STATE OF ILLINOIS
HUMAN RIGHTS COMMISSION

IN THE MATTER OF THE REQUEST FOR REVIEW BY:	CHARGE NO.:	**2018CP2109**
	EEOC NO.:	**N/A**
DAROLYN LEE,	ALS NO.:	**19-0380**
Petitioner.		

ORDER

This matter coming before the Commission on February 19, 2020, before the Commission by a panel of three, Robert A. Cantone, LeDeidre Turner, and Chair James Ferg-Cadima, upon Darolyn Lee's ("Petitioners") Request for Review ("Request") of the Notice of Dismissal issued by the Department of Human Rights ("Respondent")[1] of Charge No. 2018CP2109 and the Commission having reviewed all pleadings filed in accordance with 56 Ill. Admin. Code, Ch. XI, Subpt. D, § 5300.400, and the Commission being fully advised upon the premises;

NOW, **THEREFORE**, it is hereby **ORDERED** that:

*The Respondent's dismissal of the Petitioner's charge is **VACATED, and** the charge is **REINSTATED** and **REMANDED** to the Respondent for entry of a finding of **SUBSTANTIAL EVIDENCE** and for further proceedings consistent with this Order and the Act*[2].

DISCUSSION

On March 29, 2019, the Petitioner filed a perfected charge of discrimination with the Respondent, alleging that, Mercy Hospital and Medical Center ("Mercy"), denied her the full and equal enjoyment of its facility and services due to her sex, female (Counts A and C) and due to the conditions of pregnancy (Counts B and D), in violation of Article 5 of the Illinois Human Rights Act ("Act"). On June 7, 2019, the Respondent dismissed Counts A and C of Complainant's charge for Lack of Substantial Evidence and Counts B and D of Complainant's Charge for Lack of Jurisdiction. On October 10, 2019, Petitioner filed this timely Request for Review ("Request"). On December 3, 2019, the Petitioner filed a timely Reply to the Respondent's Response.

In Counts A and C, the Respondent requests that the Commission vacate the dismissal of Counts A and C of the Petitioner's charge for Lack of Substantial Evidence, enter a finding of Substantial Evidence and remand Counts A and C of the Petitioner's Charge to the Department's

[1] In a Request for Review Proceeding, the Illinois Department of Human Rights is the "Respondent." The party to the underlying charge who is requesting review of the Department's action shall be referred to as the "Petitioner."
[2] This order is entered pursuant to a 3-0-0 vote by the Commissioners.

Charge Processing Division for procedural processing. The Commission having therefore determined that the Respondent is unopposed to the relief sought by the Petitioner as to Counts A and C of the charge. The Respondent's dismissal of Counts A and C of the Petitioner's charge is vacated and Counts A and C of the charge are reinstated and remanded to the Respondent for entry of a finding of Substantial Evidence as to these counts, and for further processing and other proceedings consistent with this Order and the Act.

As to Counts B and D, the Commission concludes that jurisdiction exists as to Counts B and D of the Petitioner's charge and further concludes that the dismissal of Counts B and D is vacated and a finding of Substantial Evidence is warranted.

Section 1-103(L-5) of the Act defines pregnancy. The Act states that: "Pregnancy" means pregnancy, childbirth, or medical or common conditions related to pregnancy or childbirth. *See 775 ILCS 5/1-103(L5).* In Counts B and D of the Petitioner's charge, the Respondent has requested that the Commission sustain the dismissal of Counts B and D for Lack of Jurisdiction. The Respondent argued that it was an uncontested fact, that as of October 5, 2017, the date of the alleged civil rights violation, the Petitioner was not was pregnant nor was she expecting or planning to become pregnant. The Respondent further argued that the Petitioner did not allege to being pregnant, and therefore did not meet the definition of an individual who is pregnant under Section 1-103(L-5) of the Act. The Respondent cited no legal authority to support its argument.

The Commission disagrees with the Respondent's interpretation of Section 1-103(L-5). The core of the Petitioner's argument is the second half of the detention of Section Section 1-103(L-5), which states "or medical or common conditions related to pregnancy or childbirth". This is a case of first impression for the commission on this issue. As guidance to this issue, the Commission may look to federal court decisions interpreting analogous federal antidiscrimination laws as helpful and relevant to questions that may arise in the interpretation of the Act. See *City of Cairo v. FEPC*, 21 Ill.App.3d 358, 363, 315 N.E.2d 344 (5th Dist. 1974); *Montgomery Ward v. FEPC*, 49 Ill.App.3d 796, 805, 365 N.E.2d 535 (1st Dist. 1977).

The analogous federal law is the Pregnancy Discrimination Act of 1978 ("PCA"). The PCA amended Title VII of the Civil Rights Act of 1964 to prohibit sex discrimination on the basis of pregnancy. *See* 42 U.S.C. § 2000e(k). 42 U.S.C. § 2000e(k) states that: The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e–2(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided, that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

The Supreme Court interpreted the PCA to included and protect non-pregnant women. In *UAW v. Johnson,* the United States Supreme Court held that the PDA prohibits discrimination "on the basis of a woman's ability to become pregnant." See *International Union, United Automobile, Aerospace and Agricultural Implement workers of America,* 499 U.S. 187, ¶ 7 (1991). The Court reasoned that women are discriminated against in the workplace due to the fact that they could become pregnant, causing them to be given lower wages, fewer promotions, and less authority in the workplace. Federal courts have similarly held that discrimination on the basis of pregnancy applies not just to individuals who are currently pregnant. See *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979, 984 (E.D. Mo. 2003); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271-72 (W.D. Wash. 2001) (exclusion of prescription contraceptives from employer's generally comprehensive prescription drug plan violated PDA).

In interpreting the Human Rights Act, the Commission must act according to the dictate of the Illinois Supreme Court which has ruled that, as remedial legislation, the Illinois Human Rights Act should be liberally construed to give effect to its purpose. See *Bd. of Trustees of Community College District No. 508 v. Illinois Human Rights Comm'n*, 88 Ill.2d 22, 429 N.E.2d 1207, 57 Ill. Dec. 844 (1981). Based upon this rule, the Commission must construe the relevant provisions of the Act so that its interpretation is consistent with the intent of the legislature as embraced by the entire Illinois Human Rights Act. Based on federal interpretation of an analogues language, the Commission concludes that the it should give a broad interpretation of the definition of "medical or common conditions related to pregnancy or childbirth". Contraception is a means to prevent, and to control the timing of, the medical condition of pregnancy. Therefore, the Commission believes the public policy of this state as declared in the Act, is that all individuals should be free from discrimination because of medical or common conditions related to pregnancy or childbirth should include non-pregnant women that seek birth control. Therefore, jurisdiction exist as to Counts B and D.

The Commission now focuses on the Petitioner's *prima facie* case as to Counts B and D. The Petitioner alleged that in late September 2017, she contacted the Family Health Network (Medicaid provider) to schedule an appointment to have her birth control method removed and replaced. The Petitioner alleged that the provider recommended the closest location which was Mercy. The Petitioner alleged stated that the appointment was made for October 5, 2017. The Petitioner alleged that on October 5, 2017, she went to her appointment at Mercy. The Petitioner alleged that she checked in at Mercy's receptionist desk. The Petitioner was informed the receptionist that she was there to have her birth control device removed and reinserted. The Petitioner stated that the receptionist took her information and told her to have a seat to wait to be seen. The Petitioner sat down and waited ten (10) minutes to be attended. The Petitioner alleged that Dr. Olfa Najar ("Najar"), Mercy's Internist called her name and they went into a patient's examining room. The Petitioner alleged that Najar asked what the reason for her visit at which time she replied to have her birth control device removed and replaced. The Petitioner alleged that Najar made a disapproving and judgmental face. The Petitioner alleged that Najar informed her that she does not provide birth control services and gave her an appointment card to be seen by an obstetrics/gynecological

physician. The Petitioner alleged that Najar commented that all women should have babies. The Petitioner stated that she was offended by Najar's remark. The Petitioner stated that she informed Najar that she didn't want children. The Petitioner alleged that Najar also commented that having children is a beautiful experience and all women should be required to have children. The Petitioner stated that the appointment ended, and she was upset.

During the Respondent's investigation of the charge, Najar denied saying to the Petitioner that all women should have babies.

The Petitioner alleged that on or about October 6, 2017, she called Mercy's Gynecology Department that Dr. Olfa Najar had referred her and made the second appointment for two (2) weeks later on October 17, 2017. The Petitioner alleged that on October 17, 2017, she went to the appointment and checked in at the desk. The Petitioner stated that she waited 15 minutes to be called. The Petitioner alleged that Mercy's CNM Xue, called her into the patient examining room. The Petitioner alleged that Xue asked why she was being seen today. The Petitioner stated that she replied that she needed to take out her contraception device. The Petitioner alleged that Xue responded that she does not do birth control services but offered to give her a pap smear. The Petitioner stated that Xue gave her a list of different service providers that could assist her. The Petitioner alleged that she was shocked and upset. The Petitioner stated that she declined the offer for the pap smear. The Petitioner stated that she left Respondent upset and crying.

During the Respondent's investigation of the charge, Xue stated that she informed the Petitioner that she could not assist her with the removal or replacement of her birth control device because she has not been trained on the removal of her specific birth control device.

The Act provides that it is a civil rights violation for an individual to be denied the full and equal enjoyment of the facilities and services of a public accommodation on the basis of unlawful discrimination. See 775 ILCS 5/5-102(A). Generally, to establish a *prima facie* case of discrimination concerning a public accommodation the Petitioner must show that: 1) the Petitioner is within a protected category; 2) he or she was denied full enjoyment of the respondent's facilities; and 3) that others not within his or her protected class were given full enjoyment of those facilities. *See In the Matter of Velma J. Henderson and Steak N Shake, Inc.,* IHRC, Charge No. 1996CP2939, 1999 WL 33252627, *9 (March 24, 1994). In the Petitioner's matter, similar to Counts A and C, the evidence was sufficient to establish a *prima facie* case.

Additionally, an entry of substantial evidence is appropriate because there is conflicting evidence concerning the circumstances that led to the Petitioner's charge. Mercy denies that Najar made any discouraging comments. The resolution of the conflict presented by this evidence would require a credibility determination. Credibility determinations cannot be made at the investigative stage of the proceedings. See *Cooper v. Salazar*, 196 F.3d 809 (7th Cir. 1999). Therefore, a finding of substantial evidence is appropriate so that this matter may be referred to a trier of fact for determination.

THEREFORE, IT IS HEREBY ORDERED THAT:

*The Respondent's dismissal of the Petitioner's charge is **VACATED and** the charge is **REINSTATED** and **REMANDED** to the Respondent for entry of a finding of **SUBSTANTIAL EVIDENCE** and for further proceedings consistent with this Order and the Act.*

THIS IS NOT A FINAL ORDER.

STATE OF ILLINOIS)
)
HUMAN RIGHTS COMMISSION)

Entered this 6th day of March 2020.

Commissioner Robert A. Cantone

Commissioner LeDeidre Turner

Chair James Ferg-Cadima

STATE OF ILLINOIS)
)SS
COUNTY OF COOK)

ALS NO(S): 19-0380
CHARGE NO(S): 2018CP2109
EEOC NO(S): N/A
CASE NAME(S): Darolyn Lee v. Mercy Hospital and Medical Center

AFFIDAVIT OF SERVICE

Shantelle Baker, being first duly sworn, on oath states that on **March 6, 2020**, she served a copy of the attached **ORDER** on each person named below by depositing the same in the **U.S. Mail Box** at **100 W. Randolph Street, Chicago, Illinois 60601**, properly posted for **First Class Mail**, addressed as follows:

Ameri Klafeta, Emily Werth
Roger Baldwin Foundation of ACLU, Inc.
150 North Michigan Ave. - Ste. 600
Chicago, IL. 60601-0001

Camille N. Khodadad
Much Shelist, P.C.
191 N. Wacker Dr. - Ste. 1800
Chicago, IL. 60606

Hand Delivered to:

Betsey M. Madden
Chief Legal Counsel
Illinois Department of Human Rights
100 West Randolph Street, Suite 10-100
Chicago, IL 60601

Case Disposition Unit
Illinois Department of Human Rights
100 West Randolph Street, Suite 10-100
Chicago, IL 60601

Subscribed and sworn to

before me on March 6, 2020

José M. Galvez
NOTARY PUBLIC

Shantelle Baker

OFFICIAL SEAL
JOSE M GALVEZ
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:06/13/22