

97CV05927-DGT-0

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

Christine Dimino,

Plaintiff,

-against-

Staten Island Railway/Staten Island
Rapid Transit Operating Authority,
New York City Transit Authority,
John M. Long, Richard Dreyfus,

Defendants.

MEMORANDUM
AND ORDER

Civil Action No.
CV-97-5927 (DGT)

-----X

TRAGER, District Judge:

Plaintiff filed suit, under various federal and state statutes, including Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2(a)(2) and 42 U.S.C. §1983, against defendants for allegedly preventing her from performing her job as a Staten Island Rapid Transit Operating Authority ("SIRTOA") police officer because she became pregnant. Defendant Dreyfus, the Deputy Executive Assistant General Counsel of the New York City Transit Authority ("NYCTA") moved to dismiss all claims against him, pursuant to Fed.R.Civ.P. 12. Oral argument was held on June 2, 1998, at which time the court granted defendant Dreyfus' motion. On June 15, 1998, plaintiff filed a motion to reconsider, vacate, and certify pursuant to Fed.R.Civ.P. 59, 60, and 54(b). Because the court finds that it did not err in granting defendant Dreyfus' motion to dismiss, plaintiff's motion is denied.

CM

Background

(1)

Plaintiff was employed as a police officer for SIRTOA. On September 17, 1997, plaintiff advised SIRTOA's police chief, defendant Long, that she was pregnant and provided him with two notes, one from her doctor, Frank Arbucci, and one she wrote herself. The notes confirmed that plaintiff was pregnant and requested that her "work should reflect this accordingly."

Complaint, ¶19. Plaintiff's note stated:

Attached is a letter from my physician indicating I am pregnant. It is at this time I request to be placed on restricted duty to avoid complications in my pregnancy. I am sure you would agree it would be unwise for me to take on work that would involve danger to my abdomen or an exposure to falling which could result in losing my unborn child. There is also a risk of danger to the public I protect, my fellow officers and not to mention a serious liability exposure.

Thank you in advance for your prompt reply regarding this important matter.

Complaint, ¶20. The current contract between plaintiff's union and SIRTOA, however, does not contain any provision for medically-based restricted or light duty. Thus, when plaintiff arrived at work, on September 19, 1997, she was instructed by defendant Long to leave her weapon and police officer's badge in her locker and go home. See Complaint, ¶¶26-27.

On September 22, 1997, plaintiff filed a discrimination complaint with the Equal Employment Opportunity Commission ("EEOC"). Two days later, on September 24, 1997, plaintiff

presented a second note from Dr. Arbucci, which stated that he did "not want [plaintiff] to have duties which could arise in physical trauma to her abdomen." Complaint, ¶41. Plaintiff was sent to the NYCTA's Medical Department for evaluation,¹ which found that she was not capable of "full work". Defendant Long advised plaintiff to return home. See Complaint, ¶¶42-43.

In a letter from plaintiff's attorney to defendant Long, dated September 24, 1997, plaintiff's position, buttressed by legal argument, was conveyed to defendants. In the letter, plaintiff requested that defendants "refer this letter to legal counsel with a request that [plaintiff's attorney] be contacted forthwith." In the last paragraph, the letter also stated that plaintiff's counsel "hope[d]" that litigation did not become "necessary." Complaint, ¶43. Plaintiff's attorney did not wait to be contacted by defendants' legal counsel, but, instead, telephoned the office of the General Counsel of the Transit Authority, and eventually spoke with defendant Dreyfus. See Complaint, ¶44. As counsel for SIRTOA, and with knowledge of plaintiff's EEOC complaint, see Dreyfus Declaration, ¶3, defendant Dreyfus suggested that if plaintiff would sign a statement withdrawing her request for restricted duty and affirming that she was physically capable of performing her job responsibilities, she could return to work full-time. Defendant

¹The NYCTA performs several administrative functions for SIRTOA, including providing legal representation and certain medical services for SIRTOA employees.

Dreyfus drafted a statement for plaintiff to sign, which stated:

I, Christine Dimino, at the present time can perform my full duties as a police officer for the Staten Island Rapid Transit Operating Authority. I am physically and medically capable of performing these duties and hereby withdraw my request for restricted duty due to my pregnancy. Should my condition change so that I am not capable of performing my full duties as a police officer, I may submit documentation concerning my medical condition at that time for further consideration consistent with the policies of [SIRTOA].

Complaint, ¶46.

Plaintiff's attorney proposed an alternative statement, which read:

I, Christine Dimino, can perform my full duties as a police officer for the Staten Island Rapid Transit Operating Authority at the present time, just as I have performed those same duties in the past. I consider myself to be physically capable to perform the duties to which I am now assigned.

Complaint, ¶47. Because plaintiff's counter-proposal did not include a retraction of her request for light duty and of her prediction of "risk of danger to the public I protect, my fellow officers and not to mention a serious liability exposure," if she did not receive restricted duty, defendant Dreyfus rejected plaintiff's attorney's counter-proposal. See Transcript of Oral Argument, p. 3 (Defendant Dreyfus' attorney stated: "the two lawyers had conversations and exchanged drafts of a document that would, if signed, put Ms. Dimino back to work The catch was that she would have to withdraw her request for light duty which had with it this parade of horrors [] [that] [s]he was a

danger to other fellow police officers.").

On September 27, 1997, plaintiff went to work and was presented defendant Dreyfus' statement for her to read and sign. See Complaint, ¶51. Plaintiff refused to sign the statement as written. She crossed out all of its lines except the first sentence and then signed the amended statement. Id. at 52. Because plaintiff's amended statement did not include a withdrawal of her request for restricted duty and the description of danger posed to herself, her colleagues and the public, defendants would not permit her to return to work. Plaintiff thereafter filed an amended EEOC complaint naming defendant Dreyfus as a charged party, and filed the present lawsuit on October 15, 1997.

(2)

Though she initially claimed that defendant Dreyfus had violated a number of her statutory rights, at the time of oral argument plaintiff had withdrawn all her claims save one under 42 U.S.C. §1983. Drawing her support from the Equal Protection Clause in the Fourteenth Amendment of the United States Constitution, plaintiff claimed that defendant Dreyfus, as a state actor employee of SIRTOA, violated her right to be treated in the same manner as male police officers. Defendant Dreyfus posited numerous arguments for dismissal, but at oral argument the discussion focused on whether defendant was insulated from

suit under §1983 because of qualified immunity.² As a state official, defendant Dreyfus enjoys qualified immunity from liability for civil damages, unless his conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982).

²Defendant Dreyfus' other arguments were: (1) that he is absolutely immune from suit as a government attorney representing a government client; (2) that plaintiff has failed to show a "cognizable injury" under §1983 because defendants' willingness to attempt to settle the matter and return plaintiff to work would have benefitted plaintiff; (3) that defendant did not act under "color of state law" as is required for plaintiff to maintain a §1983 claim because government-employed attorneys who participate as lawyers in litigation representing government clients are not acting under state law for purposes of §1983; (4) that the allegations supporting the claim against defendant Dreyfus are inadmissible under Fed.R.Evid. 408, which states that evidence of conduct or statements made in settlement negotiations is inadmissible, so plaintiff's claim against him cannot be maintained; and (5) that the claims against defendant Dreyfus violate public policy because, if maintained, they would inhibit SIRTOA's choice of attorney in that its chosen attorney, as a named defendant, could not represent it. Some, but not all, of these arguments may, in fact, have merit, but the oral argument focused on the qualified immunity defense because plaintiff accepted that it would be applicable unless defendant had violated a "clearly established statutory or constitutional right[] of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). See Transcript of Oral Argument, pp. 5, 8 (Court: "Assuming I accept for the moment that there is no absolute immunity, only qualified immunity, what is the basis of this lawsuit?" . . . Plaintiff's attorney: "I am saying that [plaintiff] is clearly entitled, under Johnson Controls, for her to make the decision whether fetal protection is more important than bringing home a paycheck.").

Discussion

(1)

Local Civil Rule 6.3 requires a party who moves for reargument to set forth "the matters or controlling decisions which ... the court has overlooked." Local Civil Rule 6.3 (former rule 3(j)). "A court should grant a Rule 3(j) motion 'only if the moving party presents [factual] matters or controlling decisions the court overlooked that might materially have influenced its earlier decision.'" Bank Leumi Trust Co. v. Istim, Inc., 902 F. Supp. 46, 48 (S.D.N.Y. 1995) (quoting Morser v. AT&T Info. Sys., 715 F. Supp. 516, 517 (S.D.N.Y.1989)). See also Peker v. Fader, 1997 WL 282225, at *1 (S.D.N.Y. 1997) ("A motion for reargument pursuant to Local Rule 3(j) requires the moving party to demonstrate that the Court overlooked the controlling decisions or factual matters that were put before the Court in the underlying motion. . . . The Court must not allow reargument to be a substitute for appealing a final judgment or to permit a party to reargue those issues already considered merely because a party does not like the outcome.") (citations omitted). Local Rule 6.3 is "to be 'narrowly construed and strictly applied so as to avoid repetitive arguments on issues that have been fully considered by the court.'" Bank Leumi Trust Co., 902 F. Supp. at 48 (quoting Fulani v. Brady, 149 F.R.D. 501, 503 (S.D.N.Y. 1993)). "[T]he plain language of Rule 3(j) precludes a party from advancing new facts, issues or arguments not previously presented to the court 'because, by definition, material not

previously presented cannot have been "overlooked" by the court.'" Id. (quoting Heil v. Lebow, 1995 WL 231273 at *1) (citations omitted).

All of the arguments presented by plaintiff to support her motion for reargument are either new,³ in that they were not presented previously, or old, in that they were previously presented, considered and rejected by the court. Furthermore, only one argument, which itself had already been rejected at oral argument, directly addresses the basis for the court's decision - that defendant Dreyfus is entitled to qualified immunity - by positing that the court erred in its reading of the "controlling law" stated in International Union v. Johnson Controls, Inc., 499 U.S. 187 (1991). As discussed below, however, Johnson Controls did not set out the "controlling law" for a factual situation such as is present here, and, therefore, does not offer any support for plaintiff's motion for reargument.

(2)

In Johnson Controls the health risks associated with occupational exposure to lead in defendant employer's battery manufacturing process caused the defendant to implement a broad

³Plaintiff has included an argument, apparently under the "petition-for-redress" clause of the First Amendment to the United States Constitution, which states that "Congress shall make no law . . . abridging the freedom . . . to petition the Government for a redress of grievances." She now asserts that defendant Dreyfus' actions were in retaliation to her filing of a complaint with the EEOC, and, as such, violated her right to petition the EEOC for redress.

policy of excluding women from jobs that exposed them to lead. The company policy stated that "women who are pregnant or who are capable of bearing children will not be placed into jobs involving lead exposure or which could expose them to lead through the exercise of job bidding, bumping, transfer or promotion rights." Id. at 192. The plaintiff class challenged this "fetal protection policy" as sex discrimination violating Title VII of the Civil Rights Act of 1964. See id.

The Supreme Court acknowledged that "[t]he bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job. . . . Johnson Controls' policy is facially discriminatory because it requires only a female employee to produce proof that she is not capable of reproducing." Id. at 196-98. This conclusion, the Court reasoned, was "bolstered by the Pregnancy Discrimination Act ("PDA"), in which Congress explicitly provided that, for purposes of Title VII, discrimination 'on the basis of sex' includes discrimination 'because of or on the basis of pregnancy, childbirth, or related medical conditions.'" Id. at 198-99 (citations omitted). The Court held that:

Under the PDA, [defendant's] classification must be regarded, for Title VII purposes, in the same light as explicit sex discrimination. [Defendant] has chosen to treat all its female employees as potentially pregnant; that choice evinces discrimination on the basis of sex. . . . [The] policy is not neutral because it does not apply to the reproductive capacity of the company's male

employees in the same way as it applies to that of the females. . . . It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."

Id. at 199, 211. Having established that the defendant's policy discriminated against women on the basis of sex, the court went on to reject defendant's argument that the policy nonetheless did not violate Title VII because sex was a "bona fide occupational qualification." Id. at 200.

Simply stated, the Johnson Controls Court held that an employer's policy treating employees differently solely on the basis of sex, even if intended to protect unborn fetuses, violated Title VII. A corollary to this holding is that it is a woman's choice, and not her employer's, whether she should risk health problems to herself or her unborn fetus by taking on a job that poses such dangers. An employer who seeks to make this choice for a woman violates Title VII.

Turning to the current case, it is clear that Johnson Controls does not represent "controlling law." Nor does it even involve facts approximating those at issue here. This is not a case where the employer instituted a policy preventing pregnant women from working at certain jobs. In contrast to the facts in Johnson Controls, it was plaintiff, the employee, who came forward with the claim or "policy" that prevented her from performing her job. On September 17, 1997, she arrived at work and informed her employer, through defendant Long, that she was pregnant and that she wanted to be "placed on restricted duty to

avoid complications in my pregnancy. . . . [Otherwise] [t]here is [] a risk of danger to the public I protect, my fellow officers and not to mention a serious liability exposure." Complaint, ¶20. Plaintiff also presented a note from her physician, Dr. Arbucci, stating that he did "not want [her] to have duties which could arise in physical trauma to her abdomen." Complaint, ¶41. Thus, it was plaintiff, and not her employer, defendant, who linked her pregnancy to her ability to work and concluded that they were incompatible unless her work requirements were altered. In stating that she would not work unless given restricted duty, plaintiff, not the defendant, was making a "policy" choice.

If any policy of defendants is involved in this dispute, it is that of not providing employees, male or female, with a restricted work option. Yet, it is obvious that this policy, unlike that in Johnson Controls, does not "evince[] discrimination on the basis of sex. . . . [Or] apply to the reproductive capacity of the company's male employees in [a different] way as it applies to that of the females. . . . [Or] decide whether a woman's reproductive role is more important to herself and her family than her economic role." Johnson Controls, 499 U.S. at 199, 211. Whatever the wisdom of defendant SIRTOA's policy, defendant SIRTOA does not presently provide restricted work for either men or woman. This policy (or lack thereof) is sex or gender neutral. Nothing in Johnson Controls prevents defendant SIRTOA from maintaining a policy against part-time or restricted work. Nor does Johnson Controls prevent defendant Dreyfus from enforcing this policy in spite of plaintiff's

pregnancy and request that it do otherwise.

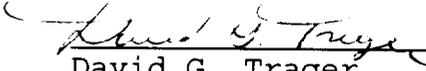
Most importantly, the accuracy of plaintiff's interpretation of Johnson Controls is certainly subject to debate. Indeed, this court believes it to be clearly erroneous. But, in any case, it is unquestionably clear that Johnson Controls is not here the "controlling law" and did not create the "clearly established statutory or constitutional right," Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), that plaintiff asserts it did. Defendant Dreyfus is, therefore, entitled to qualified immunity and plaintiff's suit against him must be dismissed.

Conclusion

For the reasons stated above, plaintiff's motion for reargument is denied. Plaintiff's motion, under Fed.R.Civ.P. 54(b), seeking that the court direct entry of partial final judgment incorporating the dismissal of claims against defendant Dreyfus is also denied.

Dated: Brooklyn, New York
September 18, 1998

SO ORDERED:



David G. Trager
United States District Judge

Sent to:

Patricia Weiss, Esq.
Attorney for plaintiff
P.O. Box 751
Sag Harbor Shopping Cove
Main Street - Suite 12
Sag Harbor, NY 11963-0019

Richard Schoolman, Esq.
Office of the General Counsel
New York City Transit Authority
Attorney for defendants
130 Livingston Street
Brooklyn, NY 11201