

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

BEVERLY KLEIN,
Complainant

v.

BRADDOCK GENERAL HOSPITAL,
Respondent

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Docket No. E-26042

FINDINGS OF FACT

CONCLUSIONS OF LAW

OPINION

RECOMMENDATIONS OF HEARING EXAMINER

FINAL ORDER

FINDINGS OF FACT *

1. Beverly Klein, (hereinafter "Complainant"), is an adult female individual residing at 4789 Wallingford Street, Pittsburgh, Pennsylvania. (N.T. 8).

2. Braddock General Hospital, (hereinafter "Respondent"), employs more than four persons at its facility in Braddock, Pennsylvania (N.T. 83-84).

3. In July 1979, the Complainant began working for the Respondent as a staff pharmacist. (Complaint).

4. The general duties of a staff pharmacist included dispensing medication, providing patient and drug information, and performing general pharmacist responsibilities. (N.T. 9).

5. At all relevant times, the Respondent employed five staff pharmacists. (N.T. 42, 84).

6. The Respondent's five staff pharmacists were supervised by Mark O'Toole, the Director of Pharmacy, (hereinafter "O'Toole") (N.T. 10, 11, 82).

7. The pharmacy operation was staffed by established shifts which included:

a. Weekdays

(1) Two staff pharmacists worked 8:30 a.m. - 5 p.m;

(2) One staff pharmacist worked 9:00 a.m. - 5:30 p.m;

*To the extent that the Opinion which follows recites facts in addition to those here listed, such facts shall be considered to be additional Findings of Fact. The following abbreviations will be utilized throughout:

N.T. Notes of Testimony
C.E. Complainant's Exhibit
R.E. Respondent's Exhibit

(3) One staff pharmacist worked 11:30 a.m. - 8 p.m.;

b. Weekends

1. Two staff pharmacists worked 8:30 a.m. - 5 p.m.;

2. One staff pharmacist worked 11:30 a.m. - 8 p.m.

(N.T. 83-84).

8. The staff pharmacists worked on a five week rotation.
(N.T. 84).

9. The Respondent maintained an outpatient cancer clinic on Wednesday and Friday mornings. (N.T. 84).

10. During the second week of a staff pharmacist's five week rotation, he or she was responsible for preparing chemotherapy drugs for the cancer clinic's use. (N.T. 84, 85).

11. Pharmacy preparation of chemotherapy drugs was primarily done on Wednesday and Friday mornings, however, there were other occasions when chemotherapy drugs had to be prepared.
(N.T. 85, 129, 130).

12. At times, inpatient treatment included chemotherapy (N.T. 52, 85) and there were two Doctors at the Respondent's hospital who occasionally scheduled their patients for evening chemotherapy. (N.T. 129-130).

13. The chemotherapy drugs used at the Respondent's facility were not orally injected but were of the type given to a patient intravenously. (N.T. 87).

14. Generally, the procedure for the preparation of injectable chemotherapeutic agents consisted of a pharmacist, clad in a protective gown and surgical gloves, pulling from stock the appropriate materials, (N.T. 91, 92), diluting the medication,

reconstituting it, and preparing it for dispensing, (N.T. 92), labeling the medication and finally handing it to either a cancer clinic nurse for clinic patients or delivering the preparation to the appropriate floor for inpatient treatments. (N.T. 93).

15. In January, 1982, the Respondent's staff pharmacists expressed their concern about using chemotherapy drugs. (N.T. 41, 85, 87).

16. In January 1982, each of the four female and 1 male staff pharmacists were concerned that chemotherapeutic drugs could create genetic damage and that working with them constituted a health hazard. (N.T. 41, 43).

17. The five staff pharmacists collectively issued O'Toole an ultimatum which provided that they would refuse to work with chemotherapy drugs until safety equipment was installed and handling guidelines established. (N.T. 42, 58, 64, 86).

18. In February 1982, the Respondent purchased a vertical laminar flow hood, biological safety cabinet. (N.T. 88).

19. The vertical laminar flow hood was delivered in April 1982 and installed on or about May 12, 1982. (N.T. 90).

20. During the period between the installation of the flow hood in May 1982, and January 1983, all the staff pharmacists apparently prepared chemotherapeutic drugs without contention or incident. (N.T. 91, 94).

21. In January 1983, the Complainant told O'Toole that she suspected she was pregnant and that she did not want to work with chemotherapeutic drugs during her pregnancy. (N.T. 10, 95).

22. In effect, O'Toole told the Complainant that he understood and that she would be relieved of that responsibility until he found out more information. (N.T. 10, 95).

23. In March 1983, the Complainant received positive confirmation that she was pregnant. (N.T. 11).

24. On March 21, 1983, during the Complainant's week to work with chemotherapeutic drugs, the Complainant filed a grievance with the Respondent's Director of Employee Relations, Ms. Linda Hanson, stating that during the Complainant's pregnancy "[she would] not handle any cancer chemotherapeutic drugs," because of her concern that to do so presented "an occupational risk which may be hazardous to [her]self and [her] unborn child." (N.T. 13, 14, 16; CE 1).

25. O'Toole had been concerned with the possible hazards of handling chemotherapeutic drugs for quite a while. In fact, he had been conducting ongoing research on this issue since 1981. (N.T. 111).

26. O'Toole's research and the safety procedures used by the Respondent's pharmacy, led O'Toole to conclude that anyone working with chemotherapeutic drugs had an extremely minimal risk of accidental exposure to the drugs and that should a pharmacist be accidentally exposed, the exposure would be negligible. (N.T. 92, 93, 94, 101, 119).

27. Both O'Toole and Hanson recognized that researchers did not limit their concern to pregnant females. Research

articles also noted a concern for males trying to conceive, and any woman of childbearing years. (N.T. 95, 147, 148).

28. Had a male pharmacist who was trying to conceive refused to handle chemotherapeutic drugs because of a personal concern that accidental exposure could have harmful effects on a partner's fetus, such male pharmacist would have been treated the same as the Complainant was handled. (N.T. 146, 147, 155).

29. In a memorandum dated March 30, 1983, Hanson answered the Complainant's grievance. (CE 3).

30. Hanson's reply instructed the Complainant to first obtain a statement from the Complainant's doctor regarding whether or not the Complainant may continue to handle chemotherapeutic drugs during her pregnancy. (CE 3).

31. The reply further indicated that if the doctor felt that the Complainant may handle the drugs, the Complainant would be required to do so. (CE 3).

32. If the Complainant's doctor indicated she could not handle the drugs while pregnant, the Complainant would be considered disabled and therefore be required to take paid sick time and/or a medical leave of absence until the time when the Complainant could return to full duty. (CE 3).

33. Hanson's reply also offered the Complainant another alternative: The Complainant was instructed that she could continue to work as long as she could if she was able to arrange for other staff pharmacist(s) to assume her duties which involved the handling of chemotherapeutic drugs during her pregnancy. (CE 3).

34. The Complainant was not satisfied with Hanson's reply to her grievance and, on or about April 13, 1983, she submitted the grievance for review by the Respondent's Executive Director, Mr. Frederick A. Hough. (N.T. 17, CE 4).

35. In essence, Hough's April 22, 1983 reply to the Complainant's grievance offered the Complainant the same options Hanson had previously proposed. (CE 5).

36. By a memorandum dated April 27, 1983, the Complainant forwarded to O'Toole her doctor's recommendation that the Complainant could perform the duties of a pharmacist as long as she avoided "particularly potential, hazardous chemotherapeutic agents." (CE 6,7).

37. The Complainant's April 27, 1983 memorandum also requested paid sick time and a medical leave of absence to begin Friday, April 29, 1983. (CE 7).

38. The Complainant never attempted to make arrangements for other staff pharmacists to exchange duties with her with respect to preparing chemotherapeutic drugs. (N.T. 56, 148).

39. Also, the Complainant neither told O'Toole, Hanson, or Hough that she considered it to be the Respondent's responsibility to reassign other staff pharmacists to perform her scheduled chemotherapy drug preparation assignments, nor did she indicate that she considered the Respondent's offered accommodation unacceptable. (N.T. 56, CE 1, CE 7).

40. Under the circumstances of this case, that portion of the Respondent's stated position which offered the Complainant

the opportunity to arrange for other pharmacists to perform her chemotherapy drug related duties was a reasonable accommodation of the Complainant's health related concerns. (CE 3, CE 5).

41. At the Respondent's facility, as often as on a weekly basis, staff pharmacists had occasion to switch work assignments. (N.T. 103).

42. Dissention of other staff pharmacists was specifically not the reason why the Complainant failed to attempt to exchange duties with her colleagues. (N.T. 72).

43. The Complainant went on paid sick leave/medical leave of absence beginning on April 29, 1983. (N.T. 25, 43).

44. It was the Respondent's policy with respect to employees on a leave of absence that the absent employee should get in touch with their department director three weeks before they intend to return to work. (N.T. 150).

45. After her April 29, 1983 departure, the Complainant never notified the Respondent that she either intended or desired to return to her position. (N.T. 43, 46, 108, 150).

46. After the Complaint failed to notify the Respondent that she was able to return to her pharmacist duties, she was terminated. (N.T. 150, 159, 160, 161).

CONCLUSIONS OF LAW

1. Complainant is an individual within the meaning of the PHRA.
2. Respondent is an employer within the meaning of the PHRA.
3. The PHRC has jurisdiction over the parties and subject matter of this action.
4. The parties and the PHRC have fully complied with the procedural prerequisites to a hearing in this case.
5. Generally, discrimination based on pregnancy constitutes sex discrimination prescribed by the PHRA.
6. Any employment policy adversely affecting a pregnant employe solely because of pregnancy is sex discrimination pure and simple.
7. The Complainant's employment status was not affected solely because of her pregnancy.
8. The PHRA seeks to overcome dissimilar treatment, on the basis of sex, of persons similarly situated.
9. The Complainant's disability extends beyond solely the Complainant's own disability to a disability arising out of a special concern for the Complainant's unborn fetus.
10. The Respondent similarly treated men and women with regard to its temporary disability policies.
11. Under the narrow and extremelly unique circumstances of this case, the basis for the alleged discrimination is a disability and not sex.

12. The Complainant was handicapped/disabled within the meaning of the PHRA because the Respondent regarded the Complainant as having an impairment.

13. The Respondent offered the Complainant a reasonable accommodation of her disability.

14. The Complainant unreasonably rejected the Respondent's offer of an accommodation.

15. The Complainant failed to show that she suffered an adverse employment action primarily attributable to the Respondent.

OPINION

This case arises on a complaint filed by Beverly A. Klein, (hereinafter "Complainant"), against the Braddock General Hospital, (hereinafter "Respondent") with the Pennsylvania Human Relations Commission, (hereinafter "PHRC"), on or about July 20, 1983, and subsequently amended on or about September 21, 1983. The Complainant's original complaint alleged sex-based discrimination in the terms and conditions of the Complainant's employment because of the Complainant's pregnancy. The September, 1983 amendment merely added the alleged basis of non-job related disability, pregnancy. In effect, the Complainant claimed that the Respondent failed to accommodate her after she informed the Respondent that she was pregnant and that it would be potentially hazardous to her unborn child if the fetus were exposed to chemotherapeutic drugs with which the Complainant worked. The Complainant further claimed that the Respondent's alleged failure violated Sections 5(a), (b)(1), and (b)(5) of the Pennsylvania Human Relations Act, Act of October 27, 1955, P.L. 744, as amended, 43 P.S. §§ 951 et seq., (hereinafter "PHRA").

Commission staff conducted an investigation into the alleged situation and found probable cause to credit the allegations of discrimination. The PHRC and the parties then attempted to eliminate the alleged unlawful practice through conference, conciliation, and persuasion. These efforts were unsuccessful, and the case was approved for public hearing. The hearing was held on September 11, 1986, in Pittsburgh, Pennsylvania, before Hearing Examiner Carl H. Summerson.

Following the hearing, the parties were afforded an opportunity to submit briefs. The Respondent's brief was received in December 1986. The Complainant's brief was received in April 1987. Since the Complainant's brief was filed beyond the prescribed time period, the Respondent moved to strike consideration of the Complainant's brief. This motion was denied, however, the Respondent was afforded an opportunity to submit a reply brief since the Complainant's brief had not been submitted concurrently with the Respondent's brief. On July 27, 1987, the Respondent submitted additional information in the form of a copy of a Minnesota Court of Appeals case, believed to be similar to this matter.

The first task in this matter is to resolve whether the factual setting of this case is appropriately a sex-based discrimination claim, or a disability-based discrimination claim. To make this assessment the crux of the Complainant's claims must be clearly seen, and the real issues stemming therefrom clearly defined.

Generally, it is well established law in Pennsylvania that disability from pregnancy must be treated the same as any other disability. Dallastown Area School District v. PHRC, 74 Pa. Commonwealth Ct. 560, 460 A.2d 878 (1983), citing Anderson v. Upper Bucks County Area Vocational Technical School, 30 Pa. Commonwealth Ct., 103, 373 A.2d 126 (1977). It is equally generally well established that discrimination based on pregnancy constitutes sex discrimination proscribed by Section 5(a) of the

PHRA. See Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A.2d 277 (1973); Freeport Area School District v. PHRC, 18 Pa. Commonwealth Ct. 400, 335 A.2d 873 (1975); Dallastown Area School District v. PHRC, 74 Pa. Commonwealth Ct. 560, 460 A.2d 878 (1983). Courts have so held primarily because pregnancy is unique to women and any employment policy adversely affecting a pregnant employe solely because of pregnancy will be found to be "sex discrimination pure and simple." Cerra v. East Stroudsburg Area School District, 450 Pa. 207, 299 A.2d 277, 280 (1973).

In the present case, the Complainant's employment status was not affected solely because of her pregnancy. The present matter is similar to the unusual factual circumstances in Board of School Directors of Fox Chapel Area School District v. Rossetti, 36 Pa. Commonwealth Ct. 105, 387 A.2d 957 (1978), rev'd 411 A.2d 486 (1979). In Rossetti, a Complainant was denied a request to take a discretionary leave of absence to discharge her maternal duties. The Complainant's newborn baby required breastfeeding because the baby was allergy-prone and had begun to refuse bottled nutrition. The Commonwealth Court ruled in favor of the Complainant saying that the unique position of women regarding childbirth was logically and naturally extended to include a request for a leave for breastfeeding purposes. Only a female can perform the breastfeeding function. However, the Pa. Supreme Court reversed saying, "[T]he evil which the Pennsylvania Human Relations Act seeks to overcome is the dissimilar treatment, on the basis of sex, of persons similarly situated. But appellee has in no way suggested that male teachers have been or would be

granted discretionary leaves of absence while females were denied them. To the contrary, appellee has been treated **no differently** than any male teacher would be who had to remain at home to care for a physically or emotionally disabled newborn infant."

A dissenting Justice suggests that the majority ignored the obvious reality that only women can perform the breastfeeding function and concluded that when the Respondent School Board arbitrarily denied discretionary leave sought for reasons unique to women, there was discrimination on the basis of sex.

The present matter is distinguishable from all prior cases which have ruled that discrimination based on pregnancy is sex discrimination. This case is closer to a slightly modified version of Rossetti. Had the Complainant in Rossetti requested leave to care for a physically or emotionally disabled newborn infant, the similarities to the present case would be closer. Either a male or female can care for a physically or emotionally disabled child. Similarly, under the facts as revealed in the present matter, both males and females expressed their concern that handling chemotherapeutic drugs posed a potential health hazard. While it is obvious that only a woman can carry a fetus, there was concern that males of childbearing years who were inclined to attempt conception also faced a possible health hazard potentially dangerous to their fetus.

Here, like in Rossetti, the disability extends beyond solely a women's own physical disability to a disability arising out of a special concern for an unborn fetus. The facts as pre-

sented show equal, male and female, concern for the laudable pursuit of the ultimate protection of an unborn child.

The undisputed testimony of the Respondent's Director of Employee Relations, Ms. Linda Hanson, emphatically stated that males and females were similarly treated regarding temporary disability situations. Clearly, in January 1982, a male pharmacist joined a boycott of chemotherapeutic drug preparation until the Respondent obtained suitable protective equipment and developed safe handling procedures. In January 1983, Complainant's immediate supervisor, the Director of Pharmacy, Mark O'Toole, told the Complainant that he sympathized with the Complainant's concerns regarding possibly being pregnant because he too was concerned because he and his wife were contemplating having a baby. Finally, there was unrebutted testimony that the available research materials dealing with the potential hazards of preparation of chemotherapeutic drugs suggested that males contemplating conception should avoid contact with these drugs to ensure their fetus' were not unduly exposed to a possible health hazard.

Accordingly, the employment problems suffered by the Complainant cannot be said to be solely based on either her sex or her pregnancy. Under the extremely unique circumstances of this case, the basis for the alleged discrimination will therefore be analyzed as a disability claim and not as a sex-based discrimination claim.

Turning therefore to the allegation that the Complainant was forced to take involuntary paid sick leave and a leave of absence because of her disability, the Respondent argues that pregnancy is not a handicap/disability within the meaning of the PHRA. The Complainant submits that the Respondent regarded her as having an impairment and failed to reasonably accommodate her disability.

In any complaint alleging employment discrimination on the basis of a handicap/disability, three primary liability issues must normally be resolved:

1. Does the Complainant have a handicap or disability within the meaning of the PHRA?;
2. Did the adverse employment action occur because of the handicap/disability?; and
3. Is the handicap/disability job related? See Small v. National Railroad Passenger Corp., Docket No. E-12593 (PA Human Relations Commission, March 3, 1981).

The resolution of this case will require an answer to only the first two questions. First, while the PHRA proscribes employment discrimination against individuals on the basis of a non-job related handicap or disability, the PHRA does not define either term. The PHRC has adopted regulations which define a handicapped or disabled person as one who:

- (A) has a physical or mental impairment which substantially limits one or more major life activities;

- (B) has a record of such an impairment; or
(C) is regarded as having such an impairment. 16
Pa. Code 44.4

Clearly, the Respondent regarded the Complainant as having an impairment. When options were given to the Complainant the Respondent stated, "if your physician states that you should not handle such drugs due to your pregnancy, you would be considered (in accordance with State law) disabled to the extent that you are unable to perform all of your job functions..." (See CE 3). Accordingly, the answer to our first inquiry is yes, the Complainant did have a handicap or disability within the meaning of the PHRA.

The real issue in this case combines a discussion of whether an adverse action occurred because of the Complainant's perceived disability and whether the Respondent offered the Complainant a reasonable accommodation which was not accepted. It is very interesting that neither the Complainant's complaint, her testimony on direct examination, nor her post hearing brief mentioned that the Respondent gave the Complainant a clear opportunity to remain working. It is obvious that the Respondent's offer to allow the Complainant to attempt to exchange duties with other staff pharmacists has been a troubling problem for the Complainant in more ways than one.

PHRC Regulations provide:

"An employer shall make reasonable accommodations by modifying a job, including but not limited to modification of duties, scheduling, amount or nature

of training, assistance provided, and the like, provided that such modification shall not impose an undue hardship." 16 Pa. Code §44.14(a)

Clearly, under this section, one of the proscribed ways an employer may make a reasonable accommodation is to modify the scheduling of its employes. In this case, the Respondent created an opportunity for the Complainant to attempt schedule modifications. In common experience, a conscientious employe interested in staying on their job would have certainly done something more than what the Complainant did.

Initially offering the Complainant the chance to exchange duties was the beginning of an accommodation to the Complainant. Under the circumstances of this case, this initial gesture should be found to be reasonable given the Complainant's obstinate reaction. The Complainant neither attempted to ask her colleagues to assume her chemotherapeutic drug preparation duties nor inform the Respondent that this option was considered unacceptable. Instead, the Complainant simply requested paid sick leave and a medical leave of absence to commence April 29, 1983. (See CE 7).

The results of this case could be different had the Complainant unsuccessfully attempted to switch her chemotherapeutic drug duties and notified the Respondent that her colleagues would not take her duties voluntarily. A closer question would have then been presented, had this occurred and the Respondent then refused to reschedule pharmacists. As it stands, the Complainant testified that she did not ask her co-workers to

exchange duties solely because she felt it was not her responsibility. This does not meet with the normal course of every day experience. One would certainly believe that if a person wanted to work, they would pursue even the slightest possible hope of keeping their job. In this matter, the hope was far more than slight because the testimony revealed that schedule switching was a common occurrence among the five staff pharmacists.

In summary, the Complainant's commencement of paid sick leave and medical leave of absence came at her own request after she totally discounted the Respondent's extended option of accommodation in the form of permitting schedule switches. Accordingly, the Complainant has failed to show that she suffered an adverse employment action primarily attributable to the Respondent. Under the unusual circumstances of this case, the primary responsibility for taking paid sick leave and a medical leave of absence rests with the Complainant. An appropriate order follows.

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

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RECOMMENDATION OF HEARING EXAMINER

Upon consideration of the entire record in this case, the Hearing Examiner concludes that the Respondent did not violate the Pennsylvania Human Relations Act, and therefore recommends that the foregoing Findings of Fact, Conclusions of Law, and Opinion be adopted by the full Pennsylvania Human Relations Commission, and that a Final Order of dismissal be entered, pursuant to Section 9 of the Act.



Carl H. Summerson
Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA HUMAN RELATIONS COMMISSION

BEVERLY KLEIN, :
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Respondent :

FINAL ORDER

AND NOW, this 30th day of September, 1987, following review of the entire record in this case, including the transcript of testimony, exhibits, briefs, and pleadings, the Pennsylvania Human Relations Commission hereby adopts the foregoing Findings of Fact, Conclusions of Law, and Opinion, in accordance with the Recommendation of the Hearing Examiner, pursuant to Section 9 of the Pennsylvania Human Relations Act, and therefore

O R D E R S

that the complaint in this case be, and the same hereby is, dismissed.

PENNSYLVANIA HUMAN RELATIONS COMMISSION

BY: Rita Clark
Rita Clark, Vice-Chairperson

ATTEST:

John P. Wisniewski
John P. Wisniewski, Secretary