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# Verdict

September 16, 2014

Joanna L. Grossman and Deborah L. Brake

## If She Don't Win It's a Shame: Female Executive Sues New York Mets for Pregnancy Discrimination



Leigh Castergine was the first woman to become a Senior Vice President in the Front Office of the Mets, a once-beloved, but now losing Major League Baseball team in New York. She was in charge of ticket sales and was rewarded over the years for innovations and successes to the tune of multiple \$50,000 raises and a \$125,000 bonus. But she met her glass ceiling when she, an unmarried woman, announced her pregnancy in 2013.

According to the **complaint she just filed** (<http://www.businessinsurance.com/Assets/pdf/CastergineVWilponPregnancyDiscriminationSuit.pdf>) in federal court, the Mets' Chief Operating Officer, Jeffrey Wilpon, looked none too favorably upon her pregnancy. She alleges that he humiliated and embarrassed her, making no secret of his disdain for her decision to have a baby without being married. And when she complained to human resources about his behavior, she was fired.

In this column, we'll consider the nature of the discrimination Castergine alleges and explain why it is part and parcel of a matrix of biases and stereotypes that pregnant women still face in the workplace.

### The Allegations in Castergine's Complaint

An Ivy League graduate and former Division 1 student athlete, Castergine had worked her way up from low-wage ticket sales jobs with other clubs to a high-ranking position in the Mets' Front Office. She specialized in data analytics and pricing strategy, key skills for a team with high costs and a waning fan base. The job was a challenge, given the team's poor performance over many years and what she describes as "a series of public relations blunders that too frequently led to the franchise being ridiculed in the sports pages." Often told that her job was like selling "tickets to a funeral" or "deck chairs on the Titanic," Castergine persevered and was recognized repeatedly and lucratively for excellent work.

When Castergine announced that she was pregnant in September 2013, the whole tenor of her worklife changed. Before revealing her pregnancy, Castergine sat in on a meeting where her superiors discussed another woman who had recently given birth. They complained that she "hasn't been the same since she had children" and discussed moving her to a different department.

Upon revealing her pregnancy, Castergine, who had once been profiled in an industry publication and described as “the next female President in the sports industry,” was subjected to a strong of torments by Wilpon, who became “fixated on the idea that Castergine would have a child without being married.” (All facts mentioned in this column are based on the allegations in Castergine’s lawsuit; the defendants have publicly denied them and stated that they are opposed to all forms of discrimination.) He would repeatedly and obviously look at her finger for an engagement ring and told her expressly that she would make more in salary and bonuses if only she would get a ring.

Wilpon’s alleged comments were often made to or in front of others. He told one colleague that he is “old fashioned” and thinks she “should be married before having a baby.” He told another that “she is a senior vice president now; people would respect her more if she was married.” He announced at a meeting that there were “two rules” regarding her pregnancy: “don’t touch her belly and don’t ask how she’s doing; she’s not sick, she’s pregnant.” He later told her: “I am as morally opposed to putting an e-cigarette sign in my ballpark as I am to Leigh having this baby without being married.” Although six other senior executives were present, including the team’s general counsel, no one objected to Wilpon’s comment.

Castergine complained to her immediate supervisor about Wilpon’s comments. He acknowledged the conduct (some of which he had heard in person), but took no action. She alleges Wilpon’s treatment of her became more hostile after the complaint, rather than designed to remediate the situation. She later complained to the Executive Director of Human Resources, Holly Lindvail, who urged Castergine to quit.

After a difficult pregnancy, Castergine gave birth in March 2014 and returned to work three months later. In July she again approached Lindvail about the hostile environment, and Lindvail again urged her to quit. In August, citing “issues” with “her performance,” the Mets fired Castergine. Wilpon claimed she failed to meet her sales goals, but also shared his belief that “something changed” when she gave birth, and she was no longer “as aggressive as she once had been.”

Castergine filed suit alleging violations of the federal Family and Medical Leave Act, the New York State anti-discrimination law, and the New York City anti-discrimination law. She alleges interference with her right to take job-protected leave for childbirth, discrimination against her on the basis of pregnancy, and retaliation.

### **A Classic Case of Pregnancy Discrimination: “Animus” and Hostility Toward Pregnant Employees**

The hostile response of Castergine’s superiors to her pregnancy is not unique. It was exactly this type of animus and bias against pregnant, working women that led Congress to enact the Pregnancy Discrimination Act (PDA) of 1978. The PDA amended Title VII of the Civil Rights Act of 1964 to clarify that pregnancy discrimination is a form of prohibited sex discrimination. The PDA was necessitated by a Supreme Court decision two years earlier, *General Electric v. Gilbert* (<https://supreme.justia.com/cases/federal/us/429/125/>), which failed to recognize this core connection between pregnancy discrimination and sex discrimination. Many state fair employment statutes, including New York’s, track the PDA in banning discrimination because of pregnancy, alongside other forms of prohibited discrimination.

While courts have long struggled to determine whether some forms of the unequal treatment of pregnant women are discriminatory (more on that below), Castergine’s allegations, if proven true, are precisely the kind that courts have most easily grasped as discriminatory. The different treatment of an employee once she is known to be pregnant, combined with derogatory remarks about her pregnancy, register easily as discriminatory and present the easiest cases for plaintiff to win.

In our review of cases decided under the federal Pregnancy Discrimination Act, we found that the vast majority of successful cases involved a discernible anti-pregnancy “animus,” typically involving explicit statements by decision-makers making derogatory comments about the plaintiff’s pregnancy. With this type of fact pattern, courts can’t help seeing the employer’s negative reaction to the plaintiff’s pregnancy, combined with an adverse employment action resulting from it, as a form of pregnancy discrimination. So if the allegations are true, the case is a home run.

## A Common Core of Stereotyping, but Inconsistent Results

But courts do worse when examining forms of pregnancy discrimination that do not neatly fit this precise paradigm, despite their underlying similarities. While many pregnant women, like Castergine, are punished for becoming pregnant, despite their undiminished ability to do the job, others require some—often modest—accommodation to keep working while pregnant, and seek equal treatment in how the employer treats non-pregnant employees in similar need of accommodations. In this class of cases, courts have done a terrible job of recognizing the unequal treatment of pregnant workers as unlawful discrimination, despite clear language in the PDA directing them to do so and despite the similarity in stereotyping that lies behind the treatment of pregnant workers in both types of cases.

These cases often involve women in much-lower paying jobs than Castergine, jobs with rigidly structured workdays and no flexibility, where pregnancy requires modest allowances to continue working. In one such case, a pregnant store clerk needed—but was refused—permission to carry a water bottle on her shift, per her doctor's orders. In another, a pregnant stocker sought, but was denied, a shift change to be permitted to stock only lighter-item shelves. The refusal-to-accommodate cases also arise frequently when women hold nontraditional jobs, jobs held predominantly by men and with a history of excluding women, and become pregnant. Police work, firefighting, and construction work are common settings for this class of pregnancy discrimination cases.

In all of these cases, the pregnant worker seeks the kind of accommodation that the employer would have provided to a non-pregnant worker with a limitation that has a similar effect on the employee's ability to work. Sometimes the employer accommodates similarly situated but non-pregnant workers because of the employer's own policy (as in policies granting light-duty work for on-the-job injuries), sometimes because of an agreement with the union, and sometimes because of another legal mandate (as with the Americans with Disabilities Act, which requires reasonable accommodations for a broad range of disabilities, even temporary ones, but has been interpreted not to cover normal pregnancy). But whatever the employer's reason for accommodating the limitations of non-pregnant workers, the PDA specifically directs them to treat pregnant workers no worse than they treat other employees similar in their ability to work. Oddly, courts confronted with an employer's refusal to provide such equal treatment have refused to recognize it as unlawful pregnancy discrimination.

What makes the courts' myopia so stark is not just that the statute clearly prescribes the equal treatment of pregnancy, or even that the cases predominantly involve lower-wage workers and women holding nontraditional jobs—precisely those workers most in need of the protections of the law. Especially anomalous in the courts' very different approaches to the unequal accommodation cases versus the type of discrimination Castergine alleges is that the very same gender stereotyping and gender ideologies underlie both types of discrimination. They should not be seen as occupying opposite ends of the spectrum, but as flip sides of the same coin. In both classes of cases, stereotypes about women, work, and maternity are at the heart of the matter.

Recognizing the continuity between overtly pushing women out of their jobs when they become pregnant and accomplishing the same result more subtly by denying pregnant workers the same benefits and treatment afforded non-pregnant workers with similar work capacity, Congress proscribed both forms of discrimination in the PDA. The latter is encapsulated in the PDA's second clause, which requires pregnant workers to be treated "the same . . . as other persons not so affected but similar in their ability or inability to work." As Congress rightly understood, that clause was necessary because denying pregnant workers the same benefits, privileges and accommodations available to other workers with conditions similarly affecting work functioned to push pregnant workers out of the workforce as effectively as more blatant discriminatory exclusions. That such discriminatory policies were justified by "cost" rather than outright animus was of no matter; "cost" predictions themselves for pregnant workers were often tainted by stereotypes predicting that women would eventually leave the workforce or be less competent workers upon becoming mothers.

Historically, employer policies that denied accommodations for pregnancy, but provided them for other conditions similarly affecting work, were based on both descriptive and prescriptive stereotypes. Descriptively, such policies were predicated on stereotypes about pregnant workers as fungible, less valuable, and less deserving of accommodation than non-pregnant workers. Prescriptively, the differential treatment of pregnancy reinforced a judgment that women should not combine work and maternity, or if they do, not at the same level of

workplace attachment as the worker held before the pregnancy.

Such stereotypes continue to have force in the differential treatment of pregnant workers today. Scholars who study work and pregnancy have found that pregnant workers' requests for even minor accommodations—accommodations readily available to others with similar work capacity—are often met with outright hostility. They are treated as fungible, not worth the kinds of investments routinely made in other workers.

### The Anomaly Reaches the High Court: *Young v. U.P.S.*

A case now pending before the U.S. Supreme Court, *Young v. United Parcel Service, Inc.*, involves precisely this type of “second-class” pregnancy discrimination. Peggy Young was fired when she presented a health care provider's note restricting her from lifting heavy packages. In actuality, it would have been a minor accommodation, since she almost never had to lift heavy packages in her day-to-day job, though her job description mentioned it as part of the job, and on the rare occasions when she did, she could always find a helpful coworker. More to the point, the U.P.S. policy would have accommodated the same request had it come from a disabled worker covered by the ADA, an employee whose on-the-job injury necessitated such a request, and even a driver who lost his or her license for any reason and needed alternative work, pursuant to a collective bargaining agreement between the company and the union. But a pregnant worker whose pregnancy required such an accommodation had no option but to leave her job. She lost her case in the lower courts because they failed to see any anti-pregnancy animus in what U.P.S. had done, and instead saw the company policy as a “pregnancy neutral” rule that favored some classes of workers while leaving out pregnancy.

Increasingly, lower courts have taken this approach to deny the claims of pregnant workers seeking treatment equal to that of similarly affected workers whose non-pregnancy conditions are accommodated. In doing so, they completely miss the overlapping gender stereotypes behind the unequal accommodation cases and the more blatant hostility to pregnancy alleged in Castergine's case against the Mets. While the fate of Peggy Young's claim now rests with the Supreme Court, Castergine's case, if proven, should be an easy run around the bases.



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