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YOUNG V. UPS: PREGNANCY ACCOMMODATION & LIGHT DUTY – WHAT DOES IT MEAN FOR CALIFORNIA EMPLOYERS?

Introduction

In *Young v. United Parcel Service, Inc.* (*Young*),[1] decided by the United States Supreme Court March 25, 2015, hope for clarity concerning the application of facially neutral light duty policies to accommodation requests from pregnant employees was answered with a not-so-clear test which may prove difficult for courts to analyze and even more difficult for employers to understand and apply. Notwithstanding anyone's dashed hope for clear guidance, *Young* will have little to no effect on California employers. Under California's Fair Employment & Housing Act (FEHA),[2] and the recently amended regulations interpreting FEHA,[3] accommodation for pregnant employees, including transfer to a light duty position, is already required unless the employer can establish the accommodation would be unreasonable.

The *Young* Case

Peggy Young was employed by UPS as a part-time driver. Young had a history of miscarriages and subsequently became pregnant in 2006. Her doctor advised her not to lift more than 20 pounds. UPS requires its drivers to lift 70 pounds (and up to 150 pounds with assistance). UPS told Young she could not work while under a lifting restriction. As a result, Young was placed on an unpaid leave and subsequently lost her medical benefits coverage.

Young sued UPS for sex and disability discrimination under the federal Pregnancy Discrimination Act (PDA) and Americans with Disabilities Act (ADA).[4] She argued that UPS had three separate accommodations policies available to certain other employees similar in their inability to work. These policies should equally apply to her.

UPS responded that Young did not fit within the categories of persons accommodated and thus it had not discriminated against Young on the basis of pregnancy. Young was treated the same as all other employees who did not fit within the categories of employees accommodated.

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[1] 2015 U.S. Lexis 2121; 126 Fair Empl. Prac. Cas. (BNA) 765.
[2] Government Code 12900 et seq.
[3] Title 2, California Code of Regulations, 11035-11051.
[4] The ADA was amended in 2008 (ADA Amendments Act of 2008, codified at 42 U.S.C. 12102(10-(2) (ADAAA)). The definition of "disability" was expanded to include "physical or mental impairments that substantially limit" an individual's ability to lift, stand, or bend. Under the EEOC regulations, the new statutory definition requires employers to accommodate employees with non-work-related temporary lifting restrictions. See 29 CFR 1630.2(j)(1).

Those categories included: (1) drivers who suffered a work-related disability; (2) drivers who lost their Department of Transportation (DOT) certification based on medical or other reasons; and (3) those who suffered from a permanent disability under the ADA. Providing Young with a light duty accommodation under any one of these policies would have provided her more favorable treatment than other employees similarly situated in their inability to work (i.e. those with a non-work-related disability). The district court and the Fourth Circuit sided with UPS, concluding that no discrimination occurred because those employees Young compared herself to — the work-related, DOT and ADA categories — were different and not "similarly situated" to her particular circumstances.

In a 6 to 3 decision, the Supreme Court rejected both arguments. The court's majority concluded that Young's argument was too broad and would grant "most-favored-nation status," or more favorable treatment, to pregnant employees under the PDA. The position of UPS, on the other hand, was too narrow a reading and failed to address Congress's clear intent under the PDA to do more than just define sex discrimination to include pregnancy. Finding middle ground, the court "crafts instead a new law," as noted in a strong and persuasive dissent. The court held that, under the *McDonnell Douglas* shifting burdens analysis,[5] once a pregnant employee demonstrates that she sought accommodation and that the employer refused her request but did accommodate others "similar in their ability or inability to work," the burden shifts to the employer to justify its refusal by relying on "legitimate, nondiscriminatory" reasons for denying the accommodation. Expense or inconvenience is normally an insufficient reason for disparate treatment. Once the employer offers a "legitimate, nondiscriminatory" reason, the burden shifts to the employee to show the reason was a pretext for discrimination. To do this, the employee may show that the employer's policies impose a "significant burden" on pregnant employees by providing evidence that the employer accommodates a large percentage of employees who are not pregnant while failing to accommodate those who are.[6] As a result, discrimination will be found unless the employer can demonstrate a "sufficiently strong justification" for the failure to accommodate.

California's Pregnancy Disability Reasonable Accommodation Requirements

FEHA makes it an unlawful employment practice for an employer "to refuse to provide reasonable accommodation for an employee for a condition related to pregnancy, childbirth, or a related medical condition" upon the employee's request and with the advice of her health care provider.[7] Under the regulations which interpret FEHA, "reasonable accommodation" includes modifying work practices, policies or work duties.[8] While the term "light duty" is not specifically mentioned in the regulations, it is unlawful for an employer who has a policy, practice or provision in a collective bargaining agreement which provides for the transfer of temporarily disabled employees to less strenuous or hazardous positions or duties for the duration of the disability, "including disabilities or conditions resulting from on-the-job injuries," to refuse to grant a transfer request of an employee disabled due to pregnancy. [9] In other words, if an employer offers light

[5] *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817.
[6] The dissent argues this analysis "conflates" disparate treatment with disparate impact.
[7] Government Code 12945(3)(A).
[8] 2 CCR 11035(s)(1) and (2).
[9] 2 CCR 11041(a)(1).

duty to employees temporarily disabled due to work-related injuries, light duty must also be available to employees disabled due to pregnancy.

If an employer does not have a light duty policy, program or practice, a medically-advised transfer request from an employee disabled due to pregnancy must be reasonably accommodated unless the request would require the employer to: (1) create a new position; (2) discharge or transfer another employee; (3) violate the terms of a collective bargaining agreement; (4) transfer an employee with more seniority; or (5) promote or transfer an employee who is not qualified to perform the new job.[10]

Post-*Young* Recommendations for Employers

While *Young* does not particularly affect the California employer, it is possible that the case could raise greater awareness amongst this state's pregnant workers, spurring challenges to employer's light duty policies, practices or programs. Employers accustomed to granting light duty requests for work-related injuries only risk exposure to liability for violations of FEHA, as well as the federal PDA, ADA and ADAAA. Employers are encouraged to:

- review reasonable accommodation policies, practices, programs and contract provisions with legal counsel, particularly those related to light duty assignments, to ensure they comply with legal requirements and are applied in a nondiscriminatory manner;
- provide training to management personnel regarding reasonable accommodation requirements and how to respond to pregnant employees' requests for accommodations;
- before a claim is made or filed, be proactive;
- engage in the interactive process with those employees requesting accommodations due to disabilities, including temporary disabilities and disabilities associated with pregnancy and related conditions.

If you have any questions concerning this issue, please do not hesitate to contact our office.

– Kelly A. Lazerson

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[10] 2 CCR 11041(a)(2)(A)(B).