An Official Publication of the New Hampshire Bar Association

NEW HAMPSHIRE BAR NEWS

As seen in the BAR NEWS - April 15, 2015

Labor & Employment Law

Impact of *Young v. UPS* Decision Might Be Minimal

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On March 25, in a 6-3 decision written by Justice Stephen Breyer, the US Supreme Court issued its opinion in Young v. UPS, interpreted the Pregnancy Discrimination Act (PDA), and vacated the judgment of the Fourth Circuit Court of Appeals. Peggy Young gets a new shot at trial, but by way of a theory neither party advocated.

The issue, as framed by Young's petition for certiorari, seemed simple enough: "Whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are "similar in their ability or inability to work."

Young was a driver for UPS, which accommodates many, but not all, of its workers with physical restrictions. Young's job required her to load and unload her truck, to lift 50 pounds and push 150 pounds. When she became pregnant, she sought a lifting limit of 20 pounds, but was denied that accommodation. UPS, however, provided accommodations for many other employees: 1) those injured on the job; 2) those who had an ADA disability; and 3) those drivers who lost their DOT licenses (because of a lost driver's license, a failed medical exam or who had been in a motor vehicle accident). UPS kept Young out of work until after she had her baby.

Young brought a claim of disparate treatment (intentional discrimination), provable by direct evidence or by circumstantial evidence under the burden-shifting analysis of *McDonnell Douglas Corp. v. Green*. She did not bring a disparate impact case (where a neutral policy hits protected classes more than others).

UPS won on summary judgment for its "pregnancy-blind" rule, and its victory was upheld by the Fourth Circuit Court of Appeals, which explained that UPS could deny Young an accommodation just the same as a UPS driver who hurt his back outside of work while lifting his infant into the air, or a volunteer fire fighter who hurt her back in an off-the-job accident. Thus, the source of the health problem drove the right to accommodation.

The Dec. 3, 2014, Supreme Court oral argument was toe-curling. Justice Anthony Kennedy (an eventual dissenter) charged that the plaintiff's counsel "started out by really giving a misimpression."

Not wilting, counsel responded, "Well, I – Your Honor, I would submit that's not right."

Justice Antonin Scalia (another eventual dissenter) opined that the plaintiff's argument was "coming down to most favored nation [status]. Justice Ruth Bader Ginsberg, who joined in the majority opinion, chastised the Solicitor General, whose position was narrower than the plaintiff's, saying, "Well, yours is the least favored nation, right?"

Some history: While the Civil Rights Act of 1964 made it illegal to discriminate in the workplace on the basis of race and sex, it was not until 1978 that Congress passed The Pregnancy Discrimination Act (PDA), in response to General Electric Co. v. Gilbert (1976) which held that pregnancy discrimination was not sex discrimination, just discrimination between pregnant and non-pregnant workers. The PDA's two most important clauses are found at 42 USC Sec. 2000e(k):

Clause 1: The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and

Clause 2: Women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in

their ability or inability to work...

Young argued Clause 2 means that if an employer provides accommodations to some subset of workers, a Title VII violation would lie when a pregnant worker was denied such accommodation ("Most favored nation status," with the exception of tenure).

UPS took "a polar opposite view," arguing that Clause 2 merely includes pregnancy discrimination within the definition of sex discrimination, and, as Justice Scalia opined, the clause does not prohibit denying pregnant women accommodations "on the basis of evenhanded policy." ("Least favored nation status.")

The majority, however, refused both "extremes." The court was troubled by Young's view, when, for example, a company favored employees who worked in extra hazardous duty situations, and focused on the statute's language "as other persons" as compared to what it could have said, but did not: "as any other persons" regarding similar ability to work, nor did it specify which other persons Congress had in mind.

It noted that in disparate treatment law, the employer can implement policies intended not to harm members of a protected class, even if the policies did so, as long as the employer has a legitimate, non-discriminatory, non-pretextural reason for doing it.

During oral argument, the Solicitor General explained that the position of the United States recently had flipped, because a few months earlier the EEOC issued its first comprehensive revision in 30 years to its Guidance on Pregnancy Discrimination, which said that an employer could not treat employees with similar disabilities differently due to the source of their disabilities. Justice Scalia chided, "I thought we felt that we don't give deference to the EEOC [and]... we don't give you any more deference than we give the EEOC... right?

Not only did the court deny deference to EEOC's position, it mocked its Guidance, in part because the Guidance was issued after the Supreme Court had granted certiorari in Young, failed to provide adequate support for its new interpretation, and didn't explain why it was taking a position contrary to the government's prior position.

The Supreme Court asked the obvious questions: Does this clause mean that courts must compare workers only in respect to the work limitations that they suffer? Does it mean that courts must ignore all other similarities or differences between pregnant and nonpregnant workers? Or does it mean that courts, when deciding who the relevant "other persons" are, may consider other similarities and differences as well? If so, which ones?

The differences between these possible interpretations come to the fore when a court, as here, must consider a workplace policy that distinguishes between pregnant and nonpregnant workers in light of characteristics not related to pregnancy.

In the end, the Supreme Court said that the plaintiff could prove pretext by showing that the policy imposes a burden on pregnant employees and the employer's "legitimate" reasons are not sufficiently strong to justify the burden.

To create a material fact in dispute, the plaintiff can show that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large number of pregnant workers; and that Young could further argue that because UPS has multiple policies benefiting non-pregnant workers, its reasons to deny pregnant workers accommodations are not sufficiently strong, giving rise to an inference of discrimination; or, as the court ultimately stated, "...why, when the employer accommodated so many, could it not accommodate pregnant workers as well?"

The impact of *Young v. UPS* may be small, however, as the issues presented are probably mooted by the 2008 amendments to the Americans with Disabilities Act, which were enacted after Peggy's baby was born, some nine years ago.

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