WORKPLACE JUSTICE

YOUNG V. UPS: WHAT IT MEANS FOR PREGNANT WORKERS

On March 25, 2015, the Supreme Court issued a decision in *Young v. UPS*, providing a victory for pregnant workers that changed the legal landscape for pregnancy accommodation claims in several important ways. At the heart of the case was Peggy Young, a driver for UPS, who became pregnant and was advised by her health care provider that she should not lift more than 20 pounds during her pregnancy. Although UPS accommodated needs for alternative duties for several groups of workers—those injured on the job, those protected by the Americans with Disabilities Act, and those who lost their commercial drivers' licenses because of medical or other reasons—the company refused to accommodate Peggy Young. Instead, UPS pushed Peggy Young onto unpaid leave for the last six months of her pregnancy despite her desire and ability to work; as a result she lost a paycheck and her UPS-provided health insurance. She sued UPS for violating the Pregnancy Discrimination Act (PDA), which states that discrimination based on pregnancy is sex discrimination, and that "women affected by pregnancy, childbirth, or related medical conditions 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."[1]

Prior to the *Young* decision, the meaning of PDA provision guaranteeing the right of workers affected by pregnancy to be treated at least as well as other employees "not so affected but similar in their ability or inability to work"[2] had been disputed in the lower courts. Unfortunately, many courts interpreted the PDA narrowly and allowed employers to refuse to accommodate workers with medical needs arising out of pregnancy even when they routinely accommodated other physical limitations. For example, the Fourth Circuit Court of Appeals held in Peggy Young's case that the PDA did not require UPS to accommodate Peggy Young or any pregnant workers because UPS's accommodation policies were "pregnancy blind" and Peggy Young had not demonstrated that they were motivated by an intent to harm pregnant women.[3]

A Victory for Pregnant Workers

In *Young v. UPS,*[4] the Supreme Court vacated the Court of Appeals decision and revived Peggy Young's case. It held that when an employer accommodates workers who are similar to pregnant workers in their ability to work, it cannot refuse to accommodate pregnant workers who need it simply because it "is more expensive or less convenient" to do so.[5] The Court also held that when an employer's accommodation policies impose a "significant burden" on pregnant workers that outweighs any justification for the policies that the employer offers, this is evidence that the employer is intentionally discriminating against pregnant workers.[6] The key question posed by the Court in *Young v. UPS* is. "Why, when an employer accommodated so many, could it not accommodate pregnant women as well?"[7] The *Young* decision is an important victory for pregnant workers, but the balancing test it sets out leaves multiple questions to be worked out in the lower courts.

Young v. UPS: What Changed

In *Young,* the Supreme Court altered the landscape for pregnancy accommodation claims in several important ways.

First, the Court made clear that a plaintiff successfully makes an initial showing in a pregnancy discrimination case challenging the denial of an accommodation when she shows (1) that she was pregnant; (2) that she sought accommodation; (3) that the employer did not accommodate her; (4) that the employer did accommodate others "similar in their ability or inability to work."[8] The Court emphasized that this does not mean that a pregnant worker must identify a nearly identical coworker that the employer accommodated. Instead, she must only show that the employer accommodated one or more other individuals who were not pregnant who had similar limitations in ability to work. This is a critical distinction because some lower courts, such as the Court of Appeal in Peggy Young's case, had previously found that a pregnant worker challenging a failure to accommodate was not comparable, for example, to employees with on-the-job injuries who were accommodated, because the pregnant

worker—though similar in ability to work—did not have an on-the-job injury.[9] The Supreme Court in *Young* corrected this catch 22 that had shut down many pregnant workers' cases.

Second, the Court offered some clarification about how an employer may and may not defend an accommodation policy after the pregnant worker has made this showing. When the pregnant worker has made this showing, the employer may then come forward with a "legitimate, nondiscriminatory" reason for the difference in treatment.[10] Importantly, however, the Court emphasized that an employer assertion that it "is more expensive or less convenient to add pregnant women to the category of those" who are covered by the accommodation policy does not constitute a legitimate, nondiscriminatory reason for the difference in treatment.[11]

Third, the Court set out a new way in which a pregnant employee may prove that the employer's stated legitimate reason is actually a pretext and that the employer is actually motivated by discrimination against pregnant women. The Court explained that when a pregnant worker shows the accommodation policies impose a significant burden on pregnant workers that outweigh any justifications offered by an employer, this can demonstrate intentional discrimination. A way of showing this significant burden is by presenting evidence that the employer "accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers."[12] The Court also noted that when an employer has multiple policies for accommodating limitations arising out of causes other than pregnancy, it may suggest that it does not have strong reasons for failing to accommodate pregnant workers too.[13] In doing so, it put employers on notice that pregnancy is not a reason to discriminate: if employers find themselves able to accommodate non-pregnant workers who need it, but not pregnant workers, they may be violating the PDA.

Other Legal Protections Remain Strong

The Supreme Court explicitly acknowledged in addition to the protections provided by the PDA, changes to the Americans with Disabilities Act (ADA) made by Congress after Young began her lawsuit against UPS[14] cover many workers whose limitations arise from pregnancy-related disabilities.[15] Even in dissent, Justice Kennedy acknowledged that the amended ADA "may require accommodations for many pregnant employees, even though pregnancy itself is not expressly classified as a disability."[16]

The Court also noted that in addition to disparate treatment claims—in which a pregnant worker claims that the employer intentionally discriminated against her, as was the case in *Young v. UPS*—refusals to accommodate pregnancy may constitute disparate impact discrimination as well.[17] Whereas disparate treatment cases focus on whether an employer was motivated by animus against pregnant women, disparate impact cases focus on whether the effects of a policy—even a neutral policy not intended to discriminate—disproportionately harm pregnant workers without a compelling justification.

Important Questions Remain

Although the *Young* decision was an important victory, lower courts will have to answer important questions in applying the test that the Supreme Court set out. For example, a pregnant worker may demonstrate a significant burden where an employer accommodates a large percentage of workers while not covering a large percentage of pregnant workers—but what constitutes a "large percentage"? Does a pregnant worker have to show precisely how many people the employer has accommodated in the past, or can she meet her burden by identifying employer policies that could be expected to accommodate most non-pregnant workers who need it? Are there other ways of demonstrating a significant burden? When will an employer's legitimate, nondiscriminatory reason be considered compelling enough to outweigh that burden?

The Supreme Court allowed Peggy Young's case to continue, but other pregnant workers may still face uncertainty about their rights in the specific contexts of their own workplaces.

1 42 U.S.C. § 2000e(k).
2 42 U.S.C. § 2000e(k).
3 Young v. United Parcel Serv., Inc., 707 F.3d 437, 446 (4th Cir. 2013).
4 135 S. Ct. 1338 (2015).
5 *Id.* at 1354.
6 *Id.*
7 *Id.* at 1355.
8 *Id.* at 1354.
9 *E.g., Young,* 707 F.3d at 450-51.
10 135 S.Ct. at 1354.
11 *Id.*
12 *Id.* at 1354-55.
13 *Id.*
14 29 CFR § 1630 (2015).
15 *Young,* 135 S. Ct. at 1348; *see* National Women's Law Center, The Amended Americans with Disabilities Act Protects Many Pregnant Workers (Nov 2014), at http://nwlc.org/wp-content/uploads/2015/08/amended_ada_protects_many_pregnant_workers.pdf.
16 135 S. Ct. at 1367 (Kennedy, J., dissenting).
17 *Id.* at 1361-62.