THE ILLINOIS ASSOCIATION OF DEFENSE TRIAL COUNSEL QUARTERLY

Feature Article

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Carrying the Burden of Proving a Claim of Discrimination Under the Pregnancy Discrimination Act following the Supreme Court's Decision in *Young v. UPS*

According to the United States Department of Labor's latest annual data, the 2013 labor force included 72.7 million women. U.S. DEPT. OF LABOR, LATEST ANNUAL DATA (2013), *available at* www.dol.gov/wb/stats/recentfacts.htm (last visited June 2, 2015). Between 2012 and 2022, it is anticipated that this number will increase by 5.4 percent. *Id*. The Department of Labor does not provide statics regarding the number of women in childbearing age who work; however, according to its website, 69.9 percent of mothers with children under the age of 18 years are in the workforce. *Id*. As the number of women in the workforce rises so too has the number of gender-based discrimination lawsuits. In 1978, Congress passed the Pregnancy Discrimination Act, which amended Title VII of the Civil Rights Act and expanded gender-based discrimination to include discrimination "on the basis of pregnancy, childbirth, or related medical conditions." Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k).

On March 25, 2015, the United States Supreme Court issued its long-awaited decision in the Pregnancy Discrimination Act case of *Young v. United Parcel Service,* 135 S. Ct. 1338, 1344 (2015). It is important, as the number of women in the workforce continues to grow, for employers throughout the country to be aware of the implications of the Supreme Court's decision. For practitioners, it is likely that we will see further development of the application of the Pregnancy Discrimination Act to Title VII lawsuits in the future.

Background Facts

The background of the *Young* case is not entirely unique. In 2006, while working as a part-time driver for UPS, Peggy Young became pregnant after suffering several miscarriages. Due to her medical history, Young's doctor recommended that she not lift anything heavier than 20 pounds during the first 20 weeks of her pregnancy or 10 pounds thereafter. *Young*, 135 S. Ct. at 1344. At the time, Young's job required her to lift packages weighing up to 70 pounds without assistance and up to 150 pounds with assistance. *Id*. Despite Young's doctor's orders and other UPS employees offers to assist Young, UPS told Young that they could not accommodate her request not to be required to lift anything over 20 pounds. *Id*. As a result, Young stayed home without pay and lost her employee medical coverage during most of the time she was pregnant. *Id*.

Young sued UPS in federal court alleging that UPS "acted unlawfully in refusing to accommodate Young's pregnancy-related lifting restriction." *Id*. Young argued that UPS should be required to accommodate her work restriction as UPS had accommodated other drivers who were "similar in their ability to work." *Id*. In response, UPS argued that it had not discriminated against Young because the other drivers who UPS accommodated were: "(1) drivers who had become disabled on the job, (2) those who had lost their Department of Transportation (DOT) certification, and (3) those

who suffered from a disability covered by the Americans with Disabilities Act of 1990 (ADA)." *Id*. Therefore, UPS treated Young "just as it treated all 'other' relevant 'persons,' not on the basis of Young's pregnancy." *Id*. Notably, the Americans with Disabilities Act was amended subsequent to Young's pregnancy in 2008 specifying that "'physical or mental impairment[s] that substantially limi[t]' an individual's ability to lift, stand, or bend are ADA-covered disabilities." *Id*. at 1348.

The Majority's Analysis

Under Title VII of the Civil Rights Act, an employer may not "discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual's . . . sex." *Id*. (citing 78 Stat. 253, 42 U.S.C. § 2000e-2(a)(1)). The Pregnancy Discrimination Act extended the prohibition of discrimination on the basis of sex to include "because of or on the basis of pregnancy, childbirth, or related medical conditions." *Young*, 135 S. Ct. at 1344-45 (citing 42 U.S.C. §2000e(k)). The Supreme Court analyzed Young's "disparate-treatment" claim that UPS intentionally treated Young less favorably than employees with Young's qualifications but outside Young's protected class. *Id*. The Supreme Court noted that "[l]iability in a disparate-treatment case depends on whether the protected trait actually motivated the employer's decision." *Id*. The key analysis of the Supreme Court's opinion was the second clause of the Pregnancy Discrimination Act, which provides:

> 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. at 1345. The language within this second clause of the Act that required the most analysis is the portion that states "as *other persons* not so affected but *similar in their ability or inability to work*." *Id*. at 1348-49 (citing 42 U.S.C. § 2000e(k)) (emphasis added by the Court). It is unclear whom Congress included among these "other persons." *Id*. The Supreme Court, in reliance on petitioner's reply brief, stated that the analysis of this clause boils down to whether the Act requires "giving 'the same accommodations to an employee with a pregnancy-related work limitation as it would give *that employee* if her work limitation stemmed from a different cause but had a similar effect on her inability to work.'" *Id*. at 1349 (citing the Petitioner's Reply Brief) (emphasis in original).

The petitioner and the United States argued that the second clause "requires an employer to provide the same accommodations to work-place disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work." *Id*. at 1349. The Supreme Court found that the respondent minimized the implications of the second clause taking the position that the language was intended to merely "define sex discrimination to include pregnancy discrimination." *Id.* This interpretation would require the courts in determining whether an employer violated Title VII to analyze "the accommodations an employer provides to pregnant women with the accommodations it provides to others *within* a facially neutral category." *Id*. (citing dissent of Scalia, J.) (emphasis in original). The majority of the Supreme Court declined to accept either interpretation. *Id*.

The Supreme Court found the petitioner's literal interpretation too broad. *Id*. Under the petitioner's approach, if "an employer accommodates only a subset of workers with disabling conditions," then "pregnant workers who are similar in the ability to work [must] receive the same treatment even if still other non-pregnant workers do not receive

accommodations." *Id*. Petitioner argues that respondent violated the statute because pregnant workers and non-pregnant workers were not treated the same. *Id*. The Supreme Court found this approach to be problematic because it requires employers to give all pregnant workers the same accommodations that the employer may provide even one or two workers irrespective of any factor considered in providing an accommodation for a non-pregnant worker, such as the worker's age or the nature of their job. *Id*.

Justice Breyer, who drafted the majority opinion, agreed with the respondent that petitioner's approach would grant pregnant workers an unconditional "most-favored-nation" status. *Id*. at 1349-50. The Supreme Court noted that the second clause does not provide that an employer must treat pregnant workers as "*any* other persons." *Id*. at 1350 (emphasis in original). In addition, disparate-treatment claims generally may be overcome by proof that an employer's policy may have an unfavorable affect on a protected class, but an employer has "a legitimate, non-discriminatory, non-pretextual reason" for the policy. *Id*. The history of the Act does not indicate that Congress intended any deviation from this approach generally taken in disparate treatment cases. *Id*.

The Supreme Court stated that the Equal Employment Opportunity Commission (EEOC) issued guidance prior to and following Congress passing the Pregnancy Discrimination Act by stating that a disability caused by or contributed to by pregnancy is considered a temporary disability and should be treated the same in terms of benefits and privileges as they are applied to other temporary disabilities. *Id*. at 1351. The EEOC also stated that "[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function." *Id*. The Supreme Court found that the EEOC's guidance did not clarify the ambiguous language of "other persons" set forth in the second clause of the Act. *Id*. The Supreme Court wrangled with the notion that while it is clear that pregnancy related disabilities should be treated the same as non-pregnancy related disabilities, this does not clarify what an employer is required to do when it does not treat all non-pregnancy related disabilities the same. *Id*.

The majority discussed another landmark gender-based discrimination case, *General Electric Company v. Gilbert*. *Id*. at 1353 (citing *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976)). In *Gilbert*, the Supreme Court evaluated whether a company policy that gave "'nonoccupational sickness and accident benefits to all employees' without providing 'disability-benefit payments for any absence due to pregnancy.'" *Young*, 135 S. Ct. at 1353 (citing *Gilbert*, 429 U.S. 125 at 128-29). In *Gilbert*, the Supreme Court held that this policy did not constitute sexual discrimination under Title VII because the policy distinguished between pregnant workers versus non-pregnant workers, not men versus women. *Young*, 135 S. Ct. at 1353. The Court found that while pregnancy was "confined to women," it was not "comparable in all other respects to [the] diseases or disabilities' that the plan covered." *Id*. The Court also did not consider pregnancy a disease or a result of an accident. *Id*. In addition, the Court did not believe that the purpose for the distinction was gender-based discrimination. *Id*.

Scalia's Dissent

In the dissenting opinion written by Justice Scalia, and joined by Justices Kennedy and Thomas, he argued that he was advocating adoption of the position set forth in *Gilbert*, acknowledging that the Pregnancy Discrimination Act overturned the *Gilbert* decision. *Id*. at 1364. However, Justice Scalia argued that the plan in *Gilbert* is different than the alleged discrimination in this case because the *Gilbert* plan specifically singled out pregnancy for disfavor. *Id*. Justice Scalia stated that the employment plan at issue in *Gilbert* was not a neutral plan, but rather "place[d]...pregnancy in a

class by itself." *Id*. The plan specifically denied coverage for sicknesses on account of pregnancy but not on account of other conditions such as "sports injuries" or "elective cosmetic surgeries." *Id*.

Justice Scalia stated that "[t]he most natural way to understand the same-treatment clause is that an employer may not distinguish between pregnant women and others of similar ability and inability *because of pregnancy*." *Id*. at 1362 (emphasis in original). Justice Scalia explained that "[i]f a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she has been 'treated the same' as everyone else." *Id*. Employing a satirical approach, Justice Scalia claimed that the majority used a wand to reach the result that it desired result without offering a sufficient explanation for the result. *Id*. at 1364. Justice Scalia argued that the words in the second clause "shall be treated the same" does not mean that the courts have to balance "the significance of the burden on pregnant workers against the strength of the employer's justifications for the policy." *Id*.

Justice Scalia also criticized the majority's opinion for failing to distinguish disparate treatment claims (one in which an employment policy is based upon a "discriminatory motive") from a discriminatory impact case (where the effect of a policy harms one group more than another without justification). *Id*. at 1365. The majority noted early in its opinion that petitioner had not brought a disparate impact claim. *Id*. at 1345. Justice Scalia argued that the majority's decision allows a pregnant woman to establish disparate treatment by showing that the effects of the employers' policy fall more harshly on pregnant women than others and are unjustified. Justice Scalia found this result problematic because these two different types of claims come with different standards of liability, different defenses, and different remedies. *Id*. at 1365. For instance, a plaintiff can be awarded compensatory and punitive damages in a disparate treatment case, but only equitable relief in a disparate impact case. *Id*.

The Supreme Court majority found that the dissenting opinion, as well as the position espoused by UPS relying on the *Gilbert* decision, failed to acknowledge that the purpose of the Pregnancy Discrimination Act was to overturn the Court's ruling in *Gilbert* as well as its rationale. *Id*. at 1353.

Conclusion

In establishing the burden of proof in a Pregnancy Discrimination Act case, the Supreme Court applied the framework from the discriminatory hiring case of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Id*. at 1353-54. The Supreme Court held that the elements of a cause of action under the second clause of the Pregnancy Discrimination Act include: (1) plaintiff belongs to a protected class; (2) plaintiff sought accommodation; (3) the employer did not accommodate plaintiff; and (4) the employer accommodated others "similarly in their ability or inability to work." *Id*. at 1354. If plaintiff makes out a prima facie case, then the burden of proof shifts to the defendant to show that its refusal to accommodate plaintiff was based upon "legitimate, non-discriminatory" reasons. *Id*. These reasons cannot include "that it was more expensive or less convenient to add pregnant women" to add the pregnant women to the group of people that the employer accommodates. *Id*.

The analysis does not end here. If a defendant offers a "legitimate, non-discriminatory reasons," plaintiff avoids summary judgment by showing that "the employers 'legitimate, non-discriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give[s] rise to an inference of intentional discrimination." *Id*.

The Supreme Court noted that a plaintiff could argue that a genuine issue of material fact exists when the employer accommodates a large portion of non-pregnant workers, but not a large percentage of non-pregnant workers. *Id*. at 1354-

55. Young claimed that she could prove that UPS accommodated most non-pregnant employees with lifting restrictions and categorically denied these accommodations to pregnant employees with lifting restrictions. *Id*. at 1355. The Supreme Court noted that Young could also argue an inference of intentional discrimination exists because UPS has numerous policies that accommodate non-pregnant employees with lifting restrictions that its reasons for not offering accommodations to pregnant employees is not strong. *Id*.

While pregnant workers, in Justice Breyer's words, did not receive a "most favored nation" status (by allowing a plaintiff to argue that she should receive a work accommodation that was offered to "any" other worker), the Supreme Court has provided a ground for workers like Peggy Young to recover against their employers. Future cases and court opinions will likely resolve several factors yet to be decided potentially including (1) who comprises this group of people "similarly in their ability or inability to work;" (2) what consists of a "legitimate, non-discriminatory reason" to not accommodate a pregnant worker; and (3) how will a plaintiff prove that an employer's purported "legitimate, non-discriminatory" reason is not sufficiently strong to justify the burden. In the meantime, employers should adjust their policies to account for the standard annunciated by the Court and the 2008 amendment to the ADA which specifically includes pregnancy as a disability.

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