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Expert Analysis

Supreme Court Shows the Way to a Jury In Pregnancy Discrimination Cases

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By a 6-3 majority, the U.S. Supreme Court provided clarification to the Pregnancy Discrimination Act (PDA) last week in *Young v. United Parcel Service*, No. 12-1226, explaining how workers can prove discrimination when they are denied pregnancy-related accommodations. After examining disparate-treatment claims under the PDA in depth, the court revived plaintiff Peggy Young's lawsuit against her employer UPS alleging pregnancy discrimination. Justice Stephen Breyer authored the majority opinion, joined by Justices John Roberts, Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, with Justice Samuel Alito concurring in a separate opinion.

At issue in Young's case was the nature of the evidence needed at summary judgment to create a triable issue for a jury on whether the company had engaged in pregnancy discrimination under the PDA. Congress passed the PDA in 1978 to overturn the Supreme Court's decision in *General Electric v. Gilbert*[1] which found that an employer's policy that provided sickness and accident benefits to all employees but did not provide disability-benefit payments for absence due to pregnancy did not violate Title VII. In particular, the Supreme Court reasoned in *Gilbert* that the employer's plan was facially nondiscriminatory because it did not cover any risk for men that it did not also cover for women, and further concluded that the plan's failure to cover a risk unique to women, such as pregnancy, did not render the plan discriminatory.[2]

> At the heart of the Young opinion is the court's guidance on what constitutes a genuine issue of material fact such that a jury could decide whether an employer engaged in pregnancy discrimination.

The PDA was passed to make clear that sex discrimination includes discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions.[3] The second clause of the PDA further requires that women with pregnancy-related conditions "be treated the same for all employment-related purposes…as other persons not so affected but similar in their ability or inability to work."[4]

In October 2006, UPS driver Peggy Young requested a workplace accommodation from the company during her pregnancy. Her doctor had instructed her not to lift more than 20 pounds during the first 20 weeks of her pregnancy, or more than 10 pounds for the remainder of her pregnancy. Although UPS required drivers like Young to be able to lift parcels weighing up to 70 pounds, the company had accommodated non-pregnant employees with similar lifting restrictions. In fact, UPS offered light-duty work to three categories of employees: workers injured on the job; workers who had an impairment recognized under the Americans with Disabilities Act and could continue to work, and workers who had lost their license, including for reason of having driven while intoxicated.

Because Young did not fall into one of these three categories, UPS did not provide Young with an accommodation and told her that she could not work while under a lifting restriction. As a result, she was forced to take an unpaid leave and eventually lost her medical coverage. Thus, Young's case presented the question of whether UPS's policies treated pregnant workers less favorably than it treated non-pregnant workers with work-related restrictions similar to hers, in violation of the PDA.

Young filed a complaint in Maryland federal court in September 2008. Following discovery, UPS filed a motion for summary judgment. In February 2011, the district court granted UPS's motion, finding both that Young could not show intentional discrimination through direct evidence and could not make out a prima facie case under the McDonnell Douglas burden-shifting

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framework. The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision in January 2013. Young then filed a petition for a writ of certiorari to the Supreme Court, and the Court granted Young's petition.

In its March 25, 2015 decision, the Supreme Court vacated the Fourth Circuit's decision and remanded. The Supreme Court concluded that Young had created a genuine dispute of material fact as to whether UPS had treated more favorably some employees whose situations could not reasonably be distinguished from Young's. The Supreme Court left it to the Fourth Circuit to determine whether UPS's reasons for treating Young less favorably than other nonpregnant employees were pretextual.

The Young court made clear that its holding did not apply to the new legal landscape, and counsel should make sure to continue to plead ADAAA failure-to-accommodate claims in addition to PDA claims in the appropriate cases.

Supreme Court Analysis

The Young majority's analysis focuses upon the evidence a plaintiff must show in support of her disparate treatment claim at summary judgment under the "other persons not so affected" language in the second clause of the PDA. Under the familiar McDonnell Douglas framework, after Young has established a prima facie case of discrimination, UPS must articulate some legitimate, non-discriminatory reason for treating non-pregnant workers (employees outside the protected class) better than pregnant employees (employees within the protected class). If UPS articulates such a reason, Young must then prove that the reasons offered were pretext for discrimination. In *Young*, the Supreme Court made clear that an employer's reason for treating pregnant employees worse than non-pregnant employees "cannot consist simply of a claim that it is more expensive or less convenient" to accommodate pregnant women.[5]

At the heart of the Young opinion is the court's guidance on what constitutes a genuine issue of material fact such that a jury could decide whether an employer engaged in pregnancy discrimination. The Young court held that a plaintiff may reach a jury on the issue of pretext by "providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers," and that the employer's proffered reasons were "not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination."[6]

While it is likely that this language will be litigated extensively in the coming years, the court did provide the following examples from Young's own evidence that it believed would support Young's argument that a significant burden exists, including evidence that the company "accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[7] It added that the fact that the company "has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong."[8]

Evidence Presented

While the court ultimately did not decide whether Young had created a genuine issue of material fact as to pretext, remanding the case back to the Fourth Circuit for consideration of that issue, it did discuss the evidence presented at length.

First, Young presented evidence that UPS maintained accommodation policies for other categories of workers and had, in fact, granted accommodations to several employees pursuant to these policies. UPS's collective-bargaining agreement contained three accommodations policies for other categories of workers: (1) employees unable to perform their normal assignments due to an on-the-job injury, (2) employees with permanent disabilities under the ADA, and (3) employees who had lost their Department of Transportation certifications due to a failed medical exam, lost driver's license, or involvement in an accident. Young presented evidence that UPS had accommodated several employees under these policies, as well as other employees where it was unclear whether the injuries had occurred on or off the job.

Second, Young presented evidence of pregnancy-biased comments made by UPS employees: the Capital Division Manager told Young that while she was pregnant she was too much of a liability and could not return until she was no longer pregnant, and a shop steward who had worked at UPS for 10 years said that the only light duty request that became an issue were women who were pregnant.

The court's opinion focused on the first category of evidence presented by Young, emphasizing that under the McDonnell Douglas analysis, an employee might rely upon statistical evidence to demonstrate that an employer's practice or policy is intentionally discriminatory. The court explained that statistical evidence might undermine the employer's proffered legitimate, nondiscriminatory explanation for its policy and lead to an inference of intentional discrimination. In Young's case, the court suggested that the "combined effects" of UPS's three accommodation policies contained in its collective-bargaining agreement might outweigh the combined strength of UPS's justifications for the policies.[9]

In vacating and remanding, the court suggested that the Fourth Circuit undertake this analysis and determine wheth-

er—when taken together—UPS's three policies and their justifications might lead to an inference of discrimination. As the court put it, "why, when the employer accommodated so many, could it not accommodate pregnant women as well?"[10] Further, a worker need not show "that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways."[11] Rather, a pregnant employee can make her case 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 'similarly in their ability or inability to work.'"

The court stressed that this approach is limited to the Pregnancy Discrimination Act context, and is "consistent with" its longstanding rule that "circumstantial proof" is sufficient to rebut an employer's reasons for treating pregnant workers differently from non-pregnant workers. Furthermore, at the summary judgment stage, Young need not definitely prove whether UPS accommodated a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers—she need only show that the question presents a triable issue of fact.

Changing Landscape

Even as the court took pains to narrow its holding to the PDA, the Young majority recognized that the laws and regulations affecting pregnancy discrimination and disability have undergone significant changes. Since Young brought her lawsuit, the Americans with Disabilities Act Amendments Act (ADAAA) came into effect, greatly expanding the definition of "disability" to include physical or mental impairments that substantially limit activities including "lifting, standing, or bending." Specifically, the ADAAA covers many work-related limitations that may exist during pregnancy, including lifting restrictions that last several months.[12]

The Young court made clear that its holding did not apply to the new legal landscape, and counsel should make sure to continue to plead ADAAA failure-to-accommodate claims in addition to PDA claims in the appropriate cases. In addition, it is unlikely that employers will roll back accommodations for non-pregnant employees as a result of Young, since employers must abide by the current, more expansive obligations to accommodate employees with disabilities as defined by the ADAAA.

The court's opinion also raises questions about the future viability of the Equal Employment Opportunity Commission's recently issued guidance on pregnancy discrimination. In July 2014—while *Young* was pending before the Supreme Court but before oral argument—the EEOC promulgated new guidelines in an apparent attempt to clarify the term "other persons" in the PDA. The EEOC's new guidance was met with much fanfare, and the EEOC itself noted that it was "the first comprehensive update of the Commission's guidance on the subject of discrimination against pregnant workers since…1983."[13]

The guidance explains 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)."[14] Notably, the guidance provides examples that closely mirrored the facts of *Young*, including a worker who requests a light-duty assignment due to a 20-pound lifting restriction related to her pregnancy.

Although the Solicitor General urged the court to accord the guidance "special, if not controlling, weight" under *Skidmore v. Swift & Co.*,[15] the court took issue with both the timing of the new guidance and its lack of consistency with the EEOC's earlier stance on the issue. The court pointed to prior cases in which the EEOC had taken positions that directly contradicted its newly issued guidance and Young's interpretation of the PDA. The court concluded that "without further explanation," it could not "rely significantly" on the EEOC's recent guidance.[16]

For those who viewed the EEOC's guidance as long overdue, the court's skepticism may come as a disappointment. It is important to note, however, that the court primarily took issue only with that portion of the guidance purporting to prohibit an employer from making distinctions based on the source of an employee's limitation. The guidance also provides information on the ADAAA and other laws affecting pregnant workers. The court's opinion left the remainder of the EEOC's guidance intact. In addition, the ADAAA's expanded reach may provide many pregnant workers with an alternative path to obtaining reasonable accommodations.

Accommodations for pregnant workers are certain to be a fast-growing area of litigation post-*Young,* and practitioners are likely to encounter more workers seeking advice on how to navigate potential claims of pregnancy discrimination and more employers seeking guidance on crafting policies that are consistent with their obligations under the PDA, ADAAA, and local and state laws.

1. 429 U.S. 125 (1976).
2. Id. at 136-40.
3. 42 U.S.C. §2000e(k).
4. Id.
5. *Young v. UPS*, No. 12-1226, slip op. at 21 (U.S. March 25, 2015), http://www.supremecourt.gov/opinions/14pdf/12-1226_k5fl.pdf.
6. Id.
7. Id.
8. Id.
9. Id. at 23.
10. Id.
11. Id. at 20.
12. See 29 C.F.R. Pt. 1630, App. to Pt. 1630 (2014).
13. Press Release, EEOC, EEOC Issues Updated Enforcement Guidance On Pregnancy Discrimination And Related Issues (July 14, 2014), available at http://www1.eeoc.gov/eeoc/newsroom/release/7-14-14.cfm.
14. 2 EEOC Compliance Manual §626-I(A)(5) (July 2014); *Young*, slip op. at 15.
15. 323 U.S. 134, 140 (1944).
16. *Young*, slip op. at 17.