



Headquarters

40 Worth Street, 10th Floor
New York, NY 10013
tel: 212.430.5982

info@abetterbalance.org
abetterbalance.org

Southern Office

301 21st Ave. South, Suite 355
Nashville, TN 37212
tel: 615.915.2417

May 29, 2019

Nicholas South
Campus President
South College – Nashville Campus
616 Marriott Drive
Nashville, TN 37214

Via Certified Mail and E-Mail ([REDACTED])

RE: Theresa Gonzales

Dear Mr. South,

A Better Balance represents Theresa Gonzales (“Ms. Gonzales”), a current employee of your for-profit company, South College in Nashville, Tennessee, in connection with her claims of pregnancy discrimination and other violations of law. A Better Balance is a non-profit legal organization that advocates for the rights of pregnant workers and caregivers in the workplace. You can learn more about our work at www.abetterbalance.org.

Based on the information provided to us by Ms. Gonzales, we believe that South College has violated state and federal law in its treatment of Ms. Gonzales and at least five other employees who were pregnant and/or needed time off to recover from childbirth because Ms. Gonzales and others were fired from their jobs while pregnant or just days after giving birth in accordance with company policy.

We hereby request that South College restore Ms. Gonzales to her original salary, compensate Ms. Gonzales for her backpay, and provide her with necessary accommodations for breastfeeding. We also call on South College to update its policies and practices with respect to pregnant workers who require time off to recover from childbirth and others to ensure fair treatment and compliance with the law. South College is identified in its mission statement as an institution that “recognizes its responsibility to society,” and consistently expresses a commitment to helping people balance the obligations of work, education, and family. We hope to see these values reflected in South College’s treatment of its pregnant and parenting employees.

I. Relevant Factual Information

Ms. Gonzales was hired as an admissions representative for South College in July 2018, with over four years of experience in admissions and education, having moved to Clarksville, TN as a

result of her husband's military service. In or around October 2018, she informed her supervisor that she was pregnant. When she inquired about maternity leave, her supervisor asked her what she had heard. She replied that she had heard that employees were terminated shortly after giving birth, but then could be rehired. Her supervisor confirmed that this was the company policy. Ms. Gonzales altered her life hoping that she would be able to return to work at South College. Her husband made plans to leave his military service after eight years to pursue his education and she enrolled in courses as a student at South College. As time went on, she became more and more concerned about whether she would really be reinstated. At one point her supervisor told her about a woman he knew who was a "career-driven woman," but who resigned on the same day she came back from her maternity leave. Ms. Gonzales understood that he was telling her this anecdote because he was worried she would do the same thing, so she reassured him that she was the sole provider for her family and therefore needed to continue working.

Ms. Gonzales gave birth to her first child, a daughter, on December 10, 2018. On or around December 14, 2018, Ms. Gonzales wrote to a South College human resources representative stating that she felt that her imminent termination was discriminatory and in violation of the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA). That representative forwarded her e-mail to South College's Chancellor and the Chancellor confirmed in writing South College's policy, stating that she was terminated "due to [her] inability to perform the essential elements of [her] job through prolonged lack of attendance to those duties." Of course, Ms. Gonzales was only unable to perform her job at the time of her termination because she was recovering from childbirth and her medical provider recommended that she limit her physical activity for about three weeks after giving birth. Because employees of South College are not permitted to accrue PTO during their first year of employment, Ms. Gonzales's only available time off consisted of five sick days, and she was terminated on December 17, 2018, as indicated in her separation notice. Prior to giving birth, Ms. Gonzales had not missed a single day of work and was ranked 4th of 10 employees in her department in terms of number of students enrolled.

Although she was devastated by her termination, Ms. Gonzales needed income to support her family and sought to be rehired to her previous position. To that end, she remained in consistent contact with her supervisor, both in person, in writing, and by phone soon after delivering her child, about her desire to be hired again at the earliest feasible date. At one point her supervisor said he did not want to "expedite a medical situation," even though Ms. Gonzales was cleared for work on January 21, 2019. On February 6, 2019, she was informed via email that she would **not** be rehired. When she asked for an explanation she was told that this was allegedly due to budgeting and staffing constraints.

During the period where Ms. Gonzales was continuously expressing her desire to return to work, South College hired one admission representative (with no industry experience) and posted an

opening for a second. They also hired an administrative assistant, who was told that she would eventually be promoted to an admissions representative position.

Ms. Gonzales complained to Human Resources that the failure to rehire her was in retaliation for her complaint regarding pregnancy discrimination. Within a few hours her employee accounts were reactivated and the following day she was informed that she *would* be rehired starting February 18, 2019, but at a reduced salary. In light of her need to support her family financially, Ms. Gonzales accepted this offer.

Upon her return, Ms. Gonzales discovered that the employee handbook had been updated while she was away (although still dated 2018) to add that:

In fact, it will be South College's practice, in most all circumstances, to terminate the employment of an employee in a non-FMLA absence if it is extended in nature and prevents the employee from performing the essential elements of their position. Consideration for rehire of the terminated employee will be at the discretion of the Campus President with the V.P. of HR and Talent, and in any case, would require a complete medical release for full duty. Terminated employees will not be given preference in rehire situations."

It is our understanding that this policy change occurred in retaliation for Ms. Gonzales's pregnancy and asserting her rights that the current policy violated federal law. To Ms. Gonzales's knowledge, at least five other women working at the Nashville campus have also been terminated during pregnancy or during recovery from childbirth under this discriminatory policy.

In addition, Ms. Gonzales is currently breastfeeding and needs to express milk while at work. In spite of multiple complaints by Ms. Gonzales, a room is not always available to her, and on at least one occasion, she was made to wait more than 40 minutes to use the designated space after being directed by her supervisor to use a bathroom, which she was not even able to use because it did not have an electrical outlet for her pump. Although she previously took paid breaks and others take paid breaks, she now has to clock out and take unpaid breaks to express breast milk. Additionally, the space she is required to use for expressing milk is a supply closet that anyone who has an access card is able to enter because she was told that it is company policy that employees are not permitted to express milk in their offices.

II. Legal Claims

We believe that South College's restrictive leave policy, which resulted in the termination of Ms. Gonzales and others who have been pregnant while employed at South College, is in violation of

the PDA¹ and the Tennessee Human Rights Act.² The PDA covers not only pregnancy but “the whole range of matters concerning the childbearing process,” including childbirth.³ South College’s policy of terminating women while pregnant or within days of giving birth violates the PDA. Additionally, according to the Equal Employment Opportunity Commission (EEOC), the PDA may be violated “if a facially neutral policy has a disproportionate adverse effect on women affected by pregnancy, childbirth, or related medical conditions.”⁴ Under this disparate impact theory, maximum leave policies and policies that limit accrual of PTO may be unlawful. For example, according to the EEOC, a policy limiting sick leave to 10 days has been found to disparately impact pregnant women and therefore violate the PDA.⁵

A disparate impact on pregnant workers can be proven where it is shown that “all or substantially all pregnant women would be negatively affected by the challenged policy.”⁶ Given that virtually all pregnant woman would be medically advised to take more than the five days available to Ms. Gonzales and similarly situated employees, this policy, explicitly stating that “it will be South College’s practice, in most all circumstances, to terminate the employment of an employee in a non-FMLA absence” has a disparate impact on pregnant women and therefore violates the PDA.

Similarly, we believe that this policy, which further states that all non-FMLA leaves are at the discretion of South College and “in no case[] will extend beyond 90 days” may violate the ADA, which “requires that employers make exceptions to their policies, including leave policies, in order to provide a reasonable accommodation.”⁷

We also believe that Ms. Gonzales has been the subject of unlawful retaliation as a result of complaints of pregnancy discrimination made in both December 2018 and February 2019, as well as illegal pregnancy discrimination in violation of federal and state law⁸ as evidenced by the change in policy to explicitly terminate employees in need of a leave of absence, and

¹ 42 U.S.C. §§ 2000e *et seq.*

² Tenn. Code Ann. § 4-21-401(a)(1).

³ See *Kocak v. Community Health Partners of Ohio, Inc.*, 400 F. 3d 466, 469-70 (6th Cir. 2005) (citing H.R. Rep. 95–948, 1978 U.S.C.C.A.N. 4749, 4753) (holding that an employee need not be pregnant at the time of the alleged adverse employment action to be protected by the PDA).

⁴ See EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (June 25, 2015), available at: https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm, citing *Abraham v. Graphic Arts. Int’l. Union*, 660 F.2d 811, 819 (D.C. Cir. 1981) (“In short, the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age an impact no male would ever encounter.”); see also *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 655 (N.D. Ill. 1991)

⁵ *Id.*

⁶ *Garcia v. Woman’s Hosp. of Texas*, 97 F.3d 810, 813 (5th Cir. 1996).

⁷ See Employer-Provided Leave and the Americans with Disabilities Act (May 9, 2016), available at: <https://www.eeoc.gov/eeoc/publications/ada-leave.cfm>; see also *Garcia-Ayala v. Lederle Parenterals, Inc.*, 212 F.3d 638, 647-48 (1st Cir. 2000) (rejecting a *per se* rule that extended leaves cannot be reasonable accommodations).

⁸ 42 U.S.C. §§ 2000e *et seq.*; Tenn. Code Ann. § 4-21-401(a)(1).

discriminatory comments made by her supervisor assuming that she would resign upon returning from maternity leave as well as paternalistic assumptions about not wanting to “expedite” her medical leave.

Finally, we believe that South College may be in violation of Section 7 of the Fair Labor Standards Act (FLSA), which requires employers to provide breastfeeding employees with reasonable break time as needed to express milk and “a place, other than a bathroom, that is shielded from view and free from intrusion from coworkers and the public” which may be used for that purpose,⁹ and Tennessee law requiring time and private space for expressing breastmilk.¹⁰

III. Conclusion

In light of the serious legal concerns raised here, we request that you contact us at (615) 915-2417 immediately to discuss this matter. We hope that we can come to an amicable resolution, as litigation is costly and lengthy for all parties involved.

You are hereby notified that you must retain and preserve all records, including any paper or electronic documents or information that may be relevant to this matter. As Ms. Gonzales is now represented by counsel, please direct all communications regarding her claims to us. We also remind you that you are prohibited by law from taking any retaliatory action against Ms. Gonzales because she seeks to vindicate her rights.

Sincerely,

Dina Bakst
Co-Founder/Co-President

Elizabeth Gedmark
Director of Southern Office/Senior Staff Attorney

CC: Randall Carr, Vice President of Talent, South College (via email - [REDACTED])

⁹ 29 U.S.C. § 207(a).

¹⁰ Tenn. Code § 50-1-305.