

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KATHLEEN B.S. SIKO	:	
Plaintiff,	:	
vs.	:	
	:	CIVIL ACTION
KASSAB , ARCHBOLD & O'BRIEN,	:	
L.L.P.	:	NO. 98-402
Defendant.	:	

GREEN, S.J.

March 24, 2000

MEMORANDUM and ORDER

Presently before the Court is Defendant's Motion for Summary Judgment, the Plaintiff's response thereto, and Defendant's Reply Brief. For the following reasons, the Motion will be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff, Kathleen Siko, began her employment as a litigation paralegal with the Defendant law firm, Kassab, Archbold & O'Brien, L.L.P., in January 1994. At that time, the litigation group consisted of four attorneys: William Archbold, ("Archbold"), Richard Stanko, ("Stanko"), Roy Stegna, ("Stegna"), and Pamela Latorre ("Latorre") and three paralegals: Kathleen Siko, ("Siko") Debbie Bilski, ("Bilski") and Karen Thiel ("Thiel"). Mr. Archbold's secretary, Kathy Marrone, served as Litigation Coordinator for the group. In this capacity, she assigned cases to attorneys within the practice group and assigned one of the three paralegals to provide litigation support on each case. Siko provided litigation support for all four litigation attorneys, however, a large portion of her work was performed in connection with cases assigned

to Stanko.

In January 1996, Siko announced that she was pregnant. In connection with this announcement, she wrote a memorandum to the attorneys within the litigation group requesting that the firm change her status from full-time to part-time after the birth of her child. In the memorandum, Siko proposed that she work from 5:00 p.m. to 10:00 p.m. Monday through Thursday and work an additional five hours a week at home. In response to the memorandum, Marrone and Stanko held a meeting with Siko, wherein they informed her that the firm could not accommodate her request. In response, Siko informed Marrone and Stanko that she could not commit to returning to work after her pregnancy if the firm could not accommodate her request for a part-time schedule. Siko later changed her mind about returning to work and wrote a memorandum to the litigation attorneys and Liz Magnotta, the firm's administrator, informing them that she planned to return to full-time status at the expiration of her maternity leave.

As a standard practice, the firm's employees underwent yearly performance evaluations which were designed to assess the employee's performance in the prior year. In June 1996, Siko and the other two paralegals in the litigation group received their annual performance reviews. Each paralegal received written evaluations from three of the litigation attorneys and Marrone. While Siko received satisfactory evaluations from Stegna and Stanko, the evaluations of Latorre and Marrone reflected dissatisfaction with her work. Joseph O'Brien, the firm's managing partner, held a meeting with the members of the litigation department to address the evaluations of the paralegals in the practice group and to decide whether these evaluations warranted termination or probation. While O'Brien recommended termination or probation, the litigation attorneys opted not to terminate Siko or place her on probation. Instead, they agreed to give each

of the paralegals raises according to the caliber of their evaluations. Thus, Bilski, who received the highest performance ratings, received a 4% raise, Siko received a 3.5% raise, and Thiel, whose evaluation was very poor, received no raise and was placed on a six-month probation.

Siko subsequently met with Liz Magnotta to review her 1996 evaluations. At that time Magnotta orally reviewed the contents of the evaluations, highlighting areas in which she thought Siko could improve her job performance. In August 1996, Siko reviewed her personnel file and inspected the 1996 evaluations. After learning of the specific contents of the evaluations, Siko wrote a memorandum to Mr. O'Brien alleging that members of the firm had discriminated against her because of her pregnancy. She left this memorandum in O'Brien's interoffice mailbox on August 15, 1996, her last full day of work before her maternity leave began.

O'Brien sent Siko a letter on August 30, 1996 requesting a meeting to discuss her charge of discrimination. On the same day, Siko filed a charge of discrimination with the Pennsylvania Human Relations Commission, which was cross-filed with the Equal Employment Opportunity Commission ("EEOC"). She then wrote a letter to O'Brien stating that she filed an administrative charge of discrimination against the firm. The letter also informed O'Brien that Siko was unable to attend the meeting he requested because it would cause her "undue stress."

Siko delivered her baby on September 10, 1996. According to the firm's short term disability policy, Siko was entitled to six weeks short term disability payment, which she received. However, Siko alleges that she sent Kathleen Marrone a memorandum informing her that she intended to take ten weeks of maternity leave beginning on August 15, 1996. Ms. Marrone does not recall receiving the memorandum and claims to have had no notice of Siko's plan to take ten weeks of maternity leave.

Because the firm believed that Siko would return to work six weeks from the date of her delivery, they expected her to return to work on October 22, 1996. Believing that she had secured ten weeks of leave, beginning on August 15, 1996, Siko intended to return to work on October 28, 1996. When Siko did not return to work on October 22, 1996, the firm dispatched a letter to her home stating that she was expected back at work by Friday, October 25, 1996. The letter also stated that Siko's failure to return by that date would be construed as a resignation from her paralegal position.

In response to the letter, Siko's husband contacted the firm to inquire about the firm's mandate that his wife return to work on October 25, 1996. He spoke with Liz Magnotta and then requested that Mr. O'Brien contact him to discuss his wife's situation. The couple waited for Mr. O'Brien to contact them, but later concluded that no response would be forthcoming. Therefore, on October 24, 1996, Siko wrote a letter to the firm stating that: 1) the firm did not give her a scheduled return date; 2) she never received information on the terms of short term disability leave; 3) she did not know that she was obligated to inform the firm of her return date; 4) she was not informed of her rights under the Family Medical Leave Act; 5) that as of 9:00 a.m. on October 22, 1996, her doctor did not release her to return to work; and 6) she considered the letter from the firm as a letter of termination, effective October 25, 1996. Siko did not return to work after sending the letter.

Siko commenced this action after receiving a right to sue letter from the EEOC on or about October 29, 1997. Her Complaint sets forth six counts: Count I alleges discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e) *et seq.* Count II alleges discrimination under the Pennsylvania Human Relations Act (PHRA), 42 P.S. § 951 *et seq.*

Count III alleges a violation of Section 510 of the Employee Retirement and Income Security Act, 29 U.S.C. § 1001 *et seq.* Counts IV and V allege retaliation under the PHRA and Title VII. Count VI alleges a violation of the Family and Medical Leave Act, 29 U.S.C.A. § 2160 *et seq.*

Defendant now moves for summary judgment on Counts I, II, III, IV, and V of the Plaintiff's complaint. The parties stipulate that Count VI of the Plaintiff's Complaint should be dismissed.

II LEGAL STANDARD

One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325, 106 S.Ct. 2548, 2553 (1986). Thus, Fed. R. Civ. P. 56(c) states that summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). As a general rule, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact. *Id.* at 323, 106 S.Ct. 2548, 2553 (1986). Essentially, the burden on the moving party may be discharged by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. This can be done by submitting affirmative evidence that negates an essential element of the nonmoving party's claim, or, in the alternative, by showing that the nonmoving party's evidence is insufficient to establish an essential element of their claim. *Id.* at 322, 106 S.Ct. at 2552.

Once the moving party has attacked whatever record evidence--if any-- the nonmoving party purports to rely upon, the burden of production shifts to the nonmoving party, who must either (1) rehabilitate the evidence attacked in the moving party's papers; (2) produce additional evidence showing the existence of a genuine issue for trial as provided in Rule 56(e); or (3) submit an affidavit explaining why further discovery is necessary as provided in Rule 56(f). Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2510 (1986). Moreover, in cases where the nonmoving party will bear the burden of proof at trial on a dispositive issue, Rule 56(e) requires the nonmoving party to go beyond the pleadings and by affidavits, depositions, answers to interrogatories, and admissions on file, designate "specific facts showing that there is a genuine issue for trial." Celotex at 324, 106 S.Ct. 2553.

III. DISCUSSION

A. Pregnancy Discrimination - Counts I and II

A plaintiff may present either direct or indirect evidence to prove that she was subjected to unlawful discrimination. See Connors v. Chrysler Fin. Corp., 160 F.3d 971, 976 (3d Cir.1998). In indirect-evidence cases, the plaintiff must first make a prima facie showing of discrimination. See Keller v. Orix Credit Alliance, Inc., 130 F.3d 1101, 1108 (3d Cir.1997) (*en banc*). If the plaintiff cannot do so, the defendant is entitled to judgment as a matter of law.

If the plaintiff does establish a prima facie case, the defendant must produce some evidence of a legitimate, nondiscriminatory reason for the adverse employment action. See Woodson v. Scott Paper Co., 109 F.3d 913, 920 n. 2 (3d Cir.), *cert. denied*, 522 U.S. 914, 118 S.Ct. 299 (1997). Once it does so, the burden remains with the plaintiff to prove by a preponderance of the evidence that the proffered reason was pretextual and that unlawful

discrimination was the real reason for the employment action. Id.

In this indirect evidence case, Defendant argues that the court need not consider whether evidence of pretext exists because Siko failed to meet her threshold burden of making out a prima facie case of unlawful discrimination. Therefore, I will begin my analysis by determining the elements of the prima facie case for pregnancy discrimination, bearing in mind that summary judgment may be properly granted in favor of Defendants if Siko failed to raise a genuine issue of material fact as to any of those elements. See Geraci v. Moody-Tottrup, Intern., Inc., 82 F3d 578, 580 (3d. Cir 1996).

To state a claim of pregnancy discrimination under Title VII of the Civil Rights Act, 42 U.S.C. § 2000(e), or the Pennsylvania Human Relations Act, 42 P.S. § 951¹, the complaint must allege that (1) the plaintiff was pregnant at the time in question, (2) she was performing her job well, (3) she suffered an adverse employment decision, and (4) there is a nexus between her pregnancy and the adverse employment decision. Boyd v. Harding Academy of Memphis, Inc., 88 F.3d 410, 413 (6th Cir.1996). In support of its Motion for Summary Judgment, Defendant argues that Siko cannot make out a prima facie case of pregnancy discrimination because she cannot show that she suffered an adverse employment action. Defendant contends that the Plaintiff's mere assertions that she received poor performance evaluations in 1996 and was denied an opportunity to work for the firm as a part-time employee do not rise to the level of adverse employment decision as contemplated by Title VII. (Def's. Mem. in Supp. of Summ. J. at 13).

¹ Under Pennsylvania law, the Pennsylvania Human Relations Act is generally applied in accordance with Title VII. Dici v. Commonwealth of Pennsylvania, 91 F.3d 542 (3d Cir.1996).

In response, the Plaintiff contends that the placement of unjustified negative evaluations in her personnel file, where they could and eventually did affect employment decisions, constitutes an adverse employment action under Title VII. (Pl.'s Mem. in Opp. of Summ. J. at 14). Specifically, Plaintiff argues that the negative evaluations she received from Ms. Marrone and Ms. LaTorre changed the managing partner's regard of her and possibly formed the basis for the firm's decision to send her a letter of ultimatum on October 22, 1996. Id. Thus, the plaintiff concludes that, at the very least, the question of whether the placement of adverse job performance evaluations in her personnel file constituted an adverse employment action is a jury question and cannot be answered as a matter of law. Defendants argue that the negative performance evaluations of Marrone and Latorre had no effect on Siko's status at the firm because the partners at the firm decided, notwithstanding the performance evaluations, to give Siko a \$1,000 raise and to continue her employment

The Third Circuit recently defined the term "adverse employment decision," in Robinson v. City of Pittsburgh, 120 F.3d 1286 (3d. Cir. 1997), a case involving discriminatory retaliation under Title VII. According to the court's definition, an adverse employment decision is one in which a discharge, refusal to rehire, or other action occurs that alters the employee's "compensation, terms, conditions, or privileges of employment, or deprives him or her of employment opportunities, or adversely affects his or her status as an employee. Robinson at 1300.

Not everything that makes an employee unhappy constitutes an adverse employment action. While it is true that Marrone and Latorre's evaluations were less than stellar, they did not preclude the plaintiff from receiving a 3.5% raise. Moreover, the plaintiff has failed to come

forward with evidence showing that two unsatisfactory evaluations led to her termination, demotion, probation, or loss of job opportunities within or outside of the firm. On summary judgment it is not enough for the plaintiff to simply proffer theories, instead she must go beyond the pleadings and by affidavits, depositions, answers to interrogatories, and admissions on file, designate "specific facts showing that there is a genuine issue for trial." Celotex at 324, 106 S.Ct. 2553. After proper opportunity for discovery, Plaintiff has failed to come forward with evidence that supports a finding that she suffered an adverse employment action.² Therefore, Defendants motion for summary judgment on Counts I and II of the plaintiff's complaint will be granted.

B. ERISA Claims - Count III

In Count III of her Complaint, Siko set forth a claim for violation of section 510 of ERISA, 29 U.S.C. § 1140. Plaintiff now seeks to withdraw Count III of the complaint and assents to the dismissal of the ERISA claim. (Pl.'s Mem. in Opp. to Def.'s M. for Summ. J. at 40). Therefore, I will dismiss Count III of the Plaintiff's complaint with prejudice.

C. Retaliation Claims - Count IV and V

To establish discriminatory retaliation under Title VII and the PHRA, a plaintiff must demonstrate that: 1) she engaged in activity protected by the statutes; 2) the employer took adverse employment action against her; and 3) there was a causal connection between her participation in the protected activity and the adverse employment action. Robinson v. City of Pittsburgh, 120 F.3d 1286, 1299 (3d Cir.1997). In support of its motion for summary judgment

² Plaintiff has also failed to come forward with evidence from which a reasonable jury could infer that the Firm's denial of her request to be hired on a part-time basis rises to the level of an adverse employment action. Therefore, to the extent that Plaintiff attempts to assert that the firm's denial of her request for part-time employment constituted an adverse employment action, her claim for pregnancy discrimination fails.

on the plaintiff's retaliation claims, Defendant argues that Siko has not alleged any retaliatory conduct which rises to the level of an adverse employment action.

Plaintiff attempts to establish a prima facie case of discriminatory retaliation by alleging that the October 22, 1996 letter of Joseph O'Brien, wherein the firm urged Siko to return to work by October 25, 1996 or the firm would consider her terminated, constituted an adverse employment action because it effectively served as a letter of termination. Defendant argues that the October 22, 1996 letter does not terminate Siko's employment, rather, it directs her to return to work on a date certain. Therefore, Defendant concludes that it was Siko who terminated her own employment by choosing not to return to work as the letter instructed.

As stated above, an adverse employment decision is one in which a discharge, refusal to rehire, or other action occurs that alters the employee's "compensation, terms, conditions, or privileges of employment, or deprives him or her of employment opportunities, or adversely affects his or her status as an employee. Robinson at 1300. In this case, Siko proffers the October 22, 1996 letter as evidence of her termination from the firm's employment after the firm discovered that she filed a charge of discrimination with the Pennsylvania Human Relations Commission.³ Close inspection of the letter at issue, however, reveals that it in no way

³ The letter at issue reads in relevant part:

Dear Kathy,

Your short term disability period you requested expired on October 21, 1996. You did not report to the office on your scheduled return date, which was October 22, 1996. As we indicated to you previously, your position and conditions of employment did not change when you left the office. Your position has remained open for you during your absence from the office.

In like respect, we have received no written or verbal communication from you regarding your return to employment at the Firm. Since we have not

terminated Ms. Siko's employment. The letter states that the firm interpreted Siko's actions, or lack thereof, as a tender of resignation. Moreover, upon receipt of the letter, Siko did not inform the firm of her intent to return to work on October 28, 1996, nor did she attempt to negotiate an alternate return date. In fact, in Ms. Siko's October 24, 1996 letter to Joseph O'Brien, she states that she interprets the October 22, 1996 letter requiring her to return to work as a letter of termination. In light of her interpretation, she neither spoke with a member of the firm regarding her belief, nor appeared for work on October 25, 1996. Based on these undisputed facts, I cannot conclude that the October 22, 1996 letter from Joseph O'Brien served as a letter of termination. Therefore, Ms. Siko did not suffer an adverse employment action in connection with her pursuit of her retaliation claims. Since Siko cannot establish that the defendant law firm took adverse employment action against her, I will grant Defendant's motion for summary judgment on Counts IV and V of her complaint.

IV CONCLUSION

For the foregoing reasons, Defendant's Motion for Summary Judgment on Counts I, II, IV and V of the Plaintiff's Complaint will be granted. Count III and VI of the Plaintiff's complaint will be voluntarily dismissed with prejudice. An appropriate Order follows.

heard from you since you left the office on August 15, 1996, and you have not reported to work on your scheduled return date, we must interpret these actions as a resignation.

If you do not report to work by Friday, October 25, 1996 at 9:00 a.m., we will remove you from our payroll and accept your resignation.

If you have questions or concerns, please contact Liz Magnotta before this time.

(Pl.'s Mem. in Opp. to M. Summ. J. at Ex. O).

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

KATHLEEN B.S. SIKO	:	
Plaintiff,	:	
vs.	:	
	:	CIVIL ACTION
KASSAB , ARCHBOLD & O'BRIEN,	:	
L.L.P.	:	NO. 98-402
Defendant.	:	

ORDER

AND NOW, this _____ day of _____, 2000, upon consideration of the Defendant's Motion for Summary Judgment, the Plaintiff's response thereto, and Defendant's reply brief, **IT IS HEREBY ORDERED** that:

1. The Motion for Summary Judgment as to Counts I, II, IV and V of the Plaintiff's Complaint is **GRANTED**;
2. Counts III and VI of the Plaintiff's Complaint are voluntarily **DISMISSED WITH PREJUDICE**; and
3. Judgment is entered in favor of Defendant and against Plaintiff on Counts I, II, IV, and V of the Plaintiff's Complaint.

BY THE COURT,

CLIFFORD SCOTT GREEN, S.J.