CONSTITUTIONAL COURT OF SPAIN
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THE CONSTITUTIONAL COURT ACKNOWLEDGES THE DISCRIMINATION OF A WOMAN THAT COULD NOT IMPROVE HER WORKING CONDITIONS BECAUSE OF BEING ABSENT FOR HIGH-RISK PREGNANCY

The Constitutional Court has acknowledged the discrimination of a woman that was no able to improve her working conditions because of being absent, first for high-risk pregnancy and after during maternity leave. The Court considers that the company should have brought to notice of the worker the possibility of moving jobs and not doing it violates her right not suffer discrimination on the grounds of sex (Article 14 of the Spanish Constitution, hereinafter CE) because the cause of her leave derives from being a woman. The Court declares null the appealed decision of the High Court of Justice of Andalusia (TSJA). The rapporteur of this judgment is Judge Antonio Narváez and Judge Pedro González-Trevijano signs a dissenting vote.

The events leading to the amparo appeal are the following: the appellant had a permanent contract as a cleaning lady, part-time of 20 hours a week in a health centre. In March 2010, she had to stop working for high-risk pregnancy and after she took her maternity leave. In July of the same year, the company hired some else also with a permanent contract but of 30 hours, in another health centre. Once the appellant started working again, she learnt about the new employee and she asked the company to have the same new conditions applied to her contract. The company denied her request despite having worked for the company a longer period which, in accordance with the applicable collective agreement, gave her preference over the new employee.

In the constitutional case law, pregnancy is a *"differential factor"* that applies only to women. For this reason, the protection of this *"biological fact"* ante the woman's health must be compatible with the preservation of her professional rights; otherwise there would be a discrimination on the grounds of sex. While it is true that Article 14 CE does not promote maternity, it is prohibited any distinction, pejorative treatment or rights limitation of a woman in her job. Therefore, negative working consequences provoked by maternity may violate the right to equality.

"Ultimately —affirms the judgment— *the company should have allowed the worker to exercise her preferential right. This way she would have been treated equally and had the same chance the rest of her part-time co-workers did. The lack of notice on the company's side and its denial to acknowledge her right caused as a pejorative effect the chance of the worker to exercise that right. That is why the company violated the right no to suffer discrimination on the grounds of sex of her employee"*.

In his dissenting vote, Judge González-Trevijano thinks that the amparo appeal should not have been admitted because it had not exhausted the previous judicial remedies, a requisite that is justified in the subsidiary character of the amparo appeal. In his opinion, before submitting the amparo appeal, she should have initiated the nullity of actions in order to let The High Court of Justice of Andalusia deliver a decision on the subject of the possible violation of the right to equality —that does not even mention in its ruling— with a view to repair the reported discrimination derived from Article 14 CE.

Madrid, 27 January 2017.