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Joanna L. Grossman

*Maurice A. Deane School of Law at Hofstra University*

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# Verdict

April 1, 2014

[Joanna L. Grossman](#)

## **Undue Burden: New York City Police Officer Denied Opportunity to Take Sergeant's Exam Because She Was Due to Give Birth the Same Day**



It was a case of bad timing. Akema Thompson, an officer with the New York City Police Department, was scheduled to take the sergeant's exam on October 19, 2013. But she was also scheduled to do something else that day—give birth to a baby. Since fetuses don't take requests, Officer Thompson requested an accommodation from the city that would have allowed her to take the exam on another day in the event she needed to reschedule because of a conflict with childbirth or immediate recovery from it. Her request was denied, despite the fact that promotional exams were routinely rescheduled for other reasons.

Officer Thompson has filed a charge of discrimination against the City of New York, alleging that the testing accommodation policy, administered by the Department of Citywide Administrative Services (“DCAS”), was unlawful as applied to her. (DCAS administers testing for all civil service jobs in New York City, and, thus, the NYPD was not responsible for the denial of Officer Thompson's request.) She claims that the denial of her request for an accommodation is invalid under federal, state, and local discrimination laws. While her case has yet to be adjudicated at any level, her situation is all too common among pregnant working women. Employers routinely deny costless accommodations that impose no hardship and that, in many cases, are made available to other workers with circumstances or conditions that conflict with workplace obligations. Officer Thompson is just the latest victim of a system that fails to see pregnancy as a condition worthy of even minor accommodation. The consequences of this mindset for individual women, like Officer Thompson, and women in general is devastating.

### ***Thompson v. City of New York: The Charges***

Officer Thompson is challenging the denial of a testing accommodation as a form of unlawful discrimination. Represented by Legal Momentum, a non-profit group that advocates for the rights of women, Officer Thompson filed a charge with the federal Equal Employment Opportunity Commission (EEOC). She alleges that the denial of her requested accommodation constitutes sex, pregnancy, and disability discrimination.

In her charge, she details the request she made and the various responses she received from DCAS. This agency regulates and administers testing for all city jobs—not just those at the NYPD. Although the facts have not been adjudicated by an agency or court, the charge filed appends copies of the written correspondence back and forth between Officer Thompson and DCAS regarding her request. (Needless to say, the factual description in this

column is based on Officer Thompson's allegations. DCAS may deny these allegations or argue for a different interpretation of them as the case proceeds through the EEOC process.)

In January 2013, Officer Thompson learned that the City had scheduled a Sergeant's promotional exam for the following October. Although this might seem like a routine event, these exams are scheduled only "as needed" and can be spaced apart by several years. Officer Thompson immediately paid almost \$800 to a test prep company for a review course.

The next month, Officer Thompson became pregnant and informed the NYPD of her condition shortly thereafter. Her due date was, as mentioned above, the exact same day as the exam.

In June 2013, Officer Thompson registered for the exam, paying an additional \$83. Because of the conflict with her due date, she contacted DCAS to request that she be allowed to take the exam on another day. She provided medical documentation of her due date and the number of weeks she would need to recover medically from childbirth. She requested the accommodation numerous times both in writing and over the phone. In one of these communications, Officer Thompson mentioned that the NYPD had told her to request to take the exam on an alternative testing day already set aside for those whose religious observance conflicted with the scheduled date.

At some point, Officer Thompson sought assistance from the Patrolmen's Benevolent Association (PBA), the union for patrol officers in the NYPD, and the PBA requested an accommodation on her behalf.

The request for accommodation was flatly denied. She was told, in one piece of correspondence, that her "request to postpone this test due to the possibility that you may give birth on, or shortly after the test date, is not approvable." In another e-mail, she was informed that City policy does allow the promotional exam to be rescheduled, but only for conflicts due to (1) military duty, (2) DCAS error, (3) required court appearance (in any type of proceeding); (4) physical disability incurred on the job or (5) the death of a close relative. She was also told in other correspondence that tests could be rescheduled to accommodate religious observance.

Three days before her due date, Officer Thompson went into labor. She was hospitalized that day, October 16. While in labor, she alleges she received a telephone call from a representative at DCAS, who reiterated that she could not postpone the test because of childbirth, but offered her a cushion to sit on during the exam or two additional hours to complete it.

Neither a cushion nor extra time was going to make it possible for Officer Thompson to sit for the sergeant's exam. She had an emergency C-section on October 16th and was not released from the hospital until October 20th, the day after the exam was given. And while other candidates may well have taken the October 2013 exam at later dates due to "approvable" conflicts, Officer Thompson was denied the opportunity. It might be years before the opportunity surfaces again.

## **Pregnancy Discrimination Law**

Before the passage of the federal Pregnancy Discrimination Act (PDA) in 1978, pregnant women worked at the whim of their employers, who had almost no restraint on their ability to exclude, mistreat, or fire them. The PDA changed the landscape dramatically by guaranteeing pregnant workers two rights: (1) the right not to be subjected to adverse treatment because of pregnancy; and (2) the right to be treated the same as non-pregnant workers who are similar in their ability or inability to work. It is this second right at issue in a case like Thompson's. Employers have no absolute duty to accommodate pregnancy, but they cannot refuse to accommodate pregnancy when offering accommodations for people with similar limitations.

Employees may also have rights under state or local pregnancy discrimination laws. The New York Human Rights Law protects against pregnancy discrimination in a manner similar to the federal PDA. And, as of January 30, 2014, New York City offers pregnant workers more expansive protections under the Pregnant Workers Fairness Act. The local PWFA (distinguished from **a federal bill** (<http://verdict.justia.com/2012/05/11/the-pregnant-workers-fairness-act>) by the same name, which has been introduced in Congress but made little progress towards enactment) applies to employers with at least four employees. The law requires employers to provide

“reasonable accommodation” necessitated by pregnancy or childbirth unless doing so would cause an “undue hardship” on the employer. The types of accommodations contemplated by the law include light-duty assignments (e.g., one without heavy lifting); changes to the work setting (e.g., to avoid toxins); more frequent breaks to eat, drink, or use the bathroom.

In Officer Thompson’s case, she is challenging the City’s refusal to accommodate her pregnancy by allowing her to postpone the sergeant’s promotional exam. Under the new PWFA in New York City, the City’s denial would almost certainly be unlawful. Asking to postpone an exam that provides the opportunity for significant career enhancement and is offered very infrequently is a reasonable request. It would be all but impossible for the City to prove that postponement imposed an undue hardship given that it already offers the same accommodation to at least five other groups of workers (noted above). All that Officer Thompson asked is that an existing accommodation be extended to her—an accommodation that would be effectively costless to the City.

But this law did not take effect until January 30, 2014, several months after the test Officer Thompson missed because of childbirth. Unless the law is applied retroactively, it will not help her. However, the New York City Division of Human Rights, which implements anti-discrimination laws, has taken the position publicly that it considered pregnancy a disability even before this law took effect. Moreover, she should have been granted the accommodation under the federal and state laws in existence at the time of her request. And it is worth noting that despite the change in city law, the DCAS testing accommodation policy remains in effect today.

As noted above, the PDA provides that employers who accommodate other forms of temporary disability must also accommodate pregnancy. This clause was expressly designed to force changes to standard employer benefit and leave policies, many of which excluded pregnancy altogether. It was designed to coerce employers out of the mindset that pregnant workers were not worthy of the same accommodations or benefits, or that pregnancy did not have cognizable effects on a woman’s ability to work uninterrupted. When the Supreme Court was first asked to interpret this provision, it concluded that the provision imposed a floor on the treatment of pregnant workers, but not a ceiling. In other words, employers could no longer exempt pregnant employees from otherwise available benefits and accommodations. But they could take things in the other direction: employers could offer accommodations for pregnancy and childbirth that they did not offer to other temporarily disabled employees. This interpretation reflected Congress’s concern with the unfair treatment of pregnant workers that was commonplace before enactment of the PDA.

By its express terms, DCAS policy is contrary to the PDA. DCAS admits that it provides such accommodations to a wide variety of workers—including some with far less dire conflicts with the test than childbirth on the same day—while withholding them from pregnant officers. For example, it allows candidates to postpone the promotional exam if a close relative has died within a week of the exam date. While this is a humane rule that correctly assumes officers need time to grieve and tend to the burial of a deceased relative, it is not clear that these officers could not show up for the scheduled exam if no alternative were given.

But for Officer Thompson, both her predicted due date and her actual delivery date posed a direct and insurmountable conflict with the exam. She could not be in two places at once—a hospital maternity ward and an administrative testing room. The allegation that she was telephoned while in the hospital and offered a cushion to sit on while she took the test, if proven, would be nothing short of mockery of her situation.

The law does not require DCAS to provide testing accommodations, but it does prohibit the agency from withholding an otherwise available accommodation from pregnant candidates. And even if the policy didn’t facially violate the PDA, it imposes a disparate impact on female officers, who are disproportionately likely to have their careers hindered by this policy. Neutral policies that cause a disparate impact must be justified by business necessity and, even then, cannot be followed if there is a less burdensome alternative. Given that the promotional exam can be postponed for a host of other reasons, it will be impossible for the City to show that the refusal of postponement to pregnant candidates is necessary to the operation of the business and/or that no less burdensome approach could be taken.

## **Why the DCAS Rule Reflects Bad Policy**

Even if DCAS could successfully argue that its non-accommodation rule comports with federal and state pregnancy discrimination law, why would it want to deny a minor and costless accommodation to a valuable employee? The answer can only be in the undervaluing of female officers. Although this particular accommodation did not relate to Officer Thompson's ability to perform her existing job, it did prevent her from seeking a promotion. Had she done well on the exam and earned a promotion, wouldn't the City be better off by advancing someone proven qualified for a higher position? And for many pregnant women, the refusal of minor accommodation will affect their ability to carry out some aspects of an existing job. An employer's refusal to accommodate in such a case can mean that the employee is forced to quit or take unpaid leave. (And because DCAS administers testing for all city jobs, its stingy accommodation policy cuts a wide swath.) While the most significant consequences will be borne by the employee, suddenly deprived of income and perhaps health insurance, the employer will suffer as well in the costs of rehiring, retraining, and, perhaps, not replacing with the same quality employee.

Pregnant women generally are physically able to engage in paid work, just as they are physically able to carry out other responsibilities in their lives. (Pregnant mothers don't suddenly stop caring for other children because a new one is on the way.) But there can be conflicts between the physical effects of pregnancy and the demands of a job. Those conflicts can run the gamut—from restrictions on physical activity like lifting or climbing to restrictions on exposure to danger to the need for a different schedule. Many women, especially those who labor in low-wage jobs with inflexible working conditions or those who labor in traditionally male-dominated occupations with serious physical demands and various kinds of hazards, do need some type of accommodation during pregnancy in order to maximize the chances of a healthy delivery and continue working.

Just as the conflicts will vary by woman, by pregnancy, and by work environment, the accommodations needed to keep a pregnant woman at work will vary as well. But often, as was true for Officer Thompson, the conflicts can be alleviated with a minor and inexpensive, or even costless, accommodation. Yet, employers still deny them. They should be taken to task for this as a matter of social policy, as well as a matter of law. Whether the law requires them to or not, employers should take the steps necessary to integrate pregnant women into the workforce—in all jobs, and at all levels. Pregnancy and childbirth are temporary, but a talented employee could be there for a lifetime.



Joanna L. Grossman, a Justia columnist, is the Sidney and Walter Siben Distinguished Professor of Family law at Hofstra University. She is the coauthor of [Inside the Castle: Law and the Family in 20th Century America](#) (Princeton University Press 2011), co-winner of the 2011 David J. Langum, Sr. Prize for Best Book in American Legal History, and the coeditor of [Gender Equality: Dimensions of Women's Equal Citizenship](#) (Cambridge University Press 2009). Her columns focus on family law, trusts and estates, and sex discrimination.

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