Pregnancy and the Workplace

by Rachel V. Rose, J.D., MBA

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Whether large or small, corporations need to address a variety of accommodations for a multitude of reasons. Failing to provide a reasonable accommodation may result in an employee claim alleging discrimination. As the U.S. Equal Employment Opportunity Commission (EEOC) indicated, "[w]henever discrimination is found, the goal of the law is to put the victim of discrimination in the same position (or nearly the same) that he or she would have been if the discrimination had never occurred."[1] The costs to the company can be significant in a multitude of ways: reputational, legal, and financial. An employee who prevails on a discrimination and/or an accommodation refusal claim, may be able to collect attorney's fees, expert witness fees, and court costs.[2] Furthermore, damages may include both compensatory and punitive damages, which "may be awarded in cases involving intentional discrimination based on a person's race, color, national origin, sex (including pregnancy), religion, disability, or genetic information."[3] Hence, the total costs associated with discrimination against a pregnant woman could be costly.

Women who are pregnant may experience complications or be advised of a condition, that may require companies to provide accommodations. With women constituting 50.8 percent of the U.S. population,[4] it is imperative that employers and employees alike appreciate the various laws. The issue of accommodating pregnant women was recently addressed by the U.S. Supreme Court in *Young v. United Parcel Service*, 575 U.S. 135 S. Ct. 1338 (2015), with Justice Stephen Breyer delivering the opinion for the Court. Although the Court vacated the lower courts' rulings and remanded the case back to the Fourth Circuit, the discussion about the Pregnancy Discrimination Act of 1978, as well as the "2014 Equal Employment Opportunity Commission's guideline concerning the application of Title VII and the ADA to pregnant employees,"[5] is something employers need to adequately address. *Young* raised some genuine issues of material fact, which is why the Court vacated summary judgment ruling under FRCP 56(a).[6] Therefore, the purpose of this article is to provide a starting point for considering issues relating to accommodating pregnant women in the workplace.

Analysis

In general, Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees "because of … sex."[7] The Pregnancy Discrimination Act of 1978 added section 701(k), which states:

> 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 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, and nothing in section 703(h) of this title shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: Provided that nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.[8]

This law forms the basis of the issues in *Young*, with a particular emphasis on the clause that requires employers to treat "women affected by pregnancy … the same for all-employment related purposes … as other persons not so affected but similar in their ability or inability to work."[9] In 2006, Peggy Young, a part-time delivery driver for the United Parcel Service (UPS), became pregnant. She was subsequently restricted by her physician from lifting anything heavier than 20 pounds during the first portion of her pregnancy and, later, from lifting more than 10 pounds. The very nature of a parcel delivery service is to distribute packages of varying sizes to various addresses. In 2007, Young filed a complaint with the EEOC, and in 2008 the EEOC issued her a "right to sue" letter.[10] As set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), the Court in *Young* was

tasked with "[d]etermin[ing] whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination."[11] To parse through these words and reach an equitable outcome, the Supreme Court adopted a hybrid remedy of sorts—balancing intentional bias with the harmful impact on women in the workforce.[12] The ultimate result did not give employers what they hoped nor women what they hoped. The Court remanded the case to be reevaluated in light of the framework articulated in its opinion.

According to the dissent in *Young*, "Title VII's prohibition of discrimination creates a liability for both disparate treatment (taking action with 'discriminatory motive') and disparate impact (using a practice that 'fall[s] more harshly on one group than another and cannot be justified by business necessity')."[13] The plaintiff, Peggy Young, did not use either theory to form the basis of her complaint. She attempted to prove disparate treatment but left the claim for disparate impact untouched. Justice Antonin Scalia argued (emphasis his) that the "most natural way to understand the same-treatment clause is that an employer may not distinguish between pregnant women and others of similar ability or inability *because of pregnancy*. Here, that means pregnant women are entitled to accommodations *on the same terms* as other workers with disabling conditions."[14] This interpretation seems reasonable; however, to adequately assess a situation, the Department of Labor (DOL), along with the EEOC and related laws, should be consulted.[15]

Conclusion

In 2010, 47 percent of the total U.S. labor force was women.[16] That number is climbing. *Young* has many implications, many of which became express in DOL guidance of pregnancy discrimination and intertwines the ADA Amendments Act of 2008. For employers, care should be given to incorporate this guidance into relevant policies and procedures. Likewise, employees should have the opportunity to consult someone if the pregnancy necessitates reasonable accommodations. In sum, this is one area of law that both cannot and should not be overlooked. ⊙

Endnotes

[1]Remedies for Employment Discrimination,U.S. Equal Employment Opportunity Commission, www.eeoc.gov/employees/remedies.cfm (last accessed Jan. 5, 2016).
[2]*Id.*
[3]*Id.*
[4]State & County QuickFacts, U.S. Census Bureau, http://quickfacts.census.gov/qfd/states/00000.html (last accessed Jan. 5, 2016).
[5]*Young v. United Parcel Serv. Inc.*, 575 U.S. ___ , 135 S. Ct. 1338 (2015), providing a 6-3 vote with three justices dissenting. Justice Antonin Scalia wrote, "Faced with two conceivable readings of the Pregnancy Discrimination Act, the Court chooses neither." 135 S. Ct. at 1361 (Scalia, J., dissenting).
[6]*Id.*
[7]Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1).
[8]Pregnancy Discrimination Act of 1978, § 2000e(k). *See also* The Pregnancy Discrimination Act of 1978, U.S. Equal Employment Opportunity Commission, www.eeoc.gov/laws/statutes/pregnancy.cfm (last accessed Jan. 5, 2016).
[9]*Id.*
[10]*See* Lyle Denniston, Opinion Analysis: Fashioning a Remedy for Pregnancy Bias, SCOTUSblog, www.scotusblog.com/case-files/cases/young-v-united-parcel-service/ (last accessed Jan. 5, 2016).
[11]*Young v. United Parcel Serv. Inc.*, 575 U.S. ___, 135 S. Ct. 1338 (2015).
[12]*Supra* n. 10.
[13]*Young,* 135 S. Ct. at 1361 (Scalia, J., dissenting), citing *Teamsters v. United States*, 431 U.S. 324, 335-36, n. 15 (1977).
[14]*Id.*
[15]On June 25, 2015, in response to *Young*, the EEOC issued Notice No. 915.003, which specifically states, "This Enforcement Guidance supersedes the Enforcement Guidance on Pregnancy Discrimination and Related Issues dated July 14, 2014. Most of this revised guidance remains the same as the prior version, but changes have been made to Sections I.B.1 (Disparate Treatment) and I.C.1 (Light Duty) in response to the Supreme Court's decision in *Young v. United Parcel Serv. Inc.*, 575 U.S. ___, 135 S. Ct. 1338 (2015). Section I A.5 of the July 14, 2014 guidance has also been deleted in response to *Young*." EEOC Notice No. 915.003, U.S. Equal Employment Opportunity Commission, www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed Jan. 5, 2016).
[16]Women in the Labor Force in 2010, United States Department of Labor, Women's Bureau, www.dol.gov/wb/factsheets/qf-laborforce-10.htm (last accessed February 19, 2016).

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