September 11, 2025

Supervisor's *Strained* Remark Leads Sixth Circuit Court of Appeals to Revive Employee's Pregnancy Discrimination Claim

Gather round, friends, and let me tell you of a *stra(i)nge* story and a *strained* decision from the Sixth Circuit Court of Appeals (which reviews decisions of the federal district courts of Kentucky, Michigan, Ohio, and Tennessee).

A "Strained" Reaction and an Estranged Relationship

What's strangest about the story is that it involves layoffs in a health care system during the peak of COVID in 2020. (And, no, that wasn't even the plaintiff's pretext argument). The Plaintiff, Jackilyn Bunnell, was an ultrasonographer for the William Beaumont Hospital System. In December 2019, she announced her pregnancy, and her supervisor congratulated her and immediately granted her first accommodation request not to be exposed to x-rays during her pregnancy.

In late February 2020, Bunnell's co-workers complained she was refusing to enter the rooms of patients with infectious diseases. Bunnell hadn't cleared that with Zeiter, who told her she wasn't relieved from entering these rooms. Bunnell then gave Zeiter a doctor's note which cursorily said, "Jackilyn is pregnant and must not be exposed to any infectious disease at work." Zeiter reacted by calling Bunnell a "disappointment" and accused her of putting a "strain" on the department. Zeiter apologized for her reaction soon after; but, when Bunnell pressed her, Zeiter maintained that while Bunnell herself was not a strain, it strained the department when employees had limitations.

In March 2020, Zeiter affirmatively removed Bunnell and another pregnant ultrasonographer from having to scan patients with COVID, without requiring a doctor's note or needing a request. Zeiter also gave Bunnell the authority to refuse assignments that made her feel unsafe whenever she worked a Labor Pool rotation where she might be placed under other supervisors.

In April 2020, the Hospital System laid off 2,250 employees. Zeiter had to choose four employees for lay off, and, applying several metrics, including many productivity metrics, she decided Bunnell and the other pregnant employee should be included in the layoff.

Though Bunnell couldn't dispute that Zeiter had voluntarily given her broad accommodations after the "strain" remark, she never forgot it nor forgave it. At her deposition, she testified that she found it inappropriate for any manager to have said "under any circumstances."

A Strained Decision

Bunnell asserted a kitchen sink of claims, but we'll be focusing on the Court's decision that Bunnell's PDA claim deserved to be heard by a jury. In making that decision, the two judges in the majority adopted Bunnell's critiques of the various sorts of productivity data that Zeiter used

Copyright 2025 Lehr Middlebrooks Vreeland & Thompson, P.C. All rights reserved.
Reproduction or distribution of these materials without authorization of the authors is prohibited.

to rank employees for the RIF, such as Zeiter's decision to consider the number of inpatient and outpatient procedures the ultrasonographers performed as opposed to inpatient procedures only. There was also a question about whether a particular rotation assignment had a higher number of patient cancellations resulting in fewer procedures performed, and whether Bunnell worked a disproportionate number of assignments at that location. Similarly, Zeiter had used portable scans as a metric, without verifying that portable scan shifts were actually equally distributed or measuring portable scans performed per hour or shift. Finally, the Court took issue with Zeiter's decision not to include the metric of total hours worked, which would have favored Bunnell.

One judge of the three-judge panel dissented that this level of second-guessing violated the employment law standard that a court should not substitute its business judgment for the employer's business judgment. The majority responded that the questions about the productivity data "***combined with Zeiter's statements evincing animus***" and the inclusion of both pregnant employees in the RIF created adequate reason to believe that pregnancy discrimination could have been the real reason for her furlough.

Take-Aways

While the *Bunnell* case is unpublished and thus not binding precedent, it is persuasive, particularly for trial courts within the Sixth Circuit's jurisdiction.

Take-Away 1: Employers should ensure that data used in a RIF (or in other decisions like compensation increases, bonuses, and promotions) do not penalize employees for lost work time or opportunities arising from legally-protected leave use or reasonable accommodations.[1]

Take-Away 2: Even when objective data is used in a RIF, employers should still review the data sets used to ensure they are reliable reflections of the overall qualities which the employer is trying to evaluate. This case illustrates how a single and non-pejorative remark, unlikely to even be known to HR or higher officers, opened the door to a higher level of scrutiny of the supervisor's decisionmaking.

Take-Away 3: Employees can point to others in their protected class status who also experienced adverse actions as evidence of bias. As employer review of decisionmaking by protected class status is under fire (but is not prohibited), concerned employers should discuss with counsel if they should regularly or situationally review certain types of decisionmaking for problematic trends that could be used as evidence of bias in future litigation. (To be clear, it has always been unlawful to make or alter employment decisions for demographic balance or to avoid a negative statistical result. Such analyses are only a screener—and only one type of screener—that tell employers where problems might lie, not where problems do lie).

If you have any questions or would like additional information, please contact Whitney Brown at 205-323-9274 or wbrown@lehrmiddlebrooks.com.

[1] It's only fair to the Hospital System to note that Bunnell did not allege that this occurred in her case, but I'd be remiss if I didn't mention this as a baseline.

Copyright 2025 Lehr Middlebrooks Vreeland & Thompson, P.C. All rights reserved.
Reproduction or distribution of these materials without authorization of the authors is prohibited.