NO. 90220-8

SUPREME COURT
OF THE STATE OF WASHINGTON

NO. 69332-8-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ELIZABETH AND JASON BROOKS,

Petitioners,

v.

BPM SENIOR LIVING COMPANY,

Respondent.

BRIEF OF *AMICUS CURIAE* LEGAL VOICE IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Washington Cases

Federal Cases

Page

Statutes

I. INTRODUCTION

This case presents issues of significant public interest to Washington's working women. At their core, the facts in this case are simple. Petitioner Elizabeth Brooks had an excellent employment record and had never received negative feedback or criticism. Then, shortly after announcing she was pregnant, her employer began criticizing her work. She took maternity leave, but cut it short when she received multiple indications, beginning just four days after she gave birth, that her job was in jeopardy. Her employer told Brooks she would be fired, and then withdrew the threat. Her work conditions suddenly became more demanding, with the employer scrutinizing her work more closely and increasing travel demands. A breastfeeding mother, her milk began to dry up from stress, and ultimately, she separated from her employment within less than six months after she had her baby.[1]

Experiences such as Ms. Brooks's are not uncommon, as women make up roughly half of all U.S. workers, and the majority of mothers work outside the home.[2] With women increasingly serving as sole or primary breadwinners and co-breadwinners (40.9% and 22.4%

[1] The facts in the foregoing introduction are all taken from the Court of Appeals opinion.

[2] Sarah Jane Glynn, "Breadwinning Mothers, Then and Now," (Center for American Progress, June 2014), at 6.

respectively in 2012),[3] job security and freedom from discrimination during and after pregnancy, as well as access to maternity leave without interference and retaliation, have significant consequences for family economic security.[4] Accordingly, in 2007, the EEOC issued groundbreaking guidance on discrimination claims involving workers with caregiving responsibilities.[5] The Guidance particularly exhorts investigators to be attentive when criticisms are not based on the employee's performance and occur only after the employee becomes pregnant.[6] Yet courts continue to apply incorrect legal standards and to ignore evidence of discrimination. This Court should grant review of the

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[3] Sarah Jane Glynn, "The New Breadwinners: 2010 Update" (Washington: Center for American Progress, 2012), at 7, available at http://americanprogress.org/issues/labor/report/2012/04/16/11377/the-new-breadwinners-2010-update/.

[4] Still, over the past decade, the number of pregnancy discrimination charges increased by 35%; about one in five charges of discrimination filed by women involved claims of pregnancy discrimination. Testimony of Joan C. Williams, Equal Employment Opportunity Commission Meeting - Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities (Feb. 15, 2012), footnotes 5 & 6 and accompanying text, available at http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm (citations omitted). Further, workers who take family leave often face discrimination or retaliation upon returning to work. Testimony of Judith L. Lichtman, Equal Employment Opportunity Commission Meeting - Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities, (Feb. 15, 2012) ("Employers subject employees to increased scrutiny upon return to work, issue poor performance evaluations, transfer workers to less desirable positions, substantially change job responsibilities, and at worst, terminate workers who request or take leave.").

[5] U.S. Equal Employment Opportunity Commission (EEOC), *Enforcement Guidance, Unlawful Disparate Treatment of Workers Based on Caregiving Responsibilities*, No. 915.002 (2007), available at http://www.eeoc.gov/policy/docs/caregiving.html.

[6] *Id.*, Example 9 (Effects of Stereotyping on Employer's Perception of Employee) and accompanying text. *See also id.*, Example 18 (Hostile Work Environment Based on Stereotypes about Mothers) and Example 19 (Hostile Work Environment Based on Pregnancy).

Court of Appeals' decision to assure that proper standards are applied in future cases as well as in this case.

II. STATEMENT OF FACTS

For the purpose of this brief supporting review, Amicus Curiae Legal Voice will refer to the facts as set forth in the trial court's Findings of Fact ("FF") and Conclusions of Law, CP 58-70, and in the slip opinion of the Court of Appeals ("Op.").

III. SUMMARY OF ARGUMENT

This Court should grant the Petition for Review because the case involves several issues of substantial public interest. *First*, the Court of Appeals erred by holding that a hostile work environment requires communications or behavior itself to be abusive. To the contrary, an employee can establish a hostile work environment without such evidence – such as here, where the trial court found that BPM had engaged in conduct based on Brooks's sex, and BPM's repeated threats that Brooks would lose her job contributed to altering the terms and conditions of her employment. *Second*, the Court of Appeals erred in failing to consider BPM's behavior motivated by Brooks's motherhood as evidence of unlawful sex-based stereotyping supporting the claims of sex discrimination and retaliation. Despite a specific finding that BPM's threats that Ms. Brooks would lose her job were based on the employer's

assumption that, as a new mother, she would not be able to perform her job, and other evidence indicating animus based on Brooks' motherhood, the Court nonetheless improperly rejected Brooks's sex discrimination and retaliation claims. *Third*, the Court of Appeals erred by defining "interference" with leave narrowly, holding that an employer does not "interfere" with the right to leave if it does not deny leave – despite evidence such as that here, that BPM told Brooks within four days of her giving birth that her job was in jeopardy and caused her to return to work early from her leave as a result.

IV. ARGUMENT

A. This Court Should Grant Review of the Erroneous Conclusion that Proof of a Hostile Work Environment Requires "Abusive" Behavior.

The Court of Appeals erred by holding that Brooks failed to establish a hostile work environment because BPM's behavior was not "abusive." This Court has identified the elements required to establish a prima facie hostile work environment claim in the familiar *Glasgow* test,[7] and to determine whether the terms and conditions of employment were altered by employer conduct, Washington courts assess the totality of the

[7] In *Glasgow v. Georgia-Pacific Corp.*, 103 Wn.2d 401, 406-07, 693 P.2d 708, 711 (1985), this Court held that to establish a hostile work environment claim, a plaintiff must show that (1) the harassment was unwelcome, (2) the harassment was because the plaintiff was a member of a protected class, (3) the harassment affected the terms and conditions of employment, and (4) the harassment is imputable to the employer.

circumstances. *Id.*, 103 Wn.2d at 407, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." *Schonauer v. DCR Entertainment Inc.*, 70 Wn. App. 808, 821, 905 P.2d 392, 400 (1995) (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23, 114 S. Ct. 267, 371, 126 L.Ed.2d 295 (1993)). No single factor is determinative in this analysis. *Harris*, 510 U.S. at 23.

While Washington courts have held that conduct must be "sufficiently pervasive so as to alter the conditions of employment and create an abusive environment," *Glasgow*, 103 Wn.2d at 406, they have never specifically required "abusive" as an additional modifier for the conduct or behavior itself. Rather, the focus of the inquiry is whether the conduct has the effect of altering the terms and conditions of employment. Indeed, the U.S. Supreme Court has articulated the standard as "hostile *or* abusive." *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81, 118 S. Ct. 998, 1003, 140 L.Ed.2d 201 (1998) (emphasis added).

Many types of behavior and conduct may have the effect of altering the terms and conditions of employment even without being explicitly "abusive." *See, e.g., Zisumbo v. McCleodUSA Telecomm. Servs, Inc.*, 154 F. App'x 715 (10th Cir. 2005) (supervisor referred to employee

as "prego," repeatedly told her to quit because of her pregnancy, gave her negative evaluations, and transferred her to an office 60 minutes away); *Walsh v. National Computer Sys.*, 332 F.3d 1150 (8th Cir. 2003) (employer required only plaintiff to provide advance notice and documentation of doctor's appointments; increased her workload; hyper-scrutinized her performance; and refused to allow her to pick up her sick child from daycare). Thus, instead, courts have properly focused on the effect of the harassing behavior on the *terms and conditions of employment*. As one court explained, "when a plaintiff endures harassing conduct, although not explicitly sexual in nature, *which undermines her ability to succeed at her job*, those acts should be considered … in assessing a hostile work environment." *O'Rourke v. City of Providence*, 235 F.3d 713, 729 (1st Cir. 2001) (emphasis added).[8]

Here, the trial court held that Ms. Brooks "had a number of phone conversations … from which she reasonably concluded that her job was in jeopardy," and she was pressured to resign. CP 73. Yet because these communications "do not appear abusive," the Court of Appeals held they were not "sufficiently pervasive so as to alter the conditions of

[8] *See also Landrau-Romero v. Banco Popular De Puerto Rico*, 212 F.3d 607, 614 (1st Cir. 2000) (giving co-worker the "silent treatment," along with equipment sabotage was evidence of racially hostile work environment); *Alonso v. Qwest Communications Co., LLC*, 178 Wn. App. 734, 315 P.3d 610 (2013) (holding that conduct having "a medically documented effect on [employee's] mental wellbeing" satisfied the standard of altering the terms and conditions of employment).

employment." Op. at 17. It is difficult to imagine what employer conduct could have more impact on the working environment and terms and conditions of employment than pervasive, direct threats to the security of that employment.

B. This Court Should Grant Review to Clarify that Evidence of Maternal Stereotyping Is Evidence of Sex Discrimination.

The Court of Appeals erred by failing to consider evidence of discriminatory animus based on Ms. Brooks's motherhood as evidence of sex discrimination. This Court should grant review to clarify that evidence of maternal profiling is a form of sex stereotyping and, thus, evidence of unlawful sex discrimination.

The assumption that a woman will perform her job less well due to her presumed family obligations is a form of sex stereotyping, and, thus, adverse job actions on the basis of such stereotypes constitute sex discrimination. *See Nevada Dep't of Human Res. v. Hibbs*, 538 U.S. 721, 730, 123 S. Ct. 1972, 155 L.Ed.2d 953 (2003). Other courts have likewise recognized maternal and caregiver stereotyping as evidence of sex discrimination.[9]

[9] *See Chadwick v. WellPoint, Inc.*, 561 F.3d 38, 48 (1st Cir. 2009) (statement that "[i]t was nothing you did or didn't do. It was just that you're going to school, you have the kids and you just have a lot on your plate right now," established unlawful "societal stereotypes regarding working women with children"); *Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 115 (2d Cir. 2004) (comments 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 the job" were evidence of gender

Here, undisputed evidence shows that not only did BPM make assumptions about Ms. Brooks based on, and during, her pregnancy, but also that this bias continued after she gave birth, based on stereotypes about her status as a mother. The trial court properly held that pressuring Brooks to quit in late 2009 was related to her pregnancy, and thus, based on sex. But it then separately considered whether pressuring Brooks to increase her travel in early 2010 was based on the same animus, concluding that it was "based on the occupancy rate crisis, not on Ms. Brooks' pregnancy," CP 72-73 – ignoring other evidence that led the court to conclude that BPM's threat to terminate was "based on Mr. Bowen's assumption that as a new mother, Ms. Brooks would not be able to perform the functions of her job." CP 77. In addition, the record contains evidence of a type sufficient to establish sex stereotyping in other cases.[10]

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discrimination); *Lust v. Sealy, Inc.*, 383 F.3d 580, 583 (7th Cir. 2004) (finding sex-stereotyping where decision maker admitted he did not promote plaintiff "because she had children and he didn't think she'd want to relocate her family, though she hadn't told him that"); *Santiago-Ramos v. Centennial P.R. Wireless Corp.*, 217 F.3d 46, 57 (1st Cir. 2000) (finding evidence of sex-based discriminatory animus where direct supervisor questioned whether the Plaintiff "would be able to manage her work and family responsibilities").

[10] Prior to becoming pregnant, Ms. Brooks had an excellent employment record and had never received negative criticism, CP 60; FF 13, but within a few weeks of Brooks announcing her pregnancy, the owner criticized her performance for the first time. CP 60; FF 15. The next day he suggested "given her situation as it now stands and the care that will be needed with her child that we approach her with the idea of being 'the marketing and sales manager' at Overlake … [which would] of course result in a decrease in her salary …." CP 61; FF 16. Brooks was subjected to increased scrutiny (January 18 email stating, "I need to know what she is doing, what are her goals next week …. We are going to demand accountability from E." CP 65; FF 37. And at the same time BPM was pressuring Brooks to increase her travel time, in a February 9 email,

Had the courts below properly considered all evidence of gender-based animus, including the actions based on motherhood stereotyping, it could have determined that the hostile work environment amounted to an adverse employment action. *See Alonso v. Qwest Communications Co., LLC*, 178 Wn. App. 734, 315 P.3d 610, 619 (2013) ("Because of the severity of this unbridled bullying and harassment, this hostile work environment amounted to an adverse employment action.").

C. This Court Should Grant Review to Clarify the Definition of the Term "Interference" in the Washington Family Leave Act.

The Court of Appeals erred by defining "interference with maternity leave" to include only denying leave or discouraging an employee from using leave, Op. at 25, and finding no Washington Family Leave Act (FLA) violation, even though Brooks was warned just four days after giving birth that her job was in jeopardy, CP 62, FF 22, and she subsequently cut her leave short from the intended 12 weeks to just over eight weeks, CP 62-63, FF 21, 25-26.

No other court has interpreted the term "interference" in the FLA. The FLA provides that it should be construed consistent with the federal counterpart. RCW 49.78.410. Some federal courts have described FMLA

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the owner wrote: "Are we to expect that because Elizabeth has a baby that the needs of the company become secondary to the needs of Elizabeth…. Maybe if she thought it was going to change her career options she should have taken a different approach to her career." CP 66; FF 39.

"interference" broadly, stating that "employer actions that deter employees' participation in protected activities constitute 'interference' or restraint' with the employees' exercise of their rights." *Bacheldor v. Am. W. Airlines, Inc.*, 259 F.3d 1112, 1124 (9th Cir. 2001), *adopted in Stallings v. Hussmann Corp.*, 447 F.3d 1041 (8th Cir. 2006). Under this definition, "interference" includes employer actions attaching negating consequences to the exercise of rights under the leave law. *Id.* Thus, an employer may not pressure an employee to reduce the amount of leave she takes; such action constitutes "interference" even though it is not an outright denial of FMLA benefits. *Xin Liu v. Amway Corp*., 347 F.3d 1125 (9th Cir. 2003).

By relying on the fact that BPM "did not prevent Brooks from taking maternity leave," and characterizing her early return to work as voluntary, the courts below defined "interference" unduly narrowly. Alternatively, they could have analyzed the facts as unlawful discrimination based on taking leave. Either way, the right to take leave is meaningless if availing oneself ultimately results in losing one's employment. This Court should grant review to clarify the term "interference" under Washington law and whether it, or the anti-discrimination protections of the Family Leave Act, applies when, as here, even if an employee requests an early return from leave, this decision is based on threats that she will otherwise lose her employment altogether.

V. CONCLUSION

For reasons set forth above, amicus curiae respectfully requests that this Court grant review of the Court of Appeals' decision.

RESPECTFULLY SUBMITTED this 8th day of July, 2014.

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