

# NJ Supreme Court Confirms Scope and Application of Pregnant Workers Fairness Act

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In 2015, the United States Supreme Court in *Young v. United Parcel Service*, 575 U.S. 206 (2015), provided insight into the analysis required for evaluating discrimination claims involving pregnant employees, including how employers must approach accommodations for those employees. Five years later, *Delanoy v. Township of Ocean*, \_\_\_ N.J. \_\_\_ (2020), marks the New Jersey Supreme Court’s first interpretation of the Pregnant Workers Fairness Act (PWFA), N.J.S.A. 10:5-12(s).

The PWFA is a statutory amendment to the New Jersey Law Against Discrimination, which was enacted in 2014 to provide additional protections for pregnant and breastfeeding employees. The court in *Delanoy* affirmed the New Jersey Appellate Division’s holding in *Delanoy v. Township of Ocean*, 462 N.J. Super. 78 (App. Div. 2020). This opinion is significant as, for the first time, the court identified three distinct theories under which claims can be brought under the PWFA, including: (1) unequal or unfavorable treatment; (2) failure to accommodate; and (3) unlawful penalization.

## **The Pregnant Workers Fairness Act**

The PWFA amended the New Jersey Law Against Discrimination by incorporating

specific protections for “pregnant or breastfeeding” employees. *Delanoy*, \_\_\_ N.J. \_\_\_ (slip op. at 3-4). Subsection (s) of the PWFA sets forth an employer’s obligations with respect to pregnant or breastfeeding employees and provides, in relevant part, that it shall be unlawful “[f]or an employer to treat, for employment-related purposes, a woman employee that the employer knows, or should know, is affected by pregnancy or breastfeeding in a manner less favorable than the treatment of other persons not affected by pregnancy or breastfeeding but similar in their ability or inability to work.” N.J.S.A. 10:5-12(s).

## **Relevant Factual and Procedural Background**

The plaintiff was a then-pregnant police officer who challenged the light-duty Standard Operating Procedures (SOPs) of the defendant employer. As noted by the court, “[t]he Maternity SOP applied to pregnant officers and the Light-Duty SOP applied to non-pregnant injured officers.” *Delanoy*, \_\_\_ N.J. \_\_\_ (slip op. at 8). Both the Maternity and Light-Duty SOP required that officers provide a note from their doctor recommending a light-duty assignment. Both SOPs also required the officers to exhaust all accumulated leave. However, the Light-Duty SOP provided a waiver of the accumulated

leave requirement, whereas the Maternity SOP did not. Additionally, the Maternity SOP also required a projected return date “no more than 45 calendar days past the expected due date,” whereas under the Light-Duty SOP, the employee’s physician determined the projected return date. *Id.* (slip op. at 8). As part of her light duty, the plaintiff was assigned to “walk-in” duty and claims she was treated detrimentally following her request for an accommodation. The plaintiff thereafter filed suit challenging the SOPs under the PWFA.

The trial court granted the defendant’s motion for summary judgment, finding that the Maternity SOP did not violate the PWFA’s “‘equal treatment’ mandate as a matter of law.” *Id.* (slip op. at 10). The Appellate Division reversed, finding, in relevant part, that the Maternity SOP was “facially invalid because it treated pregnant employees unfavorably as compared to non-pregnant employees subject to the Light-Duty SOP[.]” *Id.* (slip op. at 11). The Appellate Division also vacated the granting of summary judgment to the defendant with respect to the plaintiff’s accommodation claims, finding a genuine issue of material fact as to the reasonableness of the policy and whether it constituted an impermissible penalty.

### **The New Jersey Supreme Court Considers the PWFA**

The Supreme Court affirmed the Appellate Division’s reversal of the grant of summary judgment to the defendant. The court endorsed the Appellate Division’s recognition of three distinct causes of action under the PWFA: “1) unequal or unfavorable treatment; 2) failure to accommodate; and 3) unlawful penalization.” *Id.* (slip op. at 12). Notably, the court highlighted that the plaintiff failed to

identify which theory she brings her claim under, and instructed future litigants to identify the specific theory under which their claim is based. The court determined the Maternity SOP amounted to a per se violation of the unfavorable treatment theory of the PWFA because it “treated pregnant employees less favorably than non-pregnant employees who were similar in their ability or inability to work.” *Id.* (slip op. at 15).

Further, the court determined that the plaintiff met the statutory criteria for a failure to accommodate claim. In analyzing this claim, the court opined that reasonable accommodation claims should be analyzed under the framework articulated in the PWFA, rather than the LAD, as the Appellate Division had. *Id.* (slip op. at 20). The court identified the following elements to establish a prima facie failure to accommodate claim under the PWFA: “1) the plaintiff employee must be pregnant or breastfeeding; 2) the plaintiff employee must request reasonable accommodation, as prescribed by subsection (s), so that the employer knows or should know of the plaintiff’s need for an accommodation; and 3) the employer must fail to provide a reasonable accommodation.” *Id.* (slip op. at 25).

The court further recognized the employer has the burden of establishing that a reasonable accommodation constitutes an undue hardship as an affirmative defense, which requires the employer to “produce proof that the employee cannot fulfill an essential function of her employment, and, if so, that her continued employment with the accommodation is an undue hardship for the employer.” *Ibid.* The court recognized that an “employee’s temporary inability to perform an essential job function is one of several factors to be considered,” and “the PWFA

may require, in specific circumstances, that an employer provide a reasonable accommodation that entails temporarily permitting a pregnant employee to transfer to work that omits an essential function of her job.” *Id.* (slip op. at 25-26). Here, the court remanded to the trial court to determine whether the defendant can establish undue hardship.

Finally, the court also recognized an “unlawful penalization” theory under the PWFA. It agreed with the Appellate Division’s interpretation of this theory, which explained unlawful penalization as prohibiting “employer-imposed conditions on accommodations that are especially harsh.” *Id.* (slip op. at 28). The Appellate Division recognized retaliatory behavior could qualify as unlawful penalization. While the court agreed with the Appellate Division’s interpretation, it added further context to the legislative intent behind this theory, noting, “[t]he Legislature meant it to have its own teeth in promoting the public policy in favor of having employers welcome the continuing presence of pregnant and breastfeeding employees in their workplaces.” *Ibid.* The court urged future clarity on this issue and suggested that “all of the contemplated forms of penalty should be considered when a model jury charge is fashioned in this new area.” *Id.* (slip op. at 29). With respect to the instant matter, the court recognized the defendant’s accumulated leave condition of the Maternity SOP, as well as the plaintiff’s

suggestion that she was “unfairly assigned to ‘walk-in’ duty[,]” could potentially constitute unlawful penalization under the PWFA. *Id.* (slip op. at 29-30). However, the court found the issue of whether these actions constitute unlawful penalization is a question which must be decided by a jury on remand. *Ibid.*

This case is of import because it clearly identifies the theories under which a claim can be brought pursuant to the PWFA. Counsel are cautioned to adhere to the pronouncements of the court’s opinion since failure to do so might subject the lawsuit to challenge, particularly if an individual’s asserted PWFA claims fail to assert a theory under subsection (s) upon which the claim is based. With respect to reasonable accommodation claims, it is imperative that an employer develops and asserts any undue hardship arguments when accommodations are being considered for a pregnant or breastfeeding employee, since that analysis will be key to its affirmative defenses to any lawsuit filed under the PWFA.



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