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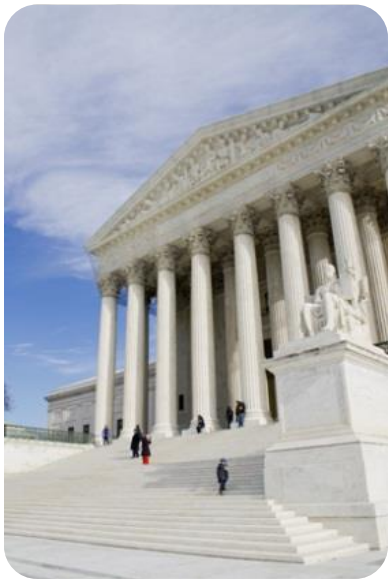
EEOC Revises Pregnancy Discrimination Guidance

On June 25, the EEOC updated its Enforcement Guidance on Pregnancy Discrimination in response to the Supreme Court's recent decision in *Young v. UPS*. The revised guidance reflects the Court's view that women may be able to prove pregnancy discrimination if an employer's light duty policy accommodated a large percentage of non-pregnant workers but did not accommodate a large percentage of pregnant workers with similar work restrictions. Employers will want to review their leave and light duty policies and factor the new guidance into decisions on accommodating pregnant workers.

Background

Title VII of the Civil Rights Act of 1964 bars employment discrimination on the basis of race, color, religion, sex or national origin. The Pregnancy Discrimination Act (PDA) amended Title VII to extend its prohibition against sex discrimination to discrimination based on pregnancy, childbirth or related medical conditions. The PDA requires employers to treat "women affected by pregnancy" the same as other non-pregnant employees "similar in their ability or inability to work."



In 2007, a part-time driver for United Parcel Service (UPS) filed a charge with the EEOC, after she requested — but was denied — light duty due to pregnancy-related lifting restrictions. Under company policy, light duty was available only to employees who (1) were injured on the job; (2) lost their DOT certifications; or (3) had a disability within the meaning of Americans with Disabilities Act (ADA). She later brought suit, claiming the policy violated the PDA. Both the trial court and the Fourth Circuit Court of Appeals found it did not. In *Young v. UPS*, the Supreme Court vacated the judgment for UPS and sent the case back to the Fourth Circuit to determine whether the company had a legitimate, nondiscriminatory, non-pretextual reason for its light duty policy. The Court explained that an employer policy that is not intended to discriminate may still violate the PDA if it imposes significant burdens on pregnant employees without a sufficiently strong justification. (See our March 26, 2015 *For Your Information*.)

While the case was pending before the Court, the EEOC issued its first comprehensive update of enforcement guidance on pregnancy discrimination in

more than 30 years, interpreting the PDA as granting the same reasonable accommodation rights to pregnant employees as the ADA grants to individuals with disabilities. Although the guidance expressly provided that "an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job injuries," the Court disregarded it in reaching its decision. (See our September 4, 2014 *For Your Information*.)

EEOC Guidance

On June 25, the EEOC updated several pages of its Enforcement Guidance on Pregnancy Discrimination and Related Issues to align the guidance with the Court's *Young v. UPS* decision. The EEOC also released questions and answers along with a fact sheet for small businesses on pregnancy discrimination. While most of the 2014 enforcement guidance remains unchanged, the new guidance modifies the "Disparate Treatment" and "Light Duty" sections and deletes the prior "Persons Similar in Their Ability or Inability to Work" section in its entirety.

Disparate Treatment Section

Relying on the *Young* decision, the 2015 guidance states:

> "Employer policies that do not facially discriminate on the basis of pregnancy may nonetheless violate the provision of the PDA where they impose significant burdens on pregnant employees that cannot be supported by a sufficiently strong justification."

The EEOC also incorporates the following example of evidence of a facially neutral policy that may indicate disparate treatment based on pregnancy, childbirth or related medical conditions:

> "In *Young v. United Parcel Serv., Inc.*, the Court said that evidence of an employer policy or practice of providing light duty to a large percentage of nonpregnant employees while failing to provide light duty to a large percentage of pregnant workers might establish that the policy or practice significantly burdens pregnant employees. If the employer's reasons for its actions are not sufficiently strong to justify the burden, that will 'give rise to an inference of intentional discrimination.'"

EEOC's Continued Focus on Pregnancy Accommodation

The EEOC's FY 2013 – 2016 **Strategic Enforcement Plan** identifies accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the PDA as an emerging issue, and indicates the EEOC will continue to prioritize these issues.

Light Duty Section

In this section, the EEOC discusses how the *McDonnell Douglas* burden-shifting framework applies to pregnancy discrimination claims. The guidance acknowledges that the analysis would not apply in intentional discrimination cases where there is direct evidence that the employer's denial of light duty was motivated by pregnancy-related animus. In the absence of such evidence, a PDA plaintiff would have to produce evidence that "a similarly situated worker was treated differently or more favorably than the pregnant worker" to establish a *prima facie* case of discrimination.

The EEOC quotes the *Young* decision extensively in summarizing how to prove a PDA violation. First, the EEOC says, a PDA plaintiff may satisfy her *prima facie* burden by identifying an employee who was similar in his or her

ability or inability to work due to an impairment (e.g., an employee with a lifting restriction) and was provided an accommodation that the pregnant employee sought. Once an employee has established a *prima facie* case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason (generally other than expense or convenience) for treating the pregnant worker differently than a non-pregnant worker similar in his or her ability or inability to work. Even if an employer can assert a legitimate nondiscriminatory reason, the pregnant worker may still show that the reason for the different treatment is pretextual. Because an employer's policy of accommodating a large percentage of nonpregnant — but not pregnant — employees with limitations may result in a significant burden on pregnant employees, the policy may present a genuine issue of material fact.

Although the *Young* Court did not address the effect of the ADAAA on workers with pregnancy-related impairments, the guidance notes that the law changed the definition of "disability," making it much easier for workers with such impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation under the ADA.

Other than the changes highlighted above, the guidance remains unchanged. Thus, employers may continue to rely on prior EEOC guidance on pregnancy discrimination topics such as access to health insurance, prohibition of forced leave, and lactation and breastfeeding.

In Closing

The Court in the *Young* case applied a new standard to discrimination claims brought under the PDA — concluding that women may be able to prove pregnancy discrimination if an employer's facially neutral policy accommodates a large percentage of non-pregnant workers but does not accommodate a large percentage of pregnant employees with substantially similar work restrictions. The EEOC has updated its enforcement guidance to align more closely with that ruling. Employers should review their leave and light duty policies, and factor the new guidance into decisions on accommodating pregnant workers.

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