Client ALERT

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Govori v. Goat Fifty: Court's decision sides with wanna be moms

Infertility may be a "gender neutral" condition (affecting both men and women), but firing a female employee for undergoing a surgical implantation precedure is "gender specific," so the employer may be liable for gender bias. That is what a federal court in New York recently ruled when it denied an employer's motion to dismiss, finding its former employee had stated a cognizable claim for sex discrimination under Title VII of the Civil Rights of 1964, because only women undergo this surgical procedure.

Elira Govori was a server at Nelson Blue Bar and Grill, owned and operated by Goat Fifty in the South Street Seaport District of New York City. She openly discussed with her supervisors her hopes of becoming a mother and, subsequently, her plans to undergo *in vitro* fertilization ("IVF") treatments. The day after she announced she was moving from the diagnostic phase of IVF to the treatment stage (for which she would need to miss time from work), she was fired. Govori filed an action against Goat Fifty, alleging its termination of her employment was discriminatory and thus violated Title VII of the Civil Rights Act of 1964 (as amended by the Pregnancy Discrimination Act of 1978 ("PDA")) and certain state anti-discrimination laws.

Goat Fifty tried to argue that women undergoing IVF were not members of a protected class under the PDA because infertility is a gender neutral condition. The U.S. District Court for the Southern District of New York disagreed. Relying heavily on a Seventh Circuit ruling *Hall v. Nalco Co.* (7th Cir. 2008) 534 F.3d 644, the New York court reiterated that claims by female employees who were fired for taking time off to undergo IVF were akin to claims for taking time off to give birth or receive other pregnancy related care because the surgical impregnation procedure of IVF necessarily involved only women. In *Hall*, firing a female employee for missing work for IVF treatments

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was viewed as "not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity." *Hall*, 534 F3d. at 648-649. The court in *Govori* adopted that rationale, stating:

> *[O]nly women undergo surgical implantation procedures; therefore, only women and not men stand in potential danger of being fired for missing work for these procedures. An employer who fires his female employee for missing work for IVF treatment discriminates not on the basis of reproductive capacity or infertility alone, but on the basis of medical conditions related to pregnancy. Thus, women who are fired for undergoing IVF are protected from such discriminatory, sex-based action by the terms of the PDA.*

The court's decision did not relieve Govori of her ultimate burden to establish a *prima facie* case of discrimination. The matter before the court was Goat Fifty's motion to dismiss, so that the court's holding was based on the pleadings before it and did not call for an evidentiary ruling. Because plaintiffs do not need to plead a *prima facie* case of discrimination, Govori's complaint was sufficient because it gave Goat Fifty fair notice of the bases for her claim and indicated the possibility of discrimination to present a plausible disparate treatment argument.

ANALYSIS

The *Govori* Court apparently adopted a liberal view of what it believed constitutes "medical conditions related to pregnancy." The Court did not appear to be concerned about the timing of Govori's IVF procedures, and while she was heading into the advanced stages of treatment, she was not, in fact, pregnant. The decision suggests that "related medical conditions" need not actually mean the woman was pregnant to be offered protection under the PDA. Thus, while an employee may be absent as a result of a gender neutral condition or illness, being fired for that absence may be deemed sex discrimination if it pertains to a medical condition "related to" pregnancy.

IMPLICATIONS

Although no California court has specifically addressed this issue, the *Govori* decision is persuasive, and employers should take heed in the meantime. An employer cannot dismiss an employee because of pregnancy. And now in New York, an employer cannot dismiss an employee when it is connected not just to pregnancy, but to a non-pregnant woman who is trying to get pregnant.

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