Synagogue Can't Unring Bell on Pregnant Worker's Firing

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By Patrick Dorrian

A program director at a New York synagogue can pursue her legal claim that she was fired because she was pregnant, despite the employer's attempt to withdraw her termination notice, a federal appeals court ruled (*Shultz v. Congregation Shearith Israel of N.Y.C., Spanish & Portugese Synagogue* , 2017 BL 279370, 2d Cir., No. 16-3140-cv, 8/10/17).

The ruling deals with the novel issue of whether an employment action supporting a lawsuit occurs when a worker is told she is being fired or when the termination actually takes effect. After hearing from Alana Shultz's lawyer, Congregation Shearith Israel of the City of New York, the Spanish and Portuguese Synagogue, told Shultz that she wasn't fired after all, two weeks after being told her job was being eliminated.

The congregation telling Shultz she could remain in the position didn't preclude her from pursuing a sex discrimination claim under federal law, the U.S. Court of Appeals for the Second Circuit held Aug. 10. Notice of termination is an adverse job action for which a worker may be entitled to damages, the court said. It pointed to U.S. Supreme Court decisions finding an employee's time to sue for an alleged discriminatory discharge begins to run when she is told she is going to be terminated.

Outcome Implied in High Court Holdings

"The Supreme Court has not directly addressed whether a rescinded termination constitutes an adverse employment action," Judge Gerard E. Lynch wrote. But the justices' holdings on the accrual of the statute of limitations in those prior cases "necessarily implies that the notification of termination qualifies as an adverse employment action," he said.

"No female employee should have to fear termination because she becomes pregnant," Shultz's attorney Jeanne M. Christensen told Bloomberg BNA in an Aug. 10 email. "We filed this action on behalf of our client, Alana Shultz, after her employer of more than a decade, Congregation Shearith Israel, fired her once it learned she was pregnant. Regardless of Shearith Israel's place in the Jewish community, the Congregation is not free to flout federal anti-discrimination laws. We look forward to moving ahead to discovery and holding Shearith Israel accountable for the gross injustice committed against our client," she said. Christensen is a partner at Wigdor LLP in New York.

Despite the Second Circuit addressing what it termed "a matter of first impression," Christensen doesn't see the ruling having a significant benefit for employees generally. The factual circumstances Shultz faced are somewhat rare, she said, and the congregation's argument that adverse employment action was never really taken against Shultz because her discharge was rescinded before it became effective was "ridiculous," Christensen said in an Aug. 10 phone interview. The ruling doesn't change the law, she said.

Once an employer fires someone, "you can't take it back," she said.

Moreover, the congregation shouldn't benefit from Shultz's lawyers calling to point out the firing was illegal, she said. "If we had sued right away" without first calling, there would have been no chance for the congregation to attempt to withdraw the discharge, Christensen said.

"We are exploring all legal options with our clients, in order to determine the best course of action following the Second Circuit's recent decision," the congregation told Bloomberg BNA Aug. 10 in an email from its lawyers. "At this time, seeking further judicial review is still on the table."

Rescission Attempt May Cap Damages

The court stressed that its holding was limited to cases in which the challenged adverse employment action is a notice of termination. Being told you're fired is "unlike other types of actions that an employer may take towards an employee in that it announces the complete termination of the employment relationship," it wrote.

And the court didn't close the door on the possibility of the time between a notice of termination and its retraction being so short that the harm flowing from the notice is so slight that no adverse action may be said to have occurred. "An impulsive 'You're fired,' followed immediately by a revocation of the firing, would present different circumstances than those of this case," Lynch said.

Even in Shultz's case, the congregation's telling her her job was still there for her isn't necessarily without legal consequence, the court ruled. If the congregation's change of stance was in good faith, the court said, Shultz may have failed to mitigate her damages by leaving the job on the date set by the notice of termination and never returning.

An employer's liability for back pay for a wrongful discharge under Title VII is tolled—or cut off—when an unconditional offer to return to employment is unreasonably rejected by the plaintiff, Lynch said.

But returning to work wasn't an option for Shultz, her lawyer said. The people she would have been working with—the congregation's Executive Director Barbara Reiss, one of its rabbis Meir Soloveichik, and Michael Lustig, a member of its board of trustees, all of whom Shultz also sued—were the ones who mistreated her in the first place and they still harbored a "deep-rooted" bias against Shultz based on her status as a pregnant woman, Christensen told Bloomberg BNA.

The decision also revived Shultz's claim of interference with her rights under the Family and Medical Leave Act as well as her sex discrimination claims under New York state and city law. It affirmed summary judgment on her constructive discharge and retaliation claims.

Judges Jose A. Cabranes and Kiyo A. Matsumoto joined the opinion.

Bryan Arbeit of Wigdor LLP also represented Shultz. Vincent Avery and Sarir Z. Silver of Akerman LLP in New York represented Shearith Israel, Reiss, Soloveichek, and Lustig.