

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

LISA MERSHON : CIVIL ACTION
 :
 v. : NO. 06-00253
 :
 WOODBOURNE FAMILY PRACTICE, LLC :

MEMORANDUM AND ORDER

Juan R. Sánchez, J.

July 19, 2006

Woodbourne Family Practice, LLC asks this Court to dismiss a former employee's complaint that it engaged in discrimination based on pregnancy and provided inadequate notice of the availability of continued medical coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), 29 U.S.C. § 1161 *et seq.* Because I find Lisa Mershon failed to state a claim of pregnancy discrimination, I will dismiss Counts I and II; because I find Woodbourne's COBRA notice inadequate, I will deny Woodbourne's Motion to Dismiss Count III of the Amended Complaint.

FACTS

Woodbourne hired Mershon on March 23, 2003, as a medical assistant. After becoming pregnant in July or August, Mershon asked for limited duty in September because she experienced complications in the pregnancy including bleeding. On October 9, 2003 Woodbourne gave Mershon a desk job. On October 21, Mershon began bleeding profusely and was sent to the hospital by her treating physician, who also faxed a note to Woodbourne saying Mershon's last day of medically approved work was that day, October 21. Mershon's supervisor, Jane Egbert, was not there on

October 21, so Mershon gave the note to one of Woodbourne's doctors, Michael Taptikoff, M.D., who told Mershon to follow her doctor's orders for bed rest. Mershon was hospitalized from October 22 to November 3, 2003. The October 21 fax listed her date of return to work as "unknown, being monitored by ultrasound[;] if condition unchanged, return to work approximately 6 weeks post-partum." Def.'s Brf., Ex. D.

On November 3, 2003 Woodbourne decided Mershon had abandoned her job and prepared a notice purporting to advise her of a rights under COBRA. Woodbourne's COBRA form reads in its entirety (handwritten additions in italics):

Cobra Notice

Date: *11-4-03*

Employee: *Lisa Mershon*

This letter acknowledges that I have been offered continuation of my health insurance. If I choose to accept Cobra benefits, I understand that the payment is due before the 20th, so my coverage is still in effect for the first of next month. *Present coverage expires 11-30-03*

I do want Cobra Benefits

I do not want Cobra Benefits

Employee Signature

The price of this coverate at presnt time is 287⁷⁰

L: you will receive a check on 11-14-03

Jane

Woodbourne mailed the notice certified on November 6, 2003 and received it back as unclaimed sometime after November 22. Two days after hearing from a co-worker she had been terminated, Mershon went to Woodbourne's office on December 20, 2003, where she received a copy of the "Cobra Notice" and learned Woodbourne had cancelled her health insurance on November 30, 2003.

In her Amended Complaint, Mershon alleges discrimination under Title VII of the Civil

Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, on the basis of disparate treatment for her pregnancy, Count I; discrimination under the Pennsylvania Human Relations Act (PHRA), 42 Pa.C.S. § 951 *et seq.*, Count II; and, breach of fiduciary duty under COBRA, Count III.

DISCUSSION

When considering a Motion to Dismiss under Federal Rule of Civil Procedure 12(b)(6), this Court is required to accept all allegations in, and reasonable inferences from, the Complaint as true and view them in the light most favorable to Mershon. *Rocks v. City of Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989). A Rule 12(b)(6) motion may only be granted “if it appears to a certainty that no relief could be granted under any set of facts which could be proved.” *D.P. Enter. Inc. v. Bucks County Cmty. Coll.*, 725 F.2d 943, 944 (3d Cir. 1984).

Pregnancy discrimination under 42 U.S.C. § 2000e-2(a)(1)¹ is a form of gender

¹§ 2000e

(k) 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, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . .

§ 2000e-2. Unlawful employment practices(a) Employer practices

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s race, color, religion, sex, or national origin.

discrimination and is subject to the familiar *McDonnell-Douglas*² burden-shifting analysis. To establish a *prima facie* case, Mershon must show (1) she is a member of a protected class; (2) she was qualified for the job in question; (3) she suffered an adverse employment decision; and (4) circumstances surrounding the adverse decision support an inference of discrimination. *McDonnell Douglas*, 411 U.S. at 802; *Weldon v. Kraft, Inc.*, 896 F.2d 793, 796 (3d Cir. 1990). Although each of these elements must be demonstrated to withstand a motion for summary judgment, the standard is less stringent at the point of a motion to dismiss. *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 511 (2002) (noting the *McDonnell Douglas* test “is an evidentiary standard, not a pleading requirement.”). Instead, Mershon must only present the “short and plain statement of the claim showing that the pleader is entitled to relief” established by F.R. Civ. P. 8(a)(2). *Swierkiewicz*, 534 U.S. at 512. Mershon must set forth facts sufficient to support an inference Woodbourne terminated her as the result of discriminatory animus.³

The Pregnancy Discrimination Act of 1978 (PDA), 42 U.S.C. § 2000e(k), does not require an employer to excuse a pregnant employee’s absences, if it would not excuse those of a non-pregnant employee. “The Pregnancy Discrimination Act requires the employer to ignore an employee’s pregnancy, but . . . not her absence from work, unless the employer overlooks the comparable absences of nonpregnant employees . . . in which event it would not be ignoring pregnancy after all.” *In re Carnegie Center Associates*, 129 F.3d 290, 296 (3d Cir. 1997), quoting

²*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

³Because Woodbourne’s Motion contained “matters outside the pleading,” it will be treated as one for summary judgment under Rule 56. Fed. R. Civ. P. 12(b). In this case, Mershon failed to state a claim for pregnancy discrimination under either the lenient Rule 12(b)(6) standard or the more stringent standard of Rule 56.

Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994). Mershon must show Woodbourne treated her differently than it would have treated an employee on leave for a temporary disability other than pregnancy. *Id.* at 299. The PDA does not require an employer to grant maternity leave or to reinstate an employee after a maternity leave. *Id.* “The PDA is a shield against discrimination, not a sword in the hands of a pregnant employee.” *Id.* The PDA “does not force employers to pretend that absent employees are present whenever their absences are caused by pregnancy.” *Crnokrak v. Evangelical Health Sys. Corp.*, 819 F. Supp. 737, 743 (N.D. Ill. 1993).

To prevail on her claim of pregnancy discrimination, Mershon must show Woodbourne treated her differently than it treated non-pregnant employees. *Carnegie Center Associates*, 129 F.3d at 297. Woodbourne’s employee handbook emphasizes attendance, making ill employees responsible for finding their own replacements and warning of “possible termination” on the fourth unexcused absence or lateness. The handbook also limits unpaid leaves of absence to those who have been employed by Woodbourne for more than year. The Manual states “[t]o be eligible for a leave of absence for any reasons [sic], an employee must have completed one year of employment with Woodbourne.” Def.’s Reply Brf., Ex. A. at 11.

Mershon had worked at Woodbourne for seven months when she left work on October 21, 2003 and was not terminated until she had missed nine more work days on November 3, 2003. Prior to October 21, Mershon had used eight sick days, seven vacation days and a personal day, exceeding Woodbourne’s allowances for new employees. Woodbourne terminated Mershon for excessive absenteeism, not because she was pregnant. Mershon was not an employee qualified for an unpaid leave of absence because she had not worked for Woodbourne for more than a year. Mershon cannot meet the second prong of the *McDonnell-Douglas* test that she was an otherwise qualified employee.

McDonnell Douglas, 411 U.S. at 802. If any prong fails, Mershon has failed to state a claim upon which relief can be granted. *Swierkiewicz*, 534 U.S. at 511. Nor has she stated facts sufficient to raise an inference of an animus toward pregnancy compared to any other illness. *Carnegie Center Associates*, 129 F.3d at 296.

Mershon claims the employee manual is evidence of an animus against pregnancy because it does not treat pregnancy as a catastrophic illness, allowing only two weeks unpaid leave for a pregnancy-related illness and four weeks for other illnesses; therefore, Mershon says she has presented a *prima facie* case of pregnancy discrimination because the regulations promulgated under Title VII require pregnancy to be treated the same as any other disability. 29 C.F.R. § 1604.10(b);⁴ Standing to sue requires the plaintiff to allege she has suffered “a distinct and palpable injury” as a result of defendant’s action. *McConnell v. Federal Election Com'n*, 540 U.S. 93, 225-26 (2003) (reiterating the “bedrock case-or-controversy requirement” of Article III); *Growth Horizons, Inc. v. Delaware County, Pa.*, 983 F.2d 1277, 1281 (3d Cir. 1993) (same). Because Mershon was not eligible for unpaid leave, she does not have standing to challenge Woodbourne’s policy.

Mershon’s second claim, that her COBRA notice was inadequate, fares better under a Rule 12(b)(6) challenge. Woodbourne argues its COBRA notice was sufficient, focusing on the

⁴Regulations promulgated under Title VII provide:

Disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions. . . . Written or unwritten employment policies and practices involving matters such as the commencement and duration of leave . . . [and] reinstatement . . . shall be applied to disability due to pregnancy . . . on the same terms and conditions as they are applied to other disabilities.

29 C.F.R. § 1604.10(b).

presumption that Mershon received the notice sent by certified mail. Woodbourne produced a registered mail envelope to prove it had sent a timely COBRA notice to Mershon. The law presumes that a letter properly addressed, stamped, and mailed was received by the person to whom it was addressed. *Hagner v. United States*, 285 U.S. 427, 430 (1932).

Of more importance is the statutory requirement an employee have sixty days in which to make a COBRA decision. The plain language of the statute requires a COBRA election period of at least 60 days,⁵ measured from the later of either the date of the qualifying event or the date on which the beneficiary receives notice of his COBRA options. 29 U.S.C. § 1165.⁶

The sixty days Woodbourne was required to give Mershon in which to elect her COBRA benefits had not expired on December 20, 2003 when she learned of her dismissal. Whether the qualifying event was her failure to return to work on November 3 or Woodbourne's decision to terminate her on November 6, 2003, Mershon had at least until January 2, 2004 to elect COBRA

⁵29 U.S.C. § 1165. **Election**

(a) In general

For purposes of this part--

(1) Election period

The term "election period" means the period which--

(A) begins not later than the date on which coverage terminates under the plan by reason of a qualifying event,

(B) is of at least 60 days' duration, and

(C) ends not earlier than 60 days after the later of--

(i) the date described in subparagraph (A), or

(ii) in the case of any qualified beneficiary who receives notice under section 1166(4) [FN1] of this title, the date of such notice.

⁶The Fifth Circuit has held the statute's language does not limit the election period to 60 days and allowed an election at any time during the COBRA's maximum length of time an employer must provide continuation coverage to employees unless the benefit plan limits the election period. *Lifecare Hospitals, Inc. v. Health Plus of Louisiana, Inc.*, 418 F.3d 436, 441-42 (5th Cir. 2005).

benefits. 29 U.S.C. § 1165. The statute requires a continuation of coverage from the date of the qualifying event through the election period. 29 U.S.C. § 1161.⁷ Woodbourne cancelled Mershon's health insurance prematurely on November 30, 2003, resulting in uninsured medical expenses and the cost of state-supported medical insurance for Mershon. *Branch v. G. Bernd Co.*, 955 F.2d 1574, 1582 (5th Cir. 1992) (holding employer liable for employee's medical expenses).⁸ I will deny Woodbourne's motion to Dismiss as to Count III, alleging a violation of fiduciary duty under ERISA. An appropriate order follows.

⁷29 U.S.C. § 1161. **Plans must provide continuation coverage to certain individuals**

(a) In general

The plan sponsor of each group health plan shall provide, in accordance with this part, that each qualified beneficiary who would lose coverage under the plan as a result of a qualifying event is entitled, under the plan, to elect, within the election period, continuation coverage under the plan.

⁸Because Mershon was denied sixty days of continued coverage in which to make her election, the adequacy of Woodbourne's "Cobra Notice" is unimportant. At the time the notice may have met the requirements of COBRA. *Bixler v. Central Pennsylvania Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1301 (3d Cir. 1993). In November 2004, the U.S. Department of Labor promulgated regulations which require the name and address of the plan administrator, an identification of the qualifying event, identification of the beneficiary, explanation of procedures, consequences of failing to elect, description of the continuation coverage, the maximum period for which it runs, how to extend the maximum period, the effect of a second qualifying event, the cost of the continuation, the due dates for payments and a reminder to keep the plan administrator informed of changes. 29 C.F.R. § 2590.606-4. The Appendix to section 2590.606-4 includes a model COBRA notice which includes all the requirements on a single page.

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ORDER

And now this 19th day of July, 2006, Defendant's Motion to Dismiss (Document 10) is GRANTED as to Counts I and II of the Amended Complaint (Document 7) and DENIED as to Count III of the Amended Complaint. It is further ORDERED Defendant's Motion for Leave to File a Reply Brief (Document 13) is GRANTED and Exhibit A to Document 13 is accepted as filed. Defendant is directed to file an Answer within 20 days. A Rule 16 Conference shall be held September 5, 2006 at 4:00 p.m. in Courtroom 5D.

BY THE COURT:

Juan R. Sánchez, J.