This summary contains the cover page, the synthesis and the extract of a decision of Mexico's Supreme Court of Justice. Changes were made to its original text to facilitate the reading of the extract. This document has informative purposes, and therefore it is not binding.

UNJUSTIFIED DISMISSAL FOR PREGNANCY
(*DESPIDO INJUSTIFICADO POR EMBARAZO*)

CASE: *Contradicción de Tesis* 318/2018

REPORTING JUDGE: Yasmín Esquivel Mossa

DECISION ISSUED BY: Second Chamber of Mexico's Supreme Court of Justice.

DATE OF DECISION: May 8, 2019

KEY WORDS: right to work, right to equality and non-discrimination, right to be judged with a gender perspective, unjustified dismissal, evidentiary assessment, resignation, pregnancy.

CITATION OF THE DECISION: Supreme Court of Justice of the Nation, *Contradicción de Tesis* 318/2018, Second Chamber, Yasmín Esquivel Mossa, J., decision of May 8, 2019, Mexico.

The full text of the decision may be consulted at the following link:
https://www.scjn.gob.mx/derechos-humanos/sites/default/files/sentencias-emblematicas/sentencia/2021-01/CT%20318-2018.pdf

SUGGESTED CITATION FOR THIS DOCUMENT: Human Rights Office of Mexico's Supreme Court of Justice, *Extract of Contradicción de Tesis 318/2018*, Mexico.

SUMMARY OF THE *CONTRADICCIÓN DE TESIS* 318/2018

BACKGROUND: A collegiate court of the State of Mexico (reporting court) reported the possible contradiction of decisions between the criteria it issued and those held by two collegiate courts of Nuevo León and one of Guerrero (dissenting courts). The dissenting courts essentially held that when a worker alleges an unjustified dismissal for her pregnancy and the employer responds by presenting her resignation, the Conciliation and Arbitration Board (the Board) hearing the matter must analyze the credibility of that document, since it would not be logical for a pregnant woman to resign from her job and lose the social security benefits she is entitled to as a worker. The court reporting the contradictory decisions decided that when an unjustified dismissal for pregnancy is alleged, if the resignation of the worker exhibited by the employer is perfected by the expert witness evidence offered by the parties, that is sufficient to give it probatory value, since it is understood that the pregnant worker voluntarily decided to terminate the employment.

ISSUE PRESENTED TO THE COURT: Whether or not to order the labor Board to analyze the credibility of the resignation of the worker exhibited by the employer, when she has stated that she was dismissed because of her pregnancy, even though the respective document has been perfected with expert witness testimony, and even when the plaintiff has not objected to the content of that document.

HOLDING: There are contradictory decisions for the following reasons. The Court has established that when a woman alleges having been subject to discrimination in the workplace, such as being dismissed for being pregnant, the gender perspective must be applied to analyze her case. This implies recognizing the socio-cultural reality women experience and eliminating the barriers and obstacles that place them at a disadvantage. The fact that a woman is pregnant presumes the need for medical attention and the enjoyment of other social security benefits to guarantee the health of the mother and the child, and therefore it is the responsibility of the State to maximize her protection and enjoyment of rights. The Boards are authorized by the Federal Labor Law to issue their awards according to the analysis of the credibility of disputed facts in

the labor proceeding, such that the evaluation of the evidence must avoid a formalistic result and be resolved according to the material truth deduced from reason and based on the constitutional principle of the primacy of reality. Thus, when a pregnant worker alleges to have been dismissed because of her pregnancy, the Board should examine whether there are indications of this and evaluate the personal conditions of the worker so it may determine whether it is credible that she has presented her resignation when pregnant, regardless of whether or not the worker has objected to the content of her resignation exhibited at trial. It should be emphasized that the presumption of the discriminatory act depends on whether the worker proves that she was pregnant at the time of the termination of employment. And the employer must prove that the termination of employment was the result of a cause unrelated to the pregnancy and that the resignation was free and spontaneous. Therefore, it was determined that the criterion issued with the following title must govern as court precedent: PREGNANT WORKER. IF THE EMPLOYER ARGUES THAT THE PLAINTIFF RESIGNED AND SHE SHOWS THAT AT THE TIME OF CONCLUSION OF THE EMPLOYMENT SHE WAS PREGNANT, A WRITTEN RESIGNATION IS INSUFFICIENT TO DEMONSTRATE THAT IT WAS FREE AND SPONTANEOUS.

VOTE: The Second Chamber decided this matter by a unanimous five votes of Judges Yasmín Esquivel Mossa, Alberto Pérez Dayán, Eduardo Medina Mora I., José Fernando Franco González Salas and Javier Laynez Potisek.

The votes may be consulted at the following link:
https://www2.scjn.gob.mx/ConsultaTematica/PaginasPub/DetallePub.aspx?AsuntoID=244233

EXTRACT OF THE *CONTRADICCIÓN DE TESIS* 318/2018

p.1 Mexico City. The Second Chamber of Mexico's Supreme Court of Justice (this Court), in session of May 8, 2019, issues the following decision.

BACKGROUND

p.1-2 On November 25, 2018, the Presiding Judge of the collegiate court of the State of Mexico (the reporting court) reported the possible contradiction of decisions between the criteria held when resolving an *amparo directo* and those held by two collegiate courts of Nuevo León and one of Guerrero (dissenting courts).

p.2-3 By ruling of October 2, 2018, the Chairman of this Court ordered the formation and registration of the relevant case file. By ruling of March 22, 2019, this matter was sent to Judge Yasmín Esquivel Mossa, to prepare the draft decision.

p.6 The legal arguments contained in the final decisions issued by the Collegiate Circuit Courts that gave rise to the contradictory decisions report are the following:

p.26 The need arose for the disputing bodies to evaluate the credibility of the resignation presented by the employer in light of the claim of the worker that she had been fired because of her pregnancy, which implied an allegation that involved using the gender perspective tool and the principle of non-discrimination against the perfecting of the document through expert witness evidence presented at trial.

This situation led the reporting court to grant full validity to the resignation of the worker, since the result of the expert witness evidence clearly proved her express consent to terminate the employment, by proving through these technical means its content and signature, as well as the time it was stamped, including her fingerprint, and therefore it deemed that given these circumstances, it was unnecessary to apply the gender perspective study, since based on those elements there was no doubt that the worker voluntarily terminated her employment.

p.27 The dissenting courts considered that in the case of an allegation of unjustified dismissal for pregnancy, the Conciliation and Arbitration Board (the Board) must study the credibility of the resignation presented by the employer, analyzing it in all conscience and with a gender perspective, even despite its perfecting with the result of expert witness evidence, since it would be illogical for a women in this condition to resign from her job, given her vulnerability and the loss of rights implied.

STUDY OF THE MERITS

p.24-25 This Court has determined that the following premises must be met for a contradiction of decisions to exist: the presence of two or more final decisions in which discrepant legal criteria on the same point of law are adopted, regardless of whether the facts surrounding them are not exactly the same; and that the difference in criteria issued in these final decisions is presented in the legal arguments, reasoning or respective legal interpretations.

p.25-26 Thus, this Court observes that there is a contradiction between the decision held by the reporting court and the one held by the dissenting courts.

p.27 It is seen that there is a contradiction of criteria on the same legal point and it consists of determining whether or not the Board should analyze the credibility of the resignation of the worker exhibited by the employer, given her claim that she was dismissed because of her pregnancy, even though the respective document has been perfected with expert witness evidence, and even when the plaintiff has not objected to the content of that document.

Thus, the criteria that must prevail as court precedent is the one held by this Court based on the following legal arguments.

p.27-28 The Second Chamber when resolving the *Contradicción de Tesis* 422/2016 established that, while pregnant women enjoy certain rights and prerogatives that the Federal Constitution and the laws recognize for her, in reality many women face a lack of stability in employment, due to the burden that some companies undertake of granting maternity leave, which requires them to substitute the pregnant employee with the consequent

costs, as well as in the postpartum and breastfeeding stage, due to the prerogatives the law requires be granted to working mothers.

p.28 Given this situation, it was determined that when the reason alleged by the worker is a discriminatory act, such as the termination of her employment by the employer because she was pregnant, this merits applying the gender perspective tool. The use of this tool implies recognizing the socio-cultural reality women experience and eliminating the barriers and obstacles that place her at a disadvantage at a particular moment in which she needs pre- and postnatal medical care and the social security benefits that guarantee the wellbeing of the minor, and requires greater and specific protection of the State, in order to achieve a real and effective guarantee of their rights.

p.30 Regarding the analysis of the credibility of facts disputed in the labor suit, the Second Chamber has issued various criteria in which it has determined their validity, based on the authority established in article 841 of the Federal Labor Law [Ley Federal del Trabajo] (LFT).

p.30-31 That provision shows that the Conciliation and Arbitration Boards must issue their awards based on the known truth and in good faith, appreciating the facts in all conscience, without imposing formalisms or rules in relation to the evidence contributed by the parties, but always expressing the reasoning and legal grounds supporting them, being clear and consistent with the claims made in the suit.

p.31 Indeed, the Second Chamber when deciding the *Contradicción de Tesis* 436/2016 held that, while the burden of proof regarding the actual time worked, when that is disputed, always falls on the employer, since it is the employer who can prove that, the Boards must, in the stage of evaluating the evidence and based on article 841 of the LFT, avoid a formalistic result and decide based on the material truth deducted from reasoning.

A similar criterion was held in the *Contradicción de Tesis* 250/2011, in which it was decided that the Board may determine whether the workday of the domestic worker is based on the normal particularities of the work or on extraordinary or special circumstances that

make it possible to determine if the work was excessive, taking into consideration the reasonability and credibility of the claim.

p.32 In addition, when deciding the *Solicitud de Sustitución de Jurisprudencia* 8/2015, the Second Chamber held the criterion that the labor judicial authorities are authorized to make a judgment of credibility when the salary indicated by the worker in its claim, according to the job held, is excessive, notwithstanding that it has been considered affirmed.

p.32-33 In these terms, it is clear that the allegation of a worker that she has been dismissed for her pregnancy means the Board must scrupulously examine whether there are indications or circumstantial evidence that could lead to the conclusion that it is implausible that the worker has resigned from her job, making use of the power conferred to it in article 841 of the LFT, and taking into account the particular characteristics of the case, as well as the personal conditions of the worker, such as her education, state of health, economic solvency and any other elements shedding light on the plausibility that the worker has resigned from her job when pregnant.

p.33 The above must be analyzed by the judge based on the principle of primacy of reality established in the third paragraph of article 17 of the Federal Constitution, since in practice the existence of a dismissal because of the pregnancy of the worker is more likely than her voluntary resignation when she became pregnant.

Therefore, even when the worker has not objected to the content of her resignation exhibited at trial, given her state of vulnerability because of her pregnancy, there is reasonable doubt regarding the consent of the woman to lose her job, due to the expenses of childbirth and the need to have access to social security to cover the medical attention needed.

It must be emphasized that the study of the credibility of the resignation exhibited by the employer is subject to proving in trial that the worker was pregnant at the time of the termination of employment, since the presumption regarding the discriminatory act

depends on that and constitutes a logical prerequisite to assert that the dismissal was due to the pregnancy of the plaintiff.

p.33-34 It is the employer that must show that the termination of the employment had a cause unrelated to the pregnancy and that the resignation was given freely and spontaneously. This is based on the criterion held by the Second Chamber when deciding the *contradicción de tesis* 422/2016, as well as the provisions of article 8 of the Convention 183 of the International Labor Organization which, although the Mexican State has not ratified it, is applicable to the case as an international standard protecting women workers, since it establishes that the employer will have the burden of proof to show that the reasons for the dismissal are not related to the pregnancy, the birth of the child and its consequences or breastfeeding.

DECISION

p.34 Therefore, the criterion that hereinafter shall govern as court precedent is the one held by this Court with the following title:

PREGNANT WORKER. IF THE EMPLOYER ARGUES THAT THE PLAINTIFF RESIGNED AND SHE SHOWS THAT AT THE TIME OF CONCLUSION OF THE EMPLOYMENT SHE WAS PREGNANT, A WRITTEN RESIGNATION IS INSUFFICIENT TO DEMONSTRATE THAT IT WAS FREE AND SPONTANEOUS.