The Legal Intelligencer

NOT FOR REPRINT

Click to Print or Select '**Print**' in your browser menu to print this document.

Page printed from: *The Legal Intelligencer*

Employment Law

Employee Need Not Be Pregnant to Pursue Pregnancy Discrimination Claim

Jeffrey Campolongo, The Legal Intelligencer

October 27, 2016

It is not very often that courts have to grapple with a claimant's inclusion in a protected class. The idea of the aggrieved individual having an "immutable characteristic" is one of the hallmarks of Title VII since the Civil Rights Act was enacted in 1964. Thus, a recent case under the Pregnancy Discrimination Act (PDA), *Snider v. Wolfington Body*, Case No. 2:16-cv-02843 (E.D. Pa. Oct. 17, 2016), challenging an employee's eligibility for protection under the law has raised a few eyebrows.

Reanne Snider was hired by Wolfington Body Co. as a clerk in August 2014. At the time she was hired, Snider was two to three months pregnant, but not "showing," according to the complaint filed in the case. Around November or December 2014 Snider requested medical leave to give birth and care for her newborn, however, her employer told her that they did not have a maternity leave policy. In her complaint, Snider alleged that during the same time period she requested to take medical leave, she was told her position was going to be eliminated.

In December 2014 or January 2015, Snider alleged that the company told her that she would be allowed to take up to 10 days of leave. Thereafter, Snider gave birth on Jan. 27, 2015, and received a letter from the employer that same day "terminating" her employment. For about five months after that, Snider contended that she sent repeated requests to the employer to be rehired to her position or an equivalent position within the company. According to court documents the employer did not respond during that time, however, it later asserted that all positions were filled by a "nonpregnant" employee.

Snider filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) on March 30, 2016, and alleged, among other things, that her request for maternity leave was an "attempt to exercise her rights under the FMLA" and that she was fired in part for this action. Eventually, the matter ended up in federal court where Snider filed a multi-count complaint alleging individual disparate treatment, systemic disparate treatment, systemic disparate impact and retaliation under Title VII and the PDA; retaliation and interference under the FMLA; and negligent misrepresentation and wrongful termination under Pennsylvania common law.

The employer filed a motion to dismiss the entire complaint. In a well-reasoned and lengthy opinion, the court dismissed all but the first count, which was the claim for individual disparate treatment under the PDA. Interestingly, the claims relating to Snider's termination were all dismissed as time-barred because Snider failed to file her EEOC claim within 300 days of Jan. 27, 2015. Snider's claims alleging failure to rehire were not time-barred, however, as they arose within 300 days of her EEOC charge. The issue then was whether Snider could still assert her pregnancy discrimination claims when she was not pregnant at the time of the adverse action.

On the all important issue of "protection," the court recited the standards for pleading a claim under the PDA citing cases which held that "a woman need not be physically pregnant at the time of the alleged discrimination to state such a claim. See *Kocak v. Community Health Partners of Ohio*, 400 F.3d 466, 468 (6th Cir. 2005), ("Whether one is or is not pregnant at the time does not control whether one can allege discrimination under the [PDA].). As suggested at the outset of this article and noted by the court herein, a PDA plaintiff's membership in the protected class is generally "obvious" where the employee "suffered the adverse employment action during pregnancy, - maternity leave, or shortly after returning to work," as in *Solomen v. Redwood Advisory*, 183 F. Supp. 2d 748, 754 (E.D. Pa. 2002). The burden on the plaintiff is more onerous where the pregnancy ended many months before the adverse action takes place.

According to the opinion, the adverse employment action of which Snider complained was not her termination (which was time- barred), but instead the alleged failures to hire (or rehire) her that occurred between June 2015 and March 2016 (four to 13 months after Snider gave birth). The burden was on Snider to plead facts to establish that she was still affected by pregnancy, childbirth or related medical conditions or that the effects of her pregnancy continued to exist in the thoughts and actions of the employer.

Snider's counsel conceded at oral argument that she was not pregnant nor did she have a medically related condition at the time she was applying for rehire and instead contended that the employer failed to rehire her because it held her prior pregnancy against her. The opinion noted that much of Snider's factual allegations pertained more to her termination, than her failure to rehire claim. Nevertheless, Snider pleaded "barely enough facts" in the view of the court to point to circumstantial evidence of the company's motive for its failure to rehire, thus allowing the disparate treatment claim under the PDA to proceed.

The court was convinced there was not any plausible cause of action for systemic disparate treatment, disparate impact or retaliation under Title VII. As for Snider's FMLA claims, the court examined whether she was "eligible" for protection under the statute. Snider and the employer agreed that Snider was not an FMLA eligible employee because she failed to work at least 1,250 hours and was not employed by the defendants for at least 12 months, see 29 U.S.C. Section 2611(2)(A). Snider argued, however, that eligibility was not a prerequisite to bringing an FMLA retaliation claim, noting that even if it was, the doctrine of equitable estoppel preserved her ability to bring FMLA related claims notwithstanding her ineligibility.

Indeed, this was not a novel argument advanced by Snider. There was a smattering of opinions allowing a noneligible employee to bring an FMLA retaliation claim. The U.S. Court of Appeals for the Third Circuit, however, has not addressed this issue. The court here surveyed district courts opinions in this circuit and concluded that the FMLA only confers rights on "eligible employees," and only "eligible employees" may ordinarily bring a cause of action for retaliation or interference

under the act. Consequently, in order to state a valid FMLA claim for either interference or retaliation, a complaint must plausibly allege that the plaintiff is an eligible employee under the act. The court also dismissed the state law claims for negligent misrepresentation and wrongful termination.

In analyzing this particular opinion, there are two points which seem to made. First, the employee's eligibility for protection as a member of a protected class is not as clear-cut as it may seem. While Snider was obviously not pregnant at the time of the adverse action, the employer's motives were the operative set of facts. This is not, by any means, a fact pattern we could expect to arise with any regularity. Nevertheless, the thorough examination of the underlying motives for the employer's actions takes center stage, as should be the case when it comes to unearthing subterranean prejudices.

Second, the court leaves open the possibility that a noneligible employee may still have a claim for retaliation under the FMLA under the right circumstances. While this case presented problems for the court, it is entirely conceivable that a different fact pattern could open the door for future claims. •

Jeffrey Campolongo is the founder of the Law Office of Jeffrey Campolongo, which, for over a decade, has been devoted to counseling employees, working professionals and small businesses in employment discrimination and human resource matters. The law office also counsels aspiring and established artists and entertainers regarding various legal issues arising in the entertainment and media industries.

Copyright 2016. ALM Media Properties, LLC. All rights reserved.