No. ___

IN THE

# Supreme Court of the United States

THE NEW YORK LAW PUBLISHING COMPANY,
THE LEGAL INTELLIGENCER and
THE PENNSYLVANIA LAW WEEKLY,
*Petitioners*,

v.

JANE DOE, C.A.R.S PROTECTION PLUS, INC.
and FRED KOHL,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit**

## PETITION FOR A WRIT OF CERTIORARI

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September 9, 2008

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## QUESTIONS PRESENTED

1. Whether the Third Circuit's blanket sealing of an entire case, including its very existence, is facially and/or presumptively unconstitutional under the First Amendment.

2. Whether the Third Circuit's blanket sealing of an entire case—dockets, judicial records and judicial proceedings—is contrary to this Court's precedents and decisions of other circuit courts of appeals and has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's supervisory powers.

3. Whether the Third Circuit erred and disregarded this Court's precedents by failing to require that both the trial and appellate court give the general public and press notice and the opportunity to be heard before sealing judicial records and closing court proceedings, and by failing to require an articulation of specific, on-the-record findings for each record and each proceeding that there is an "overriding interest" justifying closure and that no less restrictive alternatives exist.

4. Whether the Third Circuit erred and disregarded this Court's precedents when it refused to allow Petitioners to intervene in the proceedings below for the limited purpose of asserting their rights of access to judicial records and proceedings under the First Amendment and common law.

## PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceedings.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Petitioners state as follows:

Petitioner The New York Law Publishing Company is not a publicly held company, and no publicly held entity owns 10% or more of Petitioner's stock. Petitioners Legal Intelligencer and the Pennsylvania Law Weekly are newspapers owned by The New York Law Publishing Company.

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## PETITION FOR A WRIT OF CERTIORARI

## DECISIONS BELOW

The Order of the United States Court of Appeal for the Third Circuit, dated June 19, 2008, which denied Petitioners' petition and motions for intervention and access to judicial records and proceedings, is included in the Appendix at Exhibit A.

Also included in the Appendix (at Exhibit B) is the decision of the United States Court of Appeal for the Third Circuit, dated May 30, 2008, which affirmed the decision of the United States District Court for the Western District of Pennsylvania to seal the entire case, including the dockets.

## JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit was entered on June 19, 2008. The jurisdiction of this Court rests upon 28 U.S.C. § 1254.

## CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution, which states as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances."

## STATEMENT OF THE CASE

On May 30, 2008, the United States Court of Appeals for the Third Circuit filed a "precedential" decision. The decision was the first sign of the existence of a case that had been completely sealed, including the docket sheets, for seven years. The decision reversed the United States District Court for the Western District of Pennsylvania's granting of summary judgment in favor of the respondents/ defendants C.A.R.S Protection Plus, Inc. and Fred Kohl. In one paragraph, the Third Circuit also affirmed the District Court's sealing of the entire case, ruling that it was not an abuse of discretion even though the public and press was not given notice and opportunity to be heard, and no on-the-record findings supporting closure were made.

According to the Third Circuit's decision, this is an employment discrimination lawsuit brought under Title VII, as amended by the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k), by Jane Doe, who

alleged that her employer, respondent/defendant C.A.R.S Protection Plus, discriminated against her because she exercised her constitutional right to have an abortion. *See* Appendix A.

Until the Third Circuit's May 30, 2008 decision, however, the civil rights/employment discrimination lawsuit was completely sealed from public view. All proceedings were closed. All judicial records were sealed. Even the docket was sealed. As far as the public knew, the case did not exist. To this date, the only information available to the public about this seven-year old case is contained in the Third Circuit's May 30, 2008 decision.

Thus, for example, if a member of the public or press, using the PACER system, enters the number for the case in the District Court, PACER issues a report saying "This case is SEALED." No information about the case is given, not even the parties or type of case. Of course, no member of the public or press would have been able to do so, because, until the Third Circuit's decision, the case number was unknown. Or if one gives the name of the parties in this case—for example, respondent/defendant Fred Kohl—PACER issues a report saying: "Sorry, no person found." Similarly, if one uses PACER to access the Third Circuit's dockets and enters the case numbers for the appeals, PACER issues a report that says: "Case under seal." Or if one gives PACER the name of the parties in this case ("Fred Kohl"), PACER issues a report saying: "No case found with the search criteria." Thus, both courts' sealing of this case is comprehensive. For seven years, this case was invisible, and the only publicly-available information about the case remains the Third Circuit's May 30, 2008 decision.

Thirteen days after the Third Circuit revealed this case's existence in its May 30, 2008 decision, Petitioners, on June 12, 2008, timely filed two motions and one petition with the Third Circuit:

1. Emergency Motion For Intervention For The Limited Purpose of Seeking Access To Judicial Records and Proceedings;
2. Emergency Petition For Rehearing With Suggestion For Rehearing In Banc; and
3. Emergency Motion To Obtain Access To All Judicial Records And Proceedings, Including Dockets.

On June 19, 2008, before any party had responded to the motions and petition, the Third Circuit issued an Order denying Petitioners' motions and petition. *See* Appendix B. Thus, the Third Circuit refused to unseal the docket, judicial records and proceedings in the Third Circuit. And the Third Circuit refused to reconsider its May 30, 2008 decision affirming the District Court's sealing of the docket and all judicial records and proceedings in the underlying case.[1]

As a result, this entire case, at both the District Court and Third Circuit levels, remains completely sealed with the only exception of the Third Circuit's May 30, 2008 Decision and June 19, 2008 Order.

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[1] The Third Circuit's suggestion that Petitioners "pursue this matter with the District Court upon remand" makes no sense since the Third Circuit itself sealed the records and proceedings on appeal, including its own docket. The District Court, of course, has no power to order the Third Circuit to unseal its own records and proceedings. Moreover, since the Third Circuit's May 30, 2008 decision specifically sanctioned the District Court's sealing, it would be futile to ask the District Court to reverse an action the Third Circuit expressly upheld.

Petitioners understand that the respondents are also subject to a gag order preventing them from talking about the case.

As the Third Circuit's May 30, 2008 decision reveals, the District Court permitted respondent/plaintiff Jane Doe to proceed in the lawsuit using a pseudonym. Respondents/defendants C.A.R.S and Kohl challenged that ruling on appeal to the Third Circuit, which held in its May 30, 2008 decision that the District Court did not abuse its discretion in granting respondent Jane Doe's motion to proceed anonymously. Petitioners do not object to respondent/plaintiff Jane Doe's anonymity, and that is not an issue for this Court to address. Nor do Petitioners object to the redaction of information from court records and proceedings that would reveal the identity of respondent/plaintiff Jane Doe.

## REASONS FOR GRANTING THE PETITION

### I. THE THIRD CIRCUIT'S DECISION UPHOLDING THE COMPLETE SEALING OF THE CASE WITHOUT NOTICE AND OPPORTUNITY TO BE HEARD, WITHOUT ARTICULATED, ON-THE-RECORD FINDINGS AND INDIVIDUALIZED DETERMINATIONS AND WITHOUT PERMITTING PETITIONERS TO INTERVENE RAISES AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THE RELEVANT DECISIONS OF THIS COURT

#### A. The First Amendment and Common Law Right of Access

This Court has ruled that there is a common law and First Amendment right of public access to criminal cases. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982). This Court has likewise recognized a common law right of access to judicial records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978).

While this Court has not directly addressed the issue of access to civil proceedings, it has noted that "historically both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980); *see also Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property."). Indeed, this Court has observed that "in some civil cases the public interest in access . . . may be as strong as, or stronger than, most criminal cases" *Gannett v. DePasquale*, 443 U.S. 368, 387 n.15 (1979). Federal appellate courts have uni-

formly applied the right to access to civil proceedings. *See, e.g.*, *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.,* 24 F.3d 893, 897 (7th Cir. 1994); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059 (3d Cir. 1984); *Westmoreland v. CBS, Inc.*, 752 F.2d 16 (2d Cir. 1984); *In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1984); *Newman v. Graddick*, 696 F.2d 796 (11th Cir. 1983).

This right of access to judicial records and proceedings serves to enhance the basic fairness of the proceedings and to safeguard the integrity of the fact-finding process. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (*Press Enterprise I*); *Globe Newspaper*, 457 U.S. at 606. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572. Because of the importance of this right, closure must be "rare and only for cause shown that outweighs the value of openness." *Press-Enterprise I* at 509.

### B. The Third Circuit's Decision Conflicts with This Court's Jurisprudence

The Third Circuit's rulings violated this right of access in numerous fundamental ways.

*First*, this Court has held that before access can be denied, "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper*, 457 U.S. at 609 n.25. In this case, the Third Circuit affirmed the District Court's sealing of the entire case without any notice and opportunity to be heard. And the Third Circuit sealed its own docket, records and proceedings (with but two exceptions, as described

above) without providing notice and opportunity to be heard. For a period of seven years, this case was completely secret, the public and press not even aware of the denial of their rights established by this Court and thereby unable to assert their rights of access to a case involving fundamental constitutional issues. These rulings of the Third Circuit and District Court directly conflict with this Court's decisions.

*Second*, this Court has held that if access is denied, a court must articulate detailed, on-the-record "findings" that there is an "overriding interest" justifying closure and that no less restrictive alternatives exist. *See Richmond Newspapers,* 448 U.S. at 581.

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

*Press-Enterprise I*, 464 U.S. at 824 (holding that "not only was there a failure to articulate findings with the requisite specificity but there was also a failure to consider alternatives to closure").

Here, the Third Circuit affirmed the District Court's complete sealing of the lawsuit even though the trial court never made any on-the-record articulation of findings that justified closure. Moreover, the Third Circuit sealed its own dockets, records and proceedings (with but two exceptions) without articulating on the record its findings justifying closure. As a result, the public and press

were never informed why the lower courts sealed all judicial records and proceedings in this case. Nor have the lower courts explained why they sealed the case or how they conducted the required analysis under the First Amendment and common law before denying such access. These failures directly conflict with the decisions of this Court.

*Third*, this Court has strongly suggested if not held that "individualized determinations are *always* required before the right of access may be denied." *Globe Newspaper*, 457 U.S. at 608 n.20 (invalidating state statute providing for the exclusion of the public and press from trials of specified sexual offenses) (*citing Richmond Newspapers*, 448 U.S. at 581) (emphasis added). In other words, blanket closure orders are unconstitutional absent individualized determinations justifying closure for each record and proceeding.

Here, the Third Circuit affirmed the District Court's blanket sealing of an entire case, even the very existence of the case, without any "individualized determinations" that closure of each record and proceeding was justified by a compelling interest for which there were no less restrictive alternatives. Moreover, the Third Circuit sealed its own dockets, records and proceedings without any "individualized determinations" required by this Court. Thus, these rulings of the Third Circuit and District Court directly conflict with this Court's decisions.

*Lastly*, in giving the public and press the right to notice and opportunity to be heard prior to any closure, this Court has implicitly required that courts must permit members of the public and press to intervene for the limited purpose of seeking access to judicial records and proceedings. Here, the Third

Circuit, without any explanation, denied Petitioners' motion to intervene for the limited purpose of seeking access, thereby denying Petitioners the opportunity to be heard. That denial is inconsistent with the decisions of this Court.

For these four reasons, the Third Circuit's decision directly contradicts established precedent of this Court. Accordingly, Petitioners respectfully request that this Court grant certiorari and hear this appeal.

## II. THE THIRD CIRCUIT'S DECISION SEALING ITS AND THE DISTRICT COURT'S DOCKETS CONFLICTS WITH THE DECISION OF OTHER UNITED STATES COURTS OF APPEALS ON THE SAME IMPORTANT MATTER

The Third Circuit not only affirmed the District Court's complete sealing of the case docket but also has sealed its own appellate docket. By thus sealing the dockets, the lower courts effectively rendered the case a secret case, unknown and unknowable to anyone other than the parties to the lawsuit. The first time the general public and press became aware of the lawsuit was when the Third Circuit issued its May 30, 2008 decision that reversed the District Court's granting of defendant's motion for summary judgment and affirmed the District Court's sealing of the case. That first revelation of the case's existence came nearly seven years after the case was filed in 2001.

While the Third Circuit's decision blessed secret cases and dockets, other Circuit Courts have found them facially unconstitutional. The Eleventh Circuit was the first circuit court to address this issue. In *United States v. Valenti*, 987 F.2d 708 (11th Cir.

1993), *cert. den. sub nom.*, *Times Pub. Co. v. U.S. District Court for the Middle District of Florida*, 510 U.S. 907 (1993), the Eleventh Circuit held that a "dual-docketing system" or "sealed docket" in the Middle District of Florida "completely hid from public view the occurrence" of various closed proceedings and filings. *Id.* at 715. It held that this secrecy violated the public's and press' First Amendment right of access and declared it facially unconstitutional, finding that secret dockets are "inconsistent with affording the various interests of the public and the press meaningful access" to judicial records and proceedings. *Id.*

Despite the Eleventh's Circuit ruling, the Southern District of Florida continued to seal dockets in certain criminal cases. Although that district court unsealed the dockets in one criminal case, the Eleventh Circuit nonetheless rebuked the district court, reminding it that "it cannot employ secret docketing procedures that we[re] explicitly found unconstitutional in *Valenti*". *United States v. Fabio Ochoa-Vasquez*, 428 F.3d 1015, 1028 (11th Cir. 2005) (finding that the district court violated the First Amendment right of access by "ordering the clerk of court to keep records sealed, and directing that they be held in the vault and not docketed").

More recently, in *The Hartford Courant Co. v. Pellegrino*, 380 F.3d 83 (2d Cir. 2004), the Second Circuit held that the public and press have a qualified First Amendment right to inspect docket sheets, which provide an index to the records of judicial proceedings." *Id.* at 91. The Second Circuit found that

> [T]he ability of the public and press to attend civil and criminal cases would be merely theo-

> retical if the information provided by docket sheets were inaccessible. In this respect, docket sheets provide a kind of index to judicial proceedings and documents, and endow the public and press with the capacity to exercise their rights guaranteed by the First Amendment . . . . Sealed docket sheets would also frustrate the ability of the press and the public to inspect those documents, such as transcripts, that we have held presumptively open. Finally, the inaccessibility of docket sheets may thwart appellate or collateral review of the underlying sealing decisions. Without open docket sheets, a reviewing court cannot ascertain whether judicial sealing orders exist.

*Id.* at 94. Analyzing the "logic" and "experience" prongs of the test set forth in *Press-Enterprise I*, the Second Circuit found that there was a longstanding historical openness for docket sheets, and openness "enhances both . . . basic fairness . . . and the appearance of fairness so essential to public confidence in the system." *Id.* at 94 (*quoting Press-Enterprise I*, 464 U.S. at 508). As a result, the Second Circuit held that "docket sheets enjoy a presumption of openness and that the public and the media possess a qualified First Amendment right to inspect them." *Id.* at 97; *see also In re State-Record Company, Inc.,* 917 F.2d 124, 129 (4th Cir. 1990) (holding that an order sealing docket sheets violated the public's First Amendment rights, and noting "we can not understand how the docket entry sheet could be prejudicial").[2]

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[2] *See also Washington Post v. Robinson,* 935 F.2d 282, 289 (D.C. Cir. 1991) (holding that motions to seal plea agreements must be publicly docketed); *Globe Newspaper Co. v. Fenton*, 819

The right to docket sheets is the basic pre-condition for the public's exercise of its right of access to the courts. Without it, the right of access established by this Court would be meaningless. The Third Circuit's decision denying access to the docket in this case conflicts with the decisions of other Circuit Courts of Appeal. Accordingly, Petitioner respectfully requests that this Court grant certiorari and hear this appeal.[3]

## III. THE THIRD CIRCUIT'S DECISION HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, AND HAS SANCTIONED SUCH A DEPARTURE BY A LOWER COURT, AS TO CALL FOR THE EXERCISE OF THIS COURT'S SUPERVISORY POWERS

The Third Circuit's decision is truly extraordinary. It permitted the wholesale sealing of an entire case. The public knew nothing of the case's existence for nearly seven years. If the public or press asked these courts whether there was a case brought by respondent Jane Doe against respondent C.A.R.S, they would have been told that no such case existed. Nothing about this case was available. Such secrecy

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F. Supp. 89 (D. Mass. 1993) (declaring Massachusetts' law denying access to court-maintained alphabetized indexes of defendants in closed criminal cases to be violative of the First Amendment).

[3] Again, Petitioners do not object to the redaction of information from court records and proceedings that would reveal the identity of respondent/plaintiff Jane Doe. Thus, Petitioners are not seeking access to court dockets (or to any other judicial record or proceeding) to the extent that they would reveal Jane Doe's identity.

seems impossible in our country, yet it happened here, and was approved by the Third Circuit in one paragraph.

Not only did the Third Circuit deny the public and press access to this lawsuit, it also denied Petitioners even the right to intervene for the purpose of seeking access. For the Third Circuit, notice and the opportunity to be heard mean nothing when it decides to hide the existence of lawsuits. In so ruling, the Third Circuit apparently believes that there are no rights of access implicated by its decision.

This is no run-of-the-mill lawsuit. It raises the question of whether it is legally permissible for an employer to punish a woman's exercise of her constitutional right to terminate her pregnancy. In publicly issuing a "precedential" opinion, the Third Circuit itself thought this case important. Yet here an entire case, at both the trial and appellate levels, was completely sealed, and neither the Third Circuit nor the District Court thought it necessary to tell anyone about the sealing and thereby give the public and press the chance to object.

This Court has repeatedly affirmed the value of openness. For example, access:

- promotes informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system
- serves an important "educative" interest
- gives the assurance that the proceedings were conducted fairly to all concerned and "promotes confidence in the fair administration of justice"

- has a significant community therapeutic value because it provides an "outlet for community concern, hostility, and emotion"
- serves as a check on corrupt practices by exposing the judicial process to public scrutiny, thus discouraging decisions based on secret bias or partiality
- enhances the performances of all involved.

*Richmond Newspapers*, 448 U.S. at 569-72, 584, 596-97. By denying access to the dockets, all proceedings and all but two judicial records in a seven-year-old civil case raising important constitutional questions, the Third Circuit undermined and disregarded every one of these important public policies supporting access.

The secrecy of this case prompts numerous troubling questions. How many other cases are completely sealed? Is there a parallel justice system at work here, visible and accountable to no one? The possibility that there are many other sealed cases raises deeply disturbing questions about the integrity and legitimacy of our legal system. This is no idle fear, as there have been a number of recent revelations where courts have permitted cases to proceed in complete secrecy, even despite circuit court opinions prohibiting the practice.[4]

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[4] In 2006, the Reporters Committee for Freedom of the Press published a study showing that as many as 18% of criminal cases filed in D.C. federal courts were missing or "undocketed." In Connecticut, a 40-year old secret docketing system was so hidden that even the chief justice was unaware of its existence. More information about the unfortunate prevalence of secret dockets is available at http://www.rcfp.org/secretjustice/

It is vitally important that this Court act to reassure the public that the courts are transparent, operate efficiently and fairly, and dispense justice to all. Despite the rulings by some circuit courts requiring access to dockets, district courts continue to seal dockets and hide the existence of lawsuits. The only way to remedy such violations of the First Amendment is for this Court to grant cert, reverse the Third Circuit's decision, and issue an opinion that unambiguously tells federal courts that secret cases and dockets are flatly unconstitutional. Failure to do so would sanction the Third Circuit's conduct and embolden other federal courts to do the same.

Accordingly, the Petition should be granted.

## CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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September 9, 2008

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secretdockets/pg1.html. *See generally* Meliah Thomas, "The First Amendment Right of Access to Docket Sheets," 94 Cal. L. Rev. 1537 (2006).

**APPENDIX A**

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed May 30, 2008]

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Nos. 06-3625, 06-4508

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JANE DOE, Appellant at No. 06-3625,

v.

C.A.R.S PROTECTION PLUS, INC.; FRED KOHL,

———

JANE DOE,

v.

C.A.R.S PROTECTION PLUS, INC.; FRED KOHL, C.A.R.S Protection Plus, Inc., Appellant at No. 06-4508.

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On Appeal from the United States District Court
for the Western District of Pennsylvania

(D.C. No. 01-cv-02352)

District Judge: The Honorable Maurice B. Cohill, Jr.

———

ARGUED OCTOBER 31, 2007

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BEFORE: RENDELL and NYGAARD, *Circuit Judges* and McCLURE, [*] *District Judge*.

---

[*] Honorable James F. McClure, Jr., District Judge for the United States District Court for the Middle District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

NYGAARD, *Circuit Judge*.

Jane Doe sued her former employer, C.A.R.S. Protection Plus, Inc. (CARS), alleging employment discrimination based on gender, in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq*. The District Court granted the employer's motion for summary judgment, finding that Doe had failed to establish a *prima facie* case of discrimination. We will reverse.

I.

We exercise plenary review over the District Court's grant of summary judgment and apply the same standard, *i.e*., whether there are any genuine issues of material fact such that a reasonable jury could return a verdict for the plaintiff. FED. R. CIV. P. 56(c); *Debiec v. Cabot Corp.*, 352 F.3d 117, 128 n. 3 (3d Cir. 2003) (citation omitted). We view the facts of this case in the light most favorable to the nonmoving party and draw all inferences in that party's favor. *Armbruster v. Unisys Corp.,* 32 F.3d 768, 777 (3d Cir. 1994).

In an employment discrimination case, the burden of persuasion on summary judgment remains unalterably with the employer as movant. The employer must persuade us that even if all of the inferences which could reasonably be drawn from the evidentiary materials of record were viewed in the light most favorable to the plaintiff, no reasonable jury could find in the plaintiff's favor. *See Sorba v. Pennsylvania Drilling Co., Inc*., 821 F.2d 200, 201-02 (3d Cir. 1987), *cert. denied*, 484 U.S. 1019 (1988).

A.

CARS does business in several states insuring used cars. CARS hired Jane Doe as a graphic artist in June 1999. Doe's sister-in-law, Leona Dunnett, was the CARS office manager. Fred Kohl, Vice-President and part-owner of the company, was Doe's supervisor. In May of 2000, Doe learned that she was pregnant. When she told Kohl she was pregnant, she asked Kohl about making up any time missed for doctor's appointments. Kohl told Doe they would "play it by ear."

On Monday, August 7, 2000, Doe's doctor telephoned her at work to inform her that problems were detected in her recent blood test and that further tests were necessary. An amniocentesis test was scheduled for the next day. Kohl was not in the office on August 7, 2000, so Doe told Leona Dunnett and Alivia Babich (who was Kohl's personal secretary), that she needed to be off work on Tuesday, August 8, 2000. Babich notified Kohl that Doe would be absent.

The amniocentesis test was not performed on the 8th, but a sonogram was, and additional tests were scheduled for the following day. Doe's husband telephoned Kohl and informed him that there were

problems with the pregnancy and that the test would be performed on August 9th. Kohl approved the absence and said to contact him the next day.

On Wednesday, August 9th, Doe learned that her baby had severe deformities and her physician recommended that her pregnancy be terminated. That afternoon, Doe's husband again telephoned Kohl and told him that Doe would not be at work the next day. Kohl approved the absence and asked that Doe's husband call him the following day.

Doe had an additional doctor's appointment on Thursday, August 10th. Doe's husband testified that he called CARS again on that Thursday, and first spoke to Leona Dunnett. Then, he spoke with Kohl and told him that the pregnancy would be terminated the following day. Doe's husband requested that she be permitted to take one week of vacation the following week. According to Doe's husband's testimony, Kohl approved the request for a one-week vacation. Her pregnancy was terminated on Friday, August 11, 2000. Neither Doe nor her husband called Kohl over the weekend of August 12th.

A funeral was arranged for Doe's baby on Wednesday, August 16th. Kohl gave Leona Dunnett (the baby's aunt) permission to take one hour off work to attend the funeral. As she was leaving for the funeral, Leona noticed Babich packing up Doe's personal belongings from her desk. After the funeral, Leona told Doe what she had seen. Doe called Kohl who told her that she had been discharged.

After Doe was discharged from her employment at CARS, she filed a timely charge with the EEOC and was issued a right-to-sue letter. Doe filed this lawsuit, alleging employment discrimination based on

gender, a violation of Title VII, as amended by the Pregnancy Discrimination Act (PDA), 42 U.S.C. § 2000e(k). Doe maintained that CARS terminated her employment because she underwent a surgical abortion.

We note at the outset that Doe does not assert a typical pregnancy discrimination claim. She does not claim, for example, that she was discriminated against because she was pregnant or that she had been fired while on maternity leave. Instead, she argues that she was discharged because she underwent a surgical abortion. Whether the protections generally afforded pregnant women under the PDA also extend to women who have elected to terminate their pregnancies is a question of first impression in this Circuit.

II.

A.

The PDA makes it an "unlawful employment practice for an employer to discriminate against any of his employees because he has opposed any practice made an unlawful employment practice by this subchapter." 42 U.S.C. § 2000e-3(a); *see also Curay-Cramer v. Ursuline Acad. of Wilmington, Delaware*, 450 F.3d 130 (3d Cir. 2006). In *CurayCramer*, the Appellant argued that Title VII's opposition clause protects any employee who has had an abortion, who contemplates having an abortion, or who supports the rights of women who do so. *Id.* at 134. Although we did not directly address the question in that case, we pointed to a decision of the Court of Appeals for the Sixth Circuit with approval:

> We note that the Sixth Circuit Court of Appeals has held that "an employer may not discriminate

> against a woman employee because 'she has exercised her right to have an abortion.'" *Turic v. Holland Hospitality, Inc*., 85 F.3d 1211, 1214 (6th Cir.1996) (quoting H.R. REP. NO. 95-1786 (1978) (Conf.Rep.), reprinted in 1978 U.S.C.C.A.N. 4749, 4765-66). Extending that principle, the Sixth Circuit further held that an employer "cannot take adverse employment action against a female employee for merely thinking about what she has a right to do." *Id.* Likewise, the Equal Employment Opportunity Commission (EEOC) has taken the position that it is an unlawful employment practice to fire a woman "because she is pregnant or has had an abortion." 29 C.F.R. pt. 1604, App. (1986).

*Id*. at 134 n.2.

> The PDA 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.

42 U.S.C. § 200e(k). The EEOC guidelines interpreting this section, to which we give a high degree of deference under *Griggs v. Duke Power*, 401 U.S. 424, 433-34 (1971), expressly state that an abortion is covered by Title VII:

> The basic principle of the [PDA] is that women affected by pregnancy and related conditions must be treated the same as other applicants and

> employees on the basis of their ability or inability to work. A woman is therefore protected against such practices as being fired . . . merely because she is pregnant or has had an abortion.

Appendix 29 C.F.R. pt. 1604 App. (1986). Similarly, the legislative history of section 2000e(k) provides the following guidance:

> Because [the PDA] applies to all situations in which women are "affected by pregnancy, childbirth, and related medical conditions," its basic language covers women who chose to terminate their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.

H.R. Conf. Rep. No. 95-1786 at 4 (1978) as reprinted in 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766. Clearly, the plain language of the statute, together with the legislative history and the EEOC guidelines, support a conclusion that an employer may not discriminate against a woman employee because she has exercised her right to have an abortion. We now hold that the term "related medical conditions" includes an abortion.

B.

We turn now to Doe's pregnancy discrimination claims. As earlier noted, Title VII prohibits employment discrimination based on an individual's sex. 42 U.S.C. § 2000e-2(a). The prohibition is breached "wherever an employee's pregnancy [or related medical condition] is a motivating factor for the employer's adverse employment decision." *In re: Carnegie Ctr. Assoc.*, 129 F.3d 290, 294 (3d Cir. 1997). The PDA does not, however, require preferential treatment for

pregnant employees. Instead, it mandates that employers treat pregnant employees the same as non-pregnant employees who are similarly situated with respect to their ability to work. *Id.* at 297; *see also Tysinger v. Police Dept. City of Zanesville*, 463 F.3d 569, 575 (6th Cir. 2006).

Disparate treatment discrimination is proven by either using direct evidence of intent to discriminate or using indirect evidence from which a court could infer intent to discriminate. Doe supports her claim with evidence from which discrimination may be inferred. We therefore use the familiar *McDonnell Douglas* burden-shifting framework to analyze her Title VII pregnancy discrimination claims. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). Under this analysis, the employee must first establish a *prima facie* case. If the employee is able to present such a case, then the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for its adverse employment decision. If the employer is able to do so, the burden shifts back to the employee, who, to defeat a motion for summary judgment, must show that the employer's articulated reason was a pretext for intentional discrimination.

The District Court recited a correct précis of a *prima facie* case of gender discrimination. It did not, however, acknowledge the "uniqueness" of pregnancy discrimination cases and instead, incorrectly treated Doe's claims as if they were an ordinary case of gender discrimination. A *prima facie* case cannot be established on a one-size-fits-all basis. *Jones v. School Dist. of Philadelphia*, 198 F.3d 403, 411 (3d Cir. 1999). Indeed, we have often remarked that "'the nature of the required showing' to establish a *prima facie* case of disparate treatment by indirect evidence

'depends on the circumstances of the case.'" *Torre v. Casio, Inc.*, 42 F.3d 825, 830 (3d Cir.1994) (citing *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 n. 13 (3d Cir.), *cert. denied*, 464 U.S. 937 (1983)). *Compare Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 658 (6th Cir. 2000) (setting forth elements of a *prima facie* case of pregnancy discrimination) with *Peletier v. United States*, 388 F.3d 984, 987 (6th Cir. 2004) (setting out elements of a *prima facie* case of gender discrimination).

We have cautioned that "the elements of that *prima facie* case must not be applied woodenly, but must rather be tailored flexibly to fit the circumstances of each type of illegal discrimination." *Geraci v. Moody-Tottrup, Int'l, Inc.*, 82 F.3d 578, 581 (3d Cir. 1996). Moreover, the Supreme Court has cautioned that the *prima facie* requirement for making a Title VII claim "is not onerous" and poses "a burden easily met." *Texas Dep't of Cmty. Affairs v. Burdine,* 450 U.S. 248, 253 (1981)*; see also Scheidemantle v. Slippery Rock Univ., State Sys. of Higher Educ.,* 470 F.3d 535, 539 (3d Cir. 2006). The *prima facie* phase of discrimination litigation "merely serves to raise a rebuttable presumption of discrimination by 'eliminating the most common nondiscriminatory reasons for the employers treatment' of a plaintiff." *Burdine*, 450 U.S. at 253-54.

1.

We have previously indicated that establishing a *prima facie* case of pregnancy discrimination differs from establishing a *prima facie* case of gender discrimination. In *Geraci*, we wrote that

> were Geraci alleging that [her employer] terminated her solely because she is a woman, she

> could make out her *prima facie* case by merely showing that she is a member of a protected class, that she was qualified for her position and that she was discharged under conditions that give rise to an inference of unlawful discrimination.

82 F.3d at 580. We modified the first element of a *prima facie* case of pregnancy discrimination to require that an employer have actual knowledge of an employees' pregnancy, reasoning that "pregnancy, of course, is different in that its obviousness varies, both temporally and as between different affected individuals." *Id*. at 581. Therefore, in a case alleging pregnancy discrimination, to raise an inference of any unlawful discharge a plaintiff must adduce evidence that she was pregnant, and, that the employer knew it. *Id*. at 580-81; *accord Prebilich-Holland v. Gaylord Entm't. Co.*, 297 F.3d 438, 444 (6th Cir. 2002). Because we did not need to address the remaining elements of the *prima facie* case of pregnancy discrimination in *Geraci,* we must do so here.

The next two elements of the *prima facie* case remain the same as those of gender discrimination. The plaintiff must be qualified for her job and she must have suffered an adverse employment decision. The fourth element requires that a plaintiff show some nexus between her pregnancy and the adverse employment action. The nexus between a plaintiff's pregnancy and an adverse employment action raises an inference of discrimination.

2.

Neither party disputes that Doe has met her burden on the first three elements of a *prima facie* pregnancy discrimination case: 1) she is or was preg-

nant and that her employer knew she was pregnant; 2) she was qualified for her job; and, 3) she suffered an adverse employment decision. It is the fourth element that is in dispute, namely whether there is some nexus between her pregnancy and her employment termination that would permit a fact-finder to infer unlawful discrimination.

The evidence most often used to establish this nexus is that of disparate treatment, whereby a plaintiff shows that she was treated less favorably than similarly situated employees who are not in plaintiff's protected class. *See Iadimarco v. Runyon*, 190 F.3d 151, 162 (3d Cir. 1999); *see also In re Carnegie Center Associates*, 129 F.3d at 297. Although we have held that "the PDA does not require that employers treat pregnant employees better than other temporarily disabled employees" *In re Carnegie Center,* 129 F.3d at 295, the PDA does require that employers treat pregnant employees no worse. Comparing Doe to other non-pregnant workers who were temporarily disabled, we conclude that Doe has provided sufficient evidence to satisfy the fourth element of the *prima facie* case and has thus raised an inference of discrimination sufficient to defeat summary judgment.

3.

Our factual analysis starts with CARS' somewhat less than compassionate leave policies. A memorandum authored by Kohl reveals that CARS employees were given no personal or sick leave. After one year on the job, employees were given five days' paid vacation. After five years' employment, they were given ten days. Any time taken off during a work day was to be deducted from the employee's vacation time or be unpaid.

Kohl testified that when an employee is so ill that he or she cannot work, CARS required the employee or spouse to call him or another designated supervisor on a daily basis. Employees could also arrange in advance if they knew that their illness or condition would entail missing more than one day's work. Kohl also acknowledged that there are circumstances where it is not necessary to call each day, particularly in situations where it is clear from the nature of the illness or injury that the employee cannot work. This statement contradicted Kohl's statements to the EEOC wherein he testified to the EEOC investigator that employees "needed to call off every day."

The record shows that different CARS employees were treated differently. Mike King, for example, suffered a heart attack while he was employed by CARS and testified that, although he or his wife did call to tell Kohl he was still in the hospital, they did not do so daily, and that he was paid during his absence. King missed two and a half days of work due to his heart attack. Babich also testified that King's wife called in once to tell the office how he was doing, but that no one called every day.

Another employee, Bruce Boynton, left work in the middle of the day and admitted himself into a psychiatric hospital. Kohl called Boynton while he was in the hospital and told him to report back to work or be fired. On another occasion, Boynton went to the emergency room after work. He called Kohl the next morning and called at least once more during the three days he missed for a hernia and back problem.

The testimony of Alivia Babich, Kohl's secretary, confirms this disparate treatment. Babich testified that for every employee, CARS had a "separate set of

rules" and that there was no uniformly enforced rule concerning the use of vacation or sick time. She specifically indicated that there was no rule at CARS which required an employee who was sick to call the company every day to report that they would miss work due to illness. Babich also testified that when CARS employee Michael King suffered a heart attack, neither King nor his wife called-in every day. Further, Babich testified that at least two other employees who missed work due to illness were not required to telephone the company every day. *See* Appendix at 215-216. This testimony indicates that although other employees were not expected to call the office every day, Doe's employment was terminated for precisely this reason. This testimony alone satisfies Doe's burden of establishing that other employees who were similarly situated were treated differently than her. But, there is more.

The District Court dismissed this discrepancy because none of these employees reported to Kohl—they had other supervisors. Whether these other employees had other supervisors is irrelevant—based on Kohl's own testimony in which he indicates that he and he alone could give employees permission to be off sick. In his deposition, he testified:

> Q: . . . was there a policy [regarding sick leave and calling-in]?
> A: Yes, you had to call in to make somebody aware that you weren't coming in or when you planned on coming back.
> Q: Who did you need to call?
> A: Myself.
> Q: Was it acceptable to call anybody else?
> A: If I wasn't there, Mr. Tedesco would have been.

Q: Would it have been acceptable to call Alivia Babich?
A: No.
Q: Would it have been acceptable to call Leona Dunnett?
A: No.
Q: Did you have to call in yourself? If you, if you were unable or sick, could you have a spouse call?
A: Absolutely.

Appendix at 103-104. According to this testimony, all employees had to receive permission from Kohl to be off sick and that the discretion was his alone to grant or deny permission to miss work when an employee was sick. It is irrelevant that the other employees in question (King, etc.) had other supervisors. Babich did report directly to Kohl and did not call every day or give a precise return date when she was out. The District Court found that Doe could not point to any evidence from which a reasonable jury could find similarly situated CARS employees were treated differently regarding calling off work because they were sick. That finding is not supported. Babich's testimony as well as Kohl's own testimony establishes that the treatment given other employees differed from that given to Doe. This raises an inference of discrimination sufficient to satisfy her minimal burden of establishing a *prima facie* case.

The District Court also indicated that these employees had all made arrangements before missing work. There is evidence, however, that Doe did exactly that. Her husband testified that he called Kohl to request a week of vacation for his wife to recover from her surgical procedure and that Kohl agreed to the request. Doe's husband testified that all

of the phone calls to Kohl were made from his father's house. Doe's husband further testified that he talked to Kohl on Thursday, August 10th and got Kohl's permission for his wife to take a vacation the following week. The District Court discounted this testimony because telephone records do not show a phone call from Doe's father-in-law's number to CARS telephone number. Doe's husband's testimony on this point, however, at least raises an issue of material fact. Doe testified that the call from her father-in-law's house may have originated from a cell phone as "there was a lot going on at that time." Appendix at 51-52.

Additionally, Doe points to testimony of Leona Dunnett to re-enforce the point. Leona Dunnett testified that on August 10th, Kohl asked her about coverage of the reception desk for the following week:

Q: What was the substance of the conversation [with Kohl]?
A: About coverage for the reception desk for the following week. He asked me if I had everything covered.
Q: Did [Doe] regularly cover the reception desk?
A: Yes.
Q: All day long?
A: No. Just for the lunch hour.
Q: What was said?
A: There was specific personnel that he did not want answering the phones, so I needed to rearrange lunch schedules so that it was covered without having those persons answering the phones for the following week.
Q: Did [Kohl] say that [Doe] would not be in work for the next week?

A: He said we needed to arrange coverage for the next week.

Appendix at 179. Doe points to this as confirmation that the August 10th phone call did take place—Kohl wanted to make sure that the telephones were covered because he knew Doe would be off the following week.

The District Court further found that Doe had not met this fourth element of the *prima facie* case because the record shows no discriminatory animus toward her for having an abortion. Doe counters with the following testimony of Leona Dunnett:

Q: What was the situation surrounding your leaving CARS?

A: On a daily basis, I go into Mr. Kohl's office to check the warranties, and I was there as he and Alivia were working on whatever, I was checking through the warranties and Alivia said, "I don't know what all this secrecy behind [the plaintiff] losing her baby was." And Mr. Kohl said "she didn't want to take responsibility." Which upset me.

The District Court found these to be "stray remarks" and did not give them much weight. True enough, we held in *Ezold* that stray remarks by decision-makers, which were unrelated to the decision-making process, are rarely to be given weight, particularly if they are made temporally remote from the date of the decision. *See Ezold v. Wolf, Block, Schorr & Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992). However, we later explained that such remarks could provide background evidence that may be critical to a jury's determination of whether the decision-maker was more likely than not acting out of a discriminatory

motive. *Antol v. Perry*, 82 F.3d 1291, 1302 (3d Cir. 2006). As the Court of Appeals for the Eighth Circuit has opined, "although . . . stray remarks, standing alone, may not give rise to an inference of discrimination, such remarks are not irrelevant." *Fisher v. Pharmacia & Upjohn*, 225 F.3d 915, 922 (8th Cir. 2000).

Here, we focus on Kohl's remarks in which he indicated that Doe "did not want to take responsibility." A finder of fact could infer that Kohl was referring to Doe's abortion because before this remark, Babich was talking about her disagreement with the "secrecy" surrounding Doe's baby. It is unclear, however, what "responsibility" Kohl felt Doe should take. Kohl may have been referring to Doe's failure to take responsibility for her selection of an abortion procedure. Kohl may have been referring to Doe's failure to take responsibility for her own job termination. Kohl's commentary could also have been insinuating that Doe did something to cause the loss of her own baby. Or, Kohl could have been castigating Doe for not acknowledging the abortion because of an anti-abortion environment at CARS or Kohl's own personal beliefs about abortion. What is clear is that this particular remark may raise a reasonable inference that the abortion was a factor in terminating Doe's employment. Such comments are "surely the kind of fact which could cause a reasonable trier of fact to raise an eyebrow, thus providing additional threads of evidence that are relevant to the jury." *Bevan v. Honeywell, Inc*., 118 F.3d 603, 610 (8th Cir. 1997) (citations and quotations omitted)[1]

[1] Although *Bevan* was on appeal following a jury verdict in favor of the plaintiff and the district court's denial of the defendant's motion for judgment as a matter of law, the Supreme

Finally, Doe argues that her discharge only three working days after having an abortion raises an inference of discrimination because the temporal proximity between her abortion and the adverse employment action is "unusually suggestive." We have held temporal proximity sufficient to create an inference of causality to defeat summary judgment. *LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n.*, 503 F.3d 217, 232-233 (3d Cir. 2007). In assessing causation, we are mindful of the procedural posture of the case. *See id.* at 279 n. 5 ("There is . . . a difference between a plaintiff relying upon temporal proximity to satisfy her *prima facie* case for the purpose of summary judgment, and to reverse a verdict.") (internal citation omitted).

Here, Doe was fired on the day her baby was buried, just three working days after she notified Kohl that she would have to undergo an abortion. Because the District Court found Doe's discharge to coincide with her failure to "make further phone calls to Kohl as he had asked her to do," it reasoned that the timing was not unusually suggestive of discrimination. The temporal proximity, however, is sufficient here to meet Doe's minimal *prima facie* case burden as to the causal connection element. *See e.g. Fasold v. Justice*, 409 F.3d 178, 189-90 (3d Cir. 2005) (discussing a period less than one month and noting that "a short period of time" may provide the evidentiary basis of an inference of retaliation)).

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Court in *Reeves* stated that the standard applied in reviewing a judgment as a matter of law is identical to that applied in reviewing a grant of summary judgment. *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 147 (2000).

Summary judgment is to be used sparingly in employment discrimination cases, especially where, as here, we are viewing the case at first glance. Mindful that the plaintiff's burden at this first stage is not particularly onerous, we conclude that Doe has established a *prima facie* case.

C. Pretext

The District Court held that even if Doe had established a *prima facie* case, she failed to show that the nondiscriminatory reasons for her employment discharge were pretextual. The record refutes the holding. Once the plaintiff establishes a *prima facie* case, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the adverse employment action. *See McDonnell Douglas*, 411 U.S. at 802; *see also Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 319 (3d Cir. 2000). When the plaintiff meets this burden, the court's "factual inquiry then proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255. The presumption of discrimination established by the *prima facie* showing "simply drops out of the picture." *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502, 511 (1993).

If the defendant meets this burden, the plaintiff must then show that the legitimate reasons offered by the defendant are merely a pretext for discrimination. *See Jones*, 198 F.3d at 410. In order to show pretext, a plaintiff must submit evidence which (1) casts doubt upon the legitimate reason proffered by the employer such that a fact-finder could reasonably conclude that the reason was a fabrication; or (2) would allow the fact-finder to infer that discrimination was more likely than not a motivating or determinative cause of the employee's termination. *See Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994);

*Chauhan v. M. Alfieri Co., Inc*., 897 F.2d 123, 128 (3d Cir. 1990). Put another way, to avoid summary judgment, the plaintiff's evidence rebutting the employer's proffered legitimate reasons must allow a fact-finder reasonably to infer that each of the employer's proffered non-discriminatory reasons was either a *post hoc* fabrication or otherwise did not actually motivate the employment action (that is, that the proffered reason is a pretext). *See Anderson*, 13 F.3d at 1124; *Bodenheimer v. PPG Indus., Inc.*, 5 F.3d 955, 958 (5th Cir.1993).

Lastly, it is important to remember that the *prima facie* case and pretext inquiries often overlap. As our jurisprudence recognizes, evidence supporting the *prima facie* case is often helpful in the pretext stage, and nothing about the *McDonnell Douglas* formula requires us to ration the evidence between one stage or the other. *Farrell,* 206 F.3d at 286; *see also Iadimarco*, 190 F.3d at 166 (explicitly referring to the evidence of the *prima facie* case in finding evidence supporting pretext); *Jalil*, 873 F.2d at 709 n. 6 ("Although this fact is important in establishing plaintiff's *prima facie* case, there is nothing preventing it from also being used to rebut the defendant's proffered explanation.").

1.

CARS maintains that it fired Doe because she abandoned her job (the week she thought she was 'on vacation' following the abortion and the funeral). Specifically, CARS asserts that Doe was fired because neither she nor her husband called to request Friday, August 11th or the week of August 14th off from work. Unexcused absence from work is a legitimate, nondiscriminatory reason for terminating employment.

Before the District Court and again before us on appeal, Kohl asserts that he never received a telephone call from Doe's husband informing him that Doe would be off work on Friday the 11th and would need vacation time for the week of the 14th. As we noted earlier, that fact is subject to dispute from contradictory evidence. Doe pointed to her husband's testimony to the contrary. The District Court discounted Doe's husband's testimony, finding it "belied by the telephone records of calls from [Doe's husband's] father's telephone number." Dist. Ct. Op. at 12. Here, the District Court inappropriately narrowed Doe's husband's testimony, who indicated that he may have called from a borrowed cell phone. Appendix at 86-87. This testimony is also backed-up by Doe's own testimony that the call "had to be from a cell phone" and that "there was a lot going on at that time." Appendix at 51-52.

Additionally, the testimony of Leona Dunnett could be viewed by a fact-finder as substantiating Doe's claim that the call was made and that she received a week of vacation from Kohl. Leona Dunnett testified that Doe's husband called her on Friday, August 11th and asked what he would need to do for Doe to use vacation time for the week of August 14th. Dunnett also testified that she explained to Doe's husband that he would need to request it from Kohl, and that she then transferred the call to Kohl. She further testified that, after that call, Kohl asked her to make sure she had the receptionist station covered by other employees during the lunch hour for the week in question (a task for which Doe was usually responsible). Kohl's awareness of a receptionist-coverage issue permits an inference that he knew Doe would be on vacation that week.

The District Court held that Doe produced no evidence from which a reasonable jury could disbelieve CARS' asserted reason for firing her and concluded, instead, that she was discharged for discriminatory reasons. The record refutes this conclusion. This testimony creates a genuine issue of material fact as to whether CARS' proffered reasons for terminating Doe's employment were a pretext.

Finally, the District Court did not believe that Doe had pointed to any evidence which cast doubt on whether Kohl had a good faith belief that Doe had abandoned her job. The conversation between Kohl and Babich, in which Kohl remarked that Doe had not taken responsibility for her abortion indicates that Kohl may have had other reasons for terminating Doe's employment than her "abandonment" of her job. These are questions for a jury—not ones that should be resolved on summary judgment. Doe produced testimony which creates genuine issues of material fact, the resolution of which may lead a jury to determine that CARS' asserted reasons for discharging her are pretext.

III.

CARS has filed a cross appeal alleging that the District Court improperly sealed the case. "[O]rders releasing sealed material and denying a motion to unseal are collateral orders within the meaning of 28 U.S.C. § 1291," *Republic of Philippines v. Westinghouse Elec. Corp*., 949 F.2d 653, 658 n. 4 (3d Cir. 1991), and we review the grant or modification of a confidentiality order for an abuse of discretion. *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 783 (3d Cir.

1994). There was no abuse of discretion. The record fully supports the District Court's order.[2]

## IV. Conclusion

Doe has established a *prima facie* case. Furthermore, she has pointed to sufficient evidence from which a fact-finder could infer that the CARS' nondiscriminatory reason for firing Doe was a pretext. The District Court's order will be reversed and the cause remanded for further proceedings not inconsistent with this opinion.

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[2] CARS also challenges Does' use of a pseudonym. We acknowledge that the use of pseudonyms to conceal a plaintiff's identity has no explicit sanction in the federal rules. Nonetheless, the Supreme Court has given the practice implicit recognition in two abortion cases, *Roe v. Wade*, 410 U.S. 113 (1973), and *Doe v. Bolton*, 410 U.S. 179 (1973). Although we have yet to address the issue, the decision whether to allow a plaintiff to proceed anonymously rests within the sound discretion of the court. *See Doe v. Frank*, 951 F.2d 320, 323 (11th Cir. 1992); *Lindsey v. Dayton-Hudson Corp.*, 592 F.2d 1118, 1125 (10th Cir.), *cert. denied*, 444 U.S. 856 (1979). After a careful review of all the circumstances of this case (including the District Court's thorough hearing), we cannot say the trial court abused its discretion in granting Doe's motion to proceed anonymously.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed June 12, 2008]

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Nos. 06-3625 & 06-4508

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DOE,

v.

C.A.R.S PROTECTION PLUS, INC.,

(W.D. Pa. No. 01-cv-02352)

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PRESENT: RENDELL and NYGAARD, *Circuit Judges*, and MCCLURE,[*] *District Judge*

1. Emergency Motion of New York Law Publishing Company, The Legal Intelligencer and The Pennsylvania Law Weekly for Intervention for the Limited Purpose of Seeking Access to Judicial Records and Proceedings.

2. Emergency Motion of New York Law Publishing Company, The Legal Intelligencer and The Pennsylvania Law Weekly for Intervention to Obtain Access to all Judicial Records and Proceedings, Including Dockets.

3. Motion by the Appellant Jane Doe to alter and/or amend opinion.

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[*] The Honorable James F. McClure. Jr., District Judge for the United States District Court for the Middle District of Pennsylvania, sitting by designation.

/s/ Charlene Crisden
CHARLENE CRISDEN
Case Manager 267-299-4923

ORDER

The emergency motions filed by the New York Law publishing company et al., for intervention in the above captioned appeals are hereby DENIED. Movant may pursue this matter with the District Court upon remand.

The motion filed by the Appellant, Jane Doe, to amend our opinion is also hereby DENIED.

It is so ordered.

By the Court,

/s/ Richard L. Nygaard
RICHARD L. NYGAARD
Circuit Judge

Dated: June 19, 2008

clc\cc: Gary M. Davis, Esq. Dean E. Collins, Esq.
Brett A. Berman, Esq. Robert C. Clothier, Esq.