

Delivery Change: UPS Announces Modification of Challenged Pregnancy Accommodation Policy Just Weeks Ahead of Supreme Court Arguments

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In July of this year, we wrote about [new EEOC guidance](#) on the accommodation of pregnant employees under both the Americans with Disabilities Act (ADA) and Pregnancy Discrimination Act (PDA). One of the primary issues addressed in the EEOC's guidance was the accommodation of pregnant employees under the PDA on the same basis as disabled employees; in other words, whether a *non-disabled* pregnant employee can claim gender discrimination if he or she is not provided the same accommodations as a *disabled* employee. The EEOC stated that she can, equating any policy that denies such accommodation to intentional gender discrimination. (As we wrote at the time, one dissenting Commission member referred to this controversial new position as “me too” coverage — “whatever a person with a disability under the ADA is entitled to, I’m entitled too, to.”)

As we also noted in July, however, this very same issue will come before the U.S. Supreme Court this term, and a last-minute development now gives employers more reason to pay attention.

In the case of *Young v. UPS, Inc.*, the Court will address a discrimination claim brought by a pregnant delivery driver who was denied light duty work after she was put on a 20-pound lifting restriction during her pregnancy, and consequently was forced into unpaid leave. UPS readily acknowledges in the case that it denied the accommodation, and that it provides light duty work to employees with similar lifting restrictions as long as they are either injured on the job, disabled under the ADA, or lose their DOT driving certification. UPS argues, however, that this policy is “gender neutral”: regardless of gender, only drivers who fall into one of those three categories are entitled to light duty. The employee disagrees, arguing that she is entitled to whatever accommodations are available to the other employees. Thus, in *Young*, the Supreme Court will directly address the question of whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide accommodations to pregnant employees who are “similar in their ability or inability to work.” Obviously, if the Supreme Court sides with UPS and finds that no such accommodation is required by the PDA, the EEOC's guidance will no longer be valid.

In an interesting twist, however, even as the oral argument in the *Young* case is approaching in early December, UPS has announced as part of its brief to the Court filed October 24th that, effective January 1, 2015, it will make light duty available to pregnant workers with lifting or other restrictions to the same extent such work is available to employees with on-the-job injuries – in other words, that it is effectively undoing the policy under scrutiny. UPS states in a memo to employees that its new policy “reflects pregnancy-specific state laws recently enacted in a number of states where UPS conducts business, and is consistent with guidance on pregnancy-related accommodations newly issued” by the EEOC.” While this approach is not required by the PDA, UPS wrote (thereby maintaining its core argument), it “will aid operational consistency given that a number of states in which UPS operates have relatively recently mandated pregnancy accommodations.” At the same time, however, it should be noted that the change also minimizes UPS’s exposure in the case — as UPS notes in its brief, the Court’s decision now will “have no significance for any member of the UPS workforce,” and the only unresolved issue in the case is whether Ms. Young is entitled to compensatory relief based upon the wrongs that she may or may not already have incurred.

Employers sitting on the sidelines should track the *Young* case closely. It was already a significant item on the Court’s docket for business, and UPS’s announced change on the issue suggests that others may need to follow suit before too long. With questions about this case or the issue generally, contact your Hinshaw employment attorney.

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