Labor and Employment Alert: The Supreme Court, Pregnancy Accommodation and Unfinished Business

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CLIENT ALERT | 3.27.2015

On March 25, 2015, the Supreme Court announced its long-awaited decision in *Young v. United Parcel Service* regarding the scope of required accommodations under the Pregnancy Discrimination Act (PDA). The case involves a former driver for UPS who claimed that UPS violated the PDA by not offering her light duty when she was pregnant and subject to a 20-pound lifting restriction, despite accommodating nonpregnant drivers with the same lifting restriction. The Court, by a 6-3 vote, vacated the Fourth Circuit's decision granting summary judgment to UPS and directed the Fourth Circuit to reconsider the case in light of the standard the Court articulated in its decision.

The PDA requires 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." Like many employers, UPS offered accommodations to employees whose restrictions were the result of work-related injuries that did not rise to the level of a disability. However, under its policy UPS did not offer accommodations to workers whose restrictions did not rise to the level of a protected disability and were the result of a non-work related injury or condition. Young argued that, under the PDA, pregnant workers who are similar in their ability to work as the non-pregnant workers with restrictions flowing from work-related injuries must receive the same accommodations, despite the fact that other non-pregnant employees with restrictions not flowing from work-related injuries or conditions also did not receive accommodations. In contrast, UPS argued the "polar opposite" – that PDA simply defines "sex discrimination" to include pregnancy discrimination and nothing more.

The Court rejected Young's argument, stating it "doubts that Congress intended to grant pregnant workers an unconditional 'most-favored-nation' status." However, it found that UPS's argument was incorrect as well.

In identifying the appropriate standard for resolving the issue, the Court also rejected the solicitor general's argument that the Court should give special, if not controlling, weight to a 2014 Equal Employment Opportunity Commission (EEOC) guidance concerning the application of Title VII and the Americans with Disabilities Act (ADA) to pregnant employees. The Court noted this guidance was issued just two weeks after the Court agreed to hear the *Young* case, was inconsistent with the government's long-standing position on the issue, and was issued without explanation. Accordingly, the Court found that the EEOC guidance lacks the timing, "consistency," and "thoroughness" of "consideration" necessary to "give it power to persuade."

Instead, the Court crafted a standard for pregnancy accommodation cases based on the traditional *McDonnell Douglas* burden-shifting framework, which is used to show disparate discriminatory treatment by indirect evidence. To establish discrimination under *McDonnell Douglas*, an employee first establishes a prima facie case of discrimination – basically that she was qualified for the job, an adverse action was taken against her and similarly situated employees were not so affected. The burden of persuasion (not proof) then shifts to the employer to articulate a legitimate nondiscriminatory reason for the adverse action. If the employer does so, the burden then shifts back to the employee to prove that the employer's explanation was in reality a pretext for unlawful discrimination.

Explaining further, the Court in *Young* held that an employee who wants to prove she was discriminated against because her pregnancy was not reasonably accommodated can do so by showing that (1) she belongs to the protected class and sought an accommodation from her employer, (2) the employer did not accommodate her and (3) the employer accommodated others "similar in their ability or inability to work." Once the employee shows this, the employer may attempt to justify its refusal to accommodate by relying on "legitimate, nondiscriminatory" reasons. The Court noted that a "legitimate, nondiscriminatory reason" normally does not include claiming that it is more expensive or less convenient to accommodate pregnant women. Even if the employer does articulate an appropriate reason for its actions, the employee can still prevail by providing "sufficient evidence" that the employer's policies regarding accommodation impose "a significant burden" on pregnant employees, and are not "sufficiently strong" to justify the burden. The Court explained that a plaintiff can show a "significant burden" – and therefore reach a jury – "by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."

So what does all this mean to employers? First, the case isn't over yet. The Fourth Circuit must determine whether Young established sufficient facts under the Court's new standard to overcome the UPS motion for summary judgment and to present the case to a jury. Under the Court's test, what constitutes a "significant burden" on pregnant employees and what is a "sufficiently strong" reason for imposing that burden is unclear. While the Court provides some instruction, it will be up to the lower courts to provide practical guidance to employers.

Second, the Court itself noted that the actual impact of its decision may be limited given the 2008 amendments to the ADA. These amendments expanded the definition of "disability" such that pregnancy-related impairments may qualify as disabilities, which would trigger the duty to engage in an interactive process to identify available reasonable accommodations and a duty to accommodate, if a reasonable option is available. Also, more states are explicitly requiring accommodations for pregnant employees.

Finally, the EEOC said that it will revisit its pregnancy discrimination guidance and "make necessary changes" to comport with the Court's decision. Presumably, the EEOC will produce the new guidance with the appropriate timing, consistency and thoroughness of consideration the Court found lacking in its prior guidance, but that remains to be seen.

Ultimately, employers will need to see how the EEOC and courts respond to the standard announced by the Court in *Young*. In the meantime, employers should review their existing accommodation, leave, scheduling, attendance and light duty policies and consider whether revisions are appropriate to reduce the risk that their policies run afoul of their duty to accommodate pregnant employees under the PDA and ADA, as well as any applicable state or local laws. Contact your Vorys lawyer for assistance in undertaking this review and in training your supervisors to recognize and respond to requests for accommodation.