U.S. SUPREME COURT TO ADDRESS THE PREGNANCY DISCRIMINATION ACT, EVEN AS EEOC ISSUES ITS OWN GUIDANCE ON THE SAME SUBJECT

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Pregnancy discrimination has generated a lot of press this summer. On July 1, the Supreme Court agreed to hear *Young v. United Parcel Services, Inc.*, which raises fundamental questions about the protections pregnant women are entitled to under the Pregnancy Discrimination Act (PDA). Then, on July 14, the U.S. Equal Employment Opportunity Commission (EEOC) upstaged the Supreme Court by issuing its own guidance that construes the protections afforded workers under the PDA far more broadly than most courts have. Given the steady rise of pregnancy claims over the last two decades, there is clearly a lot at stake. Less clear, though, is what the practical consequences will be for employers once the dust has settled.

Young v. UPS

Young turns on the meaning of a subordinate clause. Under the PDA, "…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***." 42 U.S.C. § 2000e(k) (emphasis added). For years, courts consistently interpreted these words to mean that employment decisions affecting pregnant workers had to be "pregnancy-blind." So, for example, if a pregnant worker requested a workplace accommodation, the employer only had to provide it if it would also accommodate similarly situated non-pregnant workers with comparable limitations.

The plaintiff in *Young*, however, is urging the Supreme Court to reject this well-settled construction of the statute. Effectively, Young urges that an employer should accommodate a pregnant worker whenever ***any*** employee with similar physical restrictions would be entitled to the accommodation, even one who is not otherwise similarly situated. In other words, under this interpretation of the statute, a "pregnancy-neutral" policy would no longer be sufficient to satisfy the statute. In some cases, an employer would be obligated to treat pregnant women preferentially.

Young's own case provides a good illustration of this last point. Young was a UPS driver, a position that, among other qualifications, requires the ability to lift up to 70 pounds. After Young became pregnant, she provided UPS with medical notes indicating that she could not lift more than 20 pounds and requested a temporary transfer to light duty. UPS responded that it could not accommodate her because its policies limited such transfers to drivers who met one of three criteria, i.e., their restrictions were attributable to an on-the-job injury, they had lost their government driving certification due to a failed medical exam, or they were eligible for accommodations under the Americans with Disability Act. Accordingly, UPS treated Young exactly as it would have treated any similarly situated non-pregnant employee by advising her that she did not qualify for a light duty accommodation. Had UPS granted the accommodation, it would have treated Young preferentially over non-pregnant employees who were "similar in their ability or inability to work" and did not meet any of the three criteria for light duty.

The EEOC's Guidance

Apparently, the EEOC was impatient and could not wait to see how the Supreme Court would decide *Young*. On July 14, it issued its own guidance. Predictably, the EEOC took a position favorable to Young. It thus interpreted the PDA to mean, "An employer may not refuse to treat a pregnant worker the same as other employers who are similar in their ability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty only to workers injured on the job)." At the same time, the EEOC made some concessions to employers, thus allowing that an employer "may treat a pregnant employee the same as other employees who are similar in their ability or inability to work with respect to other prerequisites for obtaining the benefit that do not relate to the cause of an employee's limitation." Additionally, the agency considered situations in which the non-pregnant comparator might be a co-worker with a disability. In those cases, the agency concluded that an employer could evaluate whether the requested accommodation would pose an undue hardship as "this would amount to treating the pregnant employee the same as an employee with a disability whose accommodation request would also be subject to the defense of undue hardship."

Practical Considerations

Where does all this leave employers? The Supreme Court is going to have the last word, not the EEOC. But until the Supreme Court decides *Young* — which is likely to take at least several months — the EEOC presumably is going to enforce its own guidance. For now, employers should pay careful attention to it, even if the Supreme Court may ultimately overrule the agency by upholding a narrower construction of the PDA.

Employers must also comply with state and local requirements. The New York State Human Rights Law, for example, already affords pregnant women protections that go well beyond federal law. Depending on the jurisdiction, some employers may therefore be relatively unaffected by the outcome in *Young*, as their duties under local law to accommodate pregnant employees already substantially exceed those that federal law, at least up to now, has imposed

Employers should also be mindful of the Americans with Disability Act (ADA) when analyzing requests for accommodations from pregnant employees. Before 2009, pregnant women rarely qualified for accommodations under the ADA because most pregnancy-related medical conditions fell short of the requirements for establishing disability. With amendments to the ADA, however, pregnant women are now more likely to be eligible for accommodations. Indeed, the *Young* case may never have arisen had the plaintiff had her baby later. Back in 2006, when her case arose, her restrictions of

limited duration could not have possibly satisfied the ADA's requirements. Today, under the amended ADA, it is conceivable that the answer would have been different depending on her specific circumstances.

In sum, both *Young* and the EEOC's new guidance underscores that pregnancy discrimination law remains unsettled and can pose significant risks for employers. Employers therefore are advised to analyze all requests for pregnancy accommodations very carefully and not to hesitate to seek the advice of qualified counsel where necessary.