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The Heavy Burden of Light Duty: *Young v. UPS*

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On March 25, 2015, the U.S. Supreme Court issued its much-anticipated decision in *Young v. UPS*, which employer and employee groups alike hoped would clarify whether employers must provide light duty and other workplace accommodations to pregnant employees in the same manner they provide accommodations to employees who are injured on the job. While the majority opinion did not answer this question directly, the Supreme Court provided a framework for pregnant employees challenging workplace accommodation policies and practices under Title VII of the Civil Rights Act ("Title VII"), as amended by the Pregnancy Discrimination Act ("PDA").

In this 6-3 decision, the Court held that a pregnant employee can establish a *prima facie* case of disparate treatment by showing, under the familiar *McDonnell Douglas* burden-shifting framework, that: (1) she belongs to a protected class; (2) she sought an accommodation; (3) the employer did not accommodate her; and (4) the employer accommodated others "similar in their ability or inability to work." If these elements are established, an employer has the burden of production to proffer a legitimate, nondiscriminatory reason for denying the accommodation. The Court noted, however, that this reason must be more than an employer's claim that it is more expensive or less convenient to add pregnant women to the categories of those whom the employer accommodates. Once the employer proffers a legitimate, nondiscriminatory reason, the employee must establish that the employer's reason is pretextual. The Court provided examples of how this could be done in the PDA context.

Brief History of the PDA

In 1976, the Supreme Court in *General Electric Co. v. Gilbert* considered whether an employer violated Title VII's sex discrimination provision by providing employees with non-occupational sickness and accident benefits, but specifically excluding disabilities arising from pregnancy. The district court in *Gilbert* ruled against the company and found that normal pregnancy, while not necessarily either a "disease" or an "accident," was indeed disabling for a certain period, and that 10-20% of pregnancies lead to miscarriage or other complications. The employer's cost of including such benefits might indeed be higher for women than it was for men, but the district court held that fact could not save the employer from being in violation of Title VII on the basis of sex for making the distinction in its plan. The U.S. Court of Appeals for the Fourth Circuit affirmed. The Supreme Court, however, overturned the Fourth Circuit decision in *Gilbert* and held that the disability benefits plan did *not* violate Title VII because the plan treated male and female

employees alike in that it covered “exactly the same categories of risk.” The Supreme Court then reasoned that, although pregnancy-related disabilities constitute a unique risk to women, the failure to compensate women for the risk did not destroy the parity of benefits between men and women.

In 1978, Congress expressed its displeasure with the Supreme Court’s decision in *Gilbert* by enacting the Pregnancy Discrimination Act. The first clause of the PDA specifies that Title VII’s prohibition against sex discrimination applies to discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions.” 42 U.S.C. §2000e(k). The PDA’s second clause states that employers must treat “women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”

The interpretation of “other persons” in the PDA’s second clause was central to the Supreme Court’s decision in *Young*, where the Court grappled with the following questions: Does this clause mean that courts must compare workers *only* with respect to the work limitations they suffer? Does it mean courts must ignore all other similarities or differences between pregnant and non-pregnant employees? Or does it mean that courts, when deciding who the relevant “other persons” are, may consider other similarities and differences as well? If so, which ones?

Facts and Procedural History of the *Young* Case

The plaintiff, Peggy Young, worked as a part-time delivery driver for United Parcel Service (UPS) in Landover, Maryland. Although all drivers were required to be able to lift items weighing up to 70 pounds as an essential function of their jobs, the plaintiff’s duties generally included carrying lighter letters and packages. After the plaintiff became pregnant, she asked for a brief leave of absence. Shortly thereafter, she submitted a doctor’s note with a recommendation that she not lift more than 20 pounds and she asked for an accommodation to work light duty. The company denied these requests, but also denied her return to work on the basis that lifting more than 20 pounds was an essential function of her job. Notably, UPS, as do many employers, provided employees who had on-the-job injuries with light-duty assignments. Additionally, the company regularly provided light duty or other accommodations to certain other categories of employees (such as those who had disabilities under the ADA and drivers who lost DOT certification and were unable to drive). Employees who did not fall into any of these categories—whether male or female—were not eligible for light-duty assignments. Because Young did not, she remained on an unpaid leave of absence. She then filed a lawsuit against the company, arguing that the PDA requires employers to provide pregnant employees with light-duty work if they provide similar work to other employees in other circumstances. The U.S. District Court for the District of Maryland granted summary judgment for UPS, finding that Young had failed to establish her *prima facie* case of discrimination under the PDA.

On January 9, 2013, the Fourth Circuit upheld the district court ruling in *Young* that: (1) UPS did not “regard” a pregnant employee as disabled under the Americans with Disabilities Act (ADA); and (2) employers are not required under the PDA to provide pregnant employees with light-duty assignments so long as the employer treats pregnant employees the same as non-pregnant employees with respect to offering accommodations. The Fourth Circuit expressed concern that reading the PDA too broadly would result in granting pregnant employees a “most-favored-nations” status over others, including employees, males and females, who would receive no accommodations for off-the-job injuries. Therefore, the Fourth Circuit held that the company’s policy was lawful under the PDA because, “where a policy treats pregnant workers and nonpregnant workers alike, the employer has complied with the PDA.”

On April 8, 2013, Young filed a petition for *certiorari* in the U.S. Supreme Court on the following question: “Whether, and in what circumstances, the Pregnancy Discrimination Act . . . requires an employer that provides work accommodations to non-pregnant employees with work limitations to provide work accommodations to pregnant employees who are ‘similar in their ability or inability to work.’”

The Supreme Court’s Position on the Parties’ Arguments and the Resulting Decision

Both Young and the U.S. Solicitor General argued that if an employer accommodates even one or two non-pregnant employees, the employer must, as a matter of law, provide this same accommodation to all pregnant employees, irrespective of any other criteria. The Supreme Court rejected this interpretation, reasoning that Congress did not intend to grant pregnant employees such an unconditional “most-favored-nations” status any time an employer accommodates a small subset of non-pregnant employees. In rejecting their arguments, the Court explained that although the phrase “other persons” is not defined in the statute, it does not mean that an employer must treat pregnant employees the “same” as *any* single other person who is similar in ability or inability to work.

The Solicitor General also urged the Court to give deference to the EEOC's July 14, 2014 Enforcement Guidance on Pregnancy Discrimination and Related Issues. In the Guidance, the EEOC addressed the definition of "other persons" in the PDA's second clause. Specifically, the Guidance states that "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job)." The Supreme Court declined to give the Guidance the deference the United States requested,¹ taking issue with the consistency and thoroughness of it, as well as the fact that the EEOC issued the Guidance after the Supreme Court had already granted *certiorari* in this case.

The Supreme Court also rejected the company's position on the second clause of the PDA, however, which was that the clause merely clarifies that sex discrimination includes pregnancy discrimination. Under this view, an employer may have a facially neutral policy, such as a policy that accommodates employees with work-related injuries, because pregnant employees or non-pregnant employees with injuries unrelated to work are treated the same (neither group is entitled to light duty). In rejecting this interpretation, the Court found that UPS's reading would render the first clause of the PDA prohibiting discrimination superfluous. The Court also explained that the company's interpretation ignores the "unambiguous" intent of Congress in passing the PDA—to overturn the holding and reasoning of *Gilbert*, where the Court had taken a position similar to that asserted by the company (i.e., that the facially nondiscriminatory plan covered the same categories of risks for both male and female employees).

Refusing to accept the position of either party, the Supreme Court held that the answer was somewhere in between. The Court explained that a pregnant employee can establish a *prima facie* case by alleging the employer denied a request for an accommodation and the employer accommodated others "similar in their ability or inability to work." If the employee can do so, the employer has the burden of production to proffer a legitimate, nondiscriminatory reason for denying the accommodation. The Court noted, however, that this reason normally cannot consist of a claim that it is more expensive or less convenient to add pregnant women to the categories of those whom the employer accommodates. The Court reasoned that, "[a]fter all, the employer in *Gilbert* could in all likelihood have made just such a claim," and Congress expressly overruled that decision. Then, to prevail, a pregnant employee must show that the employer's legitimate, nondiscriminatory reason is pretextual. The Court explained that a plaintiff could reach a jury on this issue by providing significant evidence that the employer's facially neutral policies impose a "significant burden" on pregnant employees *and* that the employer's legitimate, nondiscriminatory reasons are not "sufficiently strong" to justify the burden. The Court went further to provide an example of a pregnant employee showing that an employer accommodated a *large* percentage of non-pregnant employees while failing to accommodate a *large* percentage of pregnant employees. Indeed, the Court highlighted that UPS had multiple policies that accommodated non-pregnant employees in various categories who had restrictions similar to Young's, which suggests that the employer's reasons for failing to accommodate pregnant employees were not sufficiently strong. The Court limited this particular approach to circumstantial cases arising under the PDA, while noting that it was consistent with its approach in similar cases under other statutes.

In remanding the case to the Fourth Circuit, the Court held that Young has in fact established a *prima facie* case of discrimination because UPS had three separate accommodation policies (on-the job, ADA, DOT) that, when taken together, demonstrate a genuine dispute as to whether the company provided more favorable treatment to at least some categories of employees under similar circumstances. The Court also noted that these policies, at least arguably, significantly burden pregnant employees. On remand, the Fourth Circuit is tasked with considering the strength of the employer's justifications for the accommodation policies related to categories other than those who are pregnant. The Supreme Court declined to decide whether Young had met her burden of showing that UPS's reasons for treating her differently were pretextual.

Remembering State Pregnancy Protection Laws

Young dealt with the application of the federal PDA to workplace accommodations. However, at least 12 states and the District of Columbia have enacted laws that treat pregnancy like a disability and therefore require employers to provide reasonable accommodations to pregnant employees absent a showing of undue hardship (similar to the ADA). As of the date of this publication, these states include:

¹ Under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), a court *may* give "rulings, interpretations and opinions" of an agency charged with the mission of enforcing a particular statute deference by reason of their body of experience and informed judgment. The Supreme Court did not give such deference in this case.

- Alaska – Alaska Stat. § 39.20.520 (2013).
- California – Cal Gov't Code §§ 12945, 12926 (2012).
- Connecticut – Conn. Gen. Stat. §§ 46a-60(a)(7), 46a-51 (2011).
- Delaware – Del. Code. tit. 19, §§ 710, 711, 716 (2014).
- District of Columbia – Protecting Pregnant Workers Fairness Act of 2014, D.C. Act. 20-458 (2014).
- Hawaii – Haw. Code R. § 12-46-107 (1990).
- Illinois – 775 Ill. Comp. Stat 5/2-101, 102 (2014).
- Louisiana – La. Rev. Stat. §§ 23:342, 23-341 (1997).
- Maryland – Md. Code, State Gov't §§ 20-609, 20-601 (2013).
- Minnesota – Minn. Stat. §§ 181.940, 181.9414, 181.9436 (2014).
- New Jersey – NJ. Stat § 10:5-12(s) (2013).
- Texas – Tex. Loc. Gov't Code § 180.004 (2001).
- West Virginia – W. Va. Code §§ 5-11b-1 et seq. (2014).

Some of these state pregnancy laws contain very different obligations from the PDA, and employers must be aware of them. By way of example, Maryland passed a statute in response to the lower court decisions in *Young*. The Maryland pregnancy law requires employers to provide reasonable accommodations to pregnant employees who provide notice to their employers of a temporary disability, even if the accommodation removes essential functions of the position. In particular, the law requires an employer to consider the following accommodations for a pregnant employee:

- Changing the employee's job duties;
- Changing the employee's work hours;
- Relocating the employee's work area;
- Providing mechanical or electrical aids;
- Transferring the employee to a less strenuous or less hazardous position; or
- Providing leave.

Furthermore, under the Maryland statute, if a pregnant employee requests a transfer to a less strenuous or less hazardous position as a reasonable accommodation (light duty), the employer must honor the request *if* the employer has a policy, practice, or a collective bargaining agreement requiring or authorizing the transfer of other temporarily disabled employees. In other words, if an employer has a policy authorizing special accommodations for employees who suffer on-the-job injuries, as almost all do, it must offer the same accommodation to pregnant employees who are temporarily disabled. State legislatures are clearly delving into the pregnancy accommodation issue, presumably to fill gaps which may be left by federal law.

Next Steps for Employers

In light of the Supreme Court's *Young* decision, the EEOC's current enforcement position, the expansion of the ADA (such that it may now include shorter-term complications arising from pregnancy), and the increasing number of states providing ADA-like accommodation protections for pregnant employees, employers should take a careful look at their accommodation policies and practices, and to whom they extend those policies and practices. Specifically, employers that have policies that provide accommodations or other types of benefits to categories of employees—where pregnancy is not one of those categories—need to ensure they have legitimate, nondiscriminatory reasons

for doing so. While the Court left open the question of what constitutes such a legitimate, nondiscriminatory reason, it did hold that cost alone would not “normally” meet the standard. Furthermore, if the categories of employees to whom those accommodations or other benefits are offered constitute a substantial number of employees, but still exclude pregnant employees, the risk of denying such benefits to pregnant employees will be high.

There are many open questions following the majority’s opinion in *Young*. For example, although the Supreme Court rejected the notion that an employer is *per se* required to provide light duty to a pregnant employee simply because it provides light duty to one set of employees injured on the job, it is unclear at what point the refusal to provide a similar accommodation to a pregnant employee constitutes a pretext for discrimination. In *Young*, the Court highlighted UPS’s “multiple policies” that accommodate non-pregnant employees with lifting restrictions, implying that UPS has sufficient light duty positions available. Indeed, the Court queried: “Why, when the employer accommodated so many, could it not accommodate pregnant women as well?” On remand, UPS will answer this question and the Fourth Circuit will determine whether to send the case to a jury, which appears likely.

In addition, the Supreme Court did not articulate what evidence is necessary to prove that an employer’s policies impose a “significant burden” on pregnant employees or what evidence is necessary to prove that an employer’s legitimate, nondiscriminatory reasons are “sufficiently strong” to justify such a burden without violating the PDA. The dissent also raises a concern about whether the *Young* majority has commingled disparate treatment claims, where motive is required, with disparate impact claims, which deal with the effects of otherwise facially neutral policies or decisions. Time will tell whether this distinction will lead to a difference in how these types of claims are pled by plaintiffs and litigated in the courts.

Notably, the Supreme Court also declined to express a view about whether changes made to the ADA in 2008 would someday limit the holding of this case. From a practical perspective, it is indeed worth considering: if the broadened ADA can now be interpreted to cover short-term impairments as disabilities, even when related to healthy pregnancies (which are not considered disabilities under the ADA), would the accommodation obligation of the ADA then render the PDA framework moot?

As is true with all accommodation issues, an employer’s policies and processes are key to avoiding and defending claims, even if the ultimate answer in a particular situation is that the requested accommodation is not available at that time, or would impose an undue hardship on the business. Moreover, as mentioned, the Supreme Court in *Young* did not outright reject an employer’s ability to have a light-duty policy reserved just for employees who are injured on the job. What *Young* does show, however, is that employers excluding pregnant employees from discussions about available reasonable accommodations—when other categories of employees remain eligible for such accommodations—run a significant liability risk.

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