IN THE SUPREME COURT OF OHIO

LaNISA ALLEN,

Plaintiff-Appellant,

v.

TOTES>>ISOTONER CORP.,

Defendant-Appellee.

Case No. 08-0845

On appeal from the Butler County Court of Appeals, Twelfth Appellate District

---

MERIT BRIEF OF DEFENDANT-APPELLEE, TOTES>>ISOTONER CORP.

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I. STATEMENT OF THE CASE

This action arises from a decision made by the Defendant-Appellee Totes>>Isotoner Corp. ("Totes or Company") to terminate the employment of Plaintiff-Appellant LaNisa Allen ("Allen" or "Plaintiff") when it was discovered that she had been taking unauthorized work breaks. Allen had been working as a temporary employee in Totes' warehouse. At the time she was hired, Totes was aware that Allen had recently given birth and that she was breastfeeding her child. When Allen explained that she would need to pump her breasts at some point during the workday, Totes management told her that she could do so during her morning break. Allen responded that she thought that arrangement would be suitable. However, after a few days at work, Allen decided to begin taking an earlier, additional paid break to pump her breasts. She not only did not ask for permission to do so, but did not even notify Totes that she was taking this additional paid break. When Totes discovered that Allen was doing so, Allen was discharged for taking unauthorized breaks.

Allen thereafter initiated this action claiming that she had been discriminated because of her sex; that her termination violated public policy; and that she was terminated due to a handicap. On August 1, 2007, the trial court granted Totes summary judgment on all three claims.

Allen filed a notice of appeal on August 30, 2007 with the Ohio Twelfth District Court of Appeals, challenging the dismissal of her pregnancy discrimination claim and public policy claim, but not challenging the dismissal of her handicap discrimination claim. (Merit Brief of Appellant, p. 1) On April 7, 2008, the Court of Appeals affirmed the trial court judgment. (T.d. 37)

II. COUNTERSTATEMENT OF FACTS

Totes is one of the world's largest marketers of umbrellas, gloves, rainwear, rubber rain boots, and other weather-related accessories. (Fightmaster Affidavit, Mem. in Supp. of Def.'s Mot. for Summary Judgment, T.d. 23, Ex. A, ¶ 2) Totes operates a large distribution facility in Butler County, Ohio. (*Id.* at ¶ 3) Products are delivered to this distribution facility by manufacturers, packaged by Totes employees, and then shipped to department stores and other mass merchandisers. (*Id.*)

Totes employs approximately 125 employees at its Butler County distribution facility year round. (*Id.* at ¶ 4) During the summer and early fall of each year, the peak season for Totes shipments, Totes hires as many as 250 additional temporary employees to package and ship products. (*Id.*) Because of its fluctuating need for temporary, seasonal workers, Totes contracts with a temporary service, Star Personnel, to assist it in hiring employees to fill Totes's peak season needs. (*Id.*) Most temporary employees hired for the peak season are released from Totes within a 90-day probationary period and never become full-time, regular employees. (*Id.*)

In July 2005, Allen contacted Star Personnel regarding a vacant position at Totes. (Allen Deposition, T.d. 21, p. 30) Allen was hired on a 90-day probationary basis. On July 25, 2005, Allen attended an orientation session at the Totes facility. (*Id.* at 33)

At the orientation session, Allen approached Angel Gravett, a Star Personnel manager, and stated that she would need a time and place to pump her breast milk on a daily basis. (*Id.* at 34-35) Gravett had never before received this request from an employee, so she consulted with Totes managers. (*Id.* at 36) The next day, Gravett called Allen and told her that she could pump her breast milk during her lunch break at 11:00 a.m. (*Id.* at 37) Allen replied " . . . I'll see, you know, how it will work out for me to wait that long to be able to pump." (*Id.*)[1] This conversation

[1] Allen did not complain about being directed to use the women's bathroom for this purpose. (*Id.* at 38)

understandably left Totes believing that Allen's breast pumping needs had been met by the arrangement, at least pending further feedback from Allen.

During all or most of Allen's first week on the job, she waited until her 11:00 a.m. lunch break, as she had agreed, to use her breast pump. (*Id.* at 37-38) After about a week of pumping during her lunch break, however, Allen decided – without asking a supervisor at Totes – to begin taking an additional break earlier in the workday "at either quarter to 10:00 or 10:00" for the purpose of pumping her breasts. (*Id.* at 44-46) Allen admitted in her deposition that she had never asked permission to take this additional break:

> Q: Prior to the time that you started pumping your breasts earlier than 11:00, did you discuss that change with anybody at Totes?
>
> A: No.
>
> ***
>
> Q: And why didn't you inform somebody in supervision that you were going to take your break earlier?
>
> A: I don't know.
>
> ***
>
> Q: Did you consider discussing it, or talking, or at least informing someone in management before you started taking the early break?
>
> A: No.

(*Id.* at 46-47)[2]

Allen contends that she "could not wait" until 11:00 a.m. to pump her breasts because her breasts became too full. (Compl., T.d. 2, ¶ 10) Whether or not this is true, it does not excuse Allen's failure to request permission to take an extra break. All Totes employees are given an 8:00 a.m. break. Plaintiff might have used this break to pump her breasts. (Allen Dep., T.d. 21

[2] Plaintiff testified that this was not the first job from which she had been discharged for "stealing time." (*Id.* at 13) Plaintiff testified that she was fired from her previous job at Lakeridge Village Nursing Home for essentially the same reason that she was terminated from Totes: "I was let go because of leaving to go take my son some milk, and I didn't clock out before I left. Since I was still on the clock, they said I was stealing time basically." (*Id.*)

at 41-42) Alternatively, she might have requested permission to delay her 8:00 a.m. break until 10:00 a.m. When asked why she did not use her 8:00 a.m. break to pump, Allen replied that she spent that time eating breakfast. (*Id.* at 42)

After a few weeks of taking extra, unauthorized breaks as she chose, Allen was observed by a female manager at Totes in the women's restroom using her breast pump at a time when she should have been on the work floor. (*Id.* at 50) When confronted, Allen admitted that she had been taking unauthorized breaks. Allen's employment at Totes was therefore terminated on August 16, 2005 not because she had been pumping breast milk, but because she taken extra paid breaks without seeking authorization. Those extra breaks were in fact contrary to the arrangement that she had made on her first day of work.

III. ARGUMENT

A. First Issue Presented By Allen For Review: Lactation Is Not "A Related Medical Condition" To Pregnancy And Therefore Is Not Protected By R.C. 4112.

Plaintiff Allen's first issue presented for review is her contention that because lactation is "associated with pregnancy," lactation is therefore protected by the Ohio Fair Employment Act, R.C. 4112.01, et seq. (FEPA) as amended by the Ohio Pregnancy Discrimination Act, R.C. 4112.01(B) (OPDA). The basic problem Allen has with regard to this issue – that lactation is "associated" with pregnancy – is that the statute in question does not protect conditions that are simply "associated" with pregnancy. Ohio law offers to protection to pregnancy and to "related **medical conditions**":

> For the purposes of section 4112.02 of the Revised Code, the terms 'because of sex' and 'on the basis of sex' include ... because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or **related medical conditions**.

R.C. 4112.01(B) (Emphasis added.)

Thus, the fact that a condition might be "associated" with pregnancy and childbirth is insufficient to invoke statutory protection. Instead, the condition at issue, if it is not pregnancy itself nor childbirth, must be a "related **medical** condition." It is undisputed that Allen was no longer pregnant when she was hired. Also, Allen has never argued that she was discriminated against either because she had been pregnant or because she gave birth to a child. That then leaves the following as the only remaining question: Is lactation a "medical condition" related to pregnancy?

No Ohio court has examined the question of whether breast-feeding or lactating in order to breast-feed is protected by R.C. 4112.01(B). Therefore, as this Court has previously directed, we look to federal case law interpreting the identical federal Pregnancy Discrimination Act (PDA). Section 2000e(k), Title 42, U.S. Code. ***Plumbers & Steamfitters Joint Apprenticeship Commt. v. Ohio Civ. Rights Comm.*** (1981), 66 Ohio St.2d 192, 196, 421 N.E.2d 128. See, also, ***Coryell v. Bank One Trust Co., N.A.***, 101 Ohio St.3d 175, 2004-Ohio-723, 803 N.E.2d 781, at ¶ 15 ("Although we are not bound to apply federal court interpretation of federal statutes to analogous Ohio statutes, we have looked to federal case law when considering claims of employment discrimination brought under the Ohio Revised Code."); ***Little Forest Med. Ctr. v. Ohio Civ. Rights Comm.*** (1991), 61 Ohio St.3d 607, 609-10, 575 N.E.2d 1164 (federal standards applicable in sex discrimination case). See ***Priest v. TFH-EB, Inc.*** (1998), 127 Ohio App.3d 159, 164-65, 711 N.E.2d 1070 ("Federal case law is especially relevant [in a pregnancy discrimination case], since R.C. 4112.01(B) reads almost the same as the [federal] Pregnancy Discrimination Act.").

The OPDA and the federal PDA state in identical language that prohibited sex discrimination involving pregnancy is limited to "any illness" arising from or during the course of a pregnancy or "related **medical** conditions." R.C. 4112.01(B) (emphasis added); compare

Section 2000e(k), Title 42, U.S. Code. Thus, the question is not, as Allen posits it, whether lactation and breast-pumping are "associated with" or "physically related to" pregnancy, but rather whether lactation and breast-pumping constitute a pregnancy "related medical condition."[3]

Lactation is not a related "medical condition." In ***Jacobson v. Regent Assisted Living, Inc.*** (D.Or. 1999), 1999 WL 373790, *11, the plaintiff was discharged during a post-pregnancy period in which she was lactating, just as was Allen. She contended that her employer's animus was established, at least in part, because it on two occasions had denied her permission to take breaks in order to pump breast milk. Rejecting this argument, the court stated:

> [T]o the extent that Jacobson bases her discrimination claim on her assertion that [her employer] would not allow her to pump her breast milk, she fails to state a claim. Title VII and the PDA do not cover breast-feeding or childrearing concerns because they are not 'medical conditions related to pregnancy, childbirth or related medical conditions.'

In addition to ***Jacobson***, all of the other federal courts that have examined post-partum lactation have concluded that it is not a "pregnancy-related medical condition." A Kentucky district court held that an employer did not violate the federal PDA by refusing to grant a lactating employee a leave of absence to breast-feed her six-week old infant: "While it may be that breast-feeding and weaning are natural concomitants of pregnancy and childbirth, they are not 'medical conditions' related thereto." ***Wallace v. Pyro Mining Co.*** (W.D.Ky. 1990) 789 F.Supp. 867, 869 *aff'd* (C.A.6) 1991 WL 270823. See ***Derungs v. Wal-Mart Stores, Inc.*** (C.A.6 2004), 374 F.3d 428, 432 ("[B]reast feeding discrimination ... is not discrimination on the basis of sex under the law.") In ***Fejes v. Gilpin Ventures, Inc.*** (D.Colo. 1997), 960 F.Supp. 1487, 1492, that court similarly rejected a claim involving the denial of leave for breast-feeding on the

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[3] Allen essentially concedes that such lactation is not an "'illness," noting that lactation occurs in "all [pregnant] female animals" and that "[e]very woman who endures a long-term pregnancy will begin to lactate." (Merit Brief of Appellant, p. 9)

ground that "breast-feeding and child rearing concerns after pregnancy are not medical conditions related to pregnancy or childbirth within the meaning of the PDA."

In the courts below, Allen attempted to distinguish ***Wallace*** and ***Gilpin*** by arguing that denying leave for breast-feeding is "one step removed from the present case ...." (Pls' Mem. In Opp., T.d. 30 at 11) That effort fails. Whether a women seeks an opportunity to leave her work assignment in order to lactate for later child-feeding or to leave work to go to her home and breastfeed her child via lactation, the underlying condition giving rise to this need is the same. Federal law, and the nearly identical Ohio PDA, offers protection to pregnancy and to illnesses and other **medical** conditions related to pregnancy, but these statutes do not attempt to address ordinary post-pregnancy issues such as child-feeding or child-rearing.

Whether women who are breast-feeding infants should be allowed work breaks or other accommodations in order to fulfill that function is a question that is worthy of debate in the Ohio Legislature. However, in this case, Allen is attempting to stretch the Ohio PDA beyond its actual reach. The Ohio PDA, interpreted in parallel with its identical federal counterpart, does not cover breast-feeding; therefore, this issue should be rejected.

B. Second Issue Presented By Allen For Review: Ohio Law Does Not Obligate Employers to Accommodate Lactating Employees.

Plaintiff Allen argues that while she was denied accommodation with respect to taking an additional break to lactate, non-lactating employees were "accommodated" because they were allowed to take breaks for toilet needs and, in case of female employees, in order to attend to needs arising from menstruation. (Merit Brief of Appellant, p. 11) She argues that this set of circumstances amounts to unlawful discrimination This reasoning, however, is based on a faulty premise.

The FEPA bans discrimination between employees of one sex versus the **other** sex. With respect to breaks taken for toilet needs, Allen was given the same rights as male employees.

With respect to menstruation, the fact that Totes is claimed to provide favorable treatment to one subclass of women and not to a different subclass of women is latitude that an employer may lawfully exercise. It is not sex discrimination under FEPA, for example, for an employer to treat short women more favorably than tall women or to treat left-handed women more favorably than right-handed women (whereas it would be discriminatory to treat short men more favorably than short women). Allen's argument, however, would have this Court establish the principle of intra-sex discrimination, an extension not at all warranted by the language of FEPA.

It is clear, and Allen essentially concedes, that the Ohio PDA does not require an employer to accommodate pregnant women to the extent that such accommodation amounts to preferential treatment. (Merit Brief of Appellant, p. 12) In ***Priest v. TFH-EB, Inc.*** (1998), 127 Ohio App.3d 159, 165, 711 N.E.2d 1070, cited by Allen, the court held that "the PDA does not require an employer to make accommodations for its pregnant employees unless it has made accommodations to similarly situated non-pregnant employees." The PDA and OPDA do not require "an employer to overlook the work restrictions of pregnant women unless the employer overlooks comparable work restrictions of other employees." *Id.*

Allen argues that because men are allowed to take restroom breaks to urinate and defecate, that she should have been allowed to leave to pump her breast milk.[4] (Merit Brief of Appellant, p. 11) What Allen fails to acknowledge is that sex discrimination, to be actionable, must involve disparate treatment of **similarly situated** men and women. ***Fox v. Lorain County Metroparks***, Lorain App. No. 07CA009134, 2007-Ohio-6143, at ¶ 16 (affirming summary judgment for employer in a sex discrimination case where female plaintiff failed to show that she was treated differently than any similarly situated male employee); ***Price v. Matco Tools***,

[4] The fact that she pumped breast milk while in the restroom does not make that function necessarily a restroom function in the usual sense of the word. Totes might well have chosen to direct Allen to pump breast milk in an empty office or similar non-restroom space, had such been available.

Summit App. No. 23583, 2007-Ohio-5116, at ¶ 37 (summary judgment where plaintiff "failed to produce evidence that similarly-situated male employees received better treatment than she, an essential element of her claim"). In other words, to be actionable, men must receive a benefit that women do not or, alternatively, women must be adversely treated in some respect while men in a similar situation are not so adversely treated. In the instant case, both men and women are allowed to use the restrooms for excretion of bodily waste – clearly there is no discrimination in that respect. Men obviously are not allowed to leave their workstations to pump breast-milk or, for that matter, to bottle-feed their infants, nor are women – again, there is no discrimination in that respect. The restriction imposed upon Allen – that is, not leaving her work station to pump breast milk (at least not without prior permission) – does not benefit men nor does it put Allen at a disadvantage with respect to any **similarly situated** men.

The above principle is illustrated in ***Phillips v. Martin Marietta Corp.*** (1971), 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d 613, in which the defendant had refused to hire women with pre-school-aged children while hiring men who had pre-school age children. In that case, there was no serious question of any general bias against hiring women, because the district court had found that 75 to 80 percent of those hired for the position in question were women. Nevertheless, the Supreme Court held that "permitting one hiring policy for women and another for men – each having pre-school-age children" – constituted sex discrimination. *Id.* at 498. In other words, it was sex discrimination to deny hire to women with one particular characteristic while hiring men possessing that same characteristic – *i.e.*, men who were similarly situated. Because the men to whom Allen points were not similarly situated to her, this argument must fail.

Even if Allen were permitted to proceed with her pregnancy discrimination claim, the claim would fail for the additional reason that her employment was terminated for a legitimate,

non-discriminatory reason. Allen was discharged for taking unauthorized breaks during working time. ***Birchard v. Marc Glassman, Inc.***, Cuyahoga App. No. 82429, 2003-Ohio-4073, at ¶ 4 (no discrimination where a pregnant employee who had been caught "stealing time" was reassigned "to the express lane so that she would be unable to stray too far from her duty post"). Assuming *arguendo* that Allen may have been entitled to take a break at a different time or even that she was entitled to an additional break, she and the Company had already reached agreement on a time when she would pump her breasts. Allen testified that she would try to comply, but never informed the Company that she had decided to do something different. Had she gone to her supervisor and explained that 11:00 did not work, the Company at least would have considered other arrangements, including but not limited to allowing her to leave her workstation at will. But Allen never gave the Company the opportunity to consider the situation.

Allen also contends that when she "specifically asked" that she be given additional time, this request was refused. (Merit Brief of Appellant, p.12) Allen's argument conveniently ignores the fact that her request was made only after she had taken several unauthorized breaks and was being terminated for doing so. This is analogous to a shoplifter who, when caught, asks whether the store would consider giving the item away for free – such a request is too little and much too late. Had Allen made a request as soon as she decided that 11:00 wasn't working, this Court would be presented with a quite different case. But, she did not. She cannot state a valid claim of denial when she had been fired for never having made the request on a timely basis.

C. Third Issue Presented for Review: Allen Cannot Identify A Clear Public Policy That Would Be Violated By Her Discharge.

Plaintiff Allen also alleges that her termination violated Ohio's public policy, pointing first to the policies embodied in R.C. 4112. The remedies provided for a violation of Chapter 4112, as set forth in R.C. 4112.99, provide complete relief for a claim of sex discrimination. Thus, the same conclusion reached by this Court in ***Leininger v. Pioneer National Latex***, 115

Ohio St.3d 311, 2007-Ohio-4921, 875 N.E.2d 36, at ¶¶ 9-12, with respect to age discrimination should be reached here, requiring affirmation of the trial court's dismissal of this claim.

Even if the result dictated by ***Leininger*** is not applied to her public policy claim, Allen's argument that the OPDA establishes a public policy barring employers from terminating the employment of a lactating female is flawed. As shown supra, R.C. 4112 does not cover the condition of post-pregnancy lactation. Therefore, because Plaintiff is unable to establish that Totes violated R.C. 4112.02, she cannot maintain her claim that Ohio's public policy identified in R.C. 4112.02 would be jeopardized.

The second public policy source Allen relies upon is R.C. 3781.55, which permits a mother to breast-feed an infant in a "place of public accommodation." The first problem with this argument is that Allen did not attempt to breast-feed her infant when she was at Totes's warehouse. Breast-feeding was never an issue with Allen and thus the asserted public policy has no application to this case. It appears that Allen would have this Court take the policy that is articulated in the statute and then extend it to a situation not contemplated by the statute.

The second problem Allen encounters, even if the public policy concerning breast-feeding somehow were extended to breast-pumping, is that the statutory policy permits such activity by visitors in "a place of public accommodation ...." R.C. 3781.55. The statute defines such a place by incorporating the definition of public accommodation found in R.C. 4112.01, which provides that a place of public accommodation is:

> Any inn, restaurant, eating house, barber shop, public conveyance by air, land, or water, theater, store, other place for the sale of merchandise, or any other place of public accommodation or amusement of which the accommodations, advantages, facilities, or privileges are available to the public.

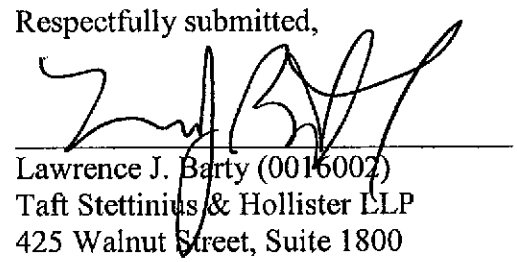
R.C. 4112.01(A)(9).

Nothing in the record of this case supports the contention that Totes's warehouse is a restaurant, a theatre, a place for the sale of merchandise or any other place available to the public. It is simply a private warehouse used by Totes for the transshipment of goods. As such, Totes's warehouse is not a place of public accommodation. Therefore, the public policy upon which Allen seeks to rely is inapplicable to Allen's workplace.

IV. CONCLUSION

Based on the foregoing, Totes respectfully asks this Court to affirm the judgment obtained by Totes below.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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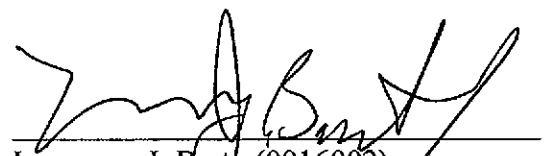

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APPENDIX

C

Only the Westlaw citation is currently available.

United States District Court, D. Oregon.
Kimberlie Bloise JACOBSON, Plaintiff,
v.
REGENT ASSISTED LIVING, INC., an Oregon corporation, Defendant.
No. CV-98-564-ST.

April 9, 1999.

FINDINGS AND RECOMMENDATION

STEWART.

INTRODUCTION

*1 Plaintiff, Kimberlie Bloise Jacobson ("Jacobson"), brings this action against her former employer, Regent Assisted Living, Inc. ("Regent"), for terminating her employment because she became pregnant and took a maternity leave. Jacobson seeks damages and an injunction based on pregnancy and sex discrimination under Title VII of the Civil Rights Act of 1964, 42 USC § 2000e-2(a)(1) ("Title VII"), and common law wrongful discharge. In the Amended Complaint, Jacobson also alleged a claim against Regent based on the Oregon Family Leave Act ("OFLA"), ORS 659.470*et seq.* and a claim against Bowen Financial Services Corporation for intentional interference with economic relations. However, she has withdrawn those latter two claims. This court has jurisdiction over the Title VII claim pursuant to 28 USC § 1331 and over the wrongful discharge claim pursuant to 28 USC § 1367.

Regent has filed a motion for summary judgment (docket # 20) which is now before the court. For the reasons set forth below, that motion should be granted.

STANDARDS

FRCP 56(c) authorizes summary judgment if no genuine issue exists regarding any material fact and the moving party is entitled to judgment as a matter of law. The moving party must show an absence of an issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986). Once the moving party shows the absence of an issue of material fact, the non-moving party must go beyond the pleadings and designate specific facts showing a genuine issue for trial. *Id* at 324. A scintilla of evidence, or evidence that is merely colorable or not significantly probative, does not present a genuine issue of material fact. *United Steelworkers of Am. v. Phelps Dodge Corp.,* 865 F.2d 1539, 1542 (9th Cir), *cert denied,* 493 U.S. 809 (1989).

The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 630 (9th Cir1987). The court must view the inferences drawn from the facts in the light most favorable to the non-moving party. Thus, reasonable doubts about the existence of a factual issue should be resolved against the moving party. *Id* at 630-31. However, when the non-moving party's claims are factually implausible, that party must come forward with more persuasive evidence than would otherwise be required. *California Architectural Bldg. Prods., Inc. v. Franciscan Ceramics Inc.,* 818 F.2d 1466, 1470 (9th Cir1987), *cert denied,* 484 U.S. 1006 (1988). The Ninth Circuit has stated, "No longer can it be argued that any disagreement about a material issue of fact precludes the use of summary judgment."*Id* at 1468.

However, the Ninth Circuit has set a high standard for granting summary judgment in employment discrimination cases. "[W]e require very little evidence to survive summary judgment in a discrimination case, because the ultimate question is one that can only be resolved through a searching inquiry-one that is most appropriately conducted by the fact-finder, upon a full record." *Schnidrig v. Columbia Machine, Inc.,* 80 F3d 1406, 1410 (9th

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Cir) (citations omitted), *cert denied,* 117 SCt 295 (1996).

UNDISPUTED FACTS

*2 Because all material facts must be viewed in the light most favorable to the non-movant, this court will view the evidence in the light most favorable to Jacobson. A review of the parties' facts, as well as the other materials submitted by the parties, including affidavits [FN1] and deposition excerpts,[FN2] includes the following:

FN1. Affidavits are identified by the last name of the affiant, and citations are to the paragraph of the affidavit.

FN2. Excerpts of various depositions are attached to the Affidavit of Andrew M. Altschul in Support of Defendants' Motion for Summary Judgment ("Altschul Aff"), Affidavit of Andrew M. Altschul in Support of Defendants' Reply Brief ("Altschul Supp Aff"), and Affidavit of Craig A. Crispin in Support of Plaintiff's Response to Defendants' Motion for Summary Judgment ("Crispin Aff"). Deposition excerpts are identified by the last name of the deponent, and citations are to the page of the deposition transcript. To avoid confusion with Jacobson, Eric Jacobsen is referred to as "E. Jacobsen."

I. *Hiring of Jacobson*

Regent is the owner and operator of assisted living facilities and stand-alone Alzheimer's care facilities and employs over 1,000 employees. Deposition of David Gibson ("Gibson Depo"), pp. 22-23. Walter Bowen ("Bowen") is the President and Chief Executive Officer of Regent and several other private corporations, including Bowen Property Management Company and Bowen Development Company, that are involved in buying real estate, developing land, and managing property. Deposition of Walter Bowen ("Bowen Depo"), pp. 7, 60-61. Bowen also has ownership interests in several other properties which are controlled, at least in part, by Bowen and are informally known as the Bowen Real Estate Group. *Id* at 60-61; Gibson Depo, pp. 22-23.

In September 1995, Regent began an extensive search for a new controller for its Accounting Department. Deposition of Steve Gish ("Gish Depo"), p. 17. At that time, Regent was the only Bowen entity that had an Accounting Department and other Bowen entities paid Regent's Accounting Department to perform their accounting functions. Deposition of Kimberlie Jacobson ("Jacobson Depo"), pp. 54-55. In April 1996, a headhunter contacted Jacobson about the available position at Regent. *Id* at 84. After an interview with Regent's Chief Financial Officer, Steven Gish, and Regent's Chief Operating Officer, E. Jacobsen, Jacobson was offered the position on April 24, 1996. Jacobson Depo, p. 85; Altschul Aff, Ex 2, p. 1. Jacobson began working at Regent on May 13, 1996, at a salary of $55,000 per year which increased to $57,500 in November 1996. Jacobson Depo, p. 42. Although she was pregnant at this time, she did not inform Regent of her pregnancy or any plans to take maternity leave. *Id* at 90-91.

II. *Jacobson's Employment with Regent*

A. *Nature of Job*

Jacobson's position, although not an executive position, had significant responsibility. As the controller, Jacobson was head of the Accounting Department and responsible for the accounting needs of Regent and other Bowen entities. *Id* at 33, 54-55, 142. Part of that responsibility included timely issuance of financial statements, accuracy of financial statements, proper functioning of the department, and adequate performance of all Accounting Department employees. *Id* at 142-43, 155. Gish, who had previously been Regent's controller, stated that the position also involved developing and building a relationship with the two key persons to whom

Jacobson was responsible for reporting, namely Dennis Parfitt ("Parfitt"), Bowen Property Management Company's President and Director of Property, and E. Jacobsen, Regent's Chief Operating Officer. Gish Depo, p. 49.

B. *Pregnancy*

*3 In July 1996, although fearing the outcome, Jacobson informed Gish that she was pregnant. Jacobson Depo, pp. 23, 94. Gish's first word was "Congratulations," and Jacobson testified that he was "very nice." *Id* at 24. Gish also suggested that he tell Bowen about her pregnancy first because he felt that was the "appropriate chain of command." *Id;* Gish Depo, p. 20. Gish later reported to Jacobson that Bowen responded to news of her pregnancy by asking "what will her commitment be to the company when she has this baby?"[FN3]Jacobson Depo, p. 7. The only comment that Jacobson recalls Bowen saying about her pregnancy was: "I guess congratulations are in order."*Id* at 15-16. After telling her about Bowen's comment, Gish never mentioned Jacobson's pregnancy again until after the baby was born. *Id* at 24. Bowen later told E. Jacobsen that "he was concerned that the accounting department's performance was suffering and that with Kim's pregnancy, that he was concerned that there wasn't-there wouldn't be any more slippage in performance."Deposition of E. Jacobsen ("E. Jacobsen Depo"), p. 29. Patricia Youngren ("Youngren"), a Regional Manager for Bowen Property Management Company, testified that regarding Jacobson's pregnancy, Parfitt told her that Bowen "wasn't real happy about it, but-or he didn't think [Bowen] was real happy about it, but it wasn't a big-wasn't a big issue."Deposition of Patricia Youngren ("Youngren Depo"), p. 17.

FN3. Bowen and Gish dispute whether Bowen made this statement or whether Gish told Jacobson about this statement. However, on a motion for summary judgment this court must take the evidence in the light most favorable to Jacobson, the non-moving party, and assume that Bowen made this statement and that Gish relayed the statement to Jacobson.

Jacobson occasionally mentioned her plans for dealing with work and her pregnancy and that she planned on working until her baby was born. Jacobson Depo, p. 97. The parties dispute whether she ever told Regent that she planned on taking a maternity leave. Although Jacobson never expressly stated that she was taking a maternity leave, she told Gish that she qualified for the OFLA. *Id* at 24, 30-31. Gish responded that she was not covered by the OFLA but that Regent would give her 12 weeks off anyway. *Id* at 30-31. Jacobson felt that a maternity leave was implied. *Id* at 29.

Jacobson offered to work from home if Regent would supply her with a computer. *Id* at 24, 26-29. However, she did not tell Regent that she intended to work only part-time from home and responded to the suggestion of the assistant controller Michelle Powelson ("Powelson") that she take time off and do nothing by stating that "[t]he baby will be sleeping a lot."*Id* at 27-30. She did not specifically tell anyone at Regent when she planned on returning to work, but conveyed her expectation to Gish and Powelson that it would be less than 12 weeks after the baby was born. *Id* at 223.

On December 10, 1996, Jacobson arrived at work and immediately told Gish and Powelson that her water had broken and that she was going to go to the hospital. *Id* at 99-100. She voluntarily took work with her to the hospital, and early the next morning, December 11, 1996, she gave birth to her child. *Id* at 101.

C. *Post-Pregnancy*

*4 Later the same day, Jacobson performed work for Regent and called Powelson to give Powelson her telephone number, encouraging Powelson to call if she needed anything. *Id* at 101-03. She voluntarily went into the office on Saturday, December

14, to work for two hours. *Id* at 104, 112. Gish called her a few days later with a work-related question and asked her when she planned on coming back to work full-time; she replied that she did not know. *Id* at 105-06. Although she was not upset about the call and believed that employers have a right to know when an employee plans on returning to work, she felt that it was unreasonable for Gish to ask when she had just gotten out of the hospital. *Id* at 106-07. Gish called Jacobson practically every day to find out when she planned on returning to work full-time. Jacobson always replied that she did not know, but that she "was supposed to work at home," not the office, based on their prior agreement. *Id* at 22, 35.

Jacobson began working part-time in the office during the week of December 23, 1996, returning home to nurse her baby. *Id* at 113. She also worked part-time during the week of December 30, 1996. *Id* at 114. Her paycheck for the end of December 1996 reflected only half her salary which she believed was in error because she thought that she was entitled to sick leave and vacation pay. *Id* at 114-15.

During December 1996, Gish decided that it was necessary for someone capable of performing some of Jacobson's duties to be at the office full-time. He so informed Jacobson and gave her the choice of returning to the office full-time or hiring a temporary accountant during the time that she worked at home. *Id* at 66-67, 121; Gish Depo, p. 83. Jacobson chose to return to work full-time. Jacobson Depo, pp. 236-37.

After returning to work full-time on January 13 or 14, 1997, Jacobson did not request additional maternity leave but sought two accommodations which were both granted. *Id* at 118-19, 121, 214. Gish granted her first request for four days of paid vacation in February 1997 to celebrate her son's baptism. *Id* at 119-20, 214. Gish also granted her second request to bring her son into work for one week because her day care coverage had fallen through. *Id* at 121. Gish also allowed her to take her son to the doctor on April 3, 1997. *Id* at 120.

Jacobson complains of two occasions where Gish did not accommodate her requests regarding the opportunity to pump her breast milk. The first occasion occurred at the office when Jacobson stopped in to work for a few hours. Gish insisted that she stay and go over some work with him, but she told him that she needed to get home and feed her son. She started leaking breast milk and was humiliated. *Id* at 36. The second occasion occurred shortly after she returned to work full-time when Gish made her attend a meeting with him in Spokane. She told him that she could not be away from home for very long because she was nursing and would need time to pump and eat to keep up her nourishment. *Id* at 35. Gish did not allow her any breaks and she was forced to sit on the plane drenched in breast milk. *Id*. This caused her humiliation and pain. *Id* at 36.

*5 Jacobson also complains that she was not invited to Bowen's annual retreat for his executives in January 1997. The purpose of the retreat is to review the prior year and to plan for the upcoming year. Bowen Depo, p. 34. Bowen, Gish (Regent's Chief Financial Officer), Parfitt (President of Bowen Property Management), Jim Eckberg (Executive Vice President of Regent), E. Jacobsen (Regent's Chief Operating Officer), Gibson (position not identified), and Brent McMahon ("McMahon") (President of Bowen Development Company) attended the retreat. Gibson Depo, p. 16. They discussed all of Regent's departments at the retreat, including Jacobson and the Accounting Department. *Id* at 17, 23. After the meeting, McMahon told Jacobson that "if people said that about me, I'd quit before I'm fired."Jacboson Depo, pp. 8-9.[FN4]

FN4. McMahon denies making this comment. Deposition of Brent McMahon ("McMahon Depo"), pp. 12-13. However, for purposes of this summary judgment motion, this court will assume that McMahon made the statement to Jacobson.

III. *Termination of Jacobson's Employment*

On April 7, 1997, after Jacobson had returned to work full-time for over 2 1/2 months, Bowen held her first formal performance review. At that review, Jacobson stated that she "thought we had a lot of rocky points over the year" but that they "could finally are seeing the light at the end of the tunnel."*Id* at 130-31. However, Bowen responded that he was "not sure that-that it's the end of the tunnel, and we need to have a management change."*Id* at 131. He also said that "we need to get someone in here who's more committed" and then terminated her. *Id* at 14-15, 132.

During the course of Jacobson's employment, both Parfitt and E. Jacobsen (to whom Jacobson's Accounting Department provided financial statements) informally complained about Jacobson and the Accounting Department to Gish and Bowen. Gish Depo, pp. 44-47; Bowen Depo, p. 38. Specifically, Parfitt felt that the Accounting Department was unavailable and not producing timely financial statements. Deposition of Dennis Parfitt ("Parfitt Depo"), pp. 16-17, 30. Although admitting that the Accounting Department had been untimely before Jacobson took over, Parfitt felt that the degree of untimeliness increased during her employment. *Id* at 30. E. Jacobsen complained to both Gish and Bowen about Jacobson and the Accounting Department, voicing the most concern to Bowen. Gish Depo, pp. 46-47; Bowen Depo, p. 38.

A few days prior to the April 7 review, Bowen asked E. Jacobsen and Parfitt to formally review the Accounting Department's performance. Bowen Depo, p. 44. E. Jacobsen wrote a one-page memorandum stating ten ways in which he was dissatisfied with Jacobson's performance. Altschul Aff, Ex 4. Among his concerns were that during Jacobson's tenure (1) the Accounting Department's communication became more fragmented, which created a lack of consistency within the department; (2) the financial statements were inaccurate; (3) his staff complained to him about the Accounting Department being uncooperative and unavailable; (4) Jacobson was unable to resolve any issues in the department during her employment; and (5) the degree of untimeliness of financial statements increased. *Id;* E. Jacobsen Depo, pp. 36, 39-40, 46.

*6 Parfitt sought input from his three Regional Managers, Youngren, John Meyer, and Scott Hines, who directly interacted with the Accounting Department in reporting to Bowen. Parfitt Depo, p. 27. Jacobson admitted that these people could appropriately evaluate the Accounting Department but not her personally. Jacobson Depo, pp. 161, 194. All three reviews, completed on April 2, 1997, complained of late financial statements, poor accuracy, and difficulty communicating with the Accounting Department. Altschul Aff, Ex 2, pp. 5-7. Parfitt provided these reviews to Bowen. Parfitt Depo, p. 28.

Jacobson admits that her department had a problem with getting financial statements completed accurately and on time, one of the accountants she supervised performed poorly, one of her employees communicated with the Regional Managers in an antagonistic manner, and the general ledgers contained insufficient descriptions. Jacobson Depo, pp. 142-43, 155-56, 164, 188-89. Though admitting to those faults, Jacobson claims that they existed before she began her employment and attributes the problem with untimeliness to turnover and inexperience, computer problems, and receiving documents from E. Jacobsen in an untimely manner. *Id*at pp. 33, 36, 41; Deposition of John Meyer ("Meyer Depo"), p. 8; E. Jacobsen Depo, p. 9. Jacobson claims that she constantly asked if she could hire additional workers or temps and asked for a raise for her staff, but that Bowen only said that "[w]e need to look at this more."Jacobson Depo, pp. 17-18. She never followed up with him because she "was let go rather quickly after that."*Id* at 18. Jacobson also believes that the Regional Manager reviews were not truthful because Parfitt wanted his own accounting department and E. Jacobsen allegedly knew that Bowen wanted to terminate her employment when he wrote his review. *Id* at 157; E. Jacobsen Depo, p. 53.

Regent and the other Bowen entities were growing at a rapid pace. The number of Regent properties for which the Accounting Department prepared financial papers increased from four to 27 during Jacobson's employment. Bowen Depo, pp. 22-23; Deposition of Michelle Powelson ("Powelson Depo"), p. 24. The Bowen entities grew as well. Parfitt Depo, p. 15. In light of the review, the complaints by Parfitt and E. Jacobsen, and Regent's rapid growth, Bowen and Gish decided that Jacobson could not perform the job as it needed to be completed. Bowen Depo, p. 49; Gish Depo, p. 75.

After her April 7 review, Jacobson worked for Regent for another 30 days to complete various work projects. Bowen offered, and Gish wrote, Jacobson a letter of recommendation that she used in finding a new job. Jacobson Depo, pp. 132, 223, 229.

IV. *Post-Termination*

Regent hired Laury Cooper ("Cooper") to replace Jacobson. Parfitt Depo, pp. 34-35; Powelson Depo, p. 36. Cooper is a married woman with no children. Powelson Depo, pp. 36-37. Bowen also authorized Bowen Property Management Company, at Cooper's request, to hire a controller to accommodate Regent's rapid growth. Bowen Depo, p. 22. Bowen filled this position with Lisa Elsner, a married woman who at the time of her hiring, had a child under the age of one. Powelson Depo, p. 37.

*7 After the April 7 review, Jacobson immediately started looking for a new job engaging in a variety of job-searching techniques such as contacting headhunters, searching the newspapers for job openings, and sending out resumes. Jacobson Depo, pp. 270-71, 277. The headhunter obtained at least three interviews for Jacobson, two of which resulted in job offers. *Id* at 271-73. In addition, she received job offers from two other companies to whose newspaper ads she responded. *Id* at 277-80. Three weeks after her termination, she accepted a controller position at AMX Systems, Inc. making $5,000 per year more than she earned at Regent. *Id* at 257. However, when she took this job, she knew that it would not be permanent because the company anticipated structural changes that would likely eliminate her position within five years. *Id* at 258-59. After accepting this position, she turned down three other offers to interview. *Id* at 279-80. She also turned down job offers, one of which came from Jana's Cookie, whose Executive Vice President of Operations was a close personal friend of Bowen and who offered Jacobson the job immediately after talking with Bowen. *Id* at 272-73.

Jacobson only worked at AMX for one year because she did not want to work as many hours and wanted to spend more time at home. *Id* at 259-60. Her job search after AMX consisted of two interviews based on a tip from an acquaintance, a couple of responses to newspaper ads, and reviewing newspaper ads for two weeks. *Id* at 280-81. She has yet to contact the same headhunter that obtained her job at Regent. *Id* at 280.

On May 11, 1998, within a week after leaving AMX, Jacobson started working as a half-time controller at Brand New Corporation earning $30,000 per year. *Id* at 264, 280. She is supplementing her part-time work by "trying to put together a brochure to do taxes and accounting from home."*Id* at 281-82.

DISCUSSION

I. *Pregnancy Discrimination under Title VII (First Claim for Relief)*

The First Claim seeks damages and an injunction based on pregnancy and sex discrimination under Title VII. Jacobson alleges that Regent discriminated against her based on her pregnancy and sex in seven ways: (1) three remarks by Bowen (the first to Gish after he first learned of Jacobson's pregnancy regarding the level of her commitment to Regent after she has her baby, the second in a conversation with E. Jacobsen expressing concern that the Accounting Department would continue to experi-

ence slippage with Jacobson's pregnancy, and the third to her when he terminated her once again regarding her commitment to Regent); (2) Youngren's statement that Bowen had expressed displeasure with Jacobson's pregnancy to Parfitt; (3) repeated questioning from Gish that began less than one week after she gave birth to her son regarding when she would return to work full-time; (4) excluding her from attending an executive retreat one month after her baby was born claiming that she was not an executive although previously allowing Gish to attend the retreat when he was Regent's controller; (5) a remark by McMahon to Jacobson that if the things said about her during the retreat were said about him, then he would quit; (6) refusing to allow her to pump her breast milk on two occasions which resulted in her being humiliated and in pain; and (7) creating biased and false performance reviews in order to terminate her.

***8** Regent argues that it is entitled to summary judgment against the First Claim because: (1) Jacobson's status as a new parent is not protected by Title VII; (2) Jacobson does not state a *prima facie* case for discrimination under Title VII; and (3) Jacobson lacks any specific and substantial evidence of pretext to rebut Regent's legitimate nondiscriminatory reason for terminating her. This court agrees with Regent's latter two arguments for the reasons set forth below.

A. *Legal Standard*

A plaintiff can prove an employer's unlawful Title VII discrimination under either of two theories. A disparate impact theory involves a "facially neutral employment criterion that has an unequal effect on members of a protected class." *Sischo-Nownejad v. Merced Community College Dist.,* 934 F.2d 1104, 1109 (9th Cir1991). A disparate treatment theory, on the other hand, involves intentional discrimination on the basis of race, color, religion, sex, or national origin. *International Bhd. of Teamsters v. United States* ("*Teamsters*"), 431 U.S. 324, 335 n 15 (1977); *Sischo-Nownejad,* 934 F.2d at ."Proof of discriminatory motive is critical" to a claim of disparate treatment. *Teamsters,* 341 U.S. at 335 n 15.

Jacobson's claim is based exclusively on a theory of disparate treatment. In order to prove disparate treatment, Jacobson "may establish a *prima facie* case by introducing evidence that 'give[s] rise to an inference of unlawful discrimination.' " *Sischo-Nownejad,* 934 F.2d at 1109, quoting *Texas Dep't of Community Affairs v. Burdine,* 450 U.S. 248, 253 (1981). She may meet this burden by demonstrating that (1) she is a member of a protected class; (2) she was performing her job in a satisfactory manner; (3) she suffered an adverse employment decision; and (4) she was treated differently than other persons outside her protected class. *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802 (1973); *Sischo-Nownejad,* 934 F.2d at 1109; *Pejic v. Hughes Helicopters, Inc.,* 840 F.2d 667, 672 (9th Cir1988); *Cleese v. Hewlitt-Packard Co.,* 911 F Supp 1312, 1317 (D Or 1995). In a summary judgment motion, the court must view the facts in the light most favorable to the nonmovant (Jacobson), and the amount of evidence which she is required to produce to create her *prima facie* case is "very little." *Sischo-Nownejad,* 934 F.2d at 1111.

Once Jacobson has established her *prima facie* case, the burden then shifts to Regent "to articulate a legitimate, nondiscriminatory reason for the challenged action. If [it] does so, then the burden returns to [Jacboson] to prove that the articulated reason is pretextual."*Id* at 1109. If Jacobson "offers direct evidence of discriminatory motive, a triable issue as to the actual motivation of the employer is created even if the evidence is not substantial. As we said in *Lindahl,* it need be 'very little.' " *Goodwin v. Hunt Wesson, Inc.,* 150 F3d 1217, 1221 (9th Cir1998). If direct evidence is unavailable, Jacobson

***9** may come forward with circumstantial evidence that tends to show that the employer's proffered motives were not the actual motives because they are inconsistent or otherwise not be-

> lievable. Such evidence of 'pretense' must be 'specific' and 'substantial' in order to create a triable issue with respect to whether the employer intended to discriminate on the basis of sex.

Id at 1221 (citations omitted).

B. *Prima Facie Case*

1. *Protected Class*

In 1978, Congress amended Title VII by enacting the Pregnancy Discrimination Act ("PDA") which provides in relevant part:

> The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth or related medical conditions shall be treated the same for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work.

42 USC § 2000e(k).

The PDA clarified that "for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex." *Newport News Shipbuilding & Dry Dock Co. v. EEOC,* 462 U.S. 669, 684 (1983)."Rather than introducing new substantive provisions protecting the rights of pregnant women, the PDA brought discrimination on the basis of pregnancy within the existing statutory framework prohibiting sex-based discrimination." *Armstrong v. Flowers Hosp., Inc.,* 33 F3d 1308, 1312 (11th Cir1994).

Regent argues that Jacobson cannot establish that she was a member of a protected class because she was not pregnant at the time of her termination and Title VII does not recognize new parents as a protected class. The Ninth Circuit has not yet considered whether a woman can state a claim under Title VII based on pregnancy discrimination that occurs after her baby was born. Because this court concludes that Jacobson's claim is based upon sex discrimination arising from her pregnancy and maternity leave and not simply on her unprotected status as a new parent, Jacobson satisfies the protected class requirement.

Regent relies on *Piantanida v. Wyman Center, Inc.,* 116 F3d 340 (8th Cir1997), for the proposition that new parents are not a protected class under Title VII. In *Piantanida,* the plaintiff had a problem with completing her tasks in a timely manner. While on a maternity leave, defendant demoted her because of her poor performance. Plaintiff admitted that defendant discriminated against her based only on her status as a new mother, not because of her gender or pregnancy status. The court held that the class of new parents includes not just pregnant women, but women who adopt and men who become fathers either from adoption or biology. As a result, "discrimination against an employee who has accepted this parental role-reprehensible as this discrimination might be-is therefore not based on the gender-specific biological functions of pregnancy and child-bearing."*Id* at 342.

***10** Regent's reliance on *Piantanida* is misplaced. The court in *Piantanida* clearly limited its ruling to the specific factual situation before it, namely plaintiff's admission that her claim was not based on her pregnancy or gender. The court expressly stated that it was "faced with the narrow question of whether being discriminated against because of one's status as a new parent is 'because of or on the basis of pregnancy, childbirth, or related medical conditions,' and therefore violative of the [PDA]."*Id.*

Furthermore, Regent's argument was rejected by *Piraino v. International Orientation Resources, Inc.,* 84 F3d 270 (7th Cir1996). In *Piraino,* the plaintiff alleged that upon learning of her pregnancy, defendant set out to find a way to dismiss her. Plaintiff argued that defendant succeeded by crafting its leave of absence policy to disqualify her or by implementing its policy to accomplish her discharge, or both. Defendant argued that plaintiff

had no pregnancy discrimination claim because by the time the events in question occurred, she was no longer pregnant. The court rejected defendant's theory, stating that this is "not a case in which the claim relates only to an employer's refusal to hire (or reinstate) a mother with a young child, without a hint of any role that the pregnancy played in the decision."*Id* at 274.

The court in *Fejes v. Gilpin Ventures, Inc.*, 960 F Supp 1487 (D Colo 1997), was faced with this same argument, namely that the plaintiff was not a member of a protected class because she was not pregnant at the time defendant terminated her. That court disagreed with the defendant's position stating that

> [t]he statute does not specify whether the discrimination must occur during the pregnancy ... [and] to read Title VII so narrowly would lead to absurd results such as 'prohibit[ing] an employer from firing a woman during her pregnancy but permit[ing] the employer to terminate her the day after delivery if the reason for termination was that the woman became pregnant in the first place.'

Id at 1492-93, quoting *Donaldson v. American Banco Corp.*, 945 F Supp 1456, 1463-64 (D Colo 1996). Furthermore, "the plain language of the statute does not require plaintiff to be pregnant when the alleged discrimination occurs."*Id* at 1493.

This court is persuaded by the reasoning of *Piranio* and *Fejes*.If an employer terminates a pregnant employee because she is pregnant, then the employee clearly has a viable Title VII claim for pregnancy discrimination. However, given the sophistication of most employers as to their potential liability under the PDA, such a claim is now rare. Instead, employers who are upset about an employee's pregnancy prudently wait until after the employee gives birth and then terminate her some time later. Title VII and PDA were meant to protect working women who become pregnant from adverse actions by employers. If an employer is allowed to terminate an employee soon after she gives birth because Title VII would not cover her as a new parent, then the PDA would have no meaning. The issue then becomes whether the employee's claim for discrimination is based upon her protected status as a pregnant woman.

***11** In this case, Jacobson argues that Bowen believed that Jacobson's pregnancy interfered with her performance and became upset when she exerted her right to take time off from work for a maternity leave following her pregnancy. She alleges that Regent violated Title VII by terminating her in retaliation for being pregnant and taking a maternity leave, instead of working full-time. Although Jacobson was a new parent, she first was a pregnant woman. Sex discrimination concerns arise in this case because Jacobson allegedly was terminated for becoming pregnant in the first place, which caused her to give birth and take a maternity leave to recover. Therefore, Jacobson has sufficiently pled that she is within a protected class.

Nevertheless, to the extent that Jacobson bases her discrimination claim on her assertion that Gish would not allow her to pump her breast milk, she fails to state a claim. Title VII and the PDA do not cover breast feeding or childrearing concerns because they are not "medical conditions related to pregnancy, childbirth or related medical conditions." *Fejes*, 960 F Supp at 1491-92; *Wallace v. Pyro Mining Co.*, 789 FSupp 867, 869-70 (WD Ky 1990). Furthermore, Jacobson does not allege that Regent took any adverse employment action against her based on the breast milk incidents. Thus, those incidents, at best, are some evidence of Regent's intent to terminate her because of her sex.

2. *Job Performance*

The second element of the *prima facie* case requires evidence that Jacobson was performing her job in a satisfactory manner. Regent argues that Jacobson's job performance was unsatisfactory as evidenced by the complaints about her performance and poor re-

views she received.

According to the undisputed evidence, Jacobson was not performing her job satisfactorily. On April 2, 1997, at Parfitt's request, three Regional Managers of Bowen Property Management Company evaluated the Accounting Department and its sub-par performance. Specifically, the reviews complained of late and inaccurate financial statements, lack of information on the financial statements, and poor communication between the Accounting Department and Property Management. In addition, E. Jacobsen's review stated that Jacobson did not set any clear policies or procedures and described inconsistency throughout the Accounting Department, timeliness and accuracy problems with financial statements, and an inability or unwillingness to problem solve on Jacobson's part.

Jacobson admits that as head of the Accounting Department, she was responsible for its performance and also admits that her department failed to timely and accurately issue financial statements. Nevertheless, she provides several excuses for the sub-par performance.

Jacobson argues that she informed Bowen of her need for more employees to accommodate the increasing workload and growth, but that Bowen declined to supply her with additional workers. However, Bowen did not reject her request; instead he said that "[w]e need to look at this more."Jacobson Depo, pp. 17-18. Jacobson admitted that she never followed up. *Id.* Moreover, at the time she was hired, Jacobson knew that Regent expected rapid growth. In fact, Gish had previously performed both her job and his duties as Chief Financial Officer. She cannot now argue that the growth was a surprise or that she was not expected to adequately handle the changing situation.

***12** In addition to asking for more employees, Jacobson asked Bowen to issue staff awards, such as $100 dinners or some kind of bonus, to increase the morale in the Accounting Department. *Id* at 60. Despite Jacobson's argument that Bowen thwarted her actions and never listened to her concerns, she testified that Bowen approved of her idea for the bonuses. *Id.* In fact, Jacobson specifically admitted that Bowen was receptive to her ideas. *Id.*

She also argues that the her performance reviews were all biased and inaccurate because E. Jacobsen knew that Bowen wanted to terminate her when he wrote his review and the three Regional Managers knew that Parfitt wanted his own accounting department when he asked them to write their reviews. However, Jacobson's argument is merely speculation. She has offered no evidence that any of the reviewers did not like her or wrote their reviews with the intent to discriminate against her. In fact, she admitted that the Accounting Department was not adequately performing for which she was responsible. More importantly, if Parfitt indeed wanted his own accounting department and influenced his Regional Managers to write false reviews, then Regent discriminated against her for reasons other than sex. This argument by Jacobson undermines, rather than supports, her claim.

Based on her admission that the Accounting Department was not adequately performing under her control, her poor performance reviews, and a lack of any credible evidence to prove that Regent thwarted any efforts she attempted to make the Accounting Department perform, it is undisputed that Jacobson was not performing her job satisfactorily. For this reason alone, Regent is entitled to summary judgment. However, as discussed below, Jacobson also fails to avoid summary judgment in another element of her *prima facie* case.

3. *Adverse Employment Decision*

The third element of Jacobson's *prima facie* case, that she suffered an adverse employment decision, is satisfied since Regent terminated her employment on April 7, 1997.

4. *Differential Treatment*

Finally, Jacobson must show that she was treated differently than other persons outside her protected class, namely men and non-pregnant women. To satisfy this burden, Jacobson points to the fact that of the other four women besides herself who were pregnant while working at Regent, only one remains employed by Regent. She argues that two of the women did not return following their maternity leaves and one resigned stating that she was overworked and underpaid. Although these women may not have returned because of some animus by Regent towards pregnant women, Jacobson offers no proof of that. All she offers is the fact that these women did not return to work. However, there could be many reasons why these women did not return to Regent. They may have wanted to spend more time at home (as did Jacobson when she left AMX) or maybe they felt that they were not paid enough. Whether they were paid less than comparable men is unknown. Absent some further supporting evidence, it is not reasonable to infer, as Jacobson proposes, that these women left Regent because of sex discrimination.

***13** In any event, Regent hired a married woman with no children to replace Jacobson and subsequently hired another woman with a child under the age of one to manage Bowen Property Management Company's accounting needs. The fact that Regent hired women to replace Jacobson, one of whom has an infant, nullifies Jacobson's inference that Regent treats women and women with young children differently than men. Thus, Jacobson has failed to prove the last requirement of her *prima facie* case. However, even if Jacobson stated a *prima facie* case, she still cannot avoid summary judgment, as discussed next.

B. *Non-Discriminatory Reason*

Assuming that Jacobson has stated a *prima facie* case, the burden then shifts to Regent to "articulate a legitimate, non-discriminatory reason for the challenged action." *Sischo-Nownejad,* 934 F.2d at 1109. Regent argues that it terminated Jacobson because her department was not properly servicing its clients. Specifically, the financial statements were not issued in a timely manner and contained inaccuracies, and the Accounting Department was fragmented with no consistency and was unresponsive or unavailable under Jacobson's command. This satisfies Regent's burden.

C. *Pretext*

The burden then returns to Jacobson "to raise a genuine factual issue as to whether [Regent's] articulated reason was pretextual."*Id* at 1110. The Ninth Circuit has stated that summary judgment is usually inappropriate at this stage:

> Even if the defendant articulates a legitimate, nondiscriminatory reason for the challenged employment decision, thus shifting the burden to the plaintiff to prove that the articulated reason is pretextual, summary judgment is normally inappropriate. "[W]hen a plaintiff has established a *prima facie* inference of disparate treatment through direct or circumstantial evidence of discriminatory intent, he will *necessarily* have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision."Specifically, in evaluating whether the defendant's articulated reason is pretextual, the trier of fact must, at a minimum, consider the same evidence that the plaintiff introduced to establish her *prima facie* case. When that evidence, direct or circumstantial, consists of more than the *McDonnell Douglas* presumption, a factual question will almost always exist with respect to any claim of a nondiscriminatory reason. The existence of this question of material fact will ordinarily preclude the granting of summary judgment.

Id at 1111 (citations omitted) (emphasis added by Ninth Circuit).

Recently, the Ninth Circuit clarified the test at the pretext stage and stated that direct evidence of dis-

criminatory motive is sufficient, even if it is not substantial, but that circumstantial evidence must be "specific and substantial." *Goodwin,* 150 F3d at 1221-22.

Although Jacobson fails to create a genuine issue of material fact sufficient to avoid summary judgment as to her *prima facie* case of discrimination, she also fails to avoid summary judgment with respect to her evidence offered to prove that Regent's non-discriminatory reason was pretextual.

*14 Her evidence of pretext consists of: (1) comments made by Bowen both when he learned of her pregnancy and when he terminated her regarding her commitment to Regent; (2) another comment by Bowen expressing concern that the Accounting Department's slippage would increase due to her pregnancy; (3) Youngren's statement that Bowen had expressed displeasure with Jacobson's pregnancy to Parfitt; (4) her belief that she would be terminated if she did not return to work after Gish began asking her when she would return and mentioning a temporary worker to fill in for her; and (5) McMahon's comment that he would quit if such negative things were said about him as were said about Jacobson by the executives at the executive retreat.

Direct evidence of pretext in discrimination cases usually consists of statements by managers or higher-level managers that betray their true intent. In this case, such direct evidence would consist of Bowen or Gish commenting that they did not like pregnant women or women with newborn children working for Regent. Jacobson points to no such statement, but instead relies on circumstantial evidence. However, an analysis of her circumstantial evidence reveals that it is not "specific and substantial."

First, Jacobson attributes more weight to Youngren's comment than it deserves. Youngren did not state that Bowen was upset with Jacobson's pregnancy, but stated only that Parfitt told her that Bowen was not very happy about it *or he did not think* Bowen was very happy about it. In essence, Youngren is not sure whether Bowen was upset or whether Parfitt thought Bowen was upset. If the latter, Parfitt's belief about what Bowen felt about Jacobson's pregnancy is irrelevant. If the former, it is hearsay and a weak reed on which to rely for evidence of discriminatory intent by Bowen, especially since Parfitt relayed that it was not "a big issue." It is not the type of "specific and substantial" evidence of pretext required.

Next, Jacobson's subjective fear, due to Gish's persistent questioning, that she would lose her job if she did not return to work is inconsistent with the evidence in the record. Jacobson obviously knew about her right to 12 weeks of maternity leave pursuant to the OFLA since she specifically referred Gish to that law. Knowing her rights under the OFLA would obviate any fear of losing her job if she did not return before the end of the 12 week leave period. Furthermore, Gish had supplied her with, and installed, a computer at her house so that she could work from home during her maternity leave. It would be inconsistent for Regent to have gone to the trouble of allowing her to take a maternity leave, buying a computer for her to do work from home, and installing it at her house if it was actually upset with her about her pregnancy and intended to terminate her because of it. In addition, Jacobson brought Gish's repeated questioning onto herself by not clearly identifying when she planned on returning to work full-time. Although Gish had a right to know, she never told him or anybody else at Regent when she planned on returning from her maternity leave.

*15 Finally, McMahon's comment proves nothing. This comment is suspect at best because, as Regent points out, Jacobson does not provide any context for it. The purpose of the executive retreat was to allow the Regent and Bowen executives to discuss the performance of their companies and brainstorm ideas for the upcoming year. McMahon's comment, absent elaboration or attribution, could easily-and more likely-have been made in reference to Jacobson's unsatisfactory job performance, rather then to

her pregnancy. In fact, Bowen, Gibson, and E. Jacobsen testified that they discussed various performance concerns regarding the businesses' operations during the retreat. Unless McMahon's comment was related to her pregnancy, it is neither direct nor circumstantial evidence of pretext.

In addition to this insufficient circumstantial evidence, Jacobson makes two additional arguments. First, she argues that Gish's failure to allow her to pump her breast milk shows evidence of pretext because it proves that he treats women differently than men. As stated above, failure to pump breast milk cannot be the basis of a claim for pregnancy or sex discrimination but may be used only as evidence of Gish's intent to discriminate. If anything, this evidence proves only that Gish treated a breast feeding woman the same as a man, and was insensitive to Jacobson's personal needs. Furthermore, Gish specifically allowed her two accommodations regarding her new baby which he was not required to do. First, he allowed her to take four paid days off in February 1997 for her son's baptism. Second, when her day care system fell through one week, he allowed her to bring her son into work. Thus, Gish's conduct regarding Jacobson's need to pump breast milk does not prove that he intended to discriminate against her by terminating her for taking a maternity leave.

Second, Jacobson argues that Parfitt's desire to have his own accounting department for Bowen Property Management Company played a role in her termination and in the biased and inaccurate reviews from his Regional Managers. However, as discussed above, even if Jacobson's argument is true, it would be a non-discriminatory reason for her termination. That seriously undercuts her entire claim of pretext because it proves two things: (1) that Parfitt may not have liked Jacobson; and more importantly (2) that Regent terminated her because of Parfitt's desires and not because she was pregnant or a woman.

Jacobson's remaining and strongest evidence of pretext consists of three comments made by Bowen. The first two comments consist of Bowen's concern about Jacobson's commitment to Regent. Jacobson argues that these comments show that Bowen was concerned that she would miss time from work because of her pregnancy and thus terminated her. The word "commitment" is neutral. It may well relate to Bowen's dislike of pregnant women who take a maternity leave and miss too much work. On the other hand, it may simply refer to employees who do not adequately perform their job, for whatever reason.

***16** The Ninth Circuit has found that single comments without additional evidence of discrimination are insufficient to state a claim. *See Kawaoka v. City of Arroyo Grande,* 17 F3d 1227 (9th Cir1994); *Federal Dep. Ins. Corp. (" FDIC ") v. Henderson,* 940 F.2d 465 (9th Cir1991). In *FDIC,* a president of a minority-owned bank sued a federal bank regulator for discrimination because the regulator encouraged the bank's board of directors to fire him. Plaintiff relied on a statement by the bank regulator from which one might infer discriminatory intent. However, the court found rational reasons for the bank regulator's actions, including a federal report on the bank noting that the bank suffered insolvency because of plaintiff's poor management. Because of those reasons, the court ruled that "one statement without additional evidence of [ ] discrimination was insufficient to state a claim." *FDIC,* 940 F.2d at 469, 473 n 16.

In *Kawaoka,* plaintiffs sued the city for violating their substantive due process and equal protection rights in enacting a revised comprehensive land-use plan and temporary water moratorium. Plaintiffs' best evidence of discriminatory intent included two statements by a member of the City Council regarding the city's revised plan. In response to learning that the city's plan decreased plaintiffs' land value, the City Council member remarked "Why should these Japanese people make all the money?" and "Why should these people make so much money?"The court, relying on *FDIC,* stated that "[t]hese deplorable remarks are insensitive and disturbing and are evidence of prejudice ... [but] they

are insufficient to raise a claim that the governmental action was on account of [ ] discrimination." *Kawaoka,* 17 F3d at 1239. The court noted that because the city had articulated many valid reasons for its plan and moratorium, the City Council member's statements were insufficient to demonstrate that she acted with discriminatory intent.

The problem with Jacobson's view of Bowen's comments, similar to the comments plaintiffs relied upon in *FDIC* and *Kawaoka,* is the lack of other evidence to support that the comments were made with a discriminatory intent. Nothing in this case indicates that Bowen terminated Jacobson because her pregnancy resulted in lack of commitment in terms of hours devoted to her job. If anything, the evidence reveals Jacobson's high level of such commitment. Jacobson worked throughout her pregnancy, worked part-time during her maternity leave, and returned to work full-time within a month. She then worked for another three months before Bowen terminated her. Yet problems with the Accounting Department occurred before and during her maternity leave and continued after she returned to work. Jacobson does not claim that those problems were caused by her pregnancy. In order for Bowen's comments about "commitment" to rise to the level of "specific and substantial" evidence of pretext, Jacobson must produce some evidence reasonably tying those comments to her termination based on her pregnancy. That causal link is missing.

*17 Bowen's remaining comment expressed concern about the Accounting Department not suffering any slippage in performance with Jacobson's pregnancy. When making that comment, Bowen was concerned with the Accounting Department's performance because it had not been adequately performing while Jacobson was present. He was afraid that absent a manager, the department would continue to experience further slippage in performance. This same concern would arise if Jacobson were a man who was required to miss work because of illness. Thus, absent further supporting evidence, this comment also falls below the level of "specific and substantial" evidence of pretext.

Because Jacobson's claimed reasons for pretext are inconsistent with the undisputed evidence in the record, Jacobson has failed to create a genuine issue of material fact that Regent's legitimate non-discriminatory reason for terminating her was pretextual. For this reason, as well as Jacobson's failure to state a *prima facie* case, Regent's motion for summary judgment against Jacobson's First Claim should be granted.

II. *Wrongful Termination (Second Claim for Relief)*

The Second Claim seeks damages based on the common law tort of wrongful termination. Jacobson alleges that Regent terminated her in retaliation for exercising her right to take a maternity leave under the OFLA. As clarified at oral argument, she bases this claim on the fact that she asked to take a maternity leave under the OFLA, which Regent granted, and then Regent terminated her for taking it.

Regent first argues that because Jacobson did not complain about any discrimination until after it terminated her, she cannot state a wrongful termination claim. It also argues that it did not wrongfully terminate Jacobson and that even if it did, she cannot bring a claim for wrongful termination because she has an adequate remedy under the OFLA. Before addressing the merits of Regent's arguments against the Second Claim, this court must first determine whether Jacobson even has a potential claim for wrongful termination under Oregon law.

A. *Requirements of a Wrongful Termination Claim*

In Oregon, the tort of wrongful termination is to "serve as a narrow exception to the at-will employment doctrine in limited circumstances where the courts have determined that the reasons for the discharge are so contrary to public policy that a remedy is necessary in order to deter such

Draper v. Astoria School Dist. No. 1C, 995 FSupp 1122, 1127 (D Or 1998), citing *Walsh v. Consolidated Freightways, Inc.,* 278 Or 347, 351-52, 563 P.2d 1205 (1977); *Sheets v. Knight,* 308 Or 220, 230-31, 779 P.2d 1000 (1989). Oregon courts recognize two circumstances that implicate this tort: (1) discharge for fulfilling a societal obligation or public duty; and (2) discharge for exercising a job-related right of important public interest. *Draper,* 995 FSupp at 1127; *Delaney v. Taco Time Int'l, Inc.,* 297 Or 10, 15-16, 681 P.2d 114, 117-18 (1984). Examples of the former include discharge for serving on jury duty, *Nees v. Hocks,* 272 Or 210, 536 P.2d 512 (1975), and discharge for refusing to defame a co-worker by signing a false report regarding a co-worker's work-related conduct, *Delaney,* 297 Or at 16, 681 P.2d at 118. Examples of the latter include discharge for resisting sexual harassment, *Holien v.. Sears, Roebuck & Co.,* 298 Or 76, 689 P.2d 1292 (1984), and discharge for filing a workers' compensation claim, *Brown v. Transcom Lines,* 284 Or 597, 588 P.2d 1087 (1978).

***18** However, a person cannot state a claim for wrongful termination if (1) the right being enforced is private and the plaintiff is not suing in her status as an employee; (2) the plaintiff simply alleges that she was discharged in violation of a right, not because she pursued the right; (3) an existing remedy adequately protects the public interest in question; or (4) the legislature has intentionally abrogated the common law remedies by establishing an exclusive remedy. *Draper,* 995 FSupp at 1130-31; *Cross v. Eastlund,* 103 Or.App. 138, 141, 796 P.2d 1214, 1216 (1990); *Delaney,* 297 Or at 16, 681 P.2d at 118.

1. *Jacobson's Claim*

Jacobson may pursue a claim for wrongful termination under Oregon law because her claim properly falls within the second category of cases in which Oregon courts recognize this tort, namely that she exercised a job-related right of important public interest. She bases her claim on retaliation for her repeated efforts to assert her rights under the OFLA to take a 12 week maternity leave.

Oregon courts have held that a woman may state a wrongful termination claim based on resisting sexual harassment, *Holien,* 298 Or at 76, 689 P.2d 1292, but may not state a claim if its basis is simply discrimination based on sex. *Kofoid v. Woodard Hotels, Inc.,* 78 Or.App. 283, 716 P.2d 771 (1986). Here, Jacobson is not simply alleging that she was discharged because of her sex, but was discharged for pursuing her rights under the OFLA. It is clear that Jacobson is not arguing that she was terminated simply because of her sex and thus *Kofoid* is inapplicable.

However, the next issue is whether the OFLA provides rights of important public interest. Although the Oregon courts have not decided this issue, it is not difficult to conclude that the OFLA protects rights that are important for the public interest. Because pregnancy and families are encouraged as important public rights, women employees should not fear losing their jobs simply because they get pregnant. It would be nonsensical to hold that statutes regarding sexual harassment and workers' compensation claims are important public interests, but that statutes regarding maternity leave are not.

2. *Adequate Remedy*

Jacobson is foreclosed from pursuing a wrongful termination claim under Oregon law if an adequate remedy exists to protect the public interest in question or if the legislature abrogated the common law remedies in this instance. Both parties misinterpret the true nature of Jacobson's claim by arguing that Title VII has or has not provided sufficient remedies to preclude wrongful termination claims in Oregon. Because Jacobson clearly relies on the OFLA as the predicate for her wrongful termination claim, references to cases discussing Title VII or 42 USC § 1983 are unhelpful.

This court need not engage in a lengthy analysis of whether the OFLA provides an adequate remedy because Jacobson has no statutory remedy under the OFLA. The OFLA only provides a remedy if an employer refuses to grant an employee leave based on several conditions listed in ORS 659.476-659.478, one of which is childbirth. In this case, Gish specifically told Jacobson that although he disputed her entitlement to it, Regent would give her 12 weeks off. In fact, Jacobson took a maternity leave and only worked part-time for the month following the birth of her son. Regent clearly allowed Jacobson to take maternity leave and she actually took it. Because she has no remedy at all under the OFLA for her subsequent termination, her wrongful termination claim is not barred by the OFLA.

B. *Summary Judgment*

***19** To prevail on her wrongful discharge claim, Jacobson must prove that Regent terminated her because she was exercising her rights under the OFLA. Regent argues that it terminated Jacobson based on her poor performance and that Jacobson has offered no proof that her termination was linked to her taking maternity leave. Because Jacobson has not provided evidence of a causal connection between her termination and her assertion of her OFLA rights, Regent should be granted summary judgment against this claim.

Jacobson argues that Regent was upset that she took a maternity leave, harassed her to come back to work, and then ultimately terminated her. Because she feared that she would lose her job, she returned to work full-time within only one month of giving birth. However, this argument is contrary to the undisputed evidence.

Jacobson first argues that she feared losing her job if she did not succumb to Gish's repeated questioning of when she would return to work and Gish's suggestion that a temporary worker be hired to fill in for her until she returned. This argument is belied by the fact that she knew she had 12 weeks of maternity leave under the OFLA and Regent could not fire her for taking that leave. In addition, she never gave Gish or anybody else at Regent a clear answer of when she planned on returning. She admits that an employer has the right to know when an employee plans on returning to work, but she left the return date unclear, causing Gish to repeatedly ask her until she provided an answer. Furthermore, Regent allowed her to work from home, purchased and installed a computer system at her home, and even offered to assist her in finding a temporary worker to help out until she returned to work full-time. It would be inconsistent for Regent to go through so much trouble if it really intended to terminate her when she returned to work full- time.

Jacobson also argues that Gish's failure to allow her to pump her breast milk on two occasions is evidence that he held animosity against pregnant women. As noted above, this merely proves Gish's insensitivity and is undermined by the fact that Gish allowed her two other accommodations.

Because Jacobson has provided no credible evidence to prove a causal connection between her termination and her assertion of her OFLA rights, Regent's motion for summary judgment against Jacobson's Second Claim should be granted.

III. *Mitigation of Damages*

Because this court recommends that Regent is entitled to summary judgment on both of Jacobson's claims, it need not address Regent's additional argument that Jacobson failed to mitigate her damages.

RECOMMENDATION

For the reasons set forth above, this court recommends that defendant's motion for summary judgment (docket # 20) should be GRANTED.

SCHEDULING ORDER

Objections to these Findings and Recommendations, if any, are due April 30, 1999. If no objections are filed, then the Findings and Recommendation will be referred to a district court judge and go under advisement on that date.

***20** If objections are filed, the response is due no later than May 17, 1999. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district court judge and go under advisement.

D.Or.,1999.
Jacobson v. Regent Assisted Living, Inc.
Not Reported in F.Supp.2d, 1999 WL 373790 (D.Or.)

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Chapter 4112. Civil Rights Commission

4112. 01 Definitions

(B) For the purposes of divisions (A) to (F) of section 4112.02 of the Revised Code, the terms "because of sex" and "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, any illness arising out of and occurring during the course of a pregnancy, childbirth, or related medical conditions. Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in division (B) of section 4111.17 of the Revised Code shall be interpreted to permit otherwise. This division shall not be construed to require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term or except where medical complications have arisen from the abortion, provided that nothing in this division precludes an employer from providing abortion benefits or otherwise affects bargaining agreements in regard to abortion.