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### SEX DISCRIMINATION

## Unwelcome labor pains: pregnancy discrimination under Title VII

by Brinton M. Wilkins

*When it was originally passed, Title VII of the Civil Rights Act of 1964 did not prohibit pregnancy-related discrimination. That changed when the Pregnancy Discrimination Act (PDA) was enacted as an amendment to Title VII in 1978. Unfortunately, female employees still struggle with perceived and real pregnancy discrimination. The issue can become complicated when the employee works in a position with physical requirements that may be unrealistic for a pregnant woman—for example, as a police officer. The city of Chandler, Oklahoma, recently ran into issues involving a pregnant police officer. Read on to see how it addressed them.*

### **A foot injury and a pregnancy**

In January 2009, Sabrina Freppon began working as the only female police officer in Chandler's seven-officer police department. In June 2010, she injured her foot while she was off-duty. When she returned to work four weeks later, her doctor restricted her to "light-duty" work. The police chief, Matt Mattheyer, told her there was no light-duty work for her.

In August 2010, Freppon told Mattheyer that she was pregnant. Her doctor again provided a letter stating that she should only perform light-duty work because of her pregnancy. After consulting with Chandler's city manager, Mattheyer reiterated that there was no light-duty work available. Freppon complained to the chief that male officers had been assigned light-duty work when they were injured. Mattheyer responded that those officers had been injured on the job.

Beginning on October 18, 2010, the city forced Freppon to take 12 weeks of unpaid leave under the Family and Medical Leave Act (FMLA). Three days later, Freppon's attorney sent a letter to Mattheyer demanding light-duty assignments for Freppon and stating that because the department had given male officers light-duty

work in the past, the city had to provide the same opportunity to female officers.

In November 2010, Freppon filed an administrative charge with the Equal Employment Opportunity Commission (EEOC) claiming gender and pregnancy discrimination and retaliation because she was forced to take FMLA leave and denied a light-duty work assignment. The EEOC declined to pursue her claim.

On November 19, an attorney for the city delivered a letter to Freppon's attorney, again denying her request for light-duty work. According to the city, male officers had received light-duty assignments because they had been injured on the job. Furthermore, a former police chief made the light-duty assignments. Later, Mattheyer adopted a policy that no officers would receive light-duty assignments, even if they were injured on the job.

After she received the letter, Freppon's involuntary unpaid FMLA leave ran out, but she didn't return to work. Furthermore, she told the Oklahoma Employment Security Commission (OESC) that she was no longer employed by the city of Chandler, even though the city hadn't terminated her employment and she hadn't told the city that she was leaving its employ. The city learned about her communications with OESC and sent another letter to her on January 31, 2011, asking her to clarify her intentions. Neither Freppon nor her attorney responded to the letter.

By March 2011, Freppon had still not returned to work. On March 28, the city sent her a final letter stating that because of her silence, it was "left to conclude that [she had] indeed separated [her] employment." The letter requested that she return her badge, commission card, and uniform, and informed her that her health insurance would continue through the end of the month.

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Freppon unsuccessfully attempted to return to work in May 2011. She then sued the city under Title VII for pregnancy discrimination because she had been denied light-duty work and forced to take unpaid FMLA leave. She also alleged that her termination was the result of pregnancy discrimination.

Furthermore, Freppon claimed that the city retaliated against her for complaining about perceived gender and pregnancy discrimination. Specifically, she argued that she had been forced to take FMLA leave and was denied access to the gun range as a result of her complaint to Mattheyer. Her case ultimately worked its way to the U.S. 10th Circuit Court of Appeals (whose rulings apply to Utah employers as well as those in Oklahoma).

### **Termination claim**

An employee who believes her employer has illegally terminated her because of gender or pregnancy must file a claim with the EEOC before initiating a lawsuit in court. If she doesn't file an EEOC charge, the court must dismiss her case.

Even though Freppon filed a complaint with the EEOC over perceived gender and pregnancy discrimination and retaliation, she made the charge before the city terminated her employment. According to the 10th Circuit, she couldn't tack her termination claim to her earlier EEOC complaint. Each incident of discrimination is its own discrete unlawful practice and must be specifically identified in an EEOC complaint.

Freppon didn't file a new EEOC complaint after she was terminated. As a result, she couldn't sue the city for discriminatory termination. The 10th Circuit dismissed the claim, even though the court thought it might have merit. Because she had filed an EEOC claim regarding the forced FMLA leave and the city's denial of a light-duty work assignment, the 10th Circuit addressed those discrimination claims.

### **Surviving discrimination claims**

The city didn't contest that refusing to give Freppon a light-duty assignment or placing her on forced unpaid FMLA leave appeared discriminatory. However, it argued that its actions were legitimate.

The city presented evidence that Freppon wasn't treated differently from other officers because her foot injury and pregnancy weren't on-the-job injuries, and no one in her position had ever been given light-duty work. Furthermore, the evidence showed that under Mattheyer no officer was given light-duty work, even when an injury occurred on the job.

The 10th Circuit never addressed Freppon's claim that the forced FMLA leave was discriminatory. Thus, even though she lost her appeal of the claim, the propriety of forcing an employee to take unwanted FMLA leave is an open question.

### **Retaliation claims**

Finally, the 10th Circuit denied Freppon's retaliation claims. She argued that the city retaliated against her for complaining to Mattheyer by refusing to allow her access to the gun range on one occasion and by forcing her to take FMLA leave. Before the case reached the 10th Circuit, a lower court had determined that neither of those actions rose to the level of "adverse employment actions." Without an adverse employment action, there can be no illegal retaliation.

The 10th Circuit agreed that being refused access to the gun range wasn't an adverse employment action, but it believed that being forced to take FMLA leave could be. When Freppon appealed the lower court's decision, however, she didn't argue that the trial court's decision was incorrect. Because she didn't attack the lower court's decision on that point, the ruling had to stand, even though the 10th Circuit believed it might have been wrong. *Freppon v. City of Chandler*, 2013 WL 3285628 (10th Cir.).

### **Lessons learned**

It's difficult to derive an overwhelmingly positive message from this case for any employer facing a similar situation. Although the city ultimately prevailed, it's victory was partly attributable to Freppon's procedural missteps. Her termination claims failed, not because the city's actions were appropriate, but because she hadn't made the claims in her EEOC complaint. And her retaliation claims failed because of a nicety of appellate procedure. Furthermore, the 10th Circuit provided almost no clarification for its decision that Freppon's FMLA leave discrimination claim was improper.

In the end, employers would be wise to look at this decision, not as an example of how to treat employees, but as a general reminder that it's illegal to discriminate against someone based on gender and pregnancy. If an employee is pregnant, you cannot hold it against her. If she is a bad employee with verifiable work-related faults and shortcomings, take appropriate disciplinary action based on her performance deficiencies alone.

And be sure not to look at this decision as support for forcing pregnant employees to take unpaid FMLA leave. Although the 10th Circuit ruled in the city's favor, whether or not an employer can do that is an open question. It seems rational to believe that despite the existence of FMLA leave, forcing an employee to take unwanted unpaid leave simply because she's pregnant is wrong.

➔ *You can catch up on the latest court cases involving pregnancy discrimination in the subscribers' area of [www.HRHero.com](http://www.HRHero.com), the website for Utah Employment Law Letter. Just log in and use the HR Answer Engine to search for articles from our 50 Employment Law Letters. Need help? Call customer service at 800-274-6774. ♣*