

Employment Law

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Appellate Division Reminds Litigants Of The Need To Produce Evidence To Sustain A Claim Under The New Jersey Law Against Discrimination

By Phillip C. Bauknight

In *Solis v. Sher*, Docket No. A-3251-10T3 (App. Div. Dec. 5, 2011), the Appellate Division affirmed the dismissal of plaintiff's pregnancy discrimination claim under the New Jersey Law Against Discrimination ("LAD"), *N.J.S.A. 10:5-1, et seq.* As discussed more thoroughly, *infra*, the Court found that plaintiff failed to present any evidence supporting her belief that the employer's proffered reason for her discharge was false.

Factual Background

Plaintiff Rose Solis was employed as a dental hygienist by defendant Jay Sher, DDS, for a 21-month period beginning in February 2006 and ending in November 2007. Plaintiff married shortly after she commenced employment and learned she was pregnant in May 2007. Throughout the course of plaintiff's employment, she had a reputation as a poor performer and was often criticized by her co-workers. She also received complaints from patients regarding her demeanor and teeth-cleaning services. On several occasions, including a month before she was fired and again two days before she was fired, defendant had to re-treat patients free of charge because of plaintiff's unsatisfactory work product. Notably, on the day she was fired, two other patients also complained about plaintiff's work. These complaints, according to defendant, were the "last straw" and, combined with plaintiff's poor work history, led to her termination.

Prior to plaintiff's termination, defendant held a series of meetings and informal discussions with plaintiff where he explained what was expected of a dental hygienist. When her behavior did not improve, defendant ran an online advertisement for a dental hygienist to replace plaintiff, but no one responded. Notably, defendant's online advertisement was done in January 2007, four months before he learned of plaintiff's pregnancy.

Despite defendant's concern over plaintiff's attitude and work performance, he hoped that she would improve. In fact, according to defendant, he expected plaintiff to return to work upon completion of her maternity leave. Notably, this expectation was consistent with defendant's treatment of other hygienists who became pregnant as he consistently granted maternity leave to pregnant employees and made it clear they were welcome back upon completion of leave. Plaintiff, however, believed these experiences made defendant less tolerant of pregnant employees. As proof, plaintiff stated that after defendant met her husband for the first time, defendant said, "remember no babies, children are overrated." Similarly, when scheduling plaintiff's maternity leave, defendant mentioned his previous problems with hygienists that took maternity leave.

The Trial Court's Decision

Plaintiff filed suit alleging wrongful termination based on pregnancy discrimination in violation of the LAD. Upon review, the trial court granted defendant's motion for summary judgment and found that plaintiff had no proof defendant terminated her because she was pregnant. The trial court observed that: (i) defendant ran an online advertisement to replace plaintiff four months before he knew plaintiff was pregnant, and (ii) the termination occurred one month after defendant had to re-treat a patient free of charge, two days

after defendant had to treat another patient free of charge, and the same day two other patients complained about plaintiff's work. Thus, defendant presented a legitimate reason for plaintiff's termination: poor work performance.

The Appellate Division Affirms

Plaintiff appealed the trial court decision. At the outset, the Appellate Division acknowledged that plaintiff established a prima facie case of discrimination. Nonetheless, the Appellate Division recognized that defendant proffered a "legitimate non-discriminatory reason" for plaintiff's termination. Thus, the issue was whether sufficient evidence existed for a reasonable fact-finder to conclude that defendant's proffered reason for the termination (poor work performance) was a pretext for discrimination and not the true reason for the employment decision.

First, the Appellate Division noted that plaintiff offered nothing to discredit the defendant's reason for her discharge and did not demonstrate any weakness or inconsistencies in defendant's proofs, which included certifications of patients and co-workers attesting to plaintiff's poor work performance. Second, the Appellate Division found that plaintiff presented no proof of disparate treatment toward pregnant employees or that other pregnant employees were terminated by defendant. To the contrary, the Appellate Division observed that defendant granted lengthy maternity leaves to employees who were pregnant. Similarly, employees who became pregnant were overtly asked to return upon completion of leave.

The Appellate Division also recognized that defendant made an effort to improve plaintiff's performance, despite complaints from clients and co-workers. Perhaps more importantly, defendant sought to replace plaintiff well before he knew she was pregnant. Finally, the Appellate Division found that defendant's comments about plaintiff's pregnancy were "jocular in nature" and could not establish a disputed material fact regarding defendant's reason for terminating plaintiff. Thus, because the LAD "does not prevent the termination or change of employment of any person who is unable to perform adequately the duties of employment, nor does it preclude discrimination among individuals on the basis of competence, performance, conduct, or any other reasonable standard," the Appellate Division affirmed the dismissal of plaintiff's complaint as there was no evidence to conclude that defendant's non-discriminatory reason for terminating plaintiff was not credible or that her pregnancy was a motivating factor in her termination.

Conclusion

Dealing with a discrimination claim is never ideal for employers. Nonetheless, employers should not panic automatically if they are sued by a former employee. While all claims should be taken seriously, *Solis* reminds employers that baseless allegations can be dispatched via motions for summary judgment if handled properly. We recommend the following tips to help defend against such claims.

- An employer should always document an employee's work performance through evaluations and work assessments. Informal evaluations are better than none at all. Similarly, an employer should maintain hard copies of any complaints made against an employee along with records of lost revenue resulting from an employee's poor work performance. The more documents you have, the better you can defend yourself.
- Prevention is key! Employers should be consistent in their interactions with employees. A critical fact in *Solis* was the defendant's uniform treatment of hygienists working for him who became (or were) pregnant.
- Be proactive when complying with accommodation policies such as maternity leave. Do not wait for an employee to ask if she can return; tell her she is welcome back. Consistent behavior is essential to LAD compliance.