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EMPLOYMENT LAW

Pregnant Employee Surmounts Summary Judgment Based on Supervisor's Comments

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Special to the Legal

When a pregnant employee invokes her rights, her employer must be scrupulous in honoring them. This issue was recently addressed in *May v. PNC Bank*, No. 18-2933, 2020 U.S. Dist. LEXIS 10186 (E.D. Pa. Jan. 22, 2020), where the court denied summary judgment based primarily on a supervisor's disparaging comments to a pregnant subordinate.

TERMINATION FOLLOWING PROTECTED LEAVE

After starting as a bank teller with PNC in 2009, Mary Jo May rose to the position of branch manager by 2016, when she began reporting to regional manager Raymond DiSandro. Following an unsuccessful pregnancy in early 2017, May took three weeks of leave under the Family and Medical Leave Act (FMLA). In June 2017, she notified DiSandro that she was pregnant again and would require modifications to her work schedule.

According to May, DiSandro's supportive attitude changed during her first FMLA leave. On learning of her second pregnancy, DiSandro allegedly made daily complaints about the inconvenience, pestered her with questions



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as to her time off and how she would ensure her branch's success and began predicting that her branch might need to close.

In July or August 2017, May spoke with PNC's human resources department about the process for requesting FMLA leave.

On Aug. 11, 2017, May asked a subordinate to seek a fee refund on one of her accounts. After this request came to light, an internal investigation

concluded that May had breached the bank's code of ethics, which prohibits the use of one's position "for inappropriate personal gain or advantage." PNC's investigator recommended that May be terminated for the ethics violation. According to PNC, DiSandro challenged this recommendation, but eventually agreed after discussing the

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matter with his supervisor and human resources. On Sept. 19, 2017, PNC fired May, who then sued for pregnancy discrimination and FMLA retaliation.

PREGNANCY DISCRIMINATION CLAIM SURVIVES

In considering May's pregnancy discrimination claim, the court

employed the familiar burden-shifting framework established in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), which requires a plaintiff to demonstrate that she was pregnant, was qualified for the position and was subject to an adverse employment action under circumstances giving rise to an inference of discrimination. Once the plaintiff does so, the burden shifts to the employer to articulate some legitimate, nondiscriminatory reason for its action. If the employer succeeds, then the burden shifts back to the plaintiff to show that the employer's stated reason was a pretext for unlawful discrimination by presenting evidence "from which a fact-finder could reasonably either disbelieve the employer's articulated legitimate reasons; or believe that an invidious discriminatory reason was more likely than not a motivating or determinative cause of the employer's action," see *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994).

PNC did not dispute the first three elements of May's prima facie case, leaving the court to consider only whether May had sufficiently demonstrated circumstances giving rise to an inference of discrimination and that PNC's proffered legitimate reasons for her termination were pretextual. To show discrimination, May pointed to DiSandro's disparaging comments around the time of both pregnancies. The court agreed, observing that DiSandro knew of both pregnancies, that he made disparaging comments during them with respect to her pregnancy-related absences, and that his comments become "almost daily" during her second pregnancy in response to her notice of a need for pregnancy-related leave.

The court also determined that DiSandro's negative comments

were sufficient evidence of pretext. Moreover, the court found that PNC's "inconsistent explanations" of who made the decision to terminate May also created a triable pretext issue. In particular, PNC stated in its discovery responses that DiSandro and three other employees were involved in the decision, yet DiSandro testified at deposition that he was the sole decision-maker and, most pointedly, that he had no recollection of discussing the termination with one of the four individuals identified in written discovery. As the court concluded, "a jury could find that the contradictory explanations ... undermine [PNC]'s proffered nondiscriminatory reason for termination." It should be noted, however, that the court did not find that the articulated basis for May's termination was "contradictory," only that PNC's witnesses differed on how the decision was made.

RETALIATION CLAIM ALSO SURVIVES

Turning to May's FMLA retaliation claim, the court considered whether she had shown protected status under the FMLA, an adverse employment action, and a causal relationship between the two. This claim also follows the *McDonnell Douglas* framework where, following a prima facie showing, the employer must offer a legitimate, nonretaliatory reason for its action, at which point the burden shifts back to the employee to demonstrate pretext.

As with May's pregnancy discrimination claim, the parties' dispute centered on causation and pretext. After weighing the evidence, the court concluded that DiSandro's alleged pattern of antagonistic comments, "coupled with its temporal proximity" to May's invocation of her FMLA rights, raised a

material factual dispute as to causation. Moreover, the court found that DiSandro's disparaging comments and PNC's inconsistent explanations were sufficient to satisfy May's burden of showing that PNC's nonretaliatory explanation was pretextual.

BEST PRACTICES TO BUILD A LITIGATION-READY RECORD

This case highlights the importance of effective policy drafting and employee training. Each claim that survived summary judgment in *May* hinged on her supervisor's offensive comments. Best practices to address this issue include requiring an HR consult whenever an employee invokes her leave rights, regularly training all supervisors on harassment, and regularly reminding all employees of where and how to report harassment. An employer's disciplinary process should include careful documentation as to who approves each step and who makes the final decision, particularly for serious infractions, as inconsistent explanations of these details can support a finding of pretext. Finally, it is critical that once a case is in litigation, the employer brings all of the decision-makers into the discovery process early on, in order to ensure that both the reason for and process of the termination are accurately articulated. •