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To Accommodate or Not to Accommodate: Supreme Court to Weigh In On Accommodations for Pregnant Worker

By Warren E. Buliox

For me and perhaps others who have a great interest in the Supreme Court, there is rarely a dull moment when it is in session. Over the past few years, we have seen pivotal decisions on health care, contraceptive use and other transformative issues. In the employment space, we saw among other cases *Vance v. Ball State University* and *United States v. Quality Stores, Inc.*, which we wrote on previously and which, respectively, clarified the definition of "supervisor" under Title VII and settled a split among federal courts as to whether severance payments are subject to FICA taxes.

As with previous years, 2015 is gearing up to be an exciting and defining year. The Supreme Court, for example, recently heard arguments in the much anticipated case of *Young v. United Parcel Service*, a pregnancy accommodation/discrimination case. This case is particularly interesting given the EEOC's recently issued guidelines on the matter.

The Plaintiff in *Young* worked as a delivery driver for the United Parcel Service ("UPS") and when she became pregnant was placed on a 20-pound lifting restriction. When she requested a light duty assignment, she was told that company policy would not permit her to continue working so long as the 20-pound lifting restriction was in

place because she could not perform the essential duties of her job (which included lifting packages weighing up to 70 pounds) and was otherwise ineligible under company policy for light-duty work, which was reserved for those with on-the-job injuries, those in need of accommodations under the Americans with Disabilities Act, and those who lost department of transportation certification.

Young eventually sued UPS, alleging, among other claims, that UPS's policy violated the Pregnancy Discrimination Act ("PDA"). Under the PDA, which was enacted to expand the definition of sex discrimination under Title VII, it is unlawful to discriminate in employment because of or on the basis of pregnancy, childbirth, or related medical conditions. The law instructs that "women affected by pregnancy...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." 42 U.S.C. § 2000e(k). This means, in part and as the Supreme Court has previously held, that "it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

Against this legal backdrop, Young argued that UPS's policy violates the PDA by affording workplace accommodations for some non-pregnant employees (those injured on the job and those with ADA qualifying disabilities) and not affording the same or similar accommodations to pregnant employees. UPS, in turn, argued that since its policy did not differentiate between pregnant or non-pregnant employees but rather differentiated based on neutral criteria (such as whether the injury occurred on the job or not), the policy did not target pregnant women specifically and could not be construed as evidence of discriminatory animus against pregnant women.

A federal court of appeals ruled in favor of UPS, holding that while a policy explicitly excluding pregnant employees from accommodations would violate the PDA, the policy at issue treats pregnant employees and non-pregnant employees alike inasmuch as there would be situations under the policy in which both pregnant and non-pregnant workers with work restrictions would *not* be afforded light duty accommodations. Hence, according to the appellate court, the policy does not run afoul to the PDA. The appellate court further reasoned that creating a requirement to accommodate pregnant workers under such a circumstance would afford pregnant workers preferential treatment, which is a mandate that was neither intended nor enacted by the PDA.

The issue now before the Supreme Court is whether, and under what circumstances, the PDA requires employers to make accommodations to pregnant workers in situations where accommodations are provided to non-pregnant workers who are

similar in their ability or inability to work. While it is unclear as to how the Court will come down on this, comments during oral arguments indicated, perhaps unsurprisingly, a potential split among the justices. During questioning of UPS's attorney, Justice Kagan commented, "[W]hat we know about the PDA is that it was supposed to be about removing stereotypes of pregnant women as marginal workers...And what you are saying is that there's a policy that accommodates some workers, but puts all pregnant women on one side of the line." On the other hand, however, Justice Scalia made mention of Young's position being akin to granting pregnant women "most favored nations" status, which at least according to the appellate court the PDA does not require.

This is indeed a case for employers to watch, as a decision in favor of Young would mean that some employers would need to revamp their accommodation policies and trainings. Regardless of the outcome of this case, though, employers would be well-served by reviewing policies and practices affecting pregnant employees to determine whether those policies may have the effect of treating pregnant employees less favorably than non-pregnant employees. Further, and until a decision is reached and the issue is hopefully settled, employers would be well-served by being particularly mindful of the EEOC's recently issued guidelines on accommodations for pregnant employees, which in part provide that employers should grant leave for pregnancy-related conditions and outlines circumstances in which employers may be required to provide light-duty assignments for pregnant workers. A decision in the *Young* case is expected later this year.