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Outside Counsel

Supreme Court Addresses Employer Responsibilities to Pregnant Workers

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Last July, the Equal Employment Opportunity Commission (EEOC) issued an Enforcement Guidance regarding the rights of pregnant women[1] under the Pregnancy Discrimination Act (PDA). The PDA provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes...as other persons not so affected but similar in their ability or inability to work."[2]

The Guidance directly addressed whether or not an employer that provides work accommodations to non-pregnant employees with work limitations must also provide work accommodations to pregnant employees who are "similar in their ability or inability to work." The Guidance answered this question in the affirmative, stating that the PDA requires an employer to provide light-duty work for a pregnant worker if the employer has a policy or practice of providing light duty to workers injured on the job and/or to employees with disabilities under the Americans with Disabilities Act (ADA). This was the first time in several years that the EEOC took an official position regarding the obligation of employers to provide accommodations to pregnant women.

The EEOC's Guidance, however, may be superseded by a new case, *Young v. United Parcel Service*, which was argued before the Supreme Court on Dec. 3, 2014.[3] Peggy Young's brief in support of her petition for certiorari discusses the factual background of her employment—she was a morning "air driver" for UPS, the world's largest package delivery company.[4] Because of her pregnancy, Young's midwife advised her not to lift heavy packages—i.e., packages weighing more than 20 pounds. (Young's job required her to lift packages weighing up to 70 pounds.) The midwife provided Young with a note to give to her managers to advise them of this lifting restriction.

But when Young gave her UPS managers the note, instead of providing her with temporary light-duty work, the managers told her she could not return to work while pregnant because she was "too much of a liability." Instead, they placed her on extended unpaid leave. UPS's policy was to provide the accommodation of "light-duty" work only to: (1) employees injured on the job, (2) employees who had disabilities within the meaning of the ADA, and (3) employees who had lost their certification to drive commercial motor vehicles—their Department of Transportation (DOT) certification.

About a month before the Supreme Court argument, at the end of October, UPS made an unexpected announcement in a brief filed in the Young case, that "[o]n a going-forward basis, UPS has voluntarily decided to provide additional accommodations for pregnancy-related physical limitations as a matter of corporate discretion."[5] The same brief set forth the terms of the new policy, which will be applied to all members of the UPS work force effective Jan. 1, 2010, and does not apply retroactively. It provides that "[l]ight duty work will be provided as an accommodation to pregnant employees with lifting or other physical restrictions to the same extent as such work is available as an accommodation to employees with similar restrictions resulting from on-the-job injuries."

Although UPS changed its policy, it asserts that the change is not required by the PDA. Thus, the questions in the Young case remain—whether Young is entitled to any compensatory relief as a result of UPS's application of its previous policy and whether the policy as

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applied to her was discriminatory on the basis of sex.

The Better Balance organization, an advocacy organization in New York City, submitted an amicus brief that detailed the impact of UPS's prior policy and its dire consequences for Young.[6] Young had already used up all of her paid medical leave and was forced to go on unpaid leave. In addition to the loss of salary, she lost significant benefits—she had no health insurance for the last six months of her pregnancy. Moreover, she could not rely on short-term disability because her doctor had not provided that she could not work, only that she had a lifting restriction. According to Better Balance, Young found herself in a "cruel bind of being neither permitted to work, nor to collect the benefits normally available to those who temporarily cannot work."

In its brief UPS argued that its temporary work policy was uniformly applied—light-duty work assignments were unavailable to all employees, unless their conditions fell within certain categories of accommodations. For example, a driver with a lifting limitation resulting from a non-job related back injury would not be eligible for an accommodation under UPS's temporary work policy, unless the injury led to ADA-cognizable disability. UPS treated a lifting restriction resulting from pregnancy—not an ADA-recognized disability, and not due to a job injury—in exactly the same way.

District and Circuit Courts

Young first exhausted her remedies with the EEOC, then filed her lawsuit with the U.S. District Court for the District of Maryland in 2008. In February 2011, the district court granted summary judgment to UPS, on the grounds that UPS's determination not to accommodate her turned on "gender neutral criteria" because UPS accommodated only workers fitting in three narrow categories and that there was no direct evidence of discrimination on the basis of gender.[7] The district court also determined that there was no reasonable inference that could be drawn that UPS had animus directed specifically at pregnant women.

On her appeal in the U.S. Court of Appeals for the Fourth Circuit, Young argued that UPS's policy of providing light-duty workplace accommodations to workers who were "similar [to her] in their ability to work or inability to work," while denying her the same accommodations, violated the PDA.[8] In the appeal, UPS countered that providing temporary alternative work arrangements to pregnant employees was not required because its policy was not facially discriminatory, but rather facially neutral, in that the policy treated pregnancy like an off- the-job injury, which was not eligible for accommodation.

An EEOC Guidance marked the first time in several years that the EEOC took an official position regarding the obligation of employers to provide accommodations to pregnant women.

The circuit sided with UPS and the district court, holding that the policy was a "pregnancy-blind policy" because the temporary work accommodations were limited to employees in three categories—workers injured on the job, workers disabled under the ADA, and workers stripped of DOT driver certification. The court found UPS's policy to be facially neutral because accommodating some employees and not others was "not direct evidence of pregnancy-based sex discrimination."

In addition, as UPS's policy treated pregnant workers and non-pregnant workers alike, the circuit court found that the company had complied with the PDA. It rejected Young's argument that she was similar to an employee under the ADA, reasoning that a pregnant woman is not like a disabled employee because her pregnancy lifting restriction is both "temporary" and not "a significant restriction on [her] ability to perform major life activities." Young also compared herself to employees who had lost their certification to drive commercial motor vehicles and employees injured on the job.

The circuit found that a pregnant woman was not like an employee who had lost his or her DOT certification because she had a lifting restriction and did not lose certification and was unlike an employee injured on the job because her inability to perform the essential job functions did not arise from an "on-the-job-injury." The court therefore affirmed the district court's ruling in favor of UPS.

EEOC Response

Subsequently, the EEOC expressly rejected the pro-employer position that the Fourth Circuit had adopted.[9] In the EEOC's publication "Q and A about the EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues," there was a specific section devoted to "light duty" work accommodation where the EEOC directly addressed the holding in *Young*.[10] The EEOC stated that an employer is *required* under the PDA to provide temporary work that is "light duty" (less demanding than normal duties) "if the employer provides light duty for employees who are not pregnant but who are *similar in their ability or inability to work*." (emphasis added)

For example, an employer may not deny light duty to a pregnant employee based on a policy that limits the light duty to employees with on-the-job injuries." The EEOC stated that its interpretation of the PDA did not create "preferential treatment for pregnant workers," but was "[c]onsistent with the language of the law," in that "the PDA requires only that an employer treat pregnant

workers the same as it treats workers who are not pregnant but who are similar in their ability or inability to work."[11]

Supreme Court Arguments

Circuit and district courts are divided over this issue.[12] When Young petitioned for certiorari, the Supreme Court granted it. On Dec. 3, the Supreme Court heard arguments from counsel for Young and for UPS as well as an attorney representing the U.S. government. The argument in its entirety is published in a transcript on the Supreme Court's website.[13] In the transcript, the questions from the Supreme Court justices focused on the language in the PDA that pregnant women "shall be treated the same for employment-related purposes...as other persons not so affected but similar in their ability or inability to work."

Young's attorney argued that "if an employer provides accommodations as a matter of policy to a class of employees who are not pregnant, who are similar in their ability or inability to work to the pregnant worker [Young] and does not provide the same accommodation or benefit to the pregnant [Young]," it violates the plain text of the PDA. Young's attorney further argued that if Congress intended to create an exception from the general "shall be treated the same" requirement of the PDA, to allow "an on-the-job/off-the-job distinction, it could have [done] so."

In response, Justice Antonin Scalia suggested that counsel was seeking what amounted to "most favored nation treatment" for pregnant employees. Pregnant women would be entitled to what amounted to the best treatment offered by the company to any of its employees.

The UPS attorney countered that a policy that created three narrow exceptions entitling employees to light-duty work did not require the company to accommodate pregnant workers as well, under the PDA. UPS's attorney argued that the evidence in the record demonstrated that there were "many employees who sustained off-the-job injuries, and the district court held specifically that no light duty [work] was given to any employees, male or female, with any medical conditions not related to work, pregnancy included." However, when pressed by Justice Ruth Bader Ginsburg, the UPS attorney did not provide an example of a worker at UPS that required a light-duty work assignment but didn't get it, with the exception of pregnant workers. Ginsburg stated that UPS's interpretation of the PDA could create a "least favored" nation status for pregnant workers if the court accepted UPS's argument.

At the oral argument, the government argued in support of Young and in support of the EEOC's Guidance. The government argued that what an employer can't do as a result of the language of the PDA was "draw distinctions that treat pregnancy-related medical conditions worse than other conditions with comparable effects on ability to work." According to the government, the very purpose of the PDA "is to reduce the number of women who are driven from the workforce or forced to go months without an income as a result of being pregnant." Ginsburg pointed out, however, that the government had previously defended a U.S. Postal Service policy similar to the UPS policy and that the Postal Service still operates under that policy.

Advocacy Support

Both UPS and Young have drawn support from advocacy organizations, with UPS's argument supported by the U.S. Chamber of Commerce and business organizations, and Young's position supported by both liberal women's rights groups and pro-life organizations.[14] The question for attorneys, employers, and pregnant workers, is whether the Supreme Court will agree with the EEOC, Young, and female advocacy groups and support the accommodation of pregnant women in the workplace or whether UPS's policy as applied to Young will be determined to be non-discriminatory and lawful. It will not be long before we have an answer to this question.

1. See EEOC, Enforcement Guidance: Pregnancy Discrimination and Related Issues (July 14, 2014).
2. 42 U.S.C. §2000 e (k).
3. *Young v. United Parcel Service*, 707 F.3d 437 (4th Cir. 2013) cert. granted, 81 U.S.L.W. 3602 (U.S. July 1, 2014) (No. 12-1226). See Oral Argument Transcript, Dec. 3, 2014.
4. Brief for Petitioner *Young v. United Parcel Service*, Add NoteToggle Note (U.S.) Docket No. 12-1226, 2014 WL 4441528, at * 10 (Sept. 4, 2014).
5. Brief for Respondent, *Young v. United Parcel Service*, Add NoteToggle Note (U.S.) Docket No. 12-1226, 2014 WL 546086, at 24.
6. Better Balance Amicus Brief, Docket No. 12-1226, 2014 WL 4536938 (Sept. 10, 2014).
7. *Young v. UPS*, Docket No. 08-2586, 2011 WL 665321 (Feb. 14, 2011).
8. *Young v. UPS*, 707 F.3d 437 (4th Cir. 2013).
9. See EEOC Guidance at 16.
10. See Q and A about the EEOC's Enforcement Guidance on Pregnancy Discrimination and Related Issues, at pp. 4-5.
11. See Q and A regarding the EEOC's Enforcement. "For example, if an employer's policy places certain types of restrictions on the availability of light duty positions, such limits on the number of light duty positions or the duration of light duty, the employer may lawfully apply the same restrictions to pregnant workers as it applies to non-pregnant workers. If an employer does not provide light duty to employees who are not pregnant, it does not have to do so for pregnant workers."
12. The EEOC's Guidance lists the cases supporting its position and contrary to its position at FN 106 and FN 107.
13. Supreme Court oral argument (subject to final review) transcript.
14. Some of the organizations that have filed amicus briefs in support of Young are: A Better Balance and the American Civil Liberties Union (ACLU); and 23 Pro-Life Organizations and the Judicial Education Project. In support of UPS are: the U.S. Chamber of Commerce, Greater New York Chamber of Commerce et al.