IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WENDI J. LEE,

Plaintiff,

v. **Case No.: 8:10-cv-02904-SDM-TBM**

PMSI, INC.,

Defendant.

_____/

PLAINTIFF'S RESPONSE AND MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS COUNT II OF PLAINTIFF'S COMPLAINT[1]

COMES NOW Plaintiff, WENDI J. LEE, by and through her undersigned counsel, and hereby files this response in opposition to the Defendant's Motion to Dismiss Count II. As grounds in opposition thereto, Plaintiff would state the following:

BACKGROUND

Plaintiff filed this lawsuit against Defendant, PMSI, INC, pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000(e) – (k), as amended by the Civil Rights Act of 1991 ("Title VII"), and the Florida Civil Rights Act of 1992, Chapter 760, Florida Statutes ("FCRA"). This is an action for discrimination because of pregnancy in violation of Title VII's Pregnancy Discrimination Act ("PDA") as amended and the FCRA.

On or about January 4, 2011, Plaintiff filed a Motion to Dismiss Count II of the Plaintiff's Complaint. Count II sets forth the claim of pregnancy discrimination brought pursuant to the FCRA. As grounds for the Motion to Dismiss, the Defendant *improperly* asserts

[1] Cases attached as Exhibit 'A."

that claims of pregnancy discrimination under the FCRA are preempted by Title VII. As such, Plaintiff respectfully requests that this Honorable Court deny Defendant's Motion to Dismiss.

ARGUMENT

A. Summary of Legal Argument

The Defendant's argument is premised on the Florida appellate court's decision in O'Laughlin v. Pinchback, 579 So.2d 788 (Fla. 1st DCA 1991), and the progeny of Middle District cases that followed O'Laughlin through Boone v. Total Rental Labs, Inc., 565 F. Supp. 2d 1223, (M.D. Fla. 2008), in which the Court held repeatedly that no relief was available under the FCRA for discrimination claims based on pregnancy. See Def.'s Mot. Dismiss at 2-5. Further, the Defendant asserts that this Court is bound to follow O'Laughlin unless clear and convincing evidence is "shown that the Florida Supreme Court would rule contrary to the O'Laughlin holding." Id. at 2. However, the Defendant's arguments fails to adequately represent the Court's current position that relief is available in pregnancy discrimination claims under the FCRA, as set forth in Terry v. Real Talent, Inc., 2009 U.S. Dist. LEXIS 99777 (M.D. Fla. Oct. 27, 2009). Additionally, the Defendant fails to recognize the Court's prevailing approach to handling motions to dismiss claims of pregnancy discrimination raised under Title VII and the FCRA.

B. This Court's *Terry* Decision Permits Claims for Pregnancy Discrimination Under the FCRA

The Plaintiff in Terry filed suit alleging discrimination on the basis of pregnancy in violation of Title VII and the FCRA. Terry, 2009 U.S. Dist. LEXIS 99777, at 1. As in this case, the Defendant in Terry filed a partial motion to dismiss on the grounds that the FCRA does not expressly prohibit pregnancy discrimination. Id. at 2. The Defendant in Terry relied, as does the Defendant in the present matter, on O'Laughlin and the subsequent Middle District cases with

the same interpretation. Id. at 3. The Plaintiff in Terry appropriately contested that O'Laughlin and its progeny were no longer applicable following the 2008 decision in Carsillo v. City of Lake Worth, 995 So.2d 1118 (Fla.App. 4 Dist. 2008). Id.

As in both the instant case and the Terry case, Carsillo involved a pregnancy discrimination claim brought under Title VII and the FCRA. Carsillo, 995 So.2d at 1119. The Florida Appellate court in Carsillo discussed the conflicting interpretations of O'Laughlin. Id. at 1120. Upon examining the issue, the court "conclude[d] that because the Florida statute is patterned after the Federal Civil Rights Act, which considers pregnancy discrimination to be sex discrimination, the Florida Act bars such discrimination." Id. at 1119. Thus, the Fourth District Court of Appeal ruled that the FCRA prohibits pregnancy discrimination. Id.

It was the clear and concise articulation of the rule in Carsillo that led this Court to reconsider its position as to whether the decision in O'Laughlin should be interpreted to mean that no relief was available for pregnancy discrimination claims under the FCRA and such claims were pre-empted by Title VII. Specifically, this Court in Terry noted:

> "the court in Carsillo pointed out that O'Laughlin can be interpreted to hold that the FCRA does prohibit pregnancy discrimination, but that cases like Boone interpreted O'Laughlin 'as not allowing relief under the Florida Act for discrimination based on pregnancy, because the Florida Act was not amended' to include such a claim."

Terry, 2009 U.S. Dist. LEXIS 99777, at 3-4 (quoting Carsillo, 995 So.2d at 1120). The Plaintiff in Terry argued that the decision in "Carsillo is a more clearly articulated opinion than O'Laughlin, which is ambiguous regarding whether the FCRA includes pregnancy discrimination. The Court agree[d]." Id. Accordingly, Plaintiff respectfully requests that this Court follow Terry and deny Defendant's Motion to Dismiss.

C. This Court's Rationale On Handling Motions To Dismiss Pregnancy Discrimination Claims Under the FCRA Allows The Plaintiff To Prevail On A Motion To Dismiss

Though the Court's adoption of Carsillo through Terry nullifies the Defendant's assertion that the Court is bound to apply O'Laughlin unless "convincing evidence" (Def.'s Mot. Dismiss at 5), is shown that the Florida Supreme Court would likely adopt Carsillo, it is worth noting that the rule set forth in Zemetskus v. Eckerd Corp., Case No. 8:02-cv-1939-T-27TBM, Doc. 13 (M.D. Fla. April 1, 2003), which Defendant relies, is not proper rationale. See Romanelli v. The Western and Southern Life Insurance Co., (M.D. Fla, Case No. 3:06-cv-819-J-32HTS 4-26-07). Although Romanelli is not intended to serve as precedent, given the confusion caused by the ambiguity in O'Laughlin, and the fact that "this issue is clearly unsettled within the Eleventh Circuit and that discovery on the federal pregnancy claim and the state FCRA pregnancy claim will be the same in this case, the Court [should under Romanelli] deny the motion to dismiss and decide this dispositive issue at a later phase of this case." Id.

As such, Plaintiff hereby respectfully requests that this Court deny Defendant's Motion to Dismiss as a matter of law.

CONCLUSION

The Defendant wrongfully relies on O'Laughlin and on the progeny of Middle District cases that interpreted O'Laughlin to mean that relief under the FRCA for discrimination claims based pregnancy is not allowed. The Court should follow its decision in Terry that applies Carsillo and deny the Defendant's Motion to Dismiss Count II of Plaintiff's Complaint.

Submitted this __11____ day of January, 2011.

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/s/ Scott K Hewitt

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