

2.26A PENALIZING EMPLOYEE AFFECTED BY PREGNANCY FOR REQUESTING OR USING AN ACCOMMODATION (Approved 10/2022)

Plaintiff claims that defendant unlawfully penalized plaintiff for requesting [or using] an accommodation of pregnancy [or breastfeeding]. Specifically, plaintiff argues that defendant should have maintained [*insert description of terms, conditions and/or privileges that were changed*] rather than [*describe change(s)*]. Defendant argues that [*insert description of defendant’s position, such as “it was not aware that plaintiff needed an accommodation” or “the changes to plaintiff’s terms, conditions and employment did not penalize plaintiff”, etc.*].

To prevail on a claim, plaintiff must prove each of the following elements by a preponderance of the evidence. First, plaintiff must prove that the defendant knew or should have known that plaintiff was affected by pregnancy or breastfeeding. Second, plaintiff must prove that based on the advice of plaintiff’s physician, plaintiff requested or used an accommodation of needs related to pregnancy or breastfeeding, and that defendant was aware of the request or use of an accommodation of pregnancy or breastfeeding. Third, plaintiff must prove that defendant detrimentally altered one or more of the terms, conditions or privileges of employment. Fourth, plaintiff must prove a causal connection between the request or use of the accommodation and

defendant’s decision to change the terms, conditions or privileges of plaintiff’s employment.¹

1. Affected by Pregnancy or Breastfeeding

To prove the first element of plaintiff’s claim, the plaintiff must show that the defendant knew or should have known that plaintiff was pregnant or breastfeeding. “Pregnancy or breastfeeding” means pregnancy, childbirth, and breastfeeding or expressing milk for breastfeeding, or medical conditions related to pregnancy, childbirth, or breastfeeding, including recovery from childbirth.²

2. Request or Use of Accommodation Based on Physician Advice

The second element that the plaintiff must prove is that based on the advice of plaintiff’s physician,³ plaintiff requested or used an accommodation of needs related to pregnancy [or breastfeeding], and that defendant was aware of plaintiff’s request or use of an accommodation of pregnancy [or breastfeeding]. In many cases, plaintiff will do so by offering evidence that plaintiff requested an accommodation from defendant. It is not necessary that the request for accommodation be in writing or even use the phrase “reasonable accommodation”.⁴ An employee may use plain English

¹ See *Delaney v. Township of Ocean*, 245 N.J. 384, 410-412 (2021).

² N.J.S.A. 10:5-12(s).

³ When the protected conduct involves requesting or using an accommodation related to breastfeeding, the plaintiff need not show that plaintiff was acting on the advice of a physician.

⁴ *Tynan v. Vicinage 13 of Superior Court of New Jersey*, 351 N.J. Super. 385, 400 (App. Div. 2002), *certif. denied*, 183 N.J. 215 (2005).

and need not mention any law requiring accommodation.⁵ Although there are no magic words that the employee must use, the employee must make clear to the employer that some accommodation is needed to perform the employee's job because of pregnancy [or breastfeeding].⁶ However, plaintiff need not prove that an accommodation was requested if plaintiff can prove that defendant knew about the use of an accommodation in some other way.

3. Detrimental Change in the Terms, Conditions or Privileges of Employment

The third element that plaintiff must prove is that the defendant altered the terms and conditions of the plaintiff's employment to the plaintiff's detriment. Generally, the plaintiff may prove this element in one of two ways. First, the plaintiff may show that the defendant imposed unreasonable conditions on the use of the accommodation. Second, plaintiff may show that (a) defendant altered, in any way, one or more of the terms, conditions or privileges of employment after defendant became aware of the request or use of an accommodation and (b) a reasonable person would believe that the change was detrimental.⁷

In deciding whether the conditions the employer imposed on the use of the accommodation were unreasonable and/or the change(s) to plaintiff's terms,

⁵ *Ibid.*

⁶ *Ibid.*

⁷ *See Delanoy, 245 N.J. at 410-412.*

conditions or privileges of employment was detrimental, you must view the conduct from the perspective of a reasonable person, not from plaintiff's own subjective perspective. In other words, the issue you must decide is not whether plaintiff personally believed that the conditions were unreasonable and/or the change in the terms, conditions and privileges of employment was detrimental. The issue you must decide is whether a reasonable person would find that the conditions imposed on the use of the accommodation were unreasonable and/or the change to the terms, conditions and privileges of employment was detrimental. You must use your own judgment in deciding whether a reasonable person would believe that the conditions imposed on the use of the accommodation was unreasonable and/or the alteration of one or more of the terms, conditions and privileges of employment was detrimental.

It is not necessary that the plaintiff show that plaintiff has actually been psychologically harmed by the change to the terms, conditions or privileges of employment, or that the plaintiff has suffered any economic loss as a consequence of the change. Those issues may be relevant to the damages plaintiff can recover, but they are not relevant to the issue of whether the conduct was unlawful. Any change to the terms, conditions or privileges of employment is unlawful if it was taken in response to the request or use of an accommodation of pregnancy or breastfeeding and a reasonable person would find that the change was detrimental.

4. Causal Connection

NOTE TO JUDGE

The causal connection charge should only be given where the defendant disputes that it changed the plaintiff's terms, conditions or privileges of employment in response to the request or use of the accommodation.

The fourth and final element is whether the plaintiff can prove the existence of a causal connection between the request for or use of an accommodation and the change to the terms, conditions and privileges of employment by the employer. Ultimately, in considering the fourth element of the plaintiff's case, you must decide whether the plaintiff's request for or use of an accommodation played a role in and made an actual difference in the defendant's decision⁸ to [*insert change to terms, conditions or privileges of employment*]. It is the plaintiff's burden to prove that it is more likely than not that the defendant penalized plaintiff because of the plaintiff's request or use of an accommodation. That is the ultimate issue you must decide: did the defendant [*insert change to terms, conditions or privileges of employment*] because of the plaintiff's request or use of an accommodation. The plaintiff may prove this directly, by proving that a retaliatory reason more likely than not motivated the defendant's action, or indirectly, by proving that the defendant's stated reason is not the real reason for the defendant's action.

⁸ See *Donofry v. Autotote Systems, Inc.*, 350 N.J. Super. 276, 295 (App. Div. 2001); see also Model Civil Charge 2.21 for an alternate formulation to be used with the jury.

You may find that the defendant had more than one reason or motivation for defendant's actions. For example, you may find that the defendant was motivated both by the plaintiff's request for or use of an accommodation and by other, non-retaliatory factors, such as the plaintiff's job performance. To prevail, the plaintiff is not required to prove that the request for or use of an accommodation was the only reason or motivation for the defendant's actions. Rather, the plaintiff must only prove that the request for or use of an accommodation played a role in the decision and that it made an actual difference in the defendant's decision.⁹ If you find that the plaintiff's request for or use of an accommodation did make an actual difference in the defendant's decision, then you must enter judgment for the plaintiff. If, however, you find that the defendant would have made the same decision regardless of the plaintiff's request for or use of an accommodation, then you must enter judgment for the defendant.

Because direct proof of causation is often not available, the plaintiff is allowed to prove plaintiff's case by circumstantial evidence. In that regard, you are to evaluate whatever indirect evidence that defendant changed plaintiff's terms, conditions or privileges of employment in response to the request or use of

⁹ See Model Civil Charge 2.21 and cases cited therein at fn. 2; see also *Donofry, supra*, 350 *N.J. Super.* at 296 ("Plaintiff need not prove that his whistle-blowing activity was the only factor in the decision to fire him."); *Kolb v. Burns*, 320 *N.J. Super.* 467, 479 (App. Div. 1999) (burden on plaintiff is to show "retaliatory discrimination was more likely than not a determinative factor in the decision").

accommodation that you find was presented during the trial. [*The court may refer to specific types of indirect evidence presented during the trial, such as prior conduct and/or comments of the parties, etc.*]

One kind of circumstantial evidence can involve the timing of events, *i.e.*, whether the defendant's action followed shortly after the defendant became aware of the plaintiff's use or request of accommodation. While such timing may be evidence of causation, it may also be simply coincidental – that is for you to decide.

Another kind of circumstantial evidence might involve evidence that the defendant became antagonistic or otherwise changed defendant's demeanor toward the plaintiff after the defendant became aware of the plaintiff's request or use of accommodation. But again, this may be evidence of causation, or it may have no relationship to the change in plaintiff's terms, conditions or privileges of employment at all, but it is for you to decide.

In addition, you should consider whether the explanation given by the defendant for defendant's action was the real reason for defendant's actions. If you don't believe the reason given by the defendant is the real reason the defendant changed the plaintiff's terms, conditions or privileges of employment, you may – but are not required to – find that the plaintiff has proven plaintiff's case. You are permitted to do so because, if you find the defendant has not told the truth about why defendant acted, you may conclude that defendant is hiding that plaintiff's terms,

conditions or privileges of employment were changed because plaintiff requested or used an accommodation. However, while you are permitted to find causation based upon your disbelief of the defendant's stated reasons, you are not required to do so. This is because you may conclude that the defendant's stated reason is not the real reason, but that the real reason is something other than plaintiff's request or use of accommodation.

The plaintiff at all times bears the ultimate burden of proving to you that it is more likely than not that the defendant penalized plaintiff for requesting or using accommodation of pregnancy or breastfeeding. To decide whether the plaintiff has proven plaintiff's claim, you should consider all of the evidence presented by the parties, using the guidelines I gave in the beginning of my instructions regarding evaluating evidence generally, such as weighing the credibility of witnesses. [*The court should refer to any other general instructions where appropriate.*] Keep in mind that in reaching your determination of whether the defendant penalized plaintiff for requesting or using accommodation, you are instructed that the defendant's actions and business practices need not be fair, wise, reasonable, moral or even right, so long as the plaintiff's request or use of accommodation did not play a role and make an actual difference in the defendant's decision to [*insert change to terms, conditions or privileges of employment*].

I remind you that the ultimate issue you must decide is whether the defendant penalized the plaintiff for requesting or using accommodation by [*insert change to terms, conditions or privileges of employment*], and that the plaintiff has the burden to prove the elements of the claim.

In summary, to win on the claim, plaintiff must prove that it is more likely than not that (1) plaintiff's employer knew or should have known that plaintiff was affected by pregnancy or breastfeeding; (2) based on the advice of plaintiff's physician, plaintiff requested or used an accommodation of needs related to pregnancy or breastfeeding, and that the defendant was aware of such request or use of an accommodation; (3) the defendant changed, in any way, one or more of the terms, conditions or privileges of plaintiff's employment after defendant became aware of the request or use of an accommodation to plaintiff's detriment and (4) plaintiff must prove a causal connection between the request or use of the accommodation and defendant's decision to change the terms, conditions or privileges of plaintiff's employment. If you find that plaintiff has proven these elements by a preponderance of the evidence, you must render a verdict in favor of plaintiff. If you find that plaintiff failed to prove any of these elements by a preponderance of the evidence, or defendant has proven by a preponderance of the evidence that maintaining plaintiff's terms, conditions and privileges of employment would have imposed an undue burden on it, you must render a verdict in favor of defendant.