

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2020

PHILADELPHIA, WEDNESDAY, MARCH 11, 2020

An **ALM** Publication

## EMPLOYMENT LAW

# No Evidence Causes Part-Time Police Officer's Discrimination Claims to Fizzle

BY SID STEINBERG  
AND DANIEL F. THORNTON

*Special to the Legal*

Without evidence, even the most compelling argument cannot carry the day. This and other themes were recently addressed in *Harrell v. Solebury Township*, No. 19-2809, 2020 U.S. Dist. LEXIS 28775 (E.D. Pa. Feb. 20, 2020), where the court granted summary judgment after finding insufficient evidence to infer that the employer's challenged promotion decisions stemmed from unlawful discrimination or retaliation.

### PASSED OVER FOR PROMOTION

Casey Harrell began working as a part-time police officer in Solebury Township's police department May 1, 2016. Her on-the-job performance was less than perfect: she received a counseling memo for tardiness in May 2017, and then further counseling for untimely responses to two priority calls in September 2017.

In November 2017, Harrell told police Chief Dominick Bellizzie that she was pregnant. At Harrell's request, Bellizzie accommodated her pregnancy and childcare obligations by assigning her to light-duty work.



STEINBERG

**SID STEINBERG** is a principal and chair of Post & Schell's employment and employee relations and labor practice groups. Steinberg's practice involves virtually all aspects of employee relations, including litigation experience defending employers against employment discrimination in federal and state courts. He can be reached at [ssteinberg@postschell.com](mailto:ssteinberg@postschell.com).



THORNTON

**DANIEL F. THORNTON** is an associate in the firm's employment and employee relations practice group.

She went on a 12-week maternity leave in March 2018, gave birth in April 2018, and returned to work June 23, 2018. Once Harrell returned, the department further accommodated her by assigning her to night shifts. Also upon her return, Harrell told Bellizzie that she wanted to be considered for a full-time position. Bellizzie replied that he would like to see her police activity improve.

On Sept. 18, 2018, Bellizzie appeared at a meeting of Solebury's Board of Supervisors and requested funding to hire two additional full-time officers in order to adequately serve the township's needs. He further explained that the department was "all-male," but that he had three female part-time officers—including Harrell—who were "excellent ... that we can draw from." The board granted Bellizzie's request.

In order to fill these new positions, Bellizzie considered four part-time officers: Harrell, Gina Ferzetti, Megan Klosterman and a male officer. The chief met with five other department supervisors in order to evaluate the candidates. In preparation for this meeting, he pulled statistics covering each candidate's performance over the past four years. The supervisors considered the quality of each candidate's work, their productivity and their disciplinary history. After meeting and discussing the candidates, Bellizzie and his fellow supervisors voted on each: Klosterman received five votes, Ferzetti received three, and Harrell and the male officer each received two. Ferzetti and Klosterman's promotions became effective Jan. 1 and Feb. 1, 2019, respectively.

Frustrated with this outcome, Harrell brought an action against Solebury alleging sex and pregnancy discrimination and retaliation in violation of Title VII of the Civil Rights Act of 1964.

## **DISCRIMINATION CLAIMS FAIL**

In order to make out a prima facie claim of sex discrimination, Harrell had to show that she is female, is qualified for the position, and suffered an adverse employment action under circumstances giving rise to an inference of discrimination. Her pregnancy-discrimination claim involved the same elements, with the added requirement that she demonstrate Solebury's knowledge—or at least an inference of knowledge—of her pregnancy.

Solebury argued that Harrell failed to offer evidence sufficient to support an inference of causation. As the court observed, this element may be satisfied in several ways, either by presenting evidence that similarly situated, nonpregnant employees were treated more favorably, or by showing that the adverse action occurred near the time of the pregnancy or by raising a causal inference through the totality of the evidence. In order to prove causation based on closeness in time, the gap must be minimal: as the court explained, temporal proximity “is measured in days not months in this circuit.”

According to Harrell, she announced her pregnancy just one month before Ferzetti was offered a part-time job, which demonstrated Solebury's intent to replace her with a nonpregnant female. The court rejected this argument, clarifying that the challenged action was not in fact Ferzetti's initial hiring, but rather her promotion, which was not effective

until January 2019, six months after Harrell returned from maternity leave. In light of this temporal gap, the court found that Harrell had to satisfy an additional burden, namely showing that she was still somehow affected by pregnancy, childbirth or related medical conditions at the time of the challenged promotions months later. But Harrell offered no such evidence. For these reasons, the court concluded that Harrell could not demonstrate causation and thus could not make out a facial case of sex or pregnancy discrimination.

## **RETALIATION CLAIM ALSO FAILS**

To establish a prima facie retaliation claim under Title VII, an employee must show that she engaged in protected activity, that her employer took an adverse employment action against her, and that there is a causal connection between her protected activity and the adverse action. Solebury argued that Harrell could not prove causation since there was no temporal proximity that was unduly suggestive of retaliation and since she had failed to offer any “time-plus” evidence—such as a pattern of antagonism against her—that could otherwise support an inference of causation. Based on Harrell's failure to respond to Solebury's arguments in her opposition briefing, the court found that she had failed to meet her burden of identifying facts in the record sufficient to support the essential elements of her retaliation case, and thus entered summary judgment in Solebury's favor on this claim as well.

## **DOCUMENTING DEFENSIBLE DECISIONS**

This case highlights the importance of using neutral metrics when making

evaluation and promotion decisions, as well as the criticality of comprehensive documentation. Impartial measures of job performance—like the statistics compiled by Chief Bellizzie in this case—provide a solid bulwark should the outcome be challenged later. Where appropriate, employers should consider using anonymized performance data to further promote objective decision-making. Employers should also review their policies and procedures for evaluation and promotion in order to ensure that impartial measures are included. Where a candidate pool includes protected individuals—whether those in protected classes or those who have engaged in protected conduct—employers should take even greater care in employing objective metrics and documenting their decisions in order to build a preemptive defense against potential discrimination and retaliation claims.