# GENDER AND PREGNANCY BIAS IN THE WORKPLACE

## Weightman v. Bank of New York Mellon Corp., 772 F. Supp. 2d 693 (W.D. Pa. 2011).

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## I. INTRODUCTION

The case of *Weightman v. Bank of New York Mellon Corp.* involved an employment discrimination action, specifically related to a gender and pregnancy bias in the workplace. Plaintiff Heather Weightman ("Weightman"), a discharged female employee, brought action against her former employer, Bank of New York Mellon Corporation ("BNY Mellon"), Defendant, at the United States District Court for the Western District of Pennsylvania, on the grounds that BNY Mellon violated Title VII of the Civil Rights Act of 1964 ("Title VII") and the Pennsylvania Human Relations Act.[1] Weightman argued that she was unfairly discharged, and in response, BNY Mellon filed a motion for summary judgment.

## II. FACTUAL BACKGROUND

BNY Mellon's predecessor, Mellon Financial Corporation, hired Weightman on August 28, 2000 as an executive secretary. Before she was discharged on January 9, 2008, she had received three promotions and her direct supervisors and managers had changed accordingly. In 2005, Weightman began reporting to her direct supervisor, Ann David who, in turn, reported to Barbara Speidel. The final report was made to Joan Hoffman, who worked as a manager of the compliance department to which Weightman belonged.

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[1] Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1991). The content of Pennsylvania Human Relations Act is consistent to that of Title VII of the Civil Rights Act of 1964, in that Pennsylvania Human Relations Act aims at prohibiting unlawful discrimination in employment on the basis of race, color, religion, ancestry, age (40 and above), sex, national origin, etc. Pennsylvania Human Relations Act, 43 Pa. Stat. § 951 et seq.

As an employee at BNY Mellon, Weightman had no remarkable problems in terms of her performance in the early stage of her employment, but during the period from 2005 to 2007, her overall rating in BNY Mellon's performance reviews declined. Weightman's 2005 Year End Performance Review rated her as "strong"; however, in 2006, BNY Mellon pointed out her confrontational communication style and relationship with her co-workers by rating her performance as "on-target" in the performance review, and lowering her performance in 2007, as "below-target."

The alleged main reason for Weightman's low rating in her performance review was absenteeism. In particular, she had demonstrated excessive absent days during the year of 2007 since her initial announcement of her pregnancy to BNY Mellon on January 10, 2007 until her return to work from maternity leave on November 14, 2007.[2] Although BNY Mellon has an Occasional Absence Policy under which certain reasonable absences would be excused, her absence amounted to thirteen days and ten occurrences in 2007, which meets the minimum requirements for corrective action under the policy.[3] In July 2007, she received two oral warnings and an initial written warning regarding her attendance. Weightman continued to miss two additional days of work, and in December 2007, received a final written warning. After receiving this final warning, however, she missed three more days of work. Thereafter, Weightman accused David of discriminating against her and David complained to human resources about Weightman's claim. Eventually, BNY Mellon terminated Weightman on January 9, 2008.

The factual dispute of this case is not whether the Defendant's conduct was wrong, but whether termination of Weightman was motivated by the Defendant's "discriminatory animus"[4] toward her gender and familial situation.

[2] Weightman was absent from work from Aug. 7, 2007 until Nov. 14, 2007.

[3] Examples of protected absences are, for example, vacation days, military leaves of absences, leave under the Family and Medical Leave Act, death of a relative or close friends, jury duty, etc.

[4] Weightman v. Bank of N.Y. Mellon Corp., 772 F. Supp. 2d 693, 695 (W.D. Pa. 2011).

### *A. Claims Based on Gender, Pregnancy, and Retaliation*

#### *1. Weightman's Claims*

Weightman's claims consisted of two parts. One was gender discrimination based on pregnancy and family responsibility. Weightman contended that due to her pregnancy, BNY Mellon discriminated against her by changing her flexible working arrangements, giving her a negative performance review, and finally terminating her, which constituted an intentional and willful violation of Title VII. As the second part of her claims, Weightman argued that she experienced retaliation based on her complaints about discrimination because BNY Mellon had given her a negative performance review and terminated her after she made a good faith complaint that she was discriminated against by BNY Mellon based on her pregnancy. According to Weightman, her complaint was protected conduct under the Title VII and Pennsylvania Human Relations Act.

As a result of BNY Mellon's conduct, Weightman argued that she lost her income and future job opportunities. She also claimed that she suffered from mental anguish, inconvenience, and humiliation. Accordingly, she requested BNY Mellon to award her reinstatement and appropriate damages.

#### *2. BNY Mellon's Counterargument*

According to BNY Mellon, the reason for the termination of Weightman was her repeated violation of its attendance policy. Even after multiple verbal and written warnings, Weightman continued to violate the company's policy—even as late as December when her final written warning was issued.

## III. RATIONALE

Weightman's argument relied on the legal basis of both Title VII of the Civil Rights Act of 1964 and the Pennsylvania Human Relations Act, both, which prohibit discrimination on the basis of sex and sex-plus discrimination.[5] These Acts include actions of discrimination due to pregnancy, childbirth, or related

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[5] Prohibition of sex-plus discrimination allows employees to claim against gender discrimination although all members of the gender are not discriminated against. *See* Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971).

medical condition and require that pregnant employees be treated equally as non-pregnant employees.[6]

Under these Acts, Weightman may establish a gender discrimination claim by presenting either direct evidence that the BNY's decision was motivated by discrimination, or indirect evidence that allows inference of Defendant's discriminatory conduct. In the present case, the court held that Weightman failed to meet requirements for either allegation.

First, under the modified standard of *Price Waterhouse v. Hopkins*, if an employee proves that there was clearly a gender discriminatory factor that motivated the employer for any employer's practice, the direct evidence is established.[7] Here, Weightman presented three pieces of direct evidence: (1) Weightman's direct supervisor "David's reaction to her pregnancy announcement; (2) adverse changes in how she was disciplined for absenteeism, in her performance reviews, and in her flexible work arrangements after announcing her pregnancy; and (3) David's December 4, 2007 comment that "'you need to make a decision, either you're going to be a mom or have a career.'"[8]

As initial evidence, Weightman presented that David did not congratulate her or express joy when she announced her pregnancy in January 2007. Although the law does not support such non-expression, the court considered it to be indirect or circumstantial evidence of gender discrimination. However, the court found that any alleged change in treatment after she announced her pregnancy would not be considered direct evidence of gender discrimination. It reasoned that the discipline against her absenteeism was made based on the BNY Mellon's Occasional Absence Policy and not due to her pregnancy. Weightman had already received negative comments on her performance evaluation and BNY Mellon had expressed its concern regarding Weightman's flexible working hours even before she had informed them of her pregnancy. Finally, David's alleged comment was not made around the time that Weightman's termination was decided, and it was not known to other co-workers, including managers who

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[6] Preferential treatment for pregnant employees is not required.

[7] Price Waterhouse v. Hopkins, 490 U.S. 228, 258 (1989), as modified by section 107 of the Civil Rights Act of 1991 (internal citations omitted).

[8] *Weightman*, 772 F. Supp. 2d at 704.

participated in her termination. Accordingly, the court found that the evidence Weightman presented was not enough to constitute direct evidence of gender discrimination.

Next, the court examined whether the evidence that Weightman provided could indirectly create an inference of gender discrimination. To establish a *prima facie* case with indirect evidence, Weightman must prove that she was qualified for the position and that some causal link exists between her pregnancy and termination. In this case, the court assumed that Weightman was qualified and, for the sake of analysis, that David's unpleasant reaction to her pregnancy and her December 4th comment would be considered indirect evidence. For the same reasons previously explained, however, this would not be considered sufficient evidence for a reasonable jury to find a nexus between her pregnancy and the adverse employment reaction.

As for Weightman's retaliation claim, the court found that Weightman might be able to establish a *prima facie* case by presenting evidence as follows:

(1) [T]he decision to terminate her was made within days of her December 12th complaint; (2) David complained to human resources about her "constant badgering" regarding vacation days within about a week of her December 12th complaint; (3) David complained to human resources about Weightman within days of Weightman raising a concern with David regarding discrimination in May of 2007; and (4) human resources refused to address or investigate the complaint.[9]

To survive the Defendant's summary judgment motion, however, Weightman must prove that her excessive absenteeism was pretext for retaliation. In the present case, Weightman was terminated less than a month after she reported David's comment to human resources. However, the fact that David complained to human resources about Weightman after she accused David of discriminating against her did not constitute pretext for retaliation.

Accordingly, due to the lack of evidence to support any of Weightman's claims, the court ruled in favor of BNY Mellon.

[9] *Id.* at 711.

## IV. CONCLUSION

The judgment of the court in the present case demonstrates that to prove discrimination, in gender and pregnancy discrimination claims, there should be clear evidence of a specific causal link between the alleged factor and the discriminatory activity. Indeed, considering the undisputed facts of this case, BNY Mellon's argument seems undefeatable. Moreover, Weightman neither disputed the facts surrounding her attendance record nor objected to her managers' concerns regarding the same; thus, making it more apparent that BNY Mellon had a legitimate reason for Weightman's termination. This case leaves a number of questions unanswered, however, concerning its effects on the social bias and discriminatory atmosphere against women in general or women with children in our society. For example, the question of whether there is no single factor of discriminatory conduct can be asked in this case. David's comment that Weightman needed to decide whether she wanted to be a mom or have a career reflects her possible bias against pregnant women. That comment, however, simply does not meet legal requirements to establish a causal link to Weightman's termination. When a woman hears a certain comment that she would not have heard but for her sex or pregnancy, it should imply some discriminatory factor. The same logic should apply to men as well.

It is generally accepted that a sincere attitude to attend work regularly is one of the most important requirements when it comes to employment discrimination cases. Therefore, in the present case, the discriminatory nature of David's comment seems to be diminished in light of Weightman's poor attendance record. Regardless, the judiciary will have to eventually clarify what exactly constitutes a single factor of discriminatory conduct, and which factors may be sufficient enough to be utilized in gender discriminatory cases.