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Supreme Court Rejects EEOC Guidance On Light Duty Assignments for Pregnant Employees

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Employers may be required by Title VII to give pregnant employees light duty positions if they would do so for other employees with similar limitations on their ability to work, the Supreme Court has held. *Young v. United Parcel Service, Inc.*, No. 12-1226, 575 U.S. ___ (2015). Although an employer may defend against such a claim by showing it had non-discriminatory reasons for treating pregnancy-related infirmities and other work-limiting conditions differently, a plaintiff can overcome that showing with evidence that the "employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden."

In *Young*, the Court held, the court of appeals failed to ask the critical question: "why, when the employer accommodated so many, could it not accommodate pregnant women as well?" Employers can anticipate facing this question in future pregnancy discrimination cases.

As the Court noted, recent changes to the Americans with Disabilities Act may diminish the practical impact of *Young*, as the ADA Amendments Act, and subsequent EEOC interpretations, have combined to expand the Act's coverage to some temporary disabilities. But *Young* unquestionably marks an appreciable expansion of Title VII's application to pregnant workers.

The Court's decision also constitutes its most recent rebuke to the EEOC. The government had argued in *Young* that the Court should give deference to an expansive interpretation of Title VII issued by the EEOC after *certiorari* had been granted, but the majority soundly rejected both the agency's claim to deference and its interpretation of Title VII. The agency's interpretations of the statute, the Court held, have lacked the "consistency" and "thoroughness [of] consideration" required for deference.

Background

The plaintiff, Peggy Young, worked as a part-time package delivery driver for UPS; that job required her, among other things, to lift more than 70 pounds on occasion. After she became pregnant, she developed complications and her doctor told her that she should not be lifting more than 20 pounds (and, as the pregnancy advanced, no more than 10 pounds). Young asked for a light-duty position for the duration of her pregnancy.

Under UPS's policies at the time, however, temporary light duty positions were available to drivers only (a) when required to accommodate a disability under the ADA or state law; (b) when necessitated by an on-the-job injury; or (c) if an injury or illness resulted in the loss of the

Department of Transportation certification the driver needed to perform the job. Because none of these circumstances applied, Young's request was denied. Her manager allegedly told her that she could not return to work "until she 'was no longer pregnant'" because given her then-present condition, she "was too much of a liability."

Young filed a lawsuit claiming that UPS's leave policies violated the Pregnancy Discrimination Act (PDA). The district court granted the employer's motion for summary judgment and the Fourth Circuit affirmed, largely because the individuals to whom Young compared herself—those who were given light duty jobs—were not "similarly situated." Thus viewed, UPS's policies were "facially neutral" and "pregnancy blind."

The Supreme Court granted *certiorari* to resolve a circuit split on the application of the PDA to light duty assignments.

The Pregnancy Discrimination Act

As initially enacted, Title VII of the Civil Rights Act of 1964 prohibited employment discrimination "because of sex," but made no mention of pregnancy. *See* 42 U.S.C. § 2000e-2(a)(1). In *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), the Supreme Court held that distinctions made by employers based on pregnancy were not the same as discrimination based on sex. The Court thus saw nothing unlawful in a disability plan that paid benefits for non-occupational sickness and accidents but expressly excluded pregnancy-related claims. Such a plan distinguished, not between men and women, but between pregnant women and those of either sex who were not pregnant. That, the Court reasoned, is not sex discrimination.

Congress responded to *Gilbert* by passing the Pregnancy Discrimination Act, which amended Title VII to specify that discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions" was, in fact, discrimination "because of sex." The PDA also provided 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…."

Id. slip op. at 3 (citing § 2000e(k)).

Disagreement on the Court: Is the Second Clause the Same as the First?

The question posed in *Young* was what, precisely, Congress meant by the phrase "other persons not so affected" in the second clause of the PDA. The plaintiff argued that the phrase was intended to create a "most favored nation" status for pregnant workers; if the employer treats any "other [group of persons]" in a favorable way with respect to leave (such as those who suffer on-the-job injuries), it must also do so for pregnant workers. All nine justices rejected that view.

Similarly, the majority rejected the view (offered by UPS) that the clause merely "defines sex discrimination to include pregnancy discrimination." Such an interpretation would render the second clause entirely superfluous, according to the Court, because the first clause effectively accomplishes that task.

Moreover, the majority explained, such a narrow reading of the language would "fail to carry out an important congressional objective": to overturn the Court's decision in *Gilbert*. The majority explained that "an individual pregnant worker who seeks to show disparate treatment [can establish a *prima*

facie case of disparate treatment] by showing . . . that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'" The employer may then offer a legitimate, nondiscriminatory reason for the refusal to accommodate, but "normally" may not defend based on cost or employer convenience. *Id.* slip op. at 20-21.

If the employer asserts such a non-discriminatory reason, the plaintiff can then prevail by showing "that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination." Pretext is shown, the majority explained, "by . . . evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers." *Id.* slip op. at 21.

The Impact of *Young*

Young's extension of the PDA may well have little practical impact on employer policies. The ADA, the Family and Medical Leave Act, and many state and local employment laws already impose on employers obligations to provide leave in a wide variety of circumstances.

For Title VII litigation, the Court's description of the shifting burdens of proof, however, is problematic. Ultimately, liability will turn on whether the fact-finder places greater value on the "burden on pregnant workers" or on the employer's rationale for making the distinction. The imprecision of this "test" suggests that lower courts will continue to have difficulty in marking out the precise limits of employer obligations under the PDA.

Although it remains to be seen how *Young* will play out in the lower courts, the attention given the case will result in a heightened focus on this issue. That attention, along with the amendments to the ADA and the more aggressive employee protections provided by many state and local non-discrimination statutes, all underscore the importance of caution for employers on pregnancy-related accommodation issues. It is sensible for employers to review their existing policies and, perhaps, reconsider the distinctions those policies draw, and to give some thought to how (or if) those distinctions could be defended in litigation or whether to take an individualized look at accommodation or light duty requests rather than trying to defend blanket rules based on the source of the temporary inability to perform the job.

Finally, *Young* is the most recent in a series of Court decisions cautioning lower courts about the risks of automatically according deference to EEOC interpretations. The agency's views do not have the "power to persuade" unless they exhibit "consistency" and "thoroughness [of] consideration."

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