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CLIENT ALERT

Does the Supreme Court's Recent Decision Interpreting the Federal Pregnancy Discrimination Act Require Employers to Change their Employment Policies?

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The law has been in flux regarding the obligation an employer has to offer the same accommodations for pregnancy that are available to other workers with medical restrictions. If company policy affords light duty to a worker injured "on the job," for example, must light duty also be available to a worker whose pregnancy imposes similar physical limitations? Or, if a worker receives an ADA accommodation, must the same accommodation be available to a non-disabled but pregnant employee?

The EEOC added to the muddle last year by publishing new guidance that expanded employer obligations: "An 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)." Under that guidance, the key factor for an employer to consider was whether employees had similar work restrictions. If so, equal treatment was generally required.

The Supreme Court has weighed in on the issue. The case involved a UPS delivery driver, Young, whose pregnancy led to a lifting restriction. While some (but not all) other workers with lifting restrictions received light duty, UPS' policy did not offer light duty for pregnancy. Young argued that UPS violated the federal Pregnancy Discrimination Act, which prohibits discrimination based on pregnancy, by not giving her an accommodation that non-pregnant employees might receive.

UPS argued that its policies were neutral on pregnancy—"pregnancy-blind"—and thus did not discriminate based on pregnancy. Its policies offered accommodations to employees who (a) were injured on the job, (b) had an ADA disability, or (c) lost DOT certifications. Workers (such as Young) not fitting into those categories—pregnant or not—did not receive accommodation. According to UPS, then, it did not treat employees differently "because of" pregnancy.

In a split decision, the Supreme Court agreed with neither side. The Court observed that Young could have claimed, but did not, that UPS' policy had a "disparate impact" on women. Young's claim was that UPS engaged in intentional, "disparate treatment" of her because of her

pregnancy. The Court rejected Young's contention that if *any other* worker received an accommodation, pregnant employees should be offered the same accommodation and failure to offer the same accommodation was per se discriminatory. The Court also rejected UPS' position that its pregnancy-neutral policies prevented Young from proving disparate treatment.

The Court in the end sided with Young by giving her an opportunity to prove that UPS intentionally discriminated against her, overturning the trial court's decision granting summary judgment to UPS.

The Court reasoned—in the key aspect of its decision—that an employee is entitled to a trial if she presents "sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons [for the policies] are not sufficiently strong to justify the burden." Accordingly, if the burden on pregnant workers created by a policy is disproportionate to the need for the policy, the disproportionality could evidence that the company purposefully treats pregnant workers less favorably.

In practical terms, this holding reduces the likelihood that an employer will obtain summary judgment on federal pregnancy discrimination claims. The Court's decision indicates that juries are to weigh a policy's effects and justifications, and pregnant employees will routinely argue that the burdens on them pale in comparison to the reasons the company offers for its policy. The result in any case will be heavily influenced by jurors' general sense of fairness. As the Court put it, a juror might wonder: "why, when the employer accommodated so many, could it not accommodate pregnant women as well." Young will have the chance to prove that UPS intentionally discriminated against her by attempting to present evidence that the effect of UPS' policies on pregnant workers is not justified by the reasons for its policies.

The Court noted that the 2008 ADA amendments might limit the "future significance" of its decision. Those amendments expanded the definition of disability, including by indicating that a substantial impairment on the ability to lift is an ADA-covered disability. The Court further observed that the EEOC interprets this broadened definition to require accommodation of employees whose temporary lifting restrictions originate off the job.

Three Justices dissented, primarily on the ground that the Court's "effects-and–justifications" balancing test really involves the disparate impact theory of discrimination. According to the dissent, the Court "bungle[d] the dichotomy between claims of disparate treatment and claims of disparate impact." Disparate impact claims rest on a showing that the effects of a company policy fall more harshly on one group of workers than others and cannot be justified by business necessity. The dissent argued that the Court should have preserved the distinction between these two theories of liability rather than muddle them.

To answer the question posed in the title of this update, employers need not change their policies on pregnancy accommodation as a result of the Court's ruling. The Court, in fact, rejected the EEOC's 2014 guidance on this issue, and that guidance is not binding on employers. Nonetheless, employers should perform a risk assessment, which may lead to policy changes. Specifically, an employer should consider whether its policies (leave, disability, and accommodation) significantly limit the opportunities pregnant workers have under those policies (the "effects"). If many workers—but relatively few of them due to pregnancy restrictions—obtain benefits under those policies, the employer should consider whether it has strong reasons for its policies ("justifications").

The case is *Young v. UPS*, No. 12-1226 (Mar. 25, 2015).

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