut complained not only about Bonner-Gibson's failure to get his approval to leave early, but also her failure to "discuss [the] situation with *us*." (Docket **[*37]** No. 46 ¶ 131 (emphasis added).) But Bonner-Gibson *did* discuss her situation with Yong, which Skrabut knew, and Yong, by his own admission, approved her early departure time at least once. Skrabut's initial email, moreover, included a complaint about Bonner-Gibson's communication regarding her return date that Bonner-Gibson denied and that both parties now agree was false. Third, and perhaps most notably, Ms. Haney offered a reason for termination in an earlier proceeding that has since been brought into question by Skrabut's own testimony and abandoned by Genesis. Genesis admits that Ms. Haney simply asserted the reason, based on her own review of materials in Bonner-Gibson's file that might support termination, without any personal knowledge that the forwarding of the email had actually played any role in the decision to fire Bonner-Gibson. (Docket No. 35-6 ¶ 8; Docket No. 46 ¶ 36.) Reading the facts in the light most favorable to Bonner-Gibson, those are three grounds for termination that have had to be set to the side or revised because the facts did not support them.

Even in this litigation, Genesis has taken a somewhat amorphous approach to explaining its grounds for firing Bonner-Gibson—alluding **[*38]** to and even offering evidence of various performance, attitude, and licensure issues, despite Skrabut's contemporaneous claim that Bonner-Gibson was fired for leaving work early. A defendant's "piling on of justifications" for its actions may be "probative of pretext," especially where some of those justifications are in tension with each other. *Gay v. Timberlake Homes, Inc., No. CIV. A. RDB-07-1930, 2008 U.S. Dist. LEXIS 58747, 2008 WL 3075588, at *10 (D. Md. Aug. 1, 2008)* (citing *Rowe v. Marley Co., 233 F.3d 825, 830 (4th Cir. 2000))*. The claim that Bonner-Gibson was a low-performing employee whose termination would have been justified regardless is difficult to square with the company's own statements of its reasons at the time of the firing and in the immediate aftermath. Genesis's argument borders on admitting that its stated reason for firing Bonner-Gibson was, in fact, pretext—just pretext for something other than discrimination or retaliation.

There are, moreover, aspects of Genesis's account that a reasonable juror could be justified in finding implausible. Genesis has repeatedly claimed that Bonner-Gibson unilaterally chose to leave early three days in a row. But Yong himself has testified that he gave her permission to leave early on the first day. Then, Bonner-Gibson's behavior the next two days was consistent with her account that she believed her actions **[*39]** were authorized. There is no evidence that she sneaked out or tried to conceal her early departures. Skrabut, moreover, was informed of Bonner-Gibson's request to Yong almost immediately, and he easily could have raised the issue with Bonner-Gibson in person. But he did not, despite working mere feet from her on her final full day. A reasonable juror could look at that behavior, particularly in the context of Skrabut's alleged repeated comments about new mothers at work, and see an employer/manager seizing on an employee's workplace misstep to spring a trap that will justify firing her for an improper reason.

Furthermore, when Skrabut finally confronted Bonner-Gibson via email, she offered a seemingly plausible explanation that the issues he had raised were the result of misunderstandings. Indeed, at least one of the accusations Skrabut made was, Genesis now concedes, false, and Bonner-Gibson denied it as such, with evidence. Whether the issue of permission to leave early was also the result of a misunderstanding is up for debate, but Bonner-Gibson gave Skrabut reason at least to consider the possibility. A reasonable juror could find it implausible that Bonner-Gibson, an employee of **[*40]** several years whom Yong and Skrabut had previously mentored, was fired for something that could be easily explained away as a miscommunication. *See N.L.R.B. v. Health Care Mgmt. Corp., 917 F.2d 1304 (Table), 1990 WL 170426, at *2 (6th Cir. 1990)* (observing that the "implausibility of the employer's asserted reasons for its actions" may be evidence of pretext).

Of course, all of this depends on whose version of events one believes. Genesis, Skrabut, and Yong have offered an alternative account of their actions, and, if a jury credits them, then the jury may well reject Bonner-Gibson's claims. That kind of credibility determination is not, however, appropriate on a motion for summary judgment. The court will deny Genesis's motion with regard to the claims that Bonner-Gibson continues to pursue. Because Bonner-Gibson has limited her opposition to Genesis's Motion for Summary judgment to her pregnancy discrimination claim and her non-ADA retaliation claims, the court will grant Genesis summary judgment on the remaining claims she has pleaded, namely, her claims for discrimination on the basis of race and disability and her claim for retaliation under the ADA.[4]

IV. CONCLUSION

For the foregoing reasons, Genesis's Motion for Summary Judgment (Docket No. 32) will be granted in part and denied **[*41]** in part. Genesis will be granted summary judgment on Bonner-Gibson's claims for race and disability discrimination, as well as her claim for retaliation under the ADA. It will be denied summary judgment on her pregnancy discrimination and remaining retaliation claims.

An appropriate order will enter.

/s/ Aleta A. Trauger

[4] Genesis argues that Bonner-Gibson has also abandoned her sex discrimination claim. Under the PDA, however, pregnancy discrimination is a species of sex discrimination, not a distinct cause of action. The court will not introduce unnecessary complexity to this case by dismissing some hypothetical Title VII claims that Bonner-Gibson is not pursuing while leaving her PDA-based Title VII claim intact.

ALETA A. TRAUGER

United States District Judge

ORDER

For the reasons explained in the accompanying Memorandum, the Motion for Summary Judgment (Docket No. 32) filed by Genesis Engineering Group ("Genesis") is hereby **GRANTED** in part and **DENIED** in part. Genesis is **GRANTED** summary judgment on Rikita Bonner-Gibson's claims for race and disability discrimination, as well as her claim for retaliation under the Americans with Disability Act, and **DENIED** summary judgment on her remaining claims

It is so **ORDERED**.

/s/ Aleta A. Trauger

ALETA A. TRAUGER

United States District Judge

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Brown v. Aria Health

United States District Court for the Eastern District of Pennsylvania

April 17, 2019, Decided; April 17, 2019, Filed

CIVIL ACTION NO. 17-1827

Reporter
2019 U.S. Dist. LEXIS 66266 *; 103 Empl. Prac. Dec. (CCH) P46,267; 2019 WL 1745653

BRIDGET BROWN, Plaintiff, v. ARIA HEALTH, Defendant.

Core Terms

pregnancy, disability, fluoroscopy, accommodate, disparate, genuine, resign, cement, pregnant, facie, complications, impairment, pregnancy-related, exposure, shield

Counsel: **[*1]** For BRIDGET BROWN, Plaintiff: DAVID M. KOLLER, LEAD ATTORNEY, KOLLER LAW PC, PHILADELPHIA, PA.

For ARIA HEALTH, Defendant: CHRISTOPHER J MORAN, TRACEY E. DIAMOND, PEPPER HAMILTON LLP, PHILADELPHIA, PA.

Judges: Hon. Petrese B. Tucker, United States District Judge.

Opinion by: Petrese B. Tucker

Opinion

MEMORANDUM

Tucker, J.

Before the Court is Defendant's Motion for Summary Judgment (Doc. 22), Plaintiff's response thereto (Doc. 27), and Defendant's reply (Doc. 28). Upon consideration of the Parties' submissions and for the reasons set forth below, Defendant's Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART.

I. PROCEDURAL HISTORY

On or about April 21, 2017, Plaintiff Bridget Brown ("Plaintiff") commenced this action in the Eastern District of Pennsylvania against Defendant Aria Health ("Defendant"). *See* Pl.'s Compl., Doc. 1. Plaintiff asserts claims of discrimination under the *Americans with Disabilities Act ("ADA")*, the *Pregnancy Discrimination Act ("PDA")*, and the *Pennsylvania Human Relations Act ("PHRA")* in response to incidents that occurred while Plaintiff was working at Defendant's Bucks County campus. Pl.'s Compl. 6-7, Doc. 1. On July 31, 2017, Defendant filed its Answer and Affirmative Defenses. **[*2]** *See* Def.'s Answer, Doc. 6.

Discovery was completed on June 5, 2018. *See* Scheduling Order, Doc. 12. Thereafter, on May 31, 2018, Plaintiff moved to compel Defendant to produce documents and information concerning "other employees who were similar in their inability to work, including those limited by a work injury and those limited by a temporary or permanent disability." Pl.'s Mot. Compel 2, Doc. 17. With respect to persons working in Defendant's Nursing Department, Plaintiff sought, *inter alia*, four years of documents and information concerning any workers compensation claims, accommodations, or light duty assignments; and approximately two years of documents and information concerning any employee who was pregnant. Pl.'s Mot. Compel Ex. A, Ex. B, Doc. 17.

On July 2, 2018, relying on *Young v. United Parcel Serv.*, the Court issued an Order (Doc. 19) denying Plaintiff's motion to compel, finding that Plaintiff's requested discovery was too broad as it did not concern employees who were similar in their ability or inability to work. *135 S. Ct. 1338, 1354, 191 L. Ed. 2d 279 (2015)* (explaining that to establish a prima facie case for pregnancy discrimination, a plaintiff must demonstrate, *inter alia*, that the employer accommodated other **[*3]** employees who were "similar in their ability or inability to work."). The Court explained that Plaintiff must demonstrate that she was treated differently than other nurses who requested not to work in rooms where fluoroscopy or bone cement were being used.

On July 3, 2018 Plaintiff moved for reconsideration (Doc. 20) of the Court's July 2, 2018 Order (Doc. 19), requesting that the Court order discovery regarding other nurses at Defendant's Bucks County campus who, during the last five years, asked to be excluded from fluoroscopy or bone cement rooms. The Court denied the motion as moot (Doc. 31) because Defendant established that no nurses had made such requests in the last five years.

This matter is now ripe for disposition. For the reasons set forth below, summary judgment is granted in part and denied in part.

II. STATEMENT OF FACTS

On October 5, 2015, Defendant hired Plaintiff as a Staff Registered Operating Room ("OR") Nurse at Defendant's Bucks County campus. Statement of Stipulated Material Facts ¶1, Doc. 23. As an OR nurse,

Plaintiff was responsible for ensuring that surgical cases are documented appropriately and keyed into the computer system; preparing the OR before surgery; **[*4]** providing necessary supplies once surgery begins; and relieving staff during breaks. Pl. Dep. 19:8-24, 20:1-2; Rena Utsey Dep. 2:18-24, 13:1-4.

On May 2, 2016, Plaintiff learned that she was pregnant. Pl. Dep. 28:9-10; Def.'s Am. Mem. Supp. Mot. Summ. J. 5, Doc. 25. Thereafter, on May 10, 2016, Plaintiff confirmed her pregnancy with her gynecologist and requested a physician's note that excluded her from rooms where fluoroscopy—a type of x-ray—was used. Pl. Dep. 32:10-25; Def.'s Am. Mem. Supp. Mot. Summ. J. 5, Doc. 25. The physician's note specified that "[Plaintiff] [wa]s restricted from fluoroscopy rooms until further notice." Pl. Dep. 35:10-25, Ex. P-6.

The next day, on May 11, 2016, Plaintiff provided her physician's note to Ms. Patricia Leichner ("Ms. Leichner")—Director of Perioperative Services at Defendant's Bucks County campus. Pl. Dep. 37:10-19; Def.'s Am. Mem. Supp. Mot. Summ. J. 5, Doc. 25. Ms. Leichner informed Plaintiff that her physician's note "was too restrictive and that [Plaintiff] would[] [not] be able to work in [Ms. Leichner's] department if [Plaintiff] submitted t[he] note." Pl. Dep. 37:21-25, 38:1-2; *see* Patricia Leichner Dep. 36:11-24, 37:1-8; 43:1-5. Ms. Leichner **[*5]** explained that "accepting a note stating zero fluor[oscopy] for the duration of her pregnancy would not be probable especially on 'on call cases' and off shift cases as she is a 12-hr employee." Pl.'s Mem. Opp'n Def.'s Mot. Summ. J., Ex. H (Notes of Patricia Leichner), Doc 27.

Ms. Leichner stated that they would try to minimize Plaintiff's contact with fluoroscopy but noted that in the past, other pregnant nurses had worked in the OR without issue. Pl. Dep. 38:18-22; Patricia Leichner Dep. 39:20-22, 31:17-22, 49:14-19; Def.'s Am. Mem. Supp. Mot. Summ. J. 5, Doc. 25. Ms. Leichner stated that if Plaintiff was to work in an OR using fluoroscopy, Plaintiff would receive lead protective clothing, portable lead shields that she could stand behind in the OR, and the option to step out of the OR when fluoroscopy was used. Pl. Dep. 39:2-25, 40:1-17; Patricia Leichner Dep. 41:3-14; Rena Utsey Dep. 52:16-24. Ms. Leichner further informed Plaintiff that if she declared her pregnancy by submitting a form to Defendant, she would also receive a fetal monitoring badge which the Hospital would monitor to make sure that Plaintiff's baby received no more than 0.5 rem of radiation, as well as a badge to **[*6]** monitor Plaintiff's own radiation exposure. Pl. Dep. 39:2-25, 54:10-15; Def.'s Am. Mem. Supp. Mot. Summ. J. 5, Doc. 25.

On May 12, 2016, Plaintiff met with Mr. Barry Miltner ("Mr. Miltner")—Senior Employee Relations Specialist. Pl. Dep. 46:13-23; Barry Miltner Dep. 30:9-24, 31:1-7. During this meeting, Mr. Miltner informed Plaintiff that she could seek other jobs within Defendant's health system if she decided not to work in ORs where fluoroscopy was used. Pl. Dep. 46:24-25, 47:1-10; Def.'s Am. Mem. Supp. Mot. Summ. J. 6, Doc 25.

On May 13, 2016, Plaintiff declared her pregnancy. *See* Pl.'s Mem. Opp'n Def.'s Mot. Summ. J., Ex. I (Declaration of Pregnancy), Doc 27. After Plaintiff declared her pregnancy, she continued to work and used the lead skirt, vest and thyroid shield, and lead shielding that she could wheel into the OR. Pl. Dep. 55:10-17; Rena Utsey Dep. 77:7-22. Although Plaintiff had the option to step out of the OR when fluoroscopy was used, she chose not to do so. Pl. Dep. 33:6-18, 40:15-22, 42:4-5; Def.'s Am. Mem. Supp. Mot. Summ. J. 7, Doc 25. Plaintiff continued to look for other jobs after declaring her pregnancy. Pl. Dep. 48:10-12, 69:14-23; Barry Miltner Dep. 115:5-8.

[*7] On June 15, 2016, Plaintiff arrived at work and discovered that she was assigned to an OR using bone cement for her entire shift; bone cement is glue used to attach prosthesis to bone. Pl. Dep. 31:11-22, 58:6-10; Def.'s Am. Mem. Supp. Mot. Summ. J. 9, Doc 25; Barry Miltner Dep. 83:1-2. Plaintiff then texted Ms. Rena Utsey ("Ms. Utsey")—Operating Room Nurse Manager—that she was leaving work because she was sick. Rena Utsey Dep. 148:8-21; Pl. Dep. 61:1-4. Plaintiff called in sick on June 16, 2016, and on June 17, 2016, she visited a gynecologist. Pl. Dep. 64:1-24; Def.'s Am. Mem. Supp. Mot. Summ. J. 9, Doc 25. Plaintiff informed her gynecologist that she was working in ORs with fluoroscopy and bone cement. Pl. Dep. 65:15-25; Def.'s Am. Mem. Supp. Mot. Summ. J. 9, Doc 25. At Plaintiff's request, her gynecologist provided a physician's note stating that "[Plaintiff] is under our care for her pregnancy. It is unsafe for her to be in fluoroscopy or bone cement rooms at this time." Pl. Dep. 67:19-25, 68:1-9; Pl.'s Mem. Opp'n Def.'s Mot. Summ. J., Ex. K (Physician's Note), Doc 27; Def.'s Am. Mem. Supp. Mot. Summ. J. 10, Doc 25.

On June 17, 2016, Plaintiff submitted her physicians' notes from **[*8]** May 10, 2016 and June 17, 2016 to Mr. Miltner by email. Barry Miltner Dep. 79:14-24, 80:1-8; Pl. Dep. 68:16-25, 69:1-13. This was the first time that Plaintiff informed Defendant that she could not work in rooms with bone cement; Plaintiff's May 10, 2016 physician's note only restricted Plaintiff's contact with fluoroscopy. Pl. Dep. 35:10-25, Ex. P-6, 58:24-25, 59:1-2; Patricia Leichner Dep. 69:7-24, 70:1-7; Rena Utsey Dep. 156:20-23. On June 17, 2017, Plaintiff also "texted Ms. Leichner stating that she would not be returning to work until everything was sorted out with HR." Def.'s Am. Mem. Supp. Mot. Summ. J. 10, Doc 25; Pl. Dep. 72:2-23. Plaintiff did not return to work after June 15, 2016. Barry Miltner Dep. 112:8-24.

On June 22, 2016, Plaintiff spoke with Ms. Leichner and Mr. Miltner by telephone. Pl. Dep. 77:2-21; Barry Miltner Dep. 103:6-17. During this meeting, Plaintiff informed Ms. Leichner and Mr. Miltner that she would be submitting her physicians' notes formally. Pl. Dep. 78:7-10; Barry Miltner Dep. 104:17-23. Mr. Miltner told Plaintiff that she could use paid time off to look for other positions. Barry Miltner Dep. 104:8-12; Pl. Dep. 79:1, 80:1-14.

The next day, Plaintiff **[*9]** met with Mr. Miltner in person. Pl. Dep. 79:20-21; Barry Miltner Dep. 107:1-4. Mr. Miltner provided Plaintiff with the necessary paperwork for a 30-day unpaid leave of absence to search for other employment. Pl. Dep. 9:22-24, 80:1-9; Barry Miltner Dep.107:5-23. Mr. Miltner further informed Plaintiff that she was ineligible for leave under the *Family and Medical Leave Act*. Barry Miltner Dep. 108:20-21.

Plaintiff did not submit any leave of absence forms, and she resigned from employment, effective June 29, 2016. Pl. Dep. 82:9-11.

III. STANDARD OF REVIEW

Summary judgment is awarded only when "there is no genuine issue as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *Liberty Mut. Ins. Co. v. Sweeney, 689 F.3d 288, 292 (3d Cir. 2012)*. To defeat a motion for summary judgment, there must be a factual dispute that is both genuine and material. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-49, 106 S. Ct. 2505, 91 L. Ed. 2d 202, (1986)*; *Dee v. Borough of Dunmore, 549 F.3d 225, 229 (3d Cir. 2008)*. A "material" fact is one "that might affect the outcome of the suit under the governing law[.]" *Anderson, 477*

U.S. at 248. A dispute over a material fact is "genuine" if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.*

The movant bears the initial burden of demonstrating the absence of a genuine dispute of a material fact. *Goldenstein v. Repossessors, Inc., 815 F.3d 142, 146 (3d Cir. 2016)*. "Where the defendant is the **[*10]** moving party, the burden is on the defendant to show that the plaintiff has failed to establish one or more essential elements of her case." *Burton v. Teleflex Inc., 707 F.3d 417, 425 (3d Cir. 2013)*. If the movant sustains its initial burden, "the burden shifts to the nonmoving party to go beyond the pleadings and come forward with specific facts showing that there is a *genuine issue for trial*." *Santini v. Fuentes, 795 F.3d 410, 416 (3d Cir. 2015)* (internal quotation marks omitted) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986))*.

At the summary judgment stage, the court's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for trial. *See Anderson, 477 U.S. at 249* (citations omitted); *Jiminez v. All American Rathskeller, Inc., 503 F.3d 247, 253 (3d Cir. 2007)*. In doing so, the court must construe the facts and inferences in the light most favorable to the non-moving party. *See Horsehead Indus., Inc. v. Paramount Communications, Inc., 258 F.3d 132, 140 (3d Cir. 2001)*. Nonetheless, the court must be mindful that "[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson, 477 U.S. at 252*.

IV. DISCUSSION

A. Disability Discrimination

Although Plaintiff appears to have abandoned her claims for disability discrimination in response to Defendant's summary judgment motion, the Court will nonetheless conduct an analysis of Plaintiff's **[*11]** claims under the ADA and PHRA.

i. ADA

In Count I, Plaintiff asserts a claim for violation of the ADA alleging that Defendant's actions constitute disability discrimination based on Plaintiff's pregnancy. Pl.'s Compl. 6-7, Doc. 1.

Employers are prohibited from discriminating based on disability with regard to job applications, hiring, advancement, or firing. *42 U.S.C.A. § 12112(a)*; 43 Pa. Cons. Stat. Ann. § 955(a) (West 2016). To establish a prima facie case of disability discrimination under the ADA, a plaintiff must demonstrate that she: (1) "has a 'disability"; (2) is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) "has suffered an adverse employment action because of that disability." *Turner v. Hershey Chocolate USA, 440 F.3d 604, 611 (3d Cir. 2006)*. An individual is deemed to have a disability if she: (1) has a "physical or mental impairment which substantially limits one or more major life activities"; (2) has "a record of such an impairment"; or (3) is "regarded as having such an impairment." *42 U.S.C. § 12102(1)*.

A routine pregnancy is not considered a disability within the meaning of the ADA. *See* *Ahern v. Eresearch Tech., Inc., 183 F. Supp. 3d 663, 668 (E.D. Pa. 2016)*; *Arozarena v. Carpenter Co., No. 17-5457, 2018 U.S. Dist. LEXIS 87137, 2018 WL 2359143, at *2 (E.D. Pa. May 24, 2018)* ("pregnancy itself is not a disability."); *see also* *Brennan v. Nat. Tele. Directory Corp., 850 F. Supp. 331, 344 (E.D. Pa. 1994)* (rejecting pregnancy as a disability because it does not substantially limit one **[*12]** or more major life activities or constitute a physical impairment that affects bodily systems or organs). Although pregnancy, alone, does not constitute a disability under the ADA, certain impairments that a woman experiences as a result of pregnancy may qualify as a disability for purposes of the statute.[1] *See* *Oliver v. Scranton Materials, Inc., No. 14-0549, 2015 U.S. Dist. LEXIS 27121, 2015 WL 1003981, at *7 (M.D. Pa. Mar. 5, 2015)* (finding complications from pregnancy sufficient to proceed under the ADA but ultimately dismissing the claims without prejudice because the plaintiff failed to specify the nature of said complications); *see also* *Varone v. Great Wolf Lodge of the Poconos, LLC, No. 15-304, 2016 U.S. Dist. LEXIS 47867, 2016 WL 1393393 (M.D. Pa. Apr. 8, 2016)* (recognizing that although pregnancy alone may not be a disability under the ADA, impairments related thereto may qualify); *Moore v. CVS RX Servs., 142 F. Supp. 3d 321, 344-45 (M.D. Pa. 2015)* (finding pregnancy-related complications could constitute a disability under the ADA). If a pregnant worker can demonstrate that she has a disability, her employer must provide reasonable accommodations unless such accommodation would impose an undue hardship on the employer. *42 U.S.C. § 12112(b)(5)*.

Here, there is no evidence that Plaintiff experienced pregnancy-related complications. During Plaintiff's deposition, she stated that her pregnancy was routine and without any complications. Pl. Dep. 89:16-20. Further, Plaintiff's Complaint does not allege any pregnancy-related **[*13]** complications. As there is no evidence to allow a jury to conclude that Plaintiff's pregnancy was a disability within the meaning of the ADA, this Court will grant summary judgment in favor of Defendant with respect to Count I.

ii. PHRA

In Count II, Plaintiff asserts a claim for violation of the PHRA alleging that Defendant's actions constitute disability discrimination based on Plaintiff's pregnancy. Pl.'s Compl. 7-8, Doc. 1. Courts use the same standard to address PHRA claims as they do ADA claims. *Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 306 (3d Cir. 1999)* (citing *Kelly v. Drexel Univ., 94 F.3d 102, 105 (3d Cir. 1996))* (because the analysis for claims under the ADA is the same for claims under the PHRA, it is not necessary to perform a separate analysis). Accordingly, Plaintiff's disability discrimination claim under the PHRA is properly analyzed under the same standard as her disability discrimination claim under the ADA. Therefore, the foregoing analysis applies equally to Plaintiff's PHRA claim. Because no genuine issue of fact exists with respect to Plaintiff's ADA claim, the Court also grants summary judgment in favor of Defendant with respect to Count II.

B. Pregnancy Discrimination

[1] The EEOC has explained that complications during pregnancy, such as "a pregnancy-related impairment that substantially limits a major life activity," may qualify a woman for protection under the ADA. *See* *29 C.F.R. Pt. § 1630, App. § 1630.2(h)*.

The Court next considers Plaintiff's claims that Defendant engaged in pregnancy discrimination in violation **[*14]** of the PDA—Count III—and PHRA—Count IV.

i. PDA

Count III of Plaintiff's Complaint alleges pregnancy discrimination in violation of the PDA. The PDA prohibits discrimination "on the basis of pregnancy, child birth, or related medical conditions." *Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076* (codified as amended at *42 U.S.C. § 2000e et seq. (1991)*). The PDA contains two clauses. The first clause amends *Title VII of the Civil Rights Act of 1964 ("Title VII")*, stating that discrimination on the basis of "pregnancy, childbirth, or related medical conditions" is a form of unlawful sex discrimination. The second clause provides that "women affected by pregnancy, childbirth, or related medical conditions" have a right to be treated the same as those "not so affected but similar in their ability or inability to work." *42 U.S.C. § 2000e(k)*. Courts analyze PDA claims as sex discrimination under *Title VII*. *Solomen v. Redwood Advisory Co., 183 F. Supp. 2d 748, 752 (E.D. Pa. 2002)*.

a. Disparate Treatment vs. Disparate Impact

A pregnant employee may make a claim for discrimination by alleging either "disparate treatment" or "disparate impact" discrimination. *Ricci v. DeStefano, 557 U.S. 557, 577-78, 129 S. Ct. 2658, 174 L. Ed. 2d 490 (2009)*. Disparate treatment is a form of intentional employment discrimination; it occurs when an employer singles out a person or a group of employees and treats them differently **[*15]** than other employees who do not share the same protected classification. *Id. at 577*. Disparate impact, however, is a form of unintentional employment discrimination. *Id.* A pregnant worker alleges a disparate impact claim when she asserts that her employer's policies—although facially neutral—disproportionally affect pregnant workers. *See Newark Branch, NAACP v. Town of Harrison, 940 F.2d 792, 798 (3rd Cir. 1991)*; *see also EEOC v. Metal Serv. Co., 892 F.2d 341, 348 (3rd Cir. 1990)*. Unlike disparate treatment claims, which focus on the employer's intent, disparate impact claims focus on the effects of the employer's policies.

In alleging that Defendant's failure to accommodate was motivated by Plaintiff's membership in a protected class—that is, her pregnancy—Plaintiff advances a disparate treatment claim. Accordingly, Counts III and IV will be analyzed under the disparate treatment framework.

b. Disparate Treatment Liability

A plaintiff alleging disparate treatment must show that her employer intentionally discriminated against her because she was pregnant. *Young, 135 S. Ct. at 1345*. A plaintiff can demonstrate intentional discrimination through either direct or indirect evidence. *Id.* Evidence is direct when it "would prove the prohibited intent without resort to an inference or presumption." *U.S. Equal Employ. Opportunity Comm'n v. Bob Evans Farms, LLC, 275 F. Supp. 3d 635, 651 (W.D. Pa. 2017)* (citing *Torre v. Casio, Inc., 42 F.3d 825, 829 (3d Cir. 1994)*). Evidence is indirect—or circumstantial—when an **[*16]** inference of intentional discrimination may be drawn. *Id. at 652*. If a plaintiff relies on indirect evidence to prove discrimination, the claim is "analyzed under the burden shifting framework provided by *McDonnell Douglas Corp. v.*

Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)." *Kautz v. Met-Pro Corp., 412 F.3d 463, 465 (3d Cir. 2005)*.

c. Prima Facie Case

To establish a prima facie case of pregnancy discrimination under the *McDonnell Douglas* framework, a plaintiff must show that: (1) she was pregnant; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) similarly situated individuals not in plaintiff's protected class were treated more favorably or there is a nexus between her pregnancy and the adverse employment action. *See Young, 135 S. Ct. at 1353-54*, *Laverty v. Drexel Univ., No. 14-5511, 2016 U.S. Dist. LEXIS 6909, 2016 WL 245307, at *6 (E.D. Pa. Jan. 21, 2016)*. This framework "is not intended to be an inflexible rule . . . . Rather, an individual plaintiff may establish a prime facie case by showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under *Title VII*." *Young, 135 S. Ct. at 1353-54* (internal citations omitted) (internal quotations omitted). Once a plaintiff has established a prima facie case, the burden then shifts to the employer to articulate some "legitimate, non-discriminatory reason **[*17]** for its actions." *Id. at 1354*. If the employer satisfies this burden, the burden shifts to the plaintiff to demonstrate that the employer's proffered reasons are pretextual. *Id.*

Here, Defendant concedes that Plaintiff satisfied the first and second elements of her pregnancy discrimination claim, thus, the Court will only address the third and fourth factor in its analysis.

1. Adverse Employment Action

An adverse employment action is an action that is "serious and tangible enough to alter an employee's compensation, terms, conditions, or privileges of employment." *Cardenas v. Massey, 269 F.3d 251, 263 (3d Cir. 2001)*. To show that she was subjected to an adverse employment action, Plaintiff claims that she was forced to resign due to Defendant's refusal to accommodate her pregnancy-related restrictions. Such a forced resignation, if proven, is called a "constructive discharge." To prove constructive discharge, a plaintiff must demonstrate that the working conditions became so intolerable that a reasonable person in the employee's position would have felt compelled to resign. *See Brooks v. CBS Radio, Inc., 342 F. App'x. 771, 777 (3d Cir. 2009)*. "In determining whether an employee was forced to resign, [courts] consider a number of factors, including whether the employee was threatened with discharge, encouraged **[*18]** to resign, demoted, subject to reduced pay or benefits, involuntarily transferred to a less desirable position, subject to altered job responsibilities, or given unsatisfactory job evaluations." *Mandel v. M & Q Packaging Corp., 706 F.3d 157, 169-70 (3d Cir. 2013)*. The Third Circuit has also specified "that in most situations, a prerequisite to a successful constructive discharge claim is that plaintiff attempted to explore alternatives before electing to resign." *Tourtellotte v. Eli Lilly & Co., Civ. A. No. 09-0774, 2013 U.S. Dist. LEXIS 54389, at *16-17 (E.D. Pa. Apr. 16, 2013)* (Tucker, J.) (quoting *Connors v. Chrysler Fin. Corp., 160 F.3d 971, 975 (3d Cir. 1998))*.

Defendant argues that Plaintiff did not suffer an adverse employment action in the form of a constructive discharge and, thus, cannot support her claim of pregnancy discrimination. Def.'s Am. Mem. Supp. Mot. Summ. J. 20, Doc. 25. Defendant contends that Plaintiff "cannot demonstrate that her work conditions were so intolerable as to constitute a constructive discharge." Def.'s Am. Mem. Supp. Mot. Summ. J. 18,

Doc. 25. To support this assertion, Defendant explains that the Hospital undertook various measures to accommodate her pregnancy by providing her with: (1) lead equipment; (2) a vest and thyroid shield; (3) an individual badge and a fetal monitoring badge to measure Plaintiff and her baby's exposure to radiation; (4) access to portable lead shields; and (5) "the **[*19]** option to step out of the operating room when necessary." Def.'s Am. Mem. Supp. Mot. Summ. J. 18, Doc. 25.

Defendant further highlights that Plaintiff did not voice any concerns to her supervisor or ask to be switched to a different room upon learning that she was assigned to a room using bone cement; Defendant maintains that instead, Plaintiff just "walked off the job." Def.'s Am. Mem. Supp. Mot. Summ. J. 19, Doc. 25. And lastly, Defendant argues that "Plaintiff's constructive discharge claim must fail because she [] [did not] explore alternative options before electing to resign." Def.'s Am. Mem. Supp. Mot. Summ. J. 19, Doc. 25.

Plaintiff responds that "sufficient evidence exists for a jury to find that [she] suffered an adverse employment action in the form of a constructive discharge and in Defendant's refusal to accommodate [her] pregnancy-related restriction." Pl.'s Mem. Opp'n Def.'s Mot. Summ. J. 13, Doc 27. Plaintiff explains that "disputed issues of fact exist as to whether Defendant's handling of Plaintiff's [physicians'] notes left her with no reasonable choice but to resign." Pl.'s Mem. Opp'n Def.'s Mot. Summ. J. 13, Doc 27. Plaintiff further maintains that issues of fact **[*20]** exists as to whether she had any viable [alternative] options to consider." Pl.'s Mem. Opp'n Def.'s Mot. Summ. J. 17, Doc 27.

On this record, a genuine issue of material fact exists as to whether Plaintiff suffered an adverse employment action in the form of a constructive discharge by way of Defendant's handling of her physicians' notes and proposed accommodations. Here, Plaintiff claims that when she provided Ms. Leichner—Director of Perioperative Services—with her physician's note regarding fluoroscopy, Ms. Leichner informed her that the note "was too restrictive and that [Plaintiff] would [] [not] be able to work in [Ms. Leichner's] department if [Plaintiff] submitted t[he] note." Pl. Dep. 37:21-25, 38:1-2; *see* Patricia Leichner Dep. 36:11-24, 37:1-8; 43:1-5. Further, when Plaintiff spoke with Mr. Miltner—Senior Employee Relations Specialist—he also informed her that she could look for other jobs within Defendant's health system if she decided not to work in ORs where fluoroscopy was used, but that Plaintiff would have to reapply through the general application process. Pl. Dep. 46:24-25, 47:1-10; Def.'s Am. Mem. Supp. Mot. Summ. J. 6, Doc 25; Barry Miltner Dep. 73:12-24. A reasonable **[*21]** jury could find that Plaintiff felt forced to resign when deciding between her physicians' instructions of zero fluoroscopy/bone cement exposure for her unborn baby's safety; Defendant's proposed accommodation of limited exposure; and reapplying for positions within Defendant's health system through the general application process. Pl.'s Mem. Opp'n Def.'s Mot. Summ. J., Ex. H (Notes of Patricia Leichner), Doc 27; Barry Miltner Dep. 102:6-24, 103:1-5.

Under these circumstances, a reasonable juror could fairly conclude that Plaintiff was subject to an adverse employment action. Accordingly, because there are genuine issues of material fact, Plaintiff has sufficiently created a triable issue as to whether her work conditions were so intolerable that she felt forced to resign.

2. Nexus between Plaintiff's pregnancy and the adverse employment action

Under the fourth prong of Plaintiff's prima facie case, she must establish that similarly situated individuals not in plaintiff's protected class were treated more favorably or that there is a nexus between her pregnancy and the adverse employment action. *See* *Young, 135 S. Ct. at 1353-54*, *Laverty v. Drexel Univ., No. 14-5511, 2016 U.S. Dist. LEXIS 6909, 2016 WL 245307, at *6 (E.D. Pa. Jan. 21, 2016)*. Plaintiff can satisfy the fourth prong by: (1) presenting evidence that similarly **[*22]** situated, non-pregnant employees were treated more favorably; (2) establishing an inference of discrimination based upon the temporal proximity between the pregnancy and the adverse act; or (3) establishing an inference of discrimination based upon review of all proffered evidence. *Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358, 366 (3d Cir. 2008)*, *Leboon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 232-233 (3d Cir. 2007)*, *Farrell v. Planters Lifesavers Co., 206 F.3d 271, 280 (3d Cir. 2000)*, *Laverty, 2016 U.S. Dist. LEXIS 6909, 2016 WL 245307, at *6*, *Snider v. Wolfington Body Co., Inc., No. 16-2843, 2016 U.S. Dist. LEXIS 143116, 2016 WL 6071359, at *3 (E.D. Pa. Oct. 17, 2016)*, *Ahern v. Eresearch Tech., Inc., 183 F. Supp. 3d 663, 669 (E.D. Pa. 2016)*.

Here, Plaintiff has presented sufficient evidence to establish a triable issue of fact as to whether there is a nexus between her pregnancy and the adverse employment action. Plaintiff, for example, contends that "Defendant did not offer [her] a Leave of Absence and/or Time Off as a Reasonable Accommodation due to pregnancy pursuant to its Unpaid Leave[] of Absence Policy" and "instead, [] only offered Plaintiff 'an unpaid Personal Leave of up to thirty (30) days (with no extension).'" Pl.'s Mem. Opp'n Def.'s Mot. Summ. J. 8, Doc 27. Plaintiff also maintains that Defendant could have accommodated her physicians' notes of zero exposure to fluoroscopy and bone cement because "there was always an operating room that did not use those substances." Pl.'s Mem. Opp'n Def.'s Mot. Summ. J. 9, Doc 27; *See* Rena Utsey Dep. 63:5-15 (stating that it was possible for Plaintiff to be assigned to rooms with no **[*23]** fluoroscopy). Plaintiff claims that Defendant never attempted to reassign her to a different room despite her physicians' orders. Pl.'s Mem. Opp'n Def.'s Mot. Summ. J. 10, Doc 27; *See* Barry Miltner Dep. 72:23-24, 73:1-2.

Given the evidence that Plaintiff has put forth concerning the fourth element of her prima facie case, there is a question of fact for the jury, and not the court to determine.

3. Pretext

Once a plaintiff has met her burden of establishing her prima facie case, the burden then shifts to the defendant to articulate some "legitimate, non-discriminatory reason for its actions." *Young, 135 S. Ct. at 1354*. If the defendant satisfies this burden, the plaintiff can demonstrate that the defendant's proffered reasons are pretextual. *Id.* Here, even assuming that Defendant satisfied its burden of producing legitimate, nondiscriminatory reasons—Defendant did not address this in its briefing—there is sufficient evidence in the record to raise a genuine dispute of material fact regarding whether those reasons are pretextual. Therefore, the Court denies summary judgment as to Count III.

ii. PHRA

Count IV of Plaintiff's Complaint alleges pregnancy discrimination in violation of the PHRA. The PHRA prohibits employers **[*24]** from discriminating based on the sex of an employee. 43 Pa. Cons. Stat. Ann. § 951 *et seq.* This includes discrimination based on pregnancy. *Cerra v. East Stroudsburg Area Sch. Dist., 450 Pa. 207, 299 A.2d 277, 279-80 (Pa. 1973)*. When a plaintiff alleges violations of the PDA and PHRA,

both claims are subject to the same *Title VII* analysis. *See Kelly, 94 F.3d at 105*, *Smith v. Pathmark Stores, Inc., No. 97-1561, 1998 U.S. Dist. LEXIS 8631, 1998 WL 309916, at *3 (E.D. Pa. June 11, 1998)* ("Courts have uniformly interpreted the PHRA consistent with *Title VII*."). Accordingly, Plaintiff's pregnancy discrimination claim under the PHRA is properly analyzed under the same standard as her pregnancy discrimination claim under the PDA. As such, the foregoing analysis applies equally to Plaintiff's PHRA claim. Because genuine issues of fact exist with respect to Plaintiff's PDA claim, the Court also denies summary judgment as to Count IV.

V. CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment is GRANTED IN PART AND DENIED IN PART. Judgment is entered in favor of Defendant and against Plaintiff on Counts I and II for disability discrimination only. Counts III and IV remain. An appropriate order follows.

ORDER

AND NOW, this 17th day of April, 2019, upon consideration of Defendant's Motion for Summary Judgment ("Motion") (Doc. 22), Plaintiff's response thereto (Doc. 27), and Defendant's reply (Doc. 28), **IT IS HEREBY ORDERED AND DECREED [*25]** that Defendant's Motion is **GRANTED IN PART AND DENIED IN PART**.[1]

BY THE COURT:

/s/ Petrese B. Tucker

Hon. Petrese B. Tucker, U.S.D.J.

End of Document

[1] This Order accompanies the Court's Memorandum Opinion dated April 17, 2019.

Boyne v. Town & Country Pediatrics & Family Med.

United States District Court for the District of Connecticut

February 7, 2017, Decided; February 7, 2017, Filed

No. 3:15-cv-1455 (MPS)

Reporter
2017 U.S. Dist. LEXIS 17321 *; 2017 WL 507212

MICHELLE BOYNE, Plaintiff v. TOWN AND COUNTRY PEDIATRICS AND FAMILY MEDICINE, Defendant.

Core Terms

pregnancy, allegations, light duty, motion to dismiss, restrictions, return to work, receptionist, reasonably related, pregnancy discrimination, amended complaint, medical condition, prima facie case, accommodation, disability, lifting, filled, temporal proximity, give rise, termination, exhausted, pregnant, survive, notice, hired, marks

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Judges: Michael P. Shea, United States District Judge.

Opinion by: Michael P. Shea

Opinion

RULING ON MOTION TO DISMISS

Plaintiff Michelle Boyne filed a two-count Second Amended Complaint against her former employer, Town and Country Pediatrics and Family Medicine, alleging violations of Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e, et seq.* (Count One) and Title II of the Americans with Disabilities Act, *42 U.S.C. §12101, et seq.* ("ADA") (Count Two). Defendant moves to dismiss Plaintiff's Second Amended Complaint ("SAC"). (ECF No. 28.) For the reasons stated below, the Court DENIES Defendant's Motion to Dismiss. (ECF No. 31.)

I. BACKGROUND

A. Factual Background

The following factual allegations are taken from the SAC. Plaintiff is a resident of the City of Bristol, Connecticut. (SAC, ECF No. 28 ¶ 2.) Defendant is a Connecticut corporation that administers medical services. (*Id.* at ¶ 3.) Plaintiff began her employment with **[*2]** Defendant as a full time medical assistant in November 2010. (*Id.* at ¶ 6.) She was initially employed through Jackie Matchett Personnel Service, and was officially hired by Defendant on March 14, 2011. (*Id.* at ¶ 6-7.)

In December 2011, Plaintiff had pregnancy complications and was placed on light work duty. (*Id.* at ¶ 8.) At that time, she was diagnosed with HELLP Syndrome, "a life-threatening pregnancy condition and disability that is a permanent diagnosis." (*Id.* at ¶ 9.) Due to HELLP Syndrome, during pregnancy the Plaintiff suffers from severe abdominal pain, a swollen liver, headaches, tiredness, nausea, and ulcers. (*Id.* at ¶ 11.) In December 2011, the Plaintiff informed the Defendant about her diagnosis with HELLP Syndrome and how it would affect her pregnancy and future pregnancies. (*Id.* at ¶ 12.) On December 31, 2011, the Plaintiff gave birth to a severely premature son due to HELLP Syndrome. (*Id.* at ¶ 13.) Her son did not survive birth. (*Id.* at ¶ 14.) Plaintiff returned to work and was placed on "light duty work with intermittent leave," which the Defendant accommodated. (*Id.* at ¶ 15-16.) Plaintiff was able to perform the essential functions of her job while on light duty. (*Id.* ***[*3]*** at ¶17.)

Plaintiff discovered that she was pregnant again in September 2013. (*Id.* at ¶ 18.) She was "nervous" to tell Defendant because of her ongoing HELLP Syndrome, and she feared that missing work could result in losing her job. (*Id.* at ¶ 19.) She informed Defendant of her pregnancy in January 2014. (*Id.* at ¶ 20.) As of January 2014, Plaintiff was working 39.5 hours per week for the Defendant. (*Id.* at ¶ 21.) 26 of those hours were spent performing receptionist duties and 13.5 were spent performing medical assistant duties. (*Id.* at ¶ 22.)

On January 31, 2014, Plaintiff had to leave work due to severe stomach pains related to her pregnancy. (*Id.* at ¶ 23.) Her obstetrician and gynecologist ("OBGYN") excused her from work from January 31 to February 5, 2014, due to medical issues from her pregnancy and HELLP Syndrome. (*Id.* at ¶ 23-24.) Plaintiff's OBGYN also required her to be on light duty for the remainder of her pregnancy, meaning that she could not bend or lift anything because it would aggravate her liver function and cause her pain. (*Id.* at ¶ 25, 27.) She called Malkie Scher ("Scher"), the Defendant's office manager, to inform her of these restrictions. (*Id.* at ¶ 26.) Plaintiff's **[*4]** OBGYN provided Defendant with out of work notes and light duty restrictions. (*Id.* at ¶ 28.) Plaintiff was able to perform the essential functions of her job while on light duty and with a reasonable accommodation. (*Id.* at ¶ 30.)

On February 4, 2014, Plaintiff received a call from Scher who told her that Dr. Ephraim P. Bartfeld, a doctor for the Defendant, would not allow Plaintiff to return to work until her light duty restrictions were lifted. (*Id.* at ¶ 29.) Plaintiff requested that she be allowed to work the 26 hours per week of her schedule as a receptionist, as that did not require any bending or lifting. (*Id.* at ¶ 31.) Her request was denied, and Defendant did not allow her to return to work at all, because Scher stated that the Defendant did not want to "risk it." (*Id.* at ¶ 33-34.)

On March 10, 2014, Plaintiff gave birth to a premature daughter, who contracted necrotizing enterocolitis ("NEC") and passed away on March 27, 2014. (*Id.* at ¶ 35-36.) On April 18, 2014, Plaintiff's OBGYN released her back to work with the same light duty restrictions of no bending or lifting because of her recovery from HELLP Syndrome. (*Id.* at ¶ 37.) At that time, Plaintiff asked Scher if she could return **[*5]** to work for the 26 hours a week that she had performed receptionist duties. (*Id.* at ¶ 38-40.) Her request was again denied, and Scher informed Plaintiff that Defendant had hired a new receptionist. (*Id.* at ¶ 42.)

Throughout April and May of 2014, Plaintiff remained in contact with Scher about her employment status. (*Id.* at ¶ 43.) On June 12, 2014, Plaintiff sent Scher a text message informing her that Plaintiff's OBGYN would lift her light duty restrictions on July 7, 2014, and that she could return to work on that date. (*Id.* at ¶ 44.) When Scher did not respond to the message, Plaintiff contacted Scher again on June 13 and June 16, 2014, to ask about her employment status. (*Id.* at ¶ 46.) On June 17, 2014, after Scher failed to respond, Plaintiff contacted Gabrielle Ministro ("Ministro"), an employee of Defendant, informed Ministro of her anticipated return to work date, and told her that Scher had not responded. (*Id.* at ¶ 48.) Ministro told the Plaintiff that she would inform the Defendant. (*Id.* at ¶ 49.) When Plaintiff contacted Ministro again on June 18, 2014, she was told that Dr. Bartfeld was handling her employment. (*Id.* at ¶ 50.) Plaintiff then contacted Dr. Bartfeld that same **[*6]** day. (*Id.* at ¶ 51.) Dr. Bartfeld informed Plaintiff that Defendant had filled her position. (*Id.* at ¶ 52.) He asked her to call back on June 20, 2014. (*Id.* at ¶ 52.) Plaintiff called back on June 20, 2014, and Dr. Bartfeld asked her to provide a doctor's note clearing her to return to her regular duties. (*Id.* at ¶ 53.) He also informed her that the only hours Defendant could provide her were on Sundays, meaning that Plaintiff's hours would decrease from 39.5 hours to six or seven hours a week. (*Id.* at ¶ 54.) On June 30, 2014, Plaintiff received a letter from Defendant stating that her employment with Defendant was terminated. (*Id.* at ¶ 55.) Defendant has hired two new receptionists and a new medical assistant. (*Id.* at ¶ 56.)

B. Procedural History

Plaintiff filed an administrative complaint with the Commission on Human Rights and Opportunities ("CHRO") and Equal Employment Opportunity Commission ("EEOC") on July 18, 2014. (*Id.* at ¶ 5.) Plaintiff received a Dismissal and Notice of Rights letter dated August 17, 2015. (*Id.*) Plaintiff filed her original complaint on October 5, 2015. (ECF No. 1.) On January 13, 2016, Defendant filed a Motion for a More Definite Statement. (ECF No. 19.) The **[*7]** Court granted the motion and ordered the Plaintiff to "submit an amended complaint that sets forth clearly which causes of action she seeks to plead." (ECF No. 20.) Plaintiff filed an amended complaint (ECF No. 21), and Defendant filed a Motion to Dismiss under *Rules 12(b)(1)* and *12(b)(6) of the Federal Rules of Civil Procedure*. (ECF No. 22.) Thereafter, the Court gave Plaintiff an opportunity to file an amended complaint "to address the alleged defects discussed in Defendants' memorandum of law" (ECF No. 24), and she did so on March 10, 2016. (SAC, ECF No. 28.)

On March 24, 2016, the Defendant renewed its motion to dismiss the SAC and incorporated by reference its prior brief.[1] (ECF No. 23.)

II. STANDARD

Under *Fed. R. Civ. P. 12(b)(6)*, the Court must determine whether the Plaintiff has alleged "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929*. Under *Twombly*, the Court accepts as true all of the complaint's factual allegations when evaluating a motion to dismiss. *Id. at 572*. The Court must "draw all reasonable inferences in favor of the non-moving party." *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co., 517 F.3d 104, 115 (2d Cir. 2008)*. "When a complaint is based solely on wholly conclusory allegations and provides no factual support for such claims, it is appropriate to grant defendants['] motion to dismiss." *Scott v. Town of Monroe, 306 F. Supp. 2d 191, 198 (D. Conn. 2004)*. For a complaint to survive **[*8]** a motion to dismiss, "[a]fter the court strips away conclusory allegations, there must remain sufficient well-pleaded factual allegations to nudge plaintiff's claims across the line from conceivable to plausible." *In re Fosamax Products Liab. Litig., 2010 U.S. Dist. LEXIS 37795, 2010 WL 1654156, at *1 (S.D.N.Y. Apr. 9, 2010)*. In other words "a plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 86 (2d Cir. 2015)* (internal quotation marks and citation omitted).

To survive a motion to dismiss in a discrimination case, "a plaintiff must allege that the employer took adverse action against her at least in part for a discriminatory reason, and she may do so by alleging facts that directly show discrimination or facts that indirectly show discrimination by giving rise to a plausible inference of discrimination." *Vega v. Hempstead Union Free Sch. Dist., 801 F.3d 72, 87 (2d Cir. 2015)*. "[W]hile a discrimination complaint need not allege facts establishing each element of a prima facie case of discrimination to survive a motion to dismiss, it must at a minimum assert nonconclusory factual matter sufficient to nudge its claims across the line from conceivable to plausible to proceed." *E.E.O.C. v. Port Auth. of N.Y. & New Jersey, 768 F.3d 247, 254 (2d Cir. 2014)* (*quoting* *Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)*; *Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2008)*; *Ashcroft v. Iqbal, 556 U.S. 662, 669-70, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009))* (internal quotation marks and citations omitted); *see also* *Vega, 801 F.3d at 83* (holding that while "*EEOC v. Port Authority* was **[*9]** an *Equal Pay Act* case and not a Title VII case" its holding applied to Title VII cases).

III. DISCUSSION

A. Pregnancy Discrimination (Count One)

[1] Defendant only incorporated "certain of its arguments" from its original motion to dismiss in its second motion to dismiss. (ECF No. 31, p.2.) Therefore, the Court only addresses the two arguments raised in Defendant's second motion, and deems the other arguments in its original motion abandoned.

Plaintiff claims in Count One of the SAC that Defendant discriminated against her in violation of Title VII of the Civil Rights Act of 1964, *42 U.S.C. § 2000e, et seq.* "[T]he Pregnancy Discrimination Act clarified that discrimination 'on the basis of sex' includes discrimination 'because of or on the basis of pregnancy, childbirth, or related medical conditions; and 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.'" *Barrett v. Forest Labs., Inc., 39 F. Supp. 3d 407, 447 (S.D.N.Y. 2014)* (*quoting* *42 U.S.C. § 2000e(k)*).

Defendant moves to dismiss Count One of the Second Amended Complaint, arguing that Plaintiff has failed to plead a prima facie case of pregnancy discrimination. In particular, Defendant argues that Plaintiff has failed to satisfy the fourth element of her prima facie case because she has not identified any similarly situated employees who were treated differently from her. As noted above, "a discrimination complaint need not allege facts establishing each element of a prima facie **[*10]** case of discrimination to survive a motion to dismiss." *Port Auth. of N.Y. & New Jersey, 768 F.3d at 254*. "A plaintiff can establish a prima facie case of pregnancy discrimination under Title VII by showing that: (1) she is a member of a protected class; (2) she satisfactorily performed the duties required by the position; (3) she was discharged; and (4) her position remained open and was ultimately filled by a non-pregnant employee. Alternatively, a plaintiff may establish the fourth element of a *prima facie* case by demonstrating that the discharge occurred in circumstances giving rise to an inference of unlawful discrimination." *Kerzer v. Kingly Mfg., 156 F.3d 396, 401 (2d Cir. 1998)*. "The discrimination complaint . . . must be viewed in light of the plaintiff's minimal burden to show discriminatory intent." *Littlejohn v. City of N.Y., 795 F.3d 297, 311 (2d Cir. 2015)*

The Plaintiff's allegations satisfy her "minimal" burden and plead enough facts to suggest that "the discharge occurred in circumstances giving rise to an inference of unlawful discrimination." *Kerzer, 156 F.3d at 401*. While one way to establish the fourth element of the prima facie claim is to allege that "the employer did accommodate others similar in their ability or inability to work," that is not the only way to raise an inference of discrimination. *Young v. UPS, Inc., 575 U.S. ___, 135 S. Ct. 1338, 1354, 191 L. Ed. 2d 279 (2015)*. "Temporal **[*11]** proximity between the plaintiff's termination and her pregnancy, childbirth, or related medical condition can raise an inference of discrimination" as well. *Briggs v. Women in Need, Inc., 819 F. Supp. 2d 119, 128-29 (E.D.N.Y. 2011)*; *see also* *Flores v. Buy Buy Baby, Inc., 118 F. Supp. 2d 425, 430-31 (S.D.N.Y. 2000)* (finding "[t]he temporal proximity of these events is adequate to raise an inference of discrimination" when plaintiff told her employer in "November or December" of her pregnancy and plan to take maternity leave and was fired in "late December"); *Pellegrino v. Cty. of Orange, 313 F. Supp. 2d 303, 315 (S.D.N.Y. 2004)* ("Evidence of temporal proximity between an employee's request for maternity leave and her termination is sufficient to establish an inference of discrimination."); *see also* *El Sayed v. Hilton Hotels Corp., 627 F.3d 931, 933 (2d Cir. 2010)* ("The temporal proximity of events may give rise to an inference of retaliation for the purposes of establishing a prima facie case of retaliation under Title VII."); *Govori v. Goat Fifty, L.L.C., 519 F. App'x 732, 734 (2d Cir. 2013)* (*El Sayed*'s "reasoning is equally applicable" in the Title VII pregnancy discrimination context).

Plaintiff's complaint alleges a close temporal proximity between her pregnancy and the denial of her request to continue light duty restrictions and ultimately her termination. Plaintiff alleges that she was excused from work for a week by her doctor due to complications from her high risk pregnancy, and was then told she could not return to work **[*12]** for the remainder of her pregnancy because Defendant did

not want to "risk it." (ECF No. 28 at ¶ 34.) Plaintiff asked to work the twenty-six hours a week of her schedule performing receptionist duties, which were within her work restrictions set by her doctor, and was denied. After her maternity leave ended in April, Plaintiff again asked to return to work with light duty restrictions, and was again denied, and told that Defendant had hired a new receptionist. She stayed in contact with Defendant's office manager throughout April and May about her employment status. On June 12, 2014, she told the office manager that her light duty restrictions would be lifted on July 7, 2014, and that she would return to work on July 7. She did not receive a response. On June 18, 2014, she was told that her position has been filled, and on June 20, 2014, Plaintiff was told that Defendant could offer only six to seven hours per week. On June 30, 2014, Plaintiff received a letter from Defendant notifying her that her employment with the company was terminated. Plaintiff alleges that she repeatedly requested to work her hours performing receptionist duties, as she had been doing before her pregnancy, **[*13]** as an accommodation due to her high-risk pregnancy, medically complicated birth, and continuing medical issues due to HELLP Syndrome. She kept in close contact with the office manager throughout her pregnancy and maternity leave, and her requests for a reasonable accommodation were repeatedly denied.

Plaintiff also makes other allegations in her complaint and her CHRO complaint that give rise to an inference of discrimination. She alleges that there were two other women in the office who were pregnant at the same time, and that Defendant did not allow her to work light duty because of the "high amount of pregnancies in the office," suggesting that her pregnancy contributed to the Defendant's decision. (ECF No. 35-2 at 5-6.)[2] Furthermore, plaintiff alleges that the Defendant hired two new receptionists as well as a medical assistant. (*Id.* at 7.) While Plaintiff does not allege that the new employees who filled her position were not pregnant, these allegations are enough to permit an inference of discrimination on the basis of her pregnancy and the related medical condition. *See* *Dollman v. Mast Indus., Inc., 731 F. Supp. 2d 328, 339 (S.D.N.Y. 2010)* (holding that the plaintiff had raised an inference of unlawful discrimination even though she did not "specifically **[*14]** identify a non-pregnant replacement who filled her position."). Because Plaintiff has met her "minimal" burden of alleging sufficient facts to raise an inference of discrimination, the Defendant's Motion to Dismiss Count One is DENIED.

B. Disability Discrimination and Failure to Accommodate (Count Two)

Defendant moves to dismiss Count Two of the Amended Complaint on the ground that Plaintiff failed to exhaust her administrative remedies as to her disability discrimination claim. "ADA Title I incorporates various provisions from Title VII of the landmark Civil Rights Act of 1964. One of these provisions, *section 2000e-5*, requires a claimant to file a charge of employment discrimination with the EEOC within 180 days after the discriminatory act." *McInerney v. Rensselaer Polytechnic Inst., 505 F.3d 135, 138 (2d Cir. 2007)*. While the ADA does impose an exhaustion requirement on plaintiffs, "a federal court may entertain a claim not alleged in an EEOC charge if it is reasonably related to the allegations in the EEOC charge." *LaCoparra v. Pergament Home Centers, Inc., 982 F. Supp. 213, 226 (S.D.N.Y. 1997)* (internal citations and quotation marks omitted). The Second Circuit detailed what is considered "reasonably related" in *Williams v. N.Y. City Hous. Auth.*:

[2] Because the CHRO complaint is incorporated by reference in the SAC (ECF No. 28 at ¶ 5), the Court may consider it on a motion to dismiss. *Chambers v. Time Warner, Inc., 282 F. 3d 147, 152 (2d. Cir. 2002)*.

> This Circuit has recognized that "[a] claim is considered reasonably related if the conduct complained **[*15]** of would fall within the scope of the EEOC investigation which can reasonably be expected to grow out of the charge that was made." *Fitzgerald v. Henderson, 251 F.3d 345, 359-60 (2d Cir.2001)* (internal quotation marks omitted). In this inquiry, "the focus should be 'on the factual allegations made in the [EEOC] charge itself, describing the discriminatory conduct about which a plaintiff is grieving.'" *Deravin v. Kerik, 335 F.3d 195, 201 (2d Cir.2003)* (quoting *Freeman v. Oakland Unified Sch. Dist., 291 F.3d 632, 637 (9th Cir.2002))*. The central question is whether the complaint filed with the EEOC gave that agency "adequate notice to investigate discrimination on both bases." *Id. at 202*. The "reasonably related" exception to the exhaustion requirement "'is essentially an allowance of loose pleading' and is based on the recognition that 'EEOC charges frequently are filled out by employees without the benefit of counsel and that their primary purpose is to alert the EEOC to the discrimination that a plaintiff claims [he] is suffering.'" *Id. at 201* (quoting *Butts, 990 F.2d at 1402*) (alteration in original).

458 F.3d 67, 70 (2d Cir. 2006) (footnote omitted).

Plaintiff filed her complaint with the CHRO on July 18, 2014. On the cover sheet of her CHRO complaint, Plaintiff marked the boxes "sex — female" and "pregnancy" as "factor/factors in this action." She argues that she has exhausted her administrative remedies because her ADA claim is **[*16]** reasonably related to her claim under the Pregnancy Discrimination Act. Defendant argues that the claim is not reasonably related because it did not give the CHRO "adequate notice to investigate discrimination on both bases." *Williams, 458 F.3d at 70*. The Defendant argues that the CHRO did not have adequate notice because the complaint does not use the word "disability" or mention a medical condition outside of the pregnancy itself.

While this is a "close call," the Court finds that the CHRO complaint is worded in a way that makes the ADA claim reasonably related to the pregnancy discrimination claim. *LaCoparra v. Pergament Home Centers, Inc., 982 F. Supp. 213, 226 (S.D.N.Y. 1997)*. Plaintiff's CHRO complaint mentions a serious medical condition, namely HELLP Syndrome. (Exh. B, ECF No. 35-2, 5.) It also details her high-risk pregnancy and lengthy recovery process due to HELLP Syndrome. (*Id.*) The CHRO complaint clearly articulates that Plaintiff suffered from a medical condition aside from her pregnancy, even if it does not use the term "disability."[3] It also clearly alleges that Plaintiff suffered from this condition starting in December of 2011. Given this background, the CHRO could reasonably infer that her condition persisted in her second pregnancy (*Id.*) Plaintiff also alleges that **[*17]** there were a "high amount of pregnancies in the office" at the time she alleges she was discriminated against, and that "both women who were pregnant at the same time . . . are still employed" by the Defendant. (*Id.* at 6.) This suggests that other pregnant women without a disability were treated more favorably; in other words, she was discriminated against for more than just her pregnancy. Furthermore, in Plaintiff's CHRO complaint, she details her request for light duty work, listed her restrictions which included "no bending or lifting," and asked for "accommodation" as a remedy. (*Id.*)[4] The allegations in her CHRO complaint gave the CHRO "adequate

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[3] The *Pregnancy Discrimination Act* states that discrimination "on the basis of sex" includes discrimination "because of or on the basis of pregnancy, childbirth, or *related medical conditions*." *42 U.S.C. § 2000e(k)* (emphasis added). While HELLP Syndrome could be classified as a "related medical condition" under the PDA, it could also be a disability under the ADA. The Supreme Court has held that "reproduction is a major life activity for the purposes of the ADA." *Bragdon v. Abbott, 524 U.S. 624, 639, 118 S. Ct. 2196, 2205, 141 L. Ed. 2d 540 (1998)*. Given this precedent, the fact that Plaintiff suffered from HELLP Syndrome, which interfered with her reproduction, gave the CHRO adequate notice that she was alleging discrimination on the basis of her pregnancy and a disability.

notice to investigate discrimination on both bases." *Williams, 458 F.3d at 70*. Especially because the "reasonably related doctrine" is "essentially an allowance of loose pleading . . . based on the recognition that EEOC charges frequently are filled out by employees without the benefit of counsel," the Court finds that Plaintiff's ADA claim was properly exhausted. *Id.*

IV. CONCLUSION

For the reasons stated above, the Court DENIES Defendant's motion to dismiss Counts One and Two.

IT IS SO ORDERED.

Dated: Hartford, Connecticut **[*18]**

February 7, 2017

/s/ Michael P. Shea, U.S.D.J.

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[4] Defendant abandoned its argument from its first Motion to Dismiss that Plaintiff has not alleged that she has a disability, because pregnancy is not considered a disability under the ADA. (ECF No. 23 at 10.) While the argument is abandoned, it remains relevant to whether Plaintiff's ADA claim is "reasonably related" to her pregnancy discrimination claim. It is true that pregnancy is not typically a disability within the meaning of the ADA. *See LaCoparra v. Pergament Home Centers, Inc., 982 F. Supp. 213, 228 (S.D.N.Y. 1997)*; *Wanamaker v. Westport Bd. of Educ., 899 F. Supp. 2d 193, 210-11 (D. Conn. 2012)*. Despite that, courts have found that an ADA claim can arise from "severe medical complications resulting from [a] pregnancy." *Bateman v. Project Hosp., Inc., 2009 U.S. Dist. LEXIS 92411, 2009 WL 3232856, at *10 (E.D.N.Y. Sept. 30, 2009)* (*citing Cerrato v. Durham, 941 F.Supp. 388, 392-94 (S.D.N.Y.1996)*; *Reilly v. Revlon, 620 F.Supp.2d 524, 546 (S.D.N.Y.2009))*. Here, the SAC states that "[i]n or around December 2011, the plaintiff was diagnosed with HELLP Syndrome, a life-threatening pregnancy condition and disability that is a *permanent diagnosis*." (ECF No. 28 at ¶ 9 (emphasis added).)

Delaware River Port Auth. v. Fraternal Order of Police Penn-Jersey Lodge No. 30

Superior Court of New Jersey, Appellate Division

March 5, 2019, Argued; March 27, 2019, Decided

DOCKET NO. A-3324-17T2

Reporter
2019 N.J. Super. Unpub. LEXIS 694 *; 2019 L.R.R.M. 106841; 2019 WL 1402887

DELAWARE RIVER PORT AUTHORITY, Plaintiff-Appellant/Cross-Respondent, v. FRATERNAL ORDER OF POLICE PENN-JERSEY LODGE NO. 30 IN THE MATTER OF LAURA BOUCHER, Defendant-Respondent/Cross-Appellant.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from Superior Court of New Jersey, Chancery Division, Camden County, Docket No. C-000087-17.

Core Terms

arbitration, accommodation, disability, interactive, pregnancy, dispatchers, vacate, frivolous, confirmed, suitable, pregnant, modified, binding

Counsel: William F. Cook argued the cause for appellant/cross-respondent (Brown & Connery LLP, attorneys; William F. Cook, of counsel and on the briefs).

Charles T. Joyce argued the cause for respondent/cross-appellant (Spear Wilderman, PC, attorneys; Charles T. Joyce, of counsel and on the briefs).

Judges: Before Judges Fisher, Hoffman and Geiger.

Opinion

PER CURIAM

The Delaware River Port Authority (DRPA) appeals from a Chancery Division order confirming an arbitration award in favor of DRPA police officer Laura Boucher, a member of the Fraternal Order of Police Penn-Jersey Lodge No. 30 (FOP), the union representing police officers employed by the DRPA. The FOP cross-appeals from the denial of its application for an award of attorney's fees and costs incurred in the Chancery action. We affirm.

I.

Boucher began working for the DRPA as a Public Safety Dispatcher in November 2012. While serving in this role, Boucher became pregnant with her first child. She experienced an uncomplicated pregnancy and continued to work as a dispatcher until about a week before her due date.

The DRPA hired Boucher as a police officer **[*2]** in 2014. After completing the academy, she was assigned to the Transit Unit, to work the 6:00 p.m. to 6:00 a.m. night shift. In the summer of 2015, Boucher became pregnant with her second child. This time Boucher's pregnancy was marked by "severe morning sickness and severe fatigue." Boucher's OB/GYN advised her to request a modified duty position from her employer in the interest of a healthy pregnancy.

On September 1, 2015, Boucher sent an email to Leila Camp, a DRPA claims assistant, stating she was pregnant and due in April 2016. Boucher further stated she planned to obtain a doctor's note for light duty at an upcoming appointment. Boucher asserted she would need leave in the next year under the *Family and Medical Leave Act (FMLA), 29 U.S.C. §§ 2601 to 2654*. Boucher asked about the process for formally requesting light duty, including any specific requirements and forms to be completed by her physician. Camp provided the FMLA paperwork, which Boucher completed and timely submitted to Brenda Greene, a DRPA claims administrator. Boucher informed Greene she notified administration of her pending request for light duty.

The following day, Lt. Robert Finnegan emailed Boucher about meeting with Chief John Stief **[*3]** concerning her request for light duty and medical leave. Finnegan instructed Boucher to submit any required paperwork to Greene. Finnegan invited Boucher to contact him with any questions.

The meeting with Stief took place on September 14, 2015. Finnegan also attended the meeting. Boucher informed Stief of her pregnancy complications and attendant request for light duty. Stief told Boucher her request was denied because no light duty was available. When Boucher inquired about a vacancy listed for a position in Central Records, Stief told her an employee in another title was filling that position.

Stief advised Greene no suitable temporary assignments were available to accommodate Boucher's light duty restrictions. In a letter to Boucher, Greene confirmed Boucher would need a modified duty assignment to return to work based on the restrictions stated in Boucher's FMLA certification and the physical requirements of her position. Greene informed Boucher there were no modified duty assignments available within the police department or throughout the Authority "that would suit your current physical restrictions."

Boucher was subsequently advised of her eligibility for short-term disability **[*4]** benefits through DRPA's disability carrier, The Standard. Boucher's application for short-term disability benefits was approved after she submitted additional medical records. Boucher used accrued paid leave to cover the two-week waiting period not covered by the disability benefits.

In late December 2015, Boucher received a letter from Camp confirming Boucher's FMLA leave became effective September 5, 2015, and expired twelve weeks later on November 27, 2015.[1] The letter also supplied Boucher with *Americans with Disabilities Act (ADA), 42 U.S.C. §§ 12101 to 12213*, forms to be submitted by January 8, 2016. Because Boucher's next doctor's appointment was not until the last week of January, FOP Secretary Tim Hoagland emailed Greene, objecting to the requirements imposed by the DRPA, including the application deadline.

In February 2016, The Standard denied long-term disability benefits and reversed the grant of short-term disability benefits because Boucher's medical records did not establish an inability to perform her job functions as of September 4, 2015, the date she stopped working. Boucher appealed the decision and received short and long-term disability benefits during the course of the subsequent grievance **[*5]** and arbitration proceedings.

Boucher's second child was born on April 8, 2016. She returned to work on June 8, 2016, without restrictions.

The DRPA and the FOP are parties to a collective bargaining agreement (CBA). Article II, Section 6 of the CBA provides:

> The DRPA and FOP agree that no action will be taken for the purpose of discriminating against any Employee because of union membership or activities, race, color, creed, age, sex, national origin, marital status, political affiliation or activity, or non[-]job-related disability, except where sex or age is a bona fide occupational qualification.

Article XIX provides:

> The DRPA will place any non-work related temporarily disabled Employees able to do so on light or limited duty status within the Department of Public Safety to the extent that such duty is determined to be available in DRPA's sole discretion, even if on an intermittent basis. This provision shall also apply to those Employees temporarily partially disabled due to injury on the job before they have fully recovered, if approved by a physician. The DRPA will make a reasonable attempt to place the temporarily partially-disabled Employee on the same work schedule currently assigned to that Patrol **[*6]** officer.

In turn, Article XXXIII states: "In addition to the rights contained in this Agreement, this Agreement incorporates any and all rights available under applicable federal or state laws, including but not limited to the Americans with Disabilities Act and the *Family and Medical Leave Act*."

The FOP filed a grievance on behalf of Boucher after the DRPA denied her request for light duty to accommodate complications that arose during her pregnancy. The grievance did not resolve and was referred to the American Arbitration Association for binding arbitration pursuant to the CBA. The parties stipulated to the following statement of the issue: "Was DRPA required to provide light duty and/or

[1] Boucher would become eligible for more FMLA hours after September 5, 2016, and after she worked at least 1250 hours preceding the leave.

reasonably accommodate Officer Boucher under Articles 2 and/or 19 of the CBA, and if so, what shall the remedy be?" The arbitrator conducted a three-day hearing. Boucher and FOP President Charles Price testified for the FOP; Greene and Stief testified for the DRPA.

Greene testified no request for light duty was granted to any DRPA police officer after 2013. Greene said the light duty position in the records room was filled by another full-time employee and there were no light duty positions in the **[*7]** past five years. Additionally, light duty positions in the radio room were no longer available to police officers because dispatcher positions were now in a different bargaining unit represented by another union.

Greene stated her responsibility to accommodate a DRPA police officer is limited to ascertaining if a suitable position is available in that department, because if not, no accommodation is possible. Greene did not contact Boucher to ask her what responsibilities and job tasks she was able to perform. Greene acknowledged that to the best of her recollection, no previous request for light duty by a pregnant officer had been denied. Greene said she was unaware of any police officer being assigned to light duty in a position outside the Department of Public Safety.

Greene recalled an instance where a police officer was placed on desk duty because his duty weapon was taken away as a result of a domestic violence complaint. The officer was not permitted to drive a police vehicle or perform other police work. He was given an alternate duty assignment of cleaning up a storage room until he could resume police work.

Boucher testified she expected to receive light duty based on her conversations **[*8]** with three other female officers who had received light duty while pregnant. Boucher's OB/GYN informed her that working the 6 p.m. to 6 a.m. shift disrupted her normal sleep rhythms and "most likely" exacerbated her fatigue and morning sickness. Boucher testified she assumed she would be working the same shift as administration if she were assigned to light duty. Had the DRPA offered her light duty during the night hours, she would have consulted her physician to determine if the accommodation was advisable. Boucher did not believe she could be "picky" regarding shift assignment on light duty, and "would have been open to some sort of cooperative agreement as to where [she] would have been available to work and where they felt work needed to be done."

Boucher further testified the DRPA never offered a dispatcher assignment "or anything like that." Had such an offer been made, she "would have considered it" and "talked to whoever offered [her] that position and figured out a way to try to make it work." In that regard, Boucher stated:

> When I requested light duty, it was purely for the fact that I wanted to work. I didn't want to sit at home. I didn't want to be on disability. I wanted **[*9]** to be able to continue to be active in the Police Department or with the Authority. There were a lot of things I missed out on being on disability. I would have done whatever I could have to continue to work.

Stief testified that light duty in the radio room is no longer available because dispatchers are represented by a separate union. He explained light duty is no longer available in central records because documents are processed electronically rather than manually. Additionally, since 2014, the DRPA has employed a media person to handle requests for video records, making that work unavailable for light duty.

Stief estimated, at any given time, between six and nine officers are out on workers' compensation leave, but no officer has been assigned desk duty or light duty since the beginning of 2014. As to the vacant

administrative secretary position, Stief said that work was being performed by another secretary, thereby allowing the DRPA to hire another police officer.

The FOP argued the DRPA violated the ADA and its own policies by not determining whether a suitable position outside the Department of Public Safety was available for Boucher to fill during her pregnancy. The FOP pointed **[*10]** to the DRPA's Worker's Compensation Modified/Alternate Duty Return to Work Program, which committed the DRPA to "make every effort" to place disabled workers in full pay employment status, even if it required finding "suitable work in another department within the Authority." The DRPA also averred the DRPA's "sole discretion" regarding light duty assignments must be read together with the other terms of the CBA, including Article II, Section 6 and Article XXXIII, which require compliance with the ADA.

The DRPA contended no officers on disability or workers' compensation leave have been placed on desk duty after January 1, 2014. It argued the desk duty of the officer facing domestic violence charges occurred more than two years before Boucher's leave in September 2015. The DRPA also claimed Article XIX applies only to positions within the Department of Public Safety. The DRPA emphasized no light duty positions were available during Boucher's pregnancy. The DRPA further argued the arbitration was limited to whether it violated Articles II or XIX of the CBA.

In her written opinion and award, the arbitrator found Article XIX granted the DRPA sole discretion to determine whether light duty assignments were available. **[*11]** Still, she reasoned:

> DRPA cannot exercise its discretion under Article XIX in a vacuum, but must do so in concert with the [CBA] as a whole. A contract interpretation that includes the Agreement as a whole is preferred to an interpretation that considers a provision in isolation. The FOP argues that Articles XIX and II, Section 6 are read in the context of the Agreement as a whole, including Article XXXIII, Officer Boucher's request for light duty as an accommodation during her pregnancy must take into account her rights under the [ADA] including the 2008 amendments (ADAAA). Article XXXIII which specifically incorporates the rights available under the ADA into the Agreement.
>
> ....
>
> The amendments to the ADA, in the ADAAA of 2008, specifically include "pregnancy-related impairments" in the definition of a disability. EEOC Enforcement Guidance: *Pregnancy Discrimination and Related Issues* No. 915.003 (June 25, 2015). Given that Officer Boucher sought a reasonable accommodation pursuant to the ADAAA, the DRPA is obligated both by statute and Articles II and XXXIII of its [CBA], which incorporate protections against discrimination and requires compliance with the ADAAA of 2008, to consider that request by engaging in an **[*12]** "interactive process" to determine what accommodation, if any, should be provided. That process requires communication between the employer and the employee to determine whether a reasonable accommodation of the employee is possible without causing undue hardship on the employer. In this instance, the DRPA unilaterally determined that no accommodation was possible without engaging in the "interactive process" required by the ADA. *Warner v. WM. Bolthouse [Farms Inc., No. 1:17-cv-00217, 2017 U.S. Dist. LEXIS 23172, at *6 (E.D. Cal. Feb. 17, 2017)* (citing *United States EEOC v. UPS Supply Chain Solutions, 620 F.3d 1103 (9th Cir. 2010))]*. That is, neither Chief Stief nor Ms. Greene inquired as to what tasks Officer Boucher could perform or what shifts she could work. Ms. Greene inquired only whether Chief Stief had light duty available within the Department of Public Safety and viewed a list of open positions on the DRPA website. While those actions are appropriate,

without some discussion with Officer Boucher, they are not sufficient to constitute an "interactive process" and to determine whether a reasonable accommodation is available.

. . . The record in this instance does not reflect that DRPA engaged in discriminatory conduct based upon Office[r] Boucher's pregnancy, but it does reflect that she was summarily denied light **[*13]** duty without any effort to determine whether she could be accommodated.
Even given Chief Stief's testimony that no light duty was available within the Department of Public Safety, it is possible that Officer Boucher could have been accommodated on an intermittent basis, had that option been discussed. Article XIX provides that light duty might be available on an intermittent basis. Police officers were assigned to work as dispatchers, despite the dispatchers' representation by a different union, when the Department of Public Safety experienced a shortage of dispatchers during the papal visit in 2015. However, only active duty police officers were assigned as dispatchers. Officer Boucher had previously worked as a dispatcher. Had a full interactive process occurred, perhaps some light duty might have been available to Officer Boucher during periods when there was a shortage of dispatchers. I note that the "interactive process" may not always result in a light duty accommodation to a pregnant police officer, pursuant to Article XIX, but that determination remains dependent on DRPA's engaging in the interactive process before exercising its discretion under Article XIX.

The FOP also argues **[*14]** that DRPA was obligated by its then new Worker's Compensation Modified/Alternative Duty Return to Work Program, together with the ADA to "make every effort" to place Officer Boucher in a fulltime position including making the effort to find "suitable work in another department..." The EEOC's Enforcement Guidance: *Worker's Compensation and the ADA*, EEOC Notice No. 915.002, does require employers that reserve light duty positions for employees with occupational injuries to extend the same opportunities to workers with disabilities covered by the ADA. In this instance, Ms. Greene reviewed the listing of job postings within the DRPA to determine whether there was one where Officer Boucher could work for the duration of her pregnancy. That review would have been sufficient in this instance had the DRPA engaged in the interactive process with Officer Boucher to determine her skills and limitations.

The arbitrator determined the DRPA violated Article XIX "when it failed to engage in an interactive process to properly determine whether Office[r] Boucher could be reasonably accommodated as required by the ADA before it exercised its discretion to deny her request for light duty to accommodate **[*15]** her pregnancy." The arbitrator awarded Boucher the "difference between the amount she received in long and short term disability payments from September 14, 2015 . . . through April 1, 2016, the point when she would have left work for the delivery of her child."

The DRPA brought this Chancery Division action to vacate the award pursuant to *N.J.S.A. 2A:24-7*. The FOP answered and counterclaimed to confirm the award and for attorney's fees and costs pursuant to *N.J.S.A. 2A:15-59.1*. The parties agreed to resolution of the matter through cross-motions for summary judgment without conducting discovery.

In an oral decision, the Chancery judge assessed the propriety of the award under the four categories enumerated in *N.J.S.A. 2A:24-8*. Specifically, the judge considered whether the arbitrator exceeded her authority by imposing a monetary award, which the DRPA labelled a sanction. The trial court concluded the arbitrator did not exceed her powers, finding the monetary award was compensatory, rather than punitive, and had an objective basis and rationale. The judge noted "the arbitrator heard the testimony and

reached the final conclusion that the DRPA did not engage in an interactive process to determine what accommodations could be made available **[*16]** to this officer." The judge declined "to challenge" the arbitrator's factual findings. The judge concurred with the arbitrator's conclusion that the DRPA did not fulfil its obligation to engage in an interactive process.

The trial court also considered the FOP's application for attorney's fees and costs as a sanction based on the DRPA routinely seeking judicial review of binding public sector arbitration awards. The trial court declined to consider prior cases filed by the DRPA, and based its ruling on the facts presented in this matter. The court concluded the DRPA had the right to challenge the award and the decision to do so was not arbitrary.

The trial court confirmed the arbitration award and denied the FOP's application for attorney's fees and costs. Orders reflecting those rulings were entered. This appeal and cross-appeal followed.

The DRPA argues the award must be reversed because the Arbitrator misapplied the law in ruling that the DRPA violated the ADA without a finding of discrimination against Boucher. The CBA granted the DRPA sole discretion in determining the availability of light duty assignments. An interactive process analysis under the ADA is irrelevant where an employee **[*17]** cannot identify any positions suitable to constitute a reasonable accommodation. The damage remedy is improper under the ADA because *42 U.S.C. § 1981a(b)(2)* excludes back pay from available compensatory damages. Finally, the DRPA asserts frivolous litigation sanctions are improper here.

In response, the FOP argues the award should be confirmed since it is reasonably debatable, consistent with the CBA binding both parties, and not susceptible to the statutory bases for judicial vacatur of a labor arbitration award. On its cross-appeal, the FOP avers the DRPA routinely challenges arbitration awards that are supposed to be final and binding, and that only monetary sanctions for frivolous litigation will dissuade them. The FOP argues the DRPA filed this action to vacate the arbitration award without justification or a reasonable chance to prevail, entitling the FOP to an award of attorney's fees and costs in the Chancery action.

II.

Our role "in reviewing arbitration awards is extremely limited." *State v. Int'l Fed'n of Prof'l & Tech. Eng'rs, Local 195, 169 N.J. 505, 513, 780 A.2d 525 (2001)* (citing *Kearny PBA Local # 21 v. Kearny PBA Local # 21, 81 N.J. 208, 221, 405 A.2d 393 (1979))*. Arbitration awards are presumed to be valid. *Local No. 153, Office & Professional Employees International Union v. Trust Co. of New Jersey, 105 N.J. 442, 448, 522 A.2d 992 (1987)*. Accordingly, we undertake "an extremely deferential review when a party to a collective bargaining agreement has sought to vacate an arbitrator's **[*18]** award." *Policemen's Benevolent Ass'n, Local No. 11 v. City of Trenton, 205 N.J. 422, 428, 16 A.3d 322 (2011)*. "Generally, when a court reviews an arbitration award, it does so mindful of the fact that the arbitrator's interpretation of the contract controls." *Borough of E. Rutherford v. E. Rutherford PBA Local 275, 213 N.J. 190, 201, 61 A.3d 941 (2013)*.

"An appellate court's review of an arbitrator's interpretation is confined to determining whether the interpretation of the contractual language is 'reasonably debatable.'" *New Jersey Transit Bus Operations, Inc. v. Amalgamated Transit Union, 187 N.J. 546, 553-54, 902 A.2d 209 (2006)* (quoting *Local 195, 169 N.J. at 513*). "Under the 'reasonably debatable standard,' a court reviewing [a public-sector] arbitration award 'may not substitute its own judgment for that of the arbitrator, regardless of the court's view of the

correctness of the arbitrator's position.'" *Borough of E. Rutherford, 213 N.J. at 201-02* (alteration in original) (quoting *Middletown Tp. PBA Local 124 v. Township of Middletown, 193 N.J. 1, 11, 935 A.2d 516 (2007)*). If the "interpretation of the contractual language" is "reasonably debatable in the minds of ordinary laymen," then "the reviewing court is bound by the arbitrator's decision." *Selected Risks Ins. Co. v. Allstate Ins. Co., 179 N.J. Super. 444, 451, 432 A.2d 544 (App. Div. 1981)* (quoting *Ukrainian Nat'l Urban Renewal Corp. v. Joseph L. Muscarelle, Inc., 151 N.J. Super. 386, 398, 376 A.2d 1299 (App. Div. 1977)*).

Consistent with these principles, the New Jersey Arbitration Act, *N.J.S.A. 2A:24-1* to -11, provides only four grounds for vacating an arbitration award:

> a. Where the award was procured by corruption, fraud or undue means;
> b. Where there was either evident partiality or corruption in the arbitrators, or any thereof;
>
> c. Where the arbitrators were guilty of misconduct . . . prejudicial to the rights of **[*19]** any party; [or]
> d. Where the arbitrators exceeded or so imperfectly executed their powers that a mutual, final and definite award upon the subject matter submitted was not made.
>
> [*N.J.S.A. 2A:24-8*.]

A court may also vacate an award if it is contrary to public policy. *Borough of E. Rutherford, 213 N.J. at 202* (quoting *Middletown Twp., 193 N.J. at 11*).

An arbitrator's "'acknowledged mistake of fact or law or a mistake that is apparent on the face of the record'" is captured within 'undue means,' "whereas an arbitrator exceeds his or her 'authority by disregarding the terms of the parties' agreement.'" *Borough of E. Rutherford, 213 N.J. at 203* (quoting *Off. of Emp. Rels. v. Commc'ns Workers of Am., 154 N.J. 98, 111-12, 711 A.2d 300 (1998)*). Whether the arbitrator exceeded his authority "entails a two-part inquiry: (1) whether the agreement authorized the award, and (2) whether the arbitrator's action is consistent with applicable law." *Id. at 212*.

The party seeking to vacate an arbitration award bears the burden of demonstrating wrongdoing on the part of the arbitrator. *Tretina Printing, Inc. v. Fitzpatrick & Assocs., 135 N.J. 349, 357, 640 A.2d 788 (1994)*; *Minkowitz v. Israeli, 433 N.J. Super. 111, 136, 77 A.3d 1189 (App. Div. 2013)*. Because a decision to vacate or confirm an arbitration award is a decision of law, we review "the denial of a motion to vacate an arbitration award de novo." *Minkowitz, 433 N.J. Super. at 136* (quoting *Manger v. Manger, 417 N.J. Super. 370, 376, 9 A.3d 1081 (App. Div. 2010)*).

We discern no basis to vacate the arbitrator's award under the statute. We reject the DRPA's position that the arbitrator misinterpreted the ADA or the CBA, or exceeded her authority. **[*20]**

The DRPA cites several federal cases for the proposition that an interactive process analysis is irrelevant where an employee cannot identify any positions suitable to constitute a reasonable accommodation. Specifically, DRPA directs our attention to *Donahue v. Consolidated Rail Corp.*, where the Third Circuit Court of Appeals recited "the Eleventh Circuit's observation that 'where a plaintiff cannot demonstrate "reasonable accommodation," the employer's lack of investigation into reasonable accommodation is unimportant.'" *224 F.3d 226, 233 (3d Cir. 2000)* (quoting *Willis v. Conopco, Inc., 108 F.3d 282, 285 (11th Cir. 1997)*). *Donahue* goes on to clarify, however: "an employer who acts in bad faith in the interactive process will be liable *if the jury can reasonably conclude that the employee would have been able to*

perform the job with accommodations." *Id. at 234-35* (quoting *Taylor v. Phoenixville Sch. Dist., 184 F.3d 296, 317 (3d Cir. 1999))* (emphasis in original). Therefore, the DRPA's reliance on *Donahue* is misplaced because the arbitrator, as the finder of fact, reasonably concluded Boucher would have been able to perform her duties with accommodations.

We find the proffered language in *Donahue* does not control this case for the following, additional reasons. First, although "elements of a claim under *§ 504(a)*[2] of the Rehabilitation Act[3] are very similar to the **[*21]** elements of a claim under *Title I of the Americans with Disabilities Act*," *id. at 229*, the fact remains that *Donahue* was not an ADA case, but was a failure-to-transfer case under the Rehabilitation Act.

Furthermore, in acknowledging the similarities between the two acts, the *Donahue* court cited to *Taylor* for the elements of a claim under the ADA. *Donahue, 224 F.3d at 229*. In *Taylor*, the court detailed the elements a disabled employee must demonstrate to show an employer failed to engage in the interactive process as follows:

> 1) the employer knew about the employee's disability; 2) the employee requested accommodations or assistance for his or her disability; 3) the employer did not make a good faith effort to assist the employee in seeking accommodations; and 4) the employee could have been reasonably accommodated but for the employer's lack of good faith.
>
> [*184 F.3d at 319-20*.]

With regard to the element of employer good faith, the *Taylor* court explained summary judgment is typically precluded where there is a genuine dispute about the employer's good faith because such a determination is properly accorded to the trier of fact. *Id. at 318*. Therefore, under *Taylor*, a determination that an employer failed to make a good faith effort in the interactive **[*22]** process is not legal, but factual in nature. *See also Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 772 (3d Cir. 2004)* (recognizing the function of the fact finder includes determinations of good faith in the interactive process).

The arbitrator's factual findings are supported by the record. Her interpretation of the contractual language is reasonably debatable. Change in shifts can be a reasonable accommodation. *Colwell v. Rite Aid Corp., 602 F.3d 495, 505-06 (3d Cir. 2010)*. So too can light duty. By not engaging in an interactive process with Boucher to learn the services she could perform and whether she would be capable of working a different shift, the DRPA did not make a good faith effort to assist Boucher in seeking accommodations. Consequently, the DRPA did not engage in a good faith effort to reasonably accommodate Boucher. Therefore, the DRPA has not met its burden of demonstrating wrongdoing on the part of the arbitrator. Accordingly, the award must be confirmed.

III.

We next address the denial of the FOP's application for an award of attorney's fees and costs. The FOP asserts the DRPA routinely challenges final and binding arbitration awards, and that only monetary sanctions for frivolous litigation will dissuade them. Relying on non-precedential federal case law, the

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[2] *29 U.S.C. § 794*.

[3] The *Rehabilitation Act of 1973, 29 U.S.C. §§ 701 to-796l*.

FOP argues it was error to **[*23]** deny an award of attorney's fees and costs because the DRPA's action to vacate the supplemental award was without justification and had no reasonable chance of success. Ostensibly, the FOP claims the DRPA's appeal was frivolous. We are unpersuaded by this argument.

The arbitrator denied the FOP's application for an award of attorney's fees and costs. The record does not demonstrate the FOP complied with the notice requirements imposed by *Rule 1:4-8(b)(1)* for an award of fees and costs for frivolous litigation under *N.J.S.A. 2A:15-59.1*. Failure to comply with the notice requirements imposed by the rule bars an award of frivolous litigation fees and costs. *Trocki Plastic Surgery Ctr. v. Bartkowski, 344 N.J. Super. 399, 406, 782 A.2d 447 (App. Div. 2001)*.

The trial court addressed the merits of the FOP's claim for frivolous litigation sanctions. It declined to speculate about prior actions filed by the DRPA to set aside arbitration awards, noting the facts involved in those prior actions were not before the court. Rather, the court assessed the facts and legal issues present in this case and concluded the DRPA had a right to challenge the award and the decision to do so was not arbitrary or frivolous. We discern no basis to overturn that decision. The issues raised by the DRPA regarding its duties under the ADA appear **[*24]** to be of first impression in this State. The DRPA also asserted it properly denied to accommodate Boucher by assigning her to light duty because no such light duty position was available. We do not view these positions to be without justification or reasonable chance to prevail, or otherwise frivolous.

The ADA is a fee-shifting statute that permits the award of reasonable counsel fees and costs to a prevailing party in any court action or administrative proceeding. *42 U.S.C. § 12205*. The FOP argues the trial court should have awarded attorney's fees and costs in the Chancery Division action because it "essentially shared the status of 'prevailing party' with Officer Boucher." We are unpersuaded by this argument. The FOP did not assert a claim under the ADA for an award of attorney's fees and costs in its counterclaim or during oral argument on its motion. We adhere to the well-settled principle that an issue or claim not presented to the trial court will not be considered on appeal. *Zaman v. Felton, 219 N.J. 199, 226-27, 98 A.3d 503 (2014)*; *Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234, 300 A.2d 142 (1973)*. We decline to address the FOP's claim for counsel fees and costs under the ADA.

The FOP's remaining arguments lack sufficient merit to warrant extensive discussion in a written opinion. *R. 2:11-3(e)(1)(E)*. The FOP is not entitled to an **[*25]** award of attorney's fees under the terms of the CBA or any other court rule or statute. Therefore, the FOP must bear the cost of its own attorney's fees and costs in this matter. *See R. 4:42-9(a)*; Pressler & Verniero, *Current N.J. Court Rules*, cmt. 1 on *R. 4:42-9* (2019). The trial court properly denied the FOP's application for an award of attorney's fees and costs.

Affirmed.

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Groslinger v. Township of Wyckoff

Superior Court of New Jersey, Appellate Division

May 13, 2009, Argued; January 20, 2010, Decided

DOCKET NO. A-5861-07T2

Reporter
2010 N.J. Super. Unpub. LEXIS 125 *; 2010 WL 174196

BRENDA GROSLINGER, Plaintiff-Appellant, v. TOWNSHIP OF WYCKOFF and JOHN YDO, Defendants-Respondents.

Notice: NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION.

PLEASE CONSULT NEW JERSEY *RULE 1:36-3* FOR CITATION OF UNPUBLISHED OPINIONS.

Prior History: [*1] On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-4019-06.

Core Terms

dispatcher, pregnancy, sick, harassment, pregnant, accommodated, arbitrator's, facie, reassignment, recommended, modified, hostile, certif, gender, sexual, grievance, irregular, patrol

Counsel: Jennifer L. Gottschalk argued the cause for appellant (Oxfeld Cohen, attorneys; Sanford R. Oxfeld, of counsel; Ms. Gottschalk, on the brief).

Ruby Kumar-Thompson and Raymond R. Wiss, argued the cause for respondents Township of Wyckoff and John Ydo (Thomas B. Hanrahan & Associates and Wiss & Bouregy, attorneys; Mr. Hanrahan and Mr. Wiss, of counsel and on the briefs; Ms. Kumar-Thompson and Melissa Kanbayashi, on the briefs).

Judges: Before Judges Rodriguez, Payne and Newman. The decision of the court was delivered by RODRIGUEZ, A. A., P.J.A.D.

Opinion by: RODRIGUEZ

Opinion

The decision of the court was delivered by

RODRIGUEZ, A. A., P.J.A.D.

Plaintiff Brenda Groslinger appeals the July 3, 2008 order granting summary judgment in favor of defendants John Ydo (Ydo) and Township of Wyckoff (Township). We affirm.

Groslinger was a police officer with the Wyckoff Police Department (WPD) for several years. In 2005, she informed her supervisor that she was pregnant and that her doctor recommended she be reassigned to non-patrol duties. She was assigned to a floating dispatcher position that required her to work an irregular schedule. **[*2]** Groslinger asserts she suffered health consequences from working this schedule. She also asserts her coworkers made inappropriate comments based on her gender and her pregnancy.

Groslinger filed a grievance with the Township Administrator alleging she had been subjected to discrimination and harassment in violation of the New Jersey Law Against Discrimination (LAD), *N.J.S.A. 10:5-1 to -49*. The grievance concluded with Groslinger's voluntary placement in an accommodated position.

Groslinger thereafter filed a complaint in the Law Division alleging she had been subjected to gender discrimination and sexual harassment in violation of the LAD and retaliation in violation of the Conscientious Employee Protection Act (CEPA), *N.J.S.A. 34:19-1 to -14*. Defendants moved for summary judgment and, following a hearing, the judge dismissed the complaint, finding in part that Groslinger's LAD claims were waived by her voluntary acceptance of modified duties following the grievance. Groslinger appealed.

These are the salient facts. Groslinger became pregnant with her first child in September 2003. At no time has the WPD ever had a "light duty" policy for patrol officers unable to perform the duties of **[*3]** their positions. However, Ydo placed Groslinger in a vacant dispatcher position, subject to her doctor clearing her to perform the duties of the position. Groslinger had worked as a civilian dispatcher prior to becoming a patrol officer. Because there were two vacant dispatcher positions at that time, Groslinger was able to work a regular shift throughout her pregnancy.

Groslinger became pregnant with her second child in August 2005 and again requested a modified duty schedule commensurate with her doctor's recommendations. As with her first pregnancy, Ydo reassigned Groslinger to "various administrative/dispatch functions," conditioned on her doctor's approval. Ydo confirmed this arrangement in a letter to Groslinger, noting that in light of the "unprecedented and temporary nature" of the reassignment, "shift changes are possible, and more than likely, due to the 'as needed' basis of some of your new functions." Groslinger did not sign this letter, stating she first wished to consult with an attorney.

Groslinger's second pregnancy was more difficult to accommodate than her first because there were no longer any vacant dispatcher positions. There were gaps in the dispatcher schedule **[*4]** that Groslinger filled. However, Ydo also had to accommodate the per diem workers who normally filled these shifts to ensure the workers would still be available after Groslinger returned to regular duty. Accordingly, Groslinger received an irregular schedule and occasionally worked a 3 p.m. to 11 p.m. shift followed by a 7 a.m. to 3 p.m. shift the next day.

Pursuant to the Township sick leave policy, codified by the Township Administrator in April 2006, Township employees were entitled to fifteen sick days per year, which could accumulate from year to year in the event of a long-term illness. A pregnant employee was entitled to unpaid leave only to the extent authorized pursuant to the Family Medical Leave Act (FMLA) [1] and/or the New Jersey Family Leave Act (FLA). [2]

In September 2005, she requested that her doctor, Leonard Nicosia, M.D., write her a note. The note stated: "[Groslinger] cannot fulfill her duties as a police officer due to her pregnancy. She is unable to return to work as of [September 14, 2005, and] until released for duty from this office."

Without speaking to anyone, Groslinger left this note on Ydo's desk and did not report **[*5]** to work for the next five days. When Ydo requested that Groslinger's doctor specify which duties she could not perform, the doctor responded with a letter stating: "After reviewing the civil dispatcher activities/job functions list, we see no reason for her to be unable to do the civil dispatcher's position at this time." Ydo ordered Groslinger back to work. Ydo additionally requested that Groslinger account for her absence from work and initiated an investigation. Groslinger claimed this investigation was intended to harass and discriminate against her. No disciplinary action was brought against her.

Groslinger returned to work. On March 1, 2006, she obtained a doctor's note excusing her from work. She gave birth on March 31, 2006. She invoked the FMLA, the FLA, and personal leave to care for the baby until the following September. Groslinger was informed that, in light of her eight years of service, she was entitled to a total of 128 sick days through the end of 2006. Because she had already utilized 101 sick days, she had twenty-seven sick days remaining. She was paid for all the sick time she used in 2005 and 2006.

Groslinger alleges that, while she was pregnant, she was subjected **[*6]** to a hostile workplace environment based on several encounters with other WPD officers. Because Ydo was on vacation when Groslinger initially disclosed her second pregnancy, she spoke with the acting chief of the department, Captain Benjamin Fox. Fox stated that light duty was unavailable and indicated Groslinger might not receive paid sick leave if she took time off, "because you are not sick, you are not injured, you are pregnant, and I don't know what category that falls in that you would be compensated for not coming to work." He suggested Groslinger could avoid working by getting pregnant every year for five years.

Around the same time, Captain Ken Hagedorn sent out a general email stating it was unlikely Groslinger would work any more patrol shifts that year, so all other requests for personal time would have to accommodate for the lack of personnel.

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[1] *29 U.S.C.A. §§ 2601-2654*.

[2] *N.J.S.A. 34:11B-1*

At some point a police secretary, Beverly Smith, said words to the effect of, "Screw her, cut off her pay, and let her sue us." Ydo learned of the remark during the Township Administrator's investigation and verbally admonished Smith for the remark. The Township Administrator later sent Smith a written letter of reprimand.

Two detectives, **[*7]** Joseph Soto and Daniel Kellogg, said words to the effect of, "If you expect to be hired here, you better put your uterus in a jar and show it to the Chief," implying the WPD would not hire a patrol officer likely to become pregnant. When Ydo learned of the incident, he verbally admonished both Soto and Kellogg and sent them each a written warning, informing them that such comments violate WPD rules and regulations. He ordered them to attend additional sexual harassment training.

In September 2005, Groslinger filed a grievance with the Township Administrator based on the conduct of her fellow officers. She alleged she had been subjected to harassment and discrimination on account of her pregnancy in violation of the WPD collective bargaining agreement, the LAD, and the FLA, and that the investigation into her use of sick leave was retaliatory, in violation of CEPA.

On November 2, 2005, Groslinger signed a letter agreeing to accept a modified duty schedule on terms substantially identical to those in the letter Ydo sent on August 25, 2005. Subsequently, the Township Administrator issued a recommendation addressing Groslinger's grievance, which the Township accepted and endorsed in a resolution. **[*8]** The Administrator found no negative motivation in Hagedorn's email regarding requests for personal leave, but recommended Ydo review the incident with Hagedorn. The Township Administrator found Fox and Groslinger's accounts of their discussion about her request for accommodated duty irreconcilable, but recommended Ydo review the incident with Fox. The Administrator found Smith's comment reflected poor judgment and recommended Smith be reassigned to another department. He found Soto and Kellogg's alleged "uterus in a jar" discussion inappropriate and recommended that they receive a written reprimand and that they attend sensitivity training. Finally, the Administrator found no merit to the allegation that Ydo had initiated the investigation into Groslinger's use of sick time to harass and intimidate her.

Regarding Groslinger's allegations that the WPD granted requests for sick time in a discriminatory manner, the Administrator found no discriminatory intent where Groslinger's doctors never said she would be unable to perform her assigned duties and where Ydo followed the same procedures used during Groslinger's first pregnancy.

In November 2005, Ydo sent a department-wide memorandum reiterating **[*9]** the Township's zero-tolerance policy regarding harassment and discrimination. The memo described the procedure for reporting alleged violations and emphasized that both false allegations and substantiated violations would result in disciplinary action.

The matter was also submitted for arbitration. The arbitrator found in favor of Groslinger. The Law Division vacated the arbitrator's award as exceeding the power of the arbitrator and violating public policy. In a companion case, Groslinger appealed. *Twp. of Wyckoff v. PBA Local 261, 409 N.J. Super. 344, 976 A.2d 1136 (App. Div. 2009)*. The appeal issue focused on the standard governing the arbitrator's decision to define the breadth of the dispute submitted by the parties. There, the issue referred to violations of the CBA without limiting reference to specific provisions of the CBA. We held that the arbitrator's interpretation of the collective bargaining agreement and the issue submitted was reasonably debatable. *Id. at 358*. Therefore, we reversed and reinstated the arbitrator's award.

Groslinger filed the present complaint in Superior Court alleging she had been subject to harassment and discrimination in violation of the LAD and retaliation in violation **[*10]** of CEPA.

In connection with this litigation, Groslinger submitted a certification asserting, in part, that:

> Although, to my knowledge, no accommodated male officer had been ordered to perform civilian duties such as dispatching, I was content with this accommodation.
>
> However, my schedule as a dispatcher quickly became a health concern and impacted upon my pregnancy. My shifts were erratic. Sometimes I worked the 7 AM to 3 PM shift and sometimes I worked the 3 PM to 11 PM shift. There were consecutive days when I would be ordered to work the 3 PM to 11 PM shift followed by the 7 AM to 3 PM shift. This provided only an eight-hour layover between the shifts.
>
> In addition, my schedule was highly erratic with regards to days off, and I rarely had consecutive days off.
>
> The short layover was difficult for me given the physical demands of pregnancy. When reporting for a 3 PM to 11 PM shift, followed by a 7 AM to 3 PM shift, I noticed health impacts on me. I felt very fatigued and that I had not had sufficient sleep because of the short, eight-hour layover.
>
> During my first pregnancy in 2003-2004, my doctor instructed me that I was a "higher-risk pregnancy" because I was [thirty-eight] years old and **[*11]** my family had a history of diabetes. Therefore, throughout my first and second pregnancies, I was diligent about my health.
>
> During my second pregnancy, as a result of the inconsistencies in my work schedule while dispatching, in addition to other factors, I was frequently getting sick. I had colds, respiratory infections, and problems with my stomach and bowels. I realized that I should not continue to work an inconsistent, erratic schedule, or else there would be continued impacts on my health and, potentially on the health of my fetus.

Following oral argument, the judge entered an order granting summary judgment to the defendants. In a written opinion, he found Groslinger had not made out a prima facie case showing an adverse employment action where:

> [T]he plaintiff's conduct in executing the November 2, 2005 agreement waived her right to bring the above claims. The court is convinced that the plaintiff was never required to perform administrative or dispatch duties, but instead, requested said duties due to her pregnancy. The plaintiff cannot bring a claim alleging disparate treatment due to a reassignment that she requested herself.

The judge further found Groslinger's CEPA claims **[*12]** were barred by her LAD claims. [3]

Groslinger appeals, arguing:

> THE TRIAL COURT ERRED IN GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT.

Summary judgment is appropriate where the moving party is entitled to judgment as a matter of law and there are no issues of material fact in dispute. *Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 540, 666 A.2d 146 (1995)*; *R. 4:46-2(c)*. On a motion for summary judgment, all facts must be viewed in the light most favorable to the non-moving party. *Brill, supra, 142 N.J. at 540*.

[3] As defendants note, this would have to be the other way around: the CEPA claims would bar the LAD claims.

Here, we agree with the judge's determination that Groslinger's accession to the November 2, 2005 agreement waived her right to bring her LAD claims. Groslinger was assigned to modified duties at her own request. By signing the agreement, she acknowledged that reassignment was contingent on department need, that she might not receive a regular schedule or regular duties, and that her reassignment was contingent on receiving clearance from her doctor. In fact, when she signed the agreement she had already been serving as a dispatcher and should have been aware of the scheduling irregularities **[*13]** and the potential impact on her health.

With regard to whether Groslinger established a prima facie claim of disparate treatment, the judge granted defendants' motion for summary judgment. For the sake of completeness, however, we will address the merits of Groslinger's individual claims.

Groslinger contends:

> PLAINTIFF ESTABLISHED A PRIMA FACIE CASE OF GENDER DISCRIMINATION BEFORE THE MOTION COURT BELOW.

The LAD prohibits an employer from taking an adverse employment action against any individual on the basis of "race, creed, color, national origin, ancestry, age, marital status, civil union status, domestic partnership status, affectional or sexual orientation, genetic information, sex, gender identity or expression, disability or atypical hereditary cellular or blood trait[.]" *N.J.S.A. 10:5-12(a)*.

To establish a prima facie case of discrimination under the LAD, a plaintiff must establish: 1) she is a member of a protected class; 2) she was performing her job at a level meeting her employer's legitimate expectations; 3) she was subject to an adverse employment action; and 4) the adverse employment action took place under circumstances giving rise to an inference of unlawful discrimination. **[*14]** *Young v. Hobart West Group, 385 N.J. Super. 448, 463, 897 A.2d 1063 (App. Div. 2005)*. LAD claims may be based on circumstantial evidence. *Maiorino v. Schering-Plough Corp., 302 N.J. Super. 323, 344-45, 695 A.2d 353 (App. Div.)*, *certif. denied*, *152 N.J. 189, 704 A.2d 19 (1997)*.

Although we have held pregnancy discrimination is a form of gender discrimination, *Gilchrist v. Bd. of Educ. of Haddonfield, 155 N.J. Super. 358, 368, 382 A.2d 946 (App. Div. 1978)*, employers are not required to carve out a "special exception" for pregnant employees, and a gender-neutral leave policy will not constitute discrimination. *Gerety v. Atl. City Hilton Casino Resort, 184 N.J. 391, 406-07, 877 A.2d 1233 (2005)*. Employers are required only to treat employees who are members of a protected class equally with non-protected class employees; members of a protected class are not entitled to preferential treatment. *Id. at 405-06*.

Groslinger's doctor twice certified she was able to perform dispatch duties while pregnant, and she did not suffer any change in condition rendering her unable to perform these duties. She claims that complications in her pregnancy were attributable, however, to the irregularity of the shifts she had to work.

Although Groslinger submitted extensive records **[*15]** of WPD's history of granting sick leave to other police employees, nothing in these records suggests she was treated any differently from her male counterparts. Male officers requesting extended sick leave were also subject to the Township's policy of allowing only fifteen sick days per year. They too were required to submit doctor certifications when they sought to take an extended period of sick leave, and they were required to submit doctor certifications before returning to work. Officers found capable of returning to active duty were ordered back to work

and were given modified duties when they were not yet able to return to full, active patrol status. These modified duties were similar to the administrative and dispatch duties Groslinger performed and were contingent on WPD needs at the time. There is nothing to indicate that a male officer who performed fill-in dispatcher duties would not have been subjected to irregular shifts in the same manner as Groslinger. Temporary reassignment to other duties, even where that reassignment was undesired, does not constitute an adverse employment action. *Shepherd v. Hunterdon Dev. Ctr., 174 N.J. 1, 27, 803 A.2d 611 (2002)*.

Although Groslinger was not **[*16]** entirely happy with her modified duty schedule, there is nothing in the record to suggest she was treated differently from her male counterparts. Nor is there any evidence in the record to suggest she was subject to an adverse employment action on the grounds that she is female or was pregnant.

Therefore, we conclude that Groslinger has not made out a prima facie claim of gender discrimination pursuant to the LAD. Our decision to affirm the dismissal of Groslinger's LAD claim is not contradictory to our conclusion in the companion case, *Twp. of Wyckoff, supra, 409 N.J. Super. 344*. There the factual basis for the arbitrator's conclusion was not challenged. As noted previously, the parties' focus was upon the arbitrator's interpretation of the issue presented to him. The arbitrator found a contractual violation of the discrimination provision in the collective bargaining agreement. *Id. at 351*.

Here, we are judging the record before the Law Division on summary judgment and applying it against a legal standard. The motion record does not support a finding of discrimination in violation of the LAD. We note that Groslinger complained primarily about her schedule during the second pregnancy. **[*17]** She felt that she was treated differently than during the first pregnancy. However, it is undisputed that during the first pregnancy there was a daytime dispatcher's position available. There was no such vacancy during the second pregnancy. We also note that according to Groslinger, "no accommodated male officer had been ordered to perform civilian duties, such as dispatching," but she was "content with the accommodation." She did not, however, allege that male officers, if any, who performed the dispatch position due to a physical condition, were treated differently with respect to scheduling. Indeed, she cannot base a discrimination claim on the hypothesis that male officers would have been treated differently had they been filling in as civilian dispatchers.

Groslinger next contends:

> PLAINTIFF ESTABLISHED A PRIMA FACIE CASE OF SEXUAL HARASSMENT BEFORE THE MOTION COURT BELOW.

As the Supreme Court noted in *Lehmann v. Toys 'R' Us, Inc., 132 N.J. 587, 626 A.2d 445 (1993)*, in a hostile work environment case, "the harassing conduct need not be sexual in nature; rather, its defining characteristic is that the harassment occurs because of the victim's sex." *Id. at 602*. The Supreme Court has articulated **[*18]** a four-prong test for hostile workplace claims: "the complained-of conduct (1) would not have occurred *but for* the employee's gender; and it was (2) *severe or pervasive* enough to make a (3) *reasonable woman* believe that (4) the conditions of employment are altered and the *working environment is hostile or abusive*. *Id. at 603-04*. The Court noted the second, third and fourth prongs are interdependent. *Id. at 604*.

The Court also noted that, with regard to the second prong, "it is the *harassing conduct* that must be severe or pervasive, not its effect on the plaintiff or on the work environment." *Id. at 606*. The severity

and pervasiveness aspects stand in inverse proportion to one another: greater severity requires less pervasiveness to establish a prima facie claim. *Id. at 607*.

Here, Groslinger predicates her hostile workplace claim on four separate incidents: Fox's suggestion that she could avoid working by staying pregnant; Smith's "screw her, cut off her pay, and let her sue us" comment; Soto and Kellog's "uterus in a jar" comment; and Hagedorn's email regarding requests for personal leave. None of these incidents is attributed to Ydo, the WPD, the Township, or to a supervisor, except **[*19]** for Fox's comment. So, to establish a claim under the LAD, Groslinger must prove the defendants were aware of the harassing conduct and failed to respond. *Heitzman v. Monmouth County, 321 N.J. Super. 133, 146, 728 A.2d 297 (App. Div. 1999)*. As to Fox, it was recommended by the Township Administrator that Ydo review the incidents with him. Even if this brief encounter with Groslinger was considered, it would not rise to the level of a hostile work environment, as a matter of law.

Even assuming that each of these other acts rose to the level of harassing conduct, there is nothing in the record to suggest Ydo or the Township's response was inadequate. The Township Administrator conducted a full investigation into Groslinger's claims and issued recommendations for corrective action. Ydo personally reviewed the incidents with Fox, Smith, Hagedorn, Soto, and Kellogg and issued verbal admonishments to Smith, Kellogg, and Soto. He also sent separate written warnings to Kellogg and Soto regarding their comments and ordered them to attend additional sexual harassment training. Ydo additionally issued a department-wide memo reminding employees of the Township's zero-tolerance policy for sexual harassment. Therefore, **[*20]** we conclude that Groslinger failed to establish a hostile workplace claim for compensatory damages.

Groslinger next contends:

> PLAINTIFF ESTABLISHED A PRIMA FACIE CASE OF RETALIATION UNDER CEPA BEFORE THE MOTION COURT BELOW.

To establish a prima facie CEPA claim, plaintiff must show: 1) she engaged in a protected activity known to defendants; 2) she was subjected to an adverse employment action by defendants after she engaged in the protected activity; and 3) there was a causal connection between the protected activity and the adverse employment action. *Romano v. Brown & Williamson Tobacco Corp., 284 N.J. Super. 543, 548-49, 665 A.2d 1139 (App. Div. 1995)*.

Groslinger predicates her CEPA claim on Ydo's decision to investigate her use of sick time, which she claims was undertaken in retaliation for her refusal to sign the August 25, 2005 letter agreement regarding her accommodated duty.

This assertion is problematic for several reasons. First, it does not appear that Groslinger's refusal to sign the letter agreement was a "protected action," as this term generally encompasses an act bringing unlawful conduct to the attention of a higher authority or refusing to participate with the employer in an illegal **[*21]** act. *N.J.S.A. 34:19-3*. Certainly Groslinger was privileged not to sign the letter, but the terms of her modified duty assignment were neither illegal nor did they violate the LAD. Groslinger's refusal to sign was not a protected act as contemplated under CEPA.

Groslinger's second problem is the causal link. Ydo initiated an investigation when Groslinger did not attend work for five days despite her doctor's certification that she was able to work. Although the

investigation began after Groslinger refused to sign the August 25 letter, there is no direct link between the investigation and Groslinger's unauthorized use of leave when she was not sick or injured.

Finally, although Ydo initiated the investigative process, no actual investigation took place and no disciplinary action was brought against Groslinger. An employee cannot claim a minor disciplinary action constitutes an adverse employment action, particularly where the employee committed the underlying infraction. *Klein v. Univ. of Medicine & Dentistry of N.J., 377 N.J. Super. 28, 45-46, 871 A.2d 681 (App. Div.), certif. denied, 185 N.J. 39, 878 A.2d 856 (2005)*; *Esposito v. Twp. of Edison, 306 N.J. Super. 280, 291, 703 A.2d 674 (App. Div. 1997), certif. denied, 156 N.J. 384, 718 A.2d 1212 (1998)*. **[*22]** Therefore, we conclude that Groslinger's CEPA claim is without merit.

Finally, Groslinger contends:

> PLAINTIFF GROSLINGER DID NOT WAIVE HER STATUTORY RIGHTS UNDER THE [LAD].

Because Groslinger has not established a prima facie case for any of her claims, we do not reach this issue.

The judge properly granted summary judgment to the defendants dismissing all of Groslinger's claims for lack of a legal or factual basis.

Affirmed.

End of Document

Larsen v. Twp. of Branchburg

Superior Court of New Jersey, Appellate Division

October 4, 2006, Argued; January 22, 2007, Decided

DOCKET NO. A-0190-05T2

Reporter
2007 N.J. Super. Unpub. LEXIS 2808 *; 2007 WL 135706

GERALYN MARIE LARSEN, Plaintiff-Appellant, v. TOWNSHIP OF BRANCHBURG, TOWNSHIP OF BRANCHBURG POLICE DEPARTMENT and CHIEF BRIAN R. FITZGERALD, Defendants-Respondents.

Prior History: [*1] On Appeal from the Superior Court of New Jersey, Law Division, Somerset County, Docket No. L-480-03.

Core Terms

disability, pregnancy, disparate, pregnant, gender, female, perceived-disability, light-duty, accommodate, patrol, complications, certification, no-light-duty, partial

Counsel: Brian M. Cige argued the cause for appellant.

Richard P. Flaum argued the cause for respondents (DiFrancesco, Bateman, Coley, Yospin, Kunzman, Davis & Lehrer, attorneys; Mr. Flaum, on the brief).

Judges: Before Judges Coburn, R. B. Coleman and Gilroy.

Opinion

PER CURIAM

Plaintiff Geralyn Marie Larsen appeals from the October 12, 2004 order of the Law Division, granting summary judgment dismissing her complaint as to defendant Brian R. Fitzgerald, Chief of the Township of Branchburg Police Department; from the order of October 15, 2004, granting partial summary judgment dismissing her disability discrimination claims; from the dismissal of her gender discrimination claims following a jury trial; and from the order of October 5, 2005, denying her motion for a judgment notwithstanding the verdict (n.o.v.), or in the alternative for a new trial. We affirm.

Plaintiff has been employed as a patrol officer in the Township of Branchburg Police Department (Department) [1] since January 1995. In June 2001, the Department eliminated its light-duty work policy. On December 9, 2002, plaintiff learned from Dr. Alan Morgan, **[*2]** her fertility specialist, that she was pregnant. On that date, Dr. Morgan gave plaintiff a note, confirming her pregnancy and "restricting her to light duty." Plaintiff delivered the note to Chief Fitzgerald and requested that she be placed on a light-duty work schedule. Because plaintiff was not assigned to light duty, she applied for and received an unpaid leave of absence from the Department.

On December 13, 2002, plaintiff filed an application for disability benefits with the Township's disability insurer, stating:

> My police department does not have a light-duty policy. If I choose to work while pregnant, the potential risks that go along with the job's responsibilities would unable [sic] me to work at full duty. I have no other choice in this regard. I cannot perform all the job responsibilities required while being **[*3]** pregnant.

Part of the application completed by Dr. Morgan stated: "Patient should not perform strenuous activities associated with being a police officer, breaking up fights, et cetera." Concerning his prognosis, the doctor stated "desk job, light duty, no physical exertion, (running after thieves, et cetera)." Lastly, the note provided "[t]he patient has a normal pregnancy, but should avoid situations that will put her baby at risk, trauma, et cetera." The disability insurer denied plaintiff's application because she "was having a normal pregnancy."

Following the insurer's denial of benefits, plaintiff wrote a letter to Chief Fitzgerald, requesting permission to return to work and attached a copy of her application for disability benefits. On February 6, 2003, a meeting occurred among plaintiff; Sergeant Keith Lambertson, plaintiff's husband who is also a member of the Department; Manny Comunez, the representative of the Fraternal Order of Police; Gregory Bonin, the Township Administrator; and Chief Fitzgerald. At the meeting, the Township denied plaintiff's request to return to work, based upon Dr. Morgan's certification that plaintiff was not to perform strenuous police activities, **[*4]** and offered plaintiff a part-time position in the Township's Tax Assessor's Office for the remainder of her pregnancy. Defendants also assured plaintiff that, whether she chose to work in the Tax Assessor's Officer or remain on leave, she would be restored to her position as a police officer as soon as she was medically cleared to perform the duties of a patrol officer without

[1] The complaint named the Township of Branchburg and the Township of Branchburg Police Department as separate defendants. The Police Department is not an independent entity, but only a department within the Township form of government. Because the parties referred to them as separate defendants in their briefs, we continued that reference for the purpose of this opinion.

restrictions. Plaintiff declined the part-time position because the salary was less than a police officer's salary.

On or about April 10, 2003, the Township offered plaintiff a full-time position in the Tax Assessor's Office with a salary at approximately $ 35,000 per year, but plaintiff again declined the offer. On March 3, 2003, plaintiff filed a claim for disability benefits with her private insurer, American Family Life Assurance Company of New York (AFLAC). In answering AFLAC's questions concerning plaintiff's job restrictions, Dr. Morgan stated: "Standing for long periods of time, running, et cetera." Notwithstanding the aforementioned medical statements, plaintiff obtained a note from Dr. Sayez-Lacey, her gynecologist, dated May 1, 2003, stating: "Geralyn Larsen is currently an obstetrical patient of mine. **[*5]** She has a normal pregnancy and can perform essential functions in her job."

Subsequent to receipt of the May 1, 2003 note, the Township prepared a certification for plaintiff to submit to her physician inquiring whether plaintiff could perform specific job functions of a patrol officer. The certification was completed by Dr. Keelen, an associate of Dr. Sayez-Lacey. Dr. Keelen indicated on the certification that plaintiff was not to perform normal patrol functions of: 1) apprehending and subduing suspects by chasing them on foot or in a patrol car; 2) guarding prisoners and arresting persons; or 3) maintaining a high level of muscular exertion for a minimum period of time. Because of the inconsistencies in the medical statements, the Township did not authorize plaintiff to return to her patrol duties. After plaintiff delivered her daughter on August 23, 2003, she returned to work full time as a Township patrol officer on December 28, 2003, receiving all appropriate salary increments.

On April 4, 2003, plaintiff filed her complaint against the defendants, Township of Branchburg, Township of Branchburg Police Department, and Chief Fitzgerald, alleging disability, and perceived-disability **[*6]** discrimination under the New Jersey Law Against Discrimination (NJLAD), *N.J.S.A. 10:5-1 to -49*. On August 22, 2003, plaintiff filed an amended complaint alleging gender discrimination under the NJLAD. On October 12, 2004, summary judgment was granted to defendant Chief Fitzgerald, dismissing all counts of the complaint. On October 15, 2004, partial summary judgment was granted dismissing plaintiff's claims for disability and perceived-disability discrimination. The gender discrimination claim was tried to a jury. Plaintiff's claim for disparate treatment was dismissed on motion at the close of her case, *R. 4:37-2(b)*. Plaintiff's disparate impact claim was submitted to the jury, resulting in a verdict of no-cause of action in favor of the Township and the Department. An order for judgment, dismissing plaintiff's complaint, was entered on June 29, 2005. On August 5, 2005, an order was entered denying plaintiff's motion for judgment n.o.v., or in the alternative, for a new trial, determining that the absence of a light-duty work policy did not constitute gender discrimination.

On appeal, defendant raises the following issues for our consideration:

POINT I

WHETHER THE TRIAL COURT ERRED IN **[*7]** GRANTING DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT, DISMISSING PLAINTIFF'S DISABILITY AND PERCEIVED-DISABILITY DISCRIMINATION CLAIMS UNDER THE LAW AGAINST DISCRIMINATION.

POINT II

WHETHER THE DISMISSAL OF PLAINTIFF'S DISABILITY AND PERCEIVED-DISABILITY DISCRIMINATION CLAIMS PREJUDICED THE PROSECUTION OF PLAINTIFF'S GENDER DISCRIMINATION CLAIM.

POINT III
WHETHER DEFENDANT CHIEF OF POLICE FITZGERALD WAS ERRONEOUSLY GRANTED SUMMARY JUDGMENT.

POINT IV.
WHETHER THE TRIAL COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR JUDGMENT N.O.V., OR IN THE ALTERNATIVE, FOR A NEW TRIAL.

I.

Plaintiff argues that the trial court erred in granting summary judgment, dismissing her disability and perceived-disability discrimination claims under the NJLAD. Plaintiff contends that defendants failed to provide a reasonable accommodation for her pregnancy by assigning her to a light-duty work schedule or to a comparable compensation post elsewhere in the Township. We disagree, concluding that a normal pregnancy, absent complications, does not constitute a disability under the NJLAD.

A trial court will grant summary judgment to the moving party "if the pleadings, depositions, answers to interrogatories and admissions **[*8]** on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment or order as a matter of law." *R. 4:46-2(c)*; *see also Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 523, 666 A.2d 146 (1995)*. On appeal, "the propriety of the trial court's order is a legal, not a factual, question." Pressler, *Current N.J. Court Rules*, comment 3.2.1 on *R. 2:10-2* (2006). "We employ the same standard that governs trial courts in reviewing summary judgment orders." *Prudential Prop. & Cas. Ins. Co. v. Boylan, 307 N.J. Super. 162, 167, 704 A.2d 597 (App. Div.), certif. denied, 154 N.J. 608, 713 A.2d 499 (1998)*. It is against this standard that we consider plaintiff's arguments.

It is undisputed that the NJLAD "prohibits employment discrimination on the basis of a disability." *Potente v. County of Hudson, 187 N.J. 103, 110, 900 A.2d 787 (2006)*. The NJLAD "prohibit[s] any unlawful discrimination against any person because such person is or has been at any time disabled or any unlawful employment practice against such person, unless the nature and extent of the disability reasonably precludes the performance of the particular employment." *N.J.S.A. 10:5-4.1*. **[*9]** "Disability" is defined as a "physical disability, infirmity, malformation or disfigurement which is *caused by bodily injury, birth defect or illness* . . . or from any mental, psychological or developmental disability resulting from anatomical, psychological, physiological or neurological conditions which prevents the normal exercise of any bodily or mental functions . . . . " *N.J.S.A. 10:5-5(q)*. (Emphasis added).

"Reasonable accommodation is only an issue in a [disability] discrimination case in two instances." *Viscik v. Fowler Equipment Co., 173 N.J. 1, 19, 800 A.2d 826 (2002)*. "The first is the case in which a plaintiff affirmatively pleads failure to reasonably accommodate as a separate cause of action." *Ibid.* "The second is the case in which an employer, rather than defending on the grounds that the employee was terminated for legitimate, non-discriminatory reasons, proffers the employee's inability to perform the job as a defense." *Id. at 19-20*. Here, plaintiff alleges failure to reasonably accommodate her disability (normal pregnancy) as the cause of action.

To establish a cause of action alleging a disability or perceived-disability discrimination, we follow the burden-shifting framework of **[*10]** *McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)*. *Id. at 13*. Therefore, to prove a prima facie case of disability discrimination for failure to accommodate, the plaintiff must demonstrate: 1) she has a disability; 2) she is otherwise qualified to perform the essential functions of the job, with our without the accommodations by the employer; and 3) she suffered an adverse employment action because of her disability. *Svarnas v. AT&T Communications, 326 N.J. Super. 59, 73, 740 A.2d 662 (App. Div. 1999)*. Therefore, the threshold inquiry in a disability discrimination case "is whether the plaintiff in question fits the statutory definition of [disabled]." *Viscik, supra, 173 N.J. at 15*.

Plaintiff contends that a normal pregnancy without complications, qualifies as a physical disability under *N.J.S.A. 10:5-4.1*. We disagree. A normal pregnancy, absent complications, is not a "physical disability [or infirmity] . . . caused by bodily injury, birth defect or illness . . . ." *N.J.S.A. 10:5-4.1*. *See also Haynes v. Bloomfield Tp. Educ. Bd., 190 N.J. Super. 36, 39, 461 A.2d 1184 (App. Div. 1983)* (holding that a normal pregnancy is neither an illness nor an injury). Thus, plaintiff failed **[*11]** to establish a prima facie case of disability discrimination. *Svarnas, supra, 326 N.J. Super. at 80*.

Plaintiff also argues that even if she had not suffered from a disability as defined in the NJLAD, defendants' motion for summary judgment should have been denied because she had presented evidence that defendants had perceived her suffering from a qualifying disability. It is not disputed that "those perceived as suffering from a particular [disability] are as much within the protected class as those who are actually [disabled]." *Rogers v. Campbell Foundry Co., 185 N.J. Super. 109, 112, 447 A.2d 589 (App. Div.), cert. denied, 91 N.J. 529, 453 A.2d 852 (1982)*. Such claims, however, are premised on the defendant perceiving the plaintiff as having a physical or mental condition that would qualify the person as "disabled" under the NJLAD if the condition actually existed. *See Heitzman v. Monmouth County, 321 N.J. Super. 133, 142, 728 A.2d 297 (App. Div. 1999)* (rejecting plaintiff's perceived-handicap discrimination claim where there was no evidence that defendants' efforts to respond to plaintiff's complaints about second-hand smoke reflected their perception that he was a handicapped person under the NJLAD). Here, defendants had **[*12]** perceived plaintiff as undergoing a normal pregnancy, which as previously stated, does not qualify as a disability under the NJLAD. The only evidence was that defendants believed plaintiff was pregnant, and that her pregnancy was normal and without complications. Accordingly, we are satisfied the trial court properly dismissed plaintiff's perceived-disability claim on summary judgment.

We determine plaintiff's argument that the trial court erred in granting partial summary judgment as to her disability and perceived-disability discrimination claims, contending the court's action prejudiced the prosecution of her gender discrimination claim, is without merit. A disability or perceived-disability discrimination claim is distinct from a gender discrimination claim. Because "[a] summary judgment . . . may be rendered on any issue in the action (including the issue of liability) although there is a genuine factual dispute as to any other issues," the trial court correctly granted partial summary judgment on the disability and perceived disability claims. *R. 4:46-2(c)*.

II.

We next address plaintiff's argument that the trial court erred in dismissing her disparate treatment claim at the end **[*13]** of her case pursuant to *Rule 4:37-2(b)* and by denying her motion for judgment n.o.v., or in the alternative, for a new trial. We review a trial court's grant of a defendant's motion for judgment at

the close of the plaintiff's case, *R. 4:37-2(b)*, de novo, that is, by applying the same legal standard as the trial court. *Epperson v. Wal-Mart Stores, Inc., 373 N.J. Super. 522, 527, 862 A.2d 1156 (App. Div. 2004)*. Under the rule, the trial court is required to deny the motion "if the evidence, together with the legitimate inferences therefrom, could sustain a judgment in plaintiff's favor." *R. 4:37-2(b)*. If we determine "there is no genuine issue of material fact, we decide whether the trial court's ruling on the law was correct." *Turner v. Wong, 363 N.J. Super. 186, 199, 832 A.2d 340 (App. Div. 2003)*. "However, '[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference.'" *Ibid.* (quoting *Manalapan Realty, L.P. v. Twp. of Manalapan, 140 N.J. 366, 378, 658 A.2d 1230 (1995)*).

The same standard applies on a motion for judgment n.o.v. under *Rule 4:40-2(b)*. However, as a condition precedent to the filing of a motion for judgment n.o.v., the party seeking **[*14]** relief must have made an appropriate motion for judgment under *Rule 4:40-1*, or another motion during the trial, where the party sought the same relief. *Velazquez v. Jiminez, 336 N.J. Super. 10, 33, 763 A.2d 753 (App. Div. 2000)*, *aff'd*, *172 N.J. 240, 798 A.2d 51 (2002)*. Because plaintiff failed to move for judgment against defendants during the trial, we do not address plaintiff's argument concerning the trial court's denial of her motion for judgment n.o.v. As such, we turn to plaintiff's arguments, challenging the court's denial of her motion for a new trial.

We do not reverse a trial court's ruling on a motion for a new trial "unless it clearly appears that there was a miscarriage of justice under the law." *R. 2:10-1*; *Baxter v. Fairmont Food Co., 74 N.J. 588, 599, 379 A.2d 225 (1977)*. We defer to the trial court's determination of a witness's credibility and demeanor. *Dolson v. Anastasia, 55 N.J. 2, 7, 258 A.2d 706 (1969)*; *see also Carey v. Lovett, 132 N.J. 44, 66, 622 A.2d 1279 (1993)* (noting that "an appellate court should . . . defer[] to the trial court's 'feel of the case'") (quoting *Baxter, supra, 74 N.J. at 600*). There was no miscarriage of justice in this case.

Plaintiff argues that she was discriminated against based on gender, when defendants **[*15]** failed to accommodate her pregnancy by offering a light-duty work schedule. Plaintiff asserts that she was treated less favorably than male police officers. Plaintiff also contends that the Department's no-light-duty policy results in a disparate impact on women because pregnancy is unique to the feminine gender. Plaintiff asserts that "the NJLAD applies to discrimination based on pregnancy and in no way limits the pursuing of a disability based cause of action for pursuing redress under the statute."

The NJLAD prohibits employment discrimination based on one's sex or gender. *N.J.S.A. 10:5-12*. "In respect of whether unequal treatment has occurred, intentionally or as a result of a policy's impact on members of a protective group, two approaches have been generally accepted." *Gerety v. Atl. City Hilton Casino Resort, supra, 184 N.J. 391, 398 (2005)*. The two approaches are: disparate treatment and disparate impact. *Ibid.* Disparate treatment is where the employer treats a protective class less favorably than others. Discriminatory motive is a critical element of the claim. *Ibid.* Disparate impact, however, "involves employment practices that are facially neutral in their treatment of different **[*16]** groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity [; and] [p]roof of discriminatory motive [on part of the employer] is not required . . . ." *Pepper v. Princeton University Board of Trustees, 77 N.J. 55, 81-82, 389 A.2d 465 (1978)* (quoting *Int'l. Brotherhood of Teamsters v. United States, 431 U.S. 324, 335-36 n. 15, 97 S. Ct. 1843, 1854-55 n. 15, 52 L. Ed. 2d 396, 415 n. 15 (1977))* (internal citations omitted).

Plaintiff's claim of unequal treatment based on gender was dismissed at the close of plaintiff's case under *Rule 4:37-2(b)*. After a careful review of the record, we are satisfied that plaintiff failed to establish a prima facie claim for disparate treatment, and that the trial judge correctly dismissed that claim. Plaintiff was treated by defendants the same as all other police officers, male or female. The no-light-duty policy was applied equally across the board, and there were no exceptions to the policy from the time it was established in 2001. We affirm substantially for the reasons expressed by Judge Kumpf in his thoughtful oral decision of June 16, 2005, granting defendants' motion as to the disparate treatment claim. We **[*17]** now address plaintiff's disparate impact claim.

"[E]mployers may not discriminate against a female employee because she becomes pregnant." *Gerety, supra, 184 N.J. at 403*. However, an employer does not discriminate when it adopts and adheres to an employment policy that treats male and female employees alike. *Id. at 403-04*. Although childbirth is unique to women, and an employer is prohibited from discriminating against a woman who becomes pregnant, an employer cannot be required to give preferential treatment to female employees who become pregnant. *Id. at 404*.

In *Gerety*, the defendant casino had a medical leave policy requiring that an employee only take twenty-six weeks of leave within a consecutive twelve-month period, which is slightly more than twice the Federal and State allowance of twelve weeks. *Id. at 393*. The casino's policy indicated that if an employee exceeded the allotted time leave, the employee would be terminated with a possibility of re-hire without seniority. *Id. at 395*. The plaintiff in *Gerety* developed medical complications while pregnant, exceeded her allowed medical leave, and was terminated. *Ibid.* The Supreme Court held that a medical leave policy is not discriminatory **[*18]** based on gender when it is applied equally to male and female employees. *Id. at 407*. The fact that a woman may experience complications early in her pregnancy and subsequently deplete her medical leave before giving birth does not render the program inherently discriminatory to women. *Ibid.* "We discern no requirement in the LAD that preferential leave treatment for pregnant employees is necessary for an employer to avoid the accusation that it is impacting women as a class unequally." *Ibid.*

The Department adopted a no-light-duty policy in 2001. The Department requires all officers on active duty to be able to perform their normal job functions. Plaintiff seeks to have the Department treat pregnant women separately and grant them employment protection above and beyond that which is provided to all other officers, male or female. We are satisfied the Department was not required to do so. There could be instances where a male officer is injured or sick and seeks a light-duty work schedule. There could be instances where a female officer seeks a light-duty work schedule for reasons unrelated to pregnancy. Under the Department's present policy, neither the male or female officer would be **[*19]** allowed to work and would have to use their accumulated sick leave or take an unpaid leave of absence. Notwithstanding, plaintiff seeks to have pregnant women exempted from the no-light-duty policy, an otherwise gender-neutral policy. Because we conclude that the light-duty policy affects both male and female officers equally, we are satisfied that the policy, and its application, does not discriminate against pregnant female police officers. *Ibid.* Here, the trial court submitted plaintiff's disparate impact claim to the jury. The jury determined that defendants did not discriminate against plaintiff in the enforcement of the Department's no-light-duty policy. We discern no reason to interfere with the jury's decision.

III.

Lastly, plaintiff argues that the trial court erred in granting Chief Fitzgerald summary judgment on all claims. Although we agree that summary judgment was improvidently granted in favor of Chief Fitzgerald on plaintiff's gender-discrimination claim not having been raised in defendants' motion, we conclude that the error is harmless. The record fails to disclose any basis for individual liability against Chief Fitzgerald.

Affirmed.

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