

Board's position are inapposite. Thus, Appellants must be deemed to have filed in a timely manner.

In view of the foregoing, we make the following:

ORDER

AND NOW, this 28th day of October, 1976 it is hereby Ordered and Decreed that the Appeals of Anne Strong and Marie Murrury are sustained. The Board of Education of the School District of the City of Pittsburgh is hereby Ordered to grant a separate hearing to each Appellant herein within thirty (30) days of the date of receipt of this Opinion and Order.

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Appeal of Cheryl Y. Rossetti, a professional employee, from a decision of the Board of School Directors of the Fox Chapel Area School District, Allegheny County, Pennsylvania

In the Office of the Secretary of Education, Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania

Teacher Tenure Appeal No. 300

OPINION

John C. Pittenger
Secretary of Education

Cheryl Y. Rossetti, Appellant herein, has appealed from a decision of the Board of School Directors of the Fox Chapel Area School District, Allegheny County, Pennsylvania, terminating her contract and dismissing her as a professional employee.

FINDINGS OF FACT

1. Cheryl Rossetti was at all times relevant a professional employee of the Fox Chapel Area School District, having signed a professional contract on August 26, 1971, and last taught at the fifth grade level in the school year of 1974-1975.
2. By letter of July 17, 1975, Cheryl Rossetti requested a maternity leave effective with the first in-service day in August of 1975.
3. In a regularly scheduled meeting of the Board on August 11, 1975, the maternity leave request was approved.
4. By a letter dated August 22, 1975, Superintendent Dr. James Burk advised Mrs. Rossetti the leave had been granted subject to the conditions contained in a soon to be ratified Collective Bargaining Agreement (the "Agreement") between the Fox Chapel Area School District and the Fox Chapel Education Association.
5. The Agreement was subsequently ratified and made effective July 1, 1975.
6. A son, Christopher Rossetti, was born to Mrs. Rossetti on October 18, 1975.
7. The maternity leave granted to Cheryl Rossetti was to terminate in December, 1975.
8. A competent teacher had been assigned to take over Mrs. Rossetti's classes during her maternity leave.
9. The substitute was being paid at a lower salary scale than Mrs. Rossetti would have received at step 9 of the contract salary scale.
10. Mrs. Rossetti personally presented through proper channels a letter from her obstetrician, Dr. Richard Hemphill, advising the District that it was medically advisable to extend Mrs. Rossetti's leave to approximately January 1, 1976.
11. The administration of the Fox Chapel Area School District approved an extension of the maternity leave until January 12, 1976.

12. By letter dated January 5, 1976, Mrs. Rossetti requested further leave because her duties as a new mother, including breastfeeding, and a lack of rest, made it difficult to return.
13. Superintendent Burk advised Mrs. Rossetti in a letter dated January 8, 1976, that there were no provisions for child rearing leave in the Agreement and directed Rossetti to return to work on January 13, 1976.
14. At a regular meeting of the Board on January 12, 1976, James Fabian, Field Representative from the Pennsylvania State Education Association, addressed the Board on behalf of Rossetti, and told the Board that Mrs. Rossetti was seeking leave because of extenuating circumstances arising from an allergy condition, which necessitated her breastfeeding her child.
15. The Board refused the request for additional leave.
16. Mrs. Rossetti was advised by letter dated January 14, 1976, to report for work.
17. In a letter dated January 17, 1976, from Cheryl Rossetti, and in a letter dated January 22, 1976, from James Fabian, Mrs. Rossetti reiterated that she was unable to return to work because she was breastfeeding her son, a condition made necessary by Mrs. Rossetti's allergy condition, and that she was requesting unpaid leave under the provisions of Article 11 of the Agreement.
18. Cheryl Rossetti has not reported to work at any time since January 12, 1976.
19. In a duly convened special meeting on January 29, 1976, the Board of Directors of the Fox Chapel Area School District (the "Board") authorized preparation of charges for the proposed dismissal of Cheryl Rossetti as a professional employee.
20. The hearing on the proposed dismissal was held on March 4, 1976, and reconvened on May 18, 1976.
21. John A. Lindblad, M.D., is Christopher Rossetti's pediatrician.
22. Dr. Lindblad, based on his understanding that Mrs. Rossetti had serious allergies, recommended breastfeeding to deter allergies in Christopher Rossetti.
23. Dr. Lindblad's opinion was that since Mrs. Rossetti is breastfeeding, and Christopher will not take a bottle, Mrs. Rossetti would be unable to teach school.
24. Cheryl Rossetti testified she has been treated for allergies for several years.
25. A letter was also introduced into evidence from Cheryl Rossetti's allergist, Dr. Shamblin, attesting to her allergies.
26. Cheryl Rossetti testified that the reason for her refusal to return to teaching was the fact that she must breastfeed, and that Christopher Rossetti's refusal to accept a bottle requires her to be present and requires her to awaken at night, making her tired and unable to teach the following day.
27. Her milk causes pain and sometimes leaks if she does not feed regularly.
28. On May 18, 1976, the School Board formally voted to discharge Cheryl Rossetti on the grounds of persistent negligence, incompetency, and persistent and wilful violation of the school laws of the Commonwealth of Pennsylvania.

TESTIMONY

The testimony taken at the hearing before the School Board on March 4, 1976, was substantially as follows:

Cheryl Y. Rossetti, a professional employee of the Fox Chapel Area School District, applied for maternity leave on July 17, 1975. Her baby was born on October 18, 1975.

Dr. Richard Hemphill notified the School Board that Cheryl Rossetti would be able to return to work in January, 1976. The School Board subsequently extended her leave to January 12, 1976.

Cheryl Rossetti requested another extension of her maternity leave on the grounds that she was still disabled because she had to breastfeed her baby. This request the School District denied.

The School District, through its superintendent, ordered Mrs. Rossetti to return to work. Mrs. Rossetti sent the School District a letter explaining she could not return to work because she was breastfeeding her baby.

The School District subsequently charged Cheryl Rossetti with persistent negligence,

incompetency, and persistent and willful violation of school laws since she failed to return to work in January, 1976.

During the tenure hearing before the School Board, on March 4, 1976, Dr. John A. Lindblad, the only physician to testify in the case, testified that Mrs. Rossetti could not work and was, therefore, disabled while she was breastfeeding. He further testified that the child refused a bottle and that the baby was fed on a demand basis five to seven times a day. He indicated that a mother who is breastfeeding has pain and is tired. He further testified that in this case, breastfeeding would last six to nine months and that when a mother has allergies, breastfeeding is highly desirable.

Cheryl Rossetti testified that she has been treated for allergies and has received a series of shots on a weekly basis for these allergies. She testified that she breastfeeds her child six to seven times a day every two to three hours, starting from six a.m. and that the baby will not take a bottle. She also testified that she has pain from the breastfeeding and that the milk leaks and that it would be impossible for her to breastfeed her child while teaching elementary students. A letter was also introduced into evidence from Cheryl Rossetti's allergist, Dr. Shamblin, attesting to her allergies.

On May 18, 1976, the School District, despite this evidence, discharged Cheryl Rossetti for persistent negligence, persistent and willful violation of school laws, and incompetency.

DISCUSSION

The case before us for consideration is one of first impression. No precise judicial precedent has been shown by either party.

At issue in the present controversy between Cheryl Rossetti and the Board of School Directors of the Fox Chapel Area School District are the rights, duties and immunities of the parties in reference to the maternity leave extension sought by Mrs. Rossetti. The Appellant, Mrs. Rossetti, after having been granted a three-month maternity leave and a five-week extension by the School Board, requested a second extension of her leave on January 5, 1976.

The applicable maternity leave provision under the Collective Bargaining Agreement between the Fox Chapel Area School District and the Fox Chapel Educators Association 1975-1977 (hereafter referred to as the collective bargaining agreement) is as follows:

Article Eleven/UNPAID LEAVES OF ABSENCE

B. Maternity Leave . . .

4) The maternity leave will end upon the PE's recovering the ability to follow her occupation. As long as her disability continues, however, she may be absent for an initial period of eight weeks following the termination of pregnancy. In the event of continuing disability, she may apply for an extension not to exceed thirty days beyond the conclusion of such eight-week period and may apply for additional extensions thereof, each not to exceed an additional thirty days. The application for the first extension and for any subsequent extension must be submitted within five days preceding the conclusion of such eight-week period or of the then current extension and must be accompanied by a certificate of her physician that the extension is needed for her recovery.

On January 5, 1976 when Mrs. Rossetti made her timely request for a second extension to her leave, the request was not at that time "accompanied by a certificate of her physician that the extension is needed for her recovery". (Collective Bargaining Agreement, Article Eleven, Sec. B Section 4). Mrs. Rossetti conceded in her letter of January 5, that she was not disabled from childbirth *per se* and could not get a letter from her own physician to that effect. She did state that she had a "duty" to breastfeed her child and was thus subsequently disabled from fulfilling her teaching duties.

Upon being denied her request for further extension of leave by letter received from Superintendent Burk dated January 9, 1976, Mrs. Rossetti took steps to substantiate the necessity of her "duty" to breastfeed her child. She obtained a letter from her child's pediatrician, dated January 12, 1976, which stated that, given Mrs. Rossetti's history of allergy problems and, "Since breastfeeding helps to decrease allergic tendencies in children and is the most compatible food for an infant with a strong history of allergies, I have advised Mrs. Rossetti that it would be best for her to breastfeed her child."

Mrs. Rossetti presented this letter along with her verbal testimony before the District's Board of School Directors on January 12, 1976. The issue at that time became somewhat muddled by the alternative proposition presented to the Board by PSEA representative, James Fabian, that Mrs. Rossetti could be eligible under the collective bargaining agreement for other types of leave which the Board had the prerogative to grant. This alternative presented should not have obscured the fact that what Mrs. Rossetti had initially applied for was an extension of her maternity leave.

Mrs. Rossetti was in the unfortunate position of being in circumstances simply not anticipated by the Collective Bargaining Agreement. Because of her duty to breastfeed her child on the advice of her child's pediatrician, she had lost "the ability to follow her occupation" as contemplated under the protections of Article Eleven, Sect. B, Section 4 of the Collective Bargaining Agreement. She did not, however, need an extension of leave for her recovery and thus could not obtain the mandated "certificate of her physician". (Collective Bargaining Agreement id.) Under the circumstances she took what steps were feasible to remain in good faith compliance with the terms of the Collective Bargaining Agreement.

At the School Board meeting of January 12, 1976, and especially at the hearing for proposed dismissal held March 4, 1976, sufficient medical evidence was presented to suggest that the child should or even must under the exigencies of his case, be breastfed by his mother. It was the child, therefore, who was disabled initially. However, since the child's disability necessitated that his mother breastfeed him, the mother for all practical purposes during the required period of breastfeeding was herself *de facto* disabled from "the ability to follow her occupation" id.

Several Federal cases have held that a reasonable maternity leave must be granted to female employees for disabilities caused by pregnancy or delivery. These cases have been decided under Title Seven of the Civil Rights Act. In these cases, the Federal Courts have held that leaves must be granted for pregnancy and delivery-related disabilities. Failure to do so was held to constitute sexual discrimination in violation of Title Seven. The Courts have further held that under the Civil Rights Act, proof of intent to discriminate is unnecessary. Discriminatory impact alone suffices. *Wetzel v. Liberty Mutual Insurance Company*, 511 F.2d 199 (6th Cir., 1975); *Zichy v. City of Philadelphia*, 392 F. Supp. 338 (1975).

The *Wetzel* case cited above *supra*, held that a private employer's plan which provided leaves for all temporary disabilities but which required that female employees return to work within three months after childbirth, or face termination was violative of equal employment provisions of Title VII of the Civil Rights Act of 1964, Sections 701 *et seq.*, 703(a)(1) as amended, 42 U.S.C.A. Sections 2000e *et seq.*, 2000c - 2(a)(1); and the Equal Employment Opportunity Commission (EEOC) guidelines found in 29 C.F.R. 1604.10(b).

The Court in upholding the EEOC guidelines stated:

"We feel that the legislative purpose of the Act is furthered by the EEOC guidelines and that the guidelines are consistent with the plain meaning of the statute. Mindful that the guidelines are interpretive rules we will give them our deference as required by *Griggs*." *Wetzel v. Liberty Mutual Insurance Company*, id. at 205, citing *Griggs v. Duke Power Co.*, 401 U.S. 424 91 S. Ct. 849, 28 L. Ed.2d 158 (1971).

The Court then stated that the pertinent EEOC guidelines concerning the leave issue were in part as follows:

"Where the termination of any employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity". *Wetzel*, *id.* at 207, citing 29 C.F.R. Section 1604.10(c).

In the instant case, the School District has not shown compelling business necessity for discharging Mrs. Rossetti. In fact, investigation of facts surrounding Mrs. Rossetti's application for an extension to her leave, indicate only an immediate benefit to the School District. Evidence introduced shows that any substitute teacher hired to replace Mrs. Rossetti is being paid at a lower scale than would apply to Mrs. Rossetti. Secondly, it is to the benefit of the children in the classroom to have the continuity of teaching available through carrying over the substitute teacher for the duration of the school year.

It is equally clear that under the circumstances of her case, Mrs. Rossetti by her termination is bearing a disparate impact for being female. It is a physical fact that given her child's need, only Mrs. Rossetti could perform the necessary function of breastfeeding her child. The grounds on which she was denied her leave and for which she was subsequently fired, therefore, seem to fall with disparate impact on Mrs. Rossetti as a member of the female sex, and do not seem to be justified by business necessity.

The Court in *Zichy v. City of Philadelphia*, *supra*, relied heavily on the *Wetzel* decision and arrived at a substantially similar result. The Court additionally determined that:

"Title VII applies to municipal corporations as readily as to private employers, so long as the municipal corporation employs fifteen or more employees in each working day of twenty or more calendar weeks in the current or proceeding calendar year." *Zichy*, *id.*, at 347, citing 42 U.S.C. Section 2000e(a) and (b) as amended 1972.

Initially, Title VII of the Civil Rights Act of 1964 78 Stat 253, 42 U.S.C. Section 2000e *et seq.* did not apply to state agencies and educational institutions. 42 U.S.C. Sections 2000c(b) and 2000e-1. However, on March 24, 1972, the Equal Opportunity Act of 1972 amended Title VII to withdraw those exemptions, Pub. L. 92-261, 86 Stat. 103.

The United States Supreme Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment, *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 39 L.Ed.2d 52, 94 S. Ct. 791 (1974). Inasmuch as overly restrictive maternity leave regulations by public schools can constitute a heavy burden on the exercise of these protected freedoms, "the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously infringe upon this vital area of a teacher's constitutional liberty." *id.*, at 640, 94 S.Ct. at 796.

The *Cleveland Board of Education* case *id.* is distinguishable on the basis that it dealt with mandatory termination of teachers from their jobs prior to delivery. However, little doubt is left that mandatory maternity leaves of any sort must be viewed with great circumspection for violation of a woman's due process rights.

The provisions for maternity leave in the instant case, must be viewed as to whether they needlessly, arbitrarily or capriciously infringed on Mrs. Rossetti's constitutional liberty rights. Inasmuch as the provisions of the Collective Bargaining Agreement Article Eleven, Sec. B. Section 4 were too narrow and failed to take into account the particular individual circumstances of

Mrs. Rossetti's situation, her denial of maternity leave extension on the grounds that she did not comply fully with these provisions was a denial of due process.

The Department of Education distributed "Maternity Leave Guidelines" in its Basic Education Circular 35 of September 14, 1973, in which the Commissioner of Basic Education, Donald M. Carroll stated:

"It has come to my attention that there is some confusion in some school districts regarding the legal responsibility of a school district to comply with the above-mentioned maternity leave guidelines promulgated by the Equal Employment Opportunity Commission, the Human Relations Commission and the Department of Education. I have been advised by the Department of Justice as follows:

'...The Administration of each public school within the Commonwealth is under a legal obligation to comply with the maternity leave guidelines promulgated by the EEOC, the Human Relations Commission and the Department of Education.'

The Secretary of Education has been given the power and duty to administer the laws of the Commonwealth as they apply to public schools . . . 71 P.S. Section 352. In accordance with his duties . . . the Secretary of Education has promulgated guidelines on maternity leave which comply with the federal and state law in the area. Each school district is under a legal obligation to comply with these guidelines which can be found in the Basic Education Handbook, Department of Education, at pages 83-100, *et seq.* The guidelines are dated June 19, 1973 . . ."

The relevant portions of the Basic Education Handbook guidelines of June 19, 1973 referred to in the passage above, provide:

83-115 Period of Leave

Maternity leave is to be for a reasonable length of time. Up to a year is reasonable. The determination of how long the maternity leave should be is up to the femal employe, provided the time taken is reasonable . . .

83-114 School Board Policy

A.) The school board must grant maternity leave when requested by one who is eligible and must reinstate the employe when the leave has expired.

While it does not seem unreasonable nor an abuse of discretion for the School Board to request that a teacher renew her maternity leave on a monthly basis after the initial expiration of her leave; it is a needless, arbitrary, and capricious infringement upon the woman's freedom of personal choice for the local school board to require that she receive the certification of her doctor for her to continue to serve a vital maternal function to her newborn child.

It is a point that seems frequently to have been lost on the many parties involved in this case, that what has been at issue is not a pregnancy disability leave. What was requested, and

that to which Mrs. Rossetti was entitled, was a maternity leave. In the extensive personal and medical testimony presented before the School Board, ample foundation for the requested extension of leave was shown.

It was undoubtedly with the intention of reducing the unnecessary prying into the personal life of the teacher, and reducing the administrative time lost in so doing, that the Secretary of Education provided that the woman herself should determine the length of her maternity leave, for any reasonable period of up to one year.

Even had the Secretary not so provided, the Due Process Clause guarantees that a woman should be free to choose to breastfeed her child whatever her reason, without incurring a penalty imposed because of her unique biological differences.

The Board of School Directors of the Fox Chapel Area School District should have granted Mrs. Rossetti's request for an extension of her maternity leave. The Board had an option in how they could have regarded Mrs. Rossetti's request that her leave be extended for the balance of the school year. They could have granted her request for an extension and advised her that she must renew her extension every thirty days, or they could have provided for an automatic renewal for the period that had been requested. The Board should not have required under applicable Pennsylvania Department of Education guidelines, to require that Mrs. Rossetti's application for unpaid maternity leave be accompanied by a certificate of her physician that the extension is needed for her recovery" (Collective Bargaining Agreement Article Eleven Sec. B. Section 4).

The guidelines of the EEOC and the Pennsylvania Human Relations Commission clearly affect the rights of teachers and, therefore, the conduct of public schools. The Secretary of Education has been given the power and duty to administer all the laws of the Commonwealth as they apply to public schools. It is his privilege as well as his duty to give great deference to those guidelines upheld by the Court and within the confines of the intent of the legislature. These guidelines alone are not being considered as controlling, but in combination with due process, public policy and the contractual obligations of the School Board, the necessary conclusion is reached that Mrs. Rossetti's leave should have been extended for the duration of the school year as she had requested. Her subsequent dismissal was, therefore, arbitrary, not for just cause, nor in accordance with the law in this Commonwealth.

The Board of School Directors of the Fox Chapel Area School District suggests that Mrs. Rossetti was guilty of "persistent negligence" and "persistent and willful violation of the school laws of the Commonwealth of Pennsylvania". However, based on the above justification, we find no merit to this position.

We also find no merit to the School District's position that this appeal cannot be pursued by Mrs. Rossetti because she has also filed charges with the Pennsylvania Human Relations Commission. Further, it is not necessary to discuss the School District's position regarding an alleged improper vote on the dismissal by virtue of the position I have already reached above.

In view of the foregoing we, therefore, make the following:

ORDER

AND NOW, to wit, this 27th day of December, 1976, the Appeal of Cheryl Y. Rossetti from the decision of dismissal by the Board of School Directors of the Fox Chapel Area School District is hereby sustained, and the Board of School Directors is directed to reinstate Cheryl Y. Rossetti forthwith retroactive to the beginning of the school year 1976-77 without loss of pay, seniority or accrued benefits.