

Judge Tosses EEOC Pregnancy-Discrimination Class Action based on Work-Life Balance Theory, Echoing Themes from *Dukes*

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Granting an employer's request for summary judgment, a federal judge in New York has ruled that the U.S. Equal Employment Opportunity Commission failed to demonstrate that an employer engaged in a pattern or practice of discrimination against pregnant employees or those who have returned from maternity leave in violation of Title VII of the Civil Rights Act. *EEOC v. Bloomberg L.P.*, No. 07-CV-08383 (S.D. N.Y. Aug. 16, 2011). Judge Loretta Preska ruled the EEOC presented insufficient evidence of discrimination in its lawsuit, which she found was based on a theory of "work-life balance." According to Judge Preska, the law does not require companies to ignore employees' work-family tradeoffs when deciding about employee pay and promotions. The law simply requires fair treatment of all employees.

Although Judge Preska did not specifically refer to the Supreme Court's ruling earlier this year disposing of a broad gender-based Rule 23 class action against Wal-Mart, *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), her decision in *Bloomberg* makes clear that federal courts are willing to utilize themes from *Dukes* when ruling on similar broad-based EEOC actions that are not governed by Rule 23.

Background

In 2007, the EEOC filed a lawsuit against Bloomberg L.P. on behalf of a class of female employees who worked for the company between February 2, 2002, and March 31, 2009, and claimed they were discriminated against because they were pregnant or took maternity leave during that time.

Proving Pattern or Practice of Pregnancy Discrimination

The EEOC alleged that Bloomberg engaged in a pattern or practice of discrimination in violation of Title VII. The EEOC's central claim was that Bloomberg reduced pregnant women's or

mothers' pay and demoted them based on the class members' pregnancy and pregnancy-related leave.

To make out a pregnancy discrimination claim, a plaintiff must show that the employer treated the employee differently from others who took leave or were otherwise unable or unwilling to perform their duties for reasons unrelated to pregnancy or that she was treated differently because of her pregnancy.

According to Judge Preska, in a pattern or practice claim, the focus is on widespread acts of intentional discrimination against individuals. The plaintiffs must prove more than "sporadic acts of discrimination; rather, they must establish that intentional discrimination was the defendant's 'standard operating procedure.'"

Evidence Insufficient

"Statistics are so central to pattern or practices cases," Judge Preska noted, "that they 'alone can make out a prima facie case of discrimination if the statistics reveal' a gross disparity in employee treatment." Judge Preska wrote that while anecdotal evidence may be enough to prove individual claims of discrimination, "rarely, if ever, can such evidence show a systemic pattern of discrimination."

In *Dukes*, the Supreme Court implicitly encouraged district courts to scrutinize expert testimony, finding reason to "doubt" the *Dukes* district court's disposition for failing to exclude the "social framework" analysis of the plaintiffs' social scientist expert. *Dukes*, 131 S. Ct. at 2554.

As a prelude to her summary judgment, and prior to the *Dukes* ruling, Judge Preska had excluded from evidence the reports and testimony of the EEOC's social psychologist (who also used a "social framework analysis") and labor economist. Judge Preska found that the EEOC's expert testimony did not meet the requirements set forth in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). Thus, the EEOC faced Bloomberg's summary judgment ruling without statistical evidence that purported to show that pregnant women taking maternity leave had incurred statistically significant lower base pay rate changes, lower bonus-type awards and lower performance ratings after taking pregnancy leaves than similarly situated, comparable employees. At the same time Judge Preska excluded the EEOC's expert's evidence, she denied the EEOC's motion to exclude Bloomberg's experts' evidence. *EEOC v. Bloomberg L.P.*, No. 07 Civ. 8383 (S.D. N.Y. Aug. 31, 2010). Thus, Bloomberg was armed with statistical evidence on summary judgment, while the EEOC possessed no such evidence and was forced to rely solely on anecdotal evidence.

The anecdotal evidence presented by the Commission was not enough. It could not overcome the company's statistical evidence, which at the time of the summary judgment ruling, was un rebutted. Bloomberg's statistical evidence showed the company's "standard operating procedure was to treat pregnant employees who took leave similarly to any employee who took significant time away from work for whatever reason." Moreover, the experts reported that employees in the plaintiff-class received higher average and median growth in their compensation packages than those who took non-maternity leaves.

In denying summary judgment, Judge Preska echoed a number of other themes from *Dukes*. In *Dukes*, the Supreme Court took notice of the fact that Wal-Mart had a policy against sex discrimination and that Wal-Mart imposed penalties for denials of equal employment opportunity. *Dukes* at 2553. Similarly, Judge Preska observed that Bloomberg provided its managers with formal training about compensation decisions, including specific admonitions not to discriminate on the basis of pregnancy. Slip Op. at 7.

In *Dukes*, the Supreme Court concluded the plaintiffs' anecdotal testimony insufficient, finding that the 120 affidavits filed represented only one account for every 12,500 class members. In *Bloomberg*, Judge Preska found it significant that the EEOC identified as victims only 78 out of potentially 603 women who were pregnant/took maternity leave (i.e., only 12.9%). Slip Op. at 42.

In *Dukes*, the Supreme Court found that decentralized discretionary decision-making by lower level managers would lead in most cases to managers selecting "sex-neutral, performance based criteria for hiring and promotion." *Dukes* at 2554. Likewise, Judge Preska found that decision-making at Bloomberg was performed by lower level managers. That decision-making was not centralized and the lower level managers were considering subjective factors required the EEOC to provide a higher quality anecdotal evidence to show that Bloomberg engaged in a pattern or practice of discrimination. Slip Op. at 40, 47.

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