BURR ALERT

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Employment Law Update after *Young v. United Parcel Service, Inc.*: Must Employers Provide Accommodations for Pregnant Employees?

A pregnant employee walks into your office and tells you that she has a lifting restriction of twenty pounds and needs an accommodation because she can't do her job. What do you do? In *Young v. United Parcel Service, Inc.*, 575 U.S. — (Mar. 25, 2015), the Court faced this issue and was tasked with deciding whether the Pregnancy Discrimination Act requires an employer to provide work accommodations to pregnant employees with work limitations.

Peggy Young, a part-time delivery driver for UPS, became pregnant and her health care provider imposed a lifting restriction that precluded her from performing an important function of her job. Young requested an accommodation, but did not qualify for light-duty work assignment under UPS's policies - which only covered those injured on the job, who lost their Department of Transportation certification(s), or who suffered from a disability covered by the ADA – and, therefore, her request was denied. Young filed suit under the Pregnancy Discrimination Act alleging, among other things, that if UPS made accommodations for other workers it should have made accommodations for her.

Both the district court and the United States Court of Appeals for the Fourth Circuit found in favor of UPS, concluding that UPS's policy was "pregnancy-blind" and that Young was different from the employees UPS was accommodating (those injured on-the-job, lacking certifications, or "disabled" under the ADA), but the Supreme Court disagreed, vacating the Fourth Circuit's decision and remanding for further consideration. To start, the Court wasted no time invalidating the EEOC's July 2014 Guidance regarding pregnancy and pregnancy-related disabilities because it lacked the timing, "consistency" and "thoroughness" of "consideration" necessary to "give it power to persuade." (Ouch!). The Court also rejected Young's argument – if the employer accommodates some workers, it must always accommodate pregnant workers – and UPS's argument – that the Pregnancy Discrimination Act does nothing more than redefine Title VII gender discrimination to include discrimination based on pregnancy. Instead, the Court concluded that the answer lay somewhere in the middle.

The Court held that a plaintiff could make a *prima facie* case of pregnancy discrimination by showing: (1) the employee belongs to the protected class; (2) the employee asked for an accommodation; (3) the employer denied the request; and (4) employer granted accommodations to other employees with similar abilities or inabilities to work. If the plaintiff makes out a *prima facie* case, the employer can rebut that case by offering a legitimate, non-discriminatory reason for treating employees outside the protected class better than employees within the protected class. If the employer meets its burden, then the Plaintiff must show that the employer's proffered reasons are pretextual. The burden-shifting approach probably sounds familiar (*McDonnell Douglas framework*) but the devil is in the details.

Applying the *McDonnell Douglas* framework, the Court found that Young created a *prima facie* case of pregnancy discrimination. Her comparator evidence showed that UPS provided more favorable treatment to at least some employees whose situations could not be distinguished from Young. Next, the Court affirmed the Fourth Circuit's finding that UPS proffered a "legitimate, non-discriminatory

reason" for denying Young's accommodation request because its policies were facially neutral and based on genuine business practices. The Court remanded, however, for a determination on whether UPS's proffered reasons were "pretextual" and that the true reason was pregnancy discrimination. In doing so, it gave a not-so-gentle nudge to the Fourth Circuit that Young's evidence that UPS accommodated most non-pregnant employees with lifting limitations and had multiple policies accommodating non-pregnant employee would likely be sufficient to meet her burden.

What does this Mean for You?

Young v. United Parcel Service, Inc. means there is now confusion where there once was clarity. It will take years of litigation to flesh out the nuances in *Young*, and, undoubtedly, the EEOC will issue new Guidance regarding pregnancy and pregnancy-related disabilities, but in the meantime:

- **DO** evaluate leave policies. Do your leave policies provide light-duty work for certain employees but not for pregnant workers?
- **DO** consider the impact your policies have on pregnant employees. Do your policies impose "a significant burden" on pregnant workers? What constitutes a significant burden is not clear, but if you have accommodated most non-pregnant employees with similar limitations you could be in trouble. The Supreme Court noted that statistical evidence could be used as evidence of pretext.
- **DO** require that pregnancy-related concerns and requests come to HR. In this time of legal uncertainty, it is critical that HR has visibility to such requests and makes sure they are handled appropriately and consistently.
- **DO** enlist the use of legal counsel when presented with a pregnancy-related accommodation situation. These scenarios can have multiple implications and can affect not only your company's future litigation, but also how you may implement policies down the road.
- **DON'T** forget to consider whether a pregnant employee who requests an accommodation is covered under ADA's expanded definition of disability to cover temporary conditions.
- **DON'T** allow supervisors to make isolated decisions about light duty accommodations. These usually result in allegations of inconsistent treatment, since different supervisors will handle situations in different ways.
- **DON'T** forget that leave time itself may be an "accommodation" of sorts. If a pregnant employee can't do her job, termination is not the answer, but FMLA or other forms of leave may be. Many employers fret over the usage of FMLA while the employee is pregnant, since she needs it for the birth of her child, but it may be the only option and is worth exploring.
- **DON'T** make assumptions about pregnancy or an employee's ability to perform her job. By making assumptions, you may be discriminating. Also, even in these uncertain times, it still remains the employee's responsibility to ask for an accommodation.
- **DON'T** be surprised if the EEOC investigates your pregnancy discrimination charges of discrimination a bit more closely. Expect information requests and on-site visits. However, as the Court made clear, the EEOC's 2014 Guidance is invalid.

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