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SECOND CIRCUIT REVIEW

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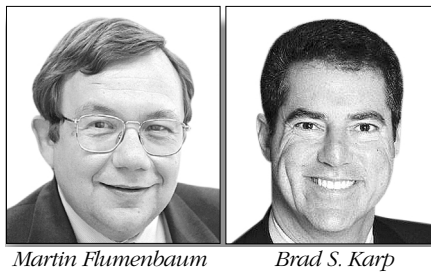
Gender Stereotyping Claims Under 42 USC §1983

In this month's column, we examine the U.S. Court of Appeals for the Second Circuit's recent ruling in *Back v. Hastings on Hudson Union Free Sch. Dist.*, No. 03-7058, 2004 WL 739846 (2d Cir April 7, 2004), in which the court wrestled with "an important question, one that strikes at the persistent 'fault line between work and family — precisely where sex-based overgeneralization has been and remains strongest.'"

In this important decision, the court held that "stereotyping about the qualities of mothers is a form of gender discrimination" that is actionable under 42 USC §1983. The court also found that such discrimination "can be determined in the absence of evidence about how the employer in question treated fathers." As a result of this ruling, the Second Circuit vacated and remanded in large part, the decision of the U.S. District Court for the Southern District of New York, which had granted summary judgment for various defendants.

Background

Plaintiff Elana Back worked as a pub-



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lic elementary school psychologist on a three-year tenure track. Although she consistently earned superlative evaluations and reviews from her supervisors, Back was denied tenure and her probationary period was terminated.

Back alleged that defendants' decision to deny tenure and terminate her employment violated her constitutional right to equal protection of the laws and asserted "that the real reason she was [terminated] was that the defendants presumed that she, as a young mother, would not continue to demonstrate the necessary devotion to her job, and indeed that she could not maintain such devotion while at the same time being a good mother."

Defendants, however, claimed that Back "lacked organizational and interpersonal skills." Consequently, Back brought suit against four defendants, including the principal of the school where she worked, the director of pupil personnel services for the school district, the school district and its superintendent.

During her first two years on the job,

Back earned excellent evaluations, and was said to be well-positioned to become tenured. Narrative evaluations by her two supervisors (the school's principal and the school district's director of pupil personnel services) indicated, among other things, that Back had "served as a positive child advocate," and was a "valuable member of the school/community."

Back continued to receive superlative evaluations and reviews after she returned to work from maternity leave during her second year, and "[o]ther contemporaneous observations also resulted in strongly positive feedback." The enthusiasm for her performance extended into Back's third year working at the school as well. And, "all three individual defendants repeatedly assured [Back] throughout this time that she would receive tenure."

According to Back, "things changed dramatically as her tenure review approached," however. One of her supervisors asked Back how she was "planning on spacing her offspring," and said, "[p]lease do not get pregnant until I retire, and suggested that Back 'wait until [her son and only child] was in kindergarten to have another child.'" Additionally, the same supervisor also challenged Back's work ethic and schedule, insisted that she needed to work longer hours, and said, "What's the big deal? You have a nanny. This is what you [have] to do to get tenure."

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Moreover, this supervisor also indicated that “Back should ‘maybe... reconsider whether [Back] could be a mother and do this job.’” Further, both supervisors “were ‘concerned that if [Back] received tenure, [she] would work [fewer hours] and did not know how [she] could possibly do this job with children.’”

Even more astonishing, according to the case, Back’s supervisors allegedly made the following comments: they expressed disbelief and uncertainty over how and whether Back could “‘perform [her] job with little ones;’” insisted that she work 12-hour days (without any evidence that Back’s performance was suffering); expressed various concerns over Back’s childcare arrangements; and basically asserted that she could not prioritize her family over her work, telling Back that, “this was perhaps not the job or the school district for her if she had ‘little ones,’ and that it was ‘not possible for [her] to be a good mother and have this job.’”

Back’s supervisors allegedly expressed these and other doubts, indicating their view that Back’s role as a young mother was fundamentally incompatible with her continued commitment to her job. Accordingly, they recommended that Back be denied tenure, reasoning that “their informal interactions with her had [not been] positive,” “far too many” parents and teachers found Back to be difficult and problematic to work with, and Back lacked critical organizational skills — all of which Back asserted were merely pretextual.

Grievance Process Led to Termination

According to the case, following the supervisors’ filings of the first negative evaluations of Back, “[t]he union filed a grievance on Back’s behalf, claiming that [the supervisors’] discriminatory comments tainted the termination deci-

sion.” The grievance review process (which included review by a panel of administrators and teachers assembled by the Board of Education) ended in Back’s termination.

Evaluating Back’s §1983 claim, the Southern District of New York granted summary judgment to the defendants based on the following five grounds: (1) the Second Circuit “had not held that a ‘sex plus’ claim can be brought under §1983”; (2) the supervisors’ comments were “‘stray remarks’ which did not show sex discrimination”; (3) Back had “failed to prove that the reasons given for not granting her tenure were pretext-

The Second Circuit thus held that the ‘stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive.’

ual”; (4) no genuine issues of material fact supported §1983 liability against the school district or its superintendent; and (5) qualified immunity justified summary judgment for the three individual defendants.

The Appeal

On appeal, Back argued that job termination (or, indeed, any “adverse employment consequence,” including demotion or denial of promotion) “imposed because of stereotypes about motherhood is a form of gender discrimination which contravenes the Equal Protection Clause,” that the district court “wrongly resolved disputed issues of material fact,” and erred in finding that the three individual defendants were entitled to qualified immunity.

The Second Circuit largely agreed. In

a unanimous decision written by Judge Guido Calabresi, the court, which also included Judges Robert A. Katzmann and Ralph K. Winter Jr., vacated the lower court’s grant of summary judgment with respect to the supervisors on both the discrimination claim and qualified immunity defense, and ordered that the case be remanded for trial with respect to them. The court, however, affirmed the lower court’s grant of summary judgment with respect to the school district and its superintendent.

In analyzing Back’s theory of discrimination, the Second Circuit first emphasized that “[i]ndividuals have a clear right, protected by the Fourteenth Amendment, to be free from discrimination on the basis of sex in public employment.” (citing *Davis v. Passman*, 442 U.S. 228, 234-35 (1979); *Rodriguez v. Bd. of Educ.*, 620 F.2d 362, 366 (2d Cir. 1980)). The court noted that plaintiffs alleging constitutional rights violations may bring employment discrimination claims under §1983 alone without also pleading a Title VII violation — which is precisely what Back did, framing her claim as one of gender discrimination arising under the Equal Protection Clause.

The court summarily rejected defendants-appellees’ characterization of Back’s claim as being “gender-plus” or “sex-plus” (which refers to an employer’s policy or practice of classifying employees “on the basis of sex plus another characteristic”), and thus not actionable under §1983, calling the terms “heuristic ...a judicial convenience developed in the context of Title VII to affirm that plaintiffs can, under certain circumstances, survive summary judgment even when not all members of a disfavored class are discriminated against.” The court explained that “sex-plus” discrimination “is certainly actionable in a §1983 case,” as long as plaintiff “pro-

vides evidence of purposefully sex-discriminatory acts.”

The Second Circuit found that Back's claims survived summary judgment in part because, as the U.S. Supreme Court has explained, “‘stereotyped remarks can certainly be evidence that gender played a part’ in an adverse employment decision.” *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989)). Indeed, Back predicated her claims on what Judge Calabresi called a “‘stereotyping’ theory.” Similar to the plaintiff in *Price Waterhouse*, Back argued that “comments made about a woman’s inability to combine work and motherhood are direct evidence of [gender-based] discrimination.” The Second Circuit agreed, finding that gender-based discrimination was plainly apparent from the views expressed by Back’s supervisors that a woman cannot simultaneously be a good mother and work long hours or have child-rearing responsibilities and be highly motivated and committed to her job.

The court found that a jury could use such statements as evidence of discrimination. Moreover, Judge Calabresi noted that the Supreme Court very recently “concluded that stereotypes of this sort were strong and pervasive enough to justify prophylactic congressional action in the form of the Family Medical Leave Act[.]” *Id.* (citing *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721 (2003)). And because stereotypes about mothers are not “gender plus parenthood” stereotypes, the Second Circuit rejected defendant-appellees’ argument that Back had to show that similarly situated men were treated differently in order to survive summary judgment. *Id.* at *8 (citing *Brown v. Henderson*, 257 F.3d 246, 252 (2d Cir. 2001)).

The Second Circuit thus held that

the “stereotyping of women as caregivers can by itself and without more be evidence of an impermissible, sex-based motive.”

Furthermore, the court found that Back defeated summary judgment with respect to her claims against her two supervisors. As a threshold matter, she successfully established individual liability under §1983 by showing (a) that her supervisors were “‘person[s]’ acting ‘under the color of state law,’ and (b) that [they] caused [her] to be deprived of a federal right.” Back also showed — as she must under Second Circuit precedent — that her two supervisors were personally involved in the alleged discrimination. *Id.* at *9 (citing *McKinnon v. Patterson*, 568 F.2d 930, 934 (2d Cir. 1977)).

The court then used the familiar framework established by *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to assess Back’s claim. Accordingly, it found that Back made out a prima facie case of discrimination with respect to her two supervisors by offering “evidence of discriminatory comments.” It further found, the supervisors could not offer case dispositive, non-discriminatory reasons for their negative evaluations of Back’s interpersonal and organizational skills.

Lastly, the court was able to identify several other factors which, when combined with “the sudden decline in performance evaluations that occurred between the beginning and end of Back’s third year — that is, only after the alleged discriminatory comments began — support a conclusion of pretext.”

Applying its proximate causation analysis, the court found that “[t]he [School] Board’s action and the [superintendent’s] negative recommendation” — which formally denied Back tenure — “were certainly ‘normal or foreseeable consequence[s]’ ” of her supervisors’

negative recommendations. Consequently, the court concluded that Back demonstrated a causal connection between her supervisors’ actions and her injury, as she must to prove employment discrimination.

The Second Circuit affirmed the lower court’s grant of summary judgment to the school district and its superintendent. The court found no sustainable claim that the school district had any policy or custom of gender discrimination. *Id.* at *13 (citing *Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658, 694 (1978)). The school district had, in fact, responded reasonably to Back’s allegations by appointing an independent review panel. Furthermore, there was no evidence that the superintendent “engaged directly in any discriminatory conduct.” Indeed, neither party demonstrated “‘deliberate indifference’ of the sort that shows that ‘the defendant intended the discrimination to occur.’ ”

Finally, the court rejected the two supervisors’ qualified immunity claims on the basis that the “constitutional right to be free from sex discrimination [and] adverse actions taken on the basis of gender stereotypes,” was defined with “reasonable specificity” under both Second Circuit and Supreme Court jurisprudence.

The pragmatic impact of *Back* may prove to be significant. The Second Circuit has provided a clearer statement that gender discrimination claims may be brought under §1983, one that satisfies the statute’s remedial purposes and empowers a wider range of potential plaintiffs.