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Pregnancy Discrimination

EEOC Commissioner Says *Young* Decision Has Spurred Review of Pregnancy Guidance

By Lydell C. Bridgeford

April 23 — The Equal Employment Opportunity Commission will revise its 2014 pregnancy guidance to address the burden-shifting formula endorsed by the U.S. Supreme Court majority in *Young v. United Parcel Service, Inc.*, EEOC Commissioner Victoria Lipnic told participants at a conference April 21.

Speaking at the general session of the Disability Management Employer Coalition's FMLA/ADAAA Employer Compliance Conference, Lipnic said the commission will revise the guidance to address how a pregnant worker "goes about proving a case and what type of evidence the EEOC will consider in a pregnancy discrimination charge alleging a denial of reasonable accommodation."

On March 25, the Supreme Court ruled 6-3 that an employer may violate Title VII of the 1964 Civil Rights Act, as amended by the Pregnancy Discrimination Act, if it fails to offer an accommodation to a pregnant employee with a light-duty work restriction, while providing the same accommodation to nonpregnant employees with temporary impairments (*Young v. United Parcel Service, Inc.*, 126 FEP Cases 765 (U.S. 2015) (57 DLR AA-1, 3/25/15).

However, the majority opinion criticized the EEOC's broad interpretation of the PDA in its 2014 guidance, finding that the statute doesn't grant pregnant employees "an unconditional most-favored-nation status." According to the Supreme Court, the EEOC guidance lacked the "special power to persuade" and is inconsistent with previous positions held by the federal government. "Without further explanation, we cannot rely significantly on the EEOC's determination," Justice Stephen Breyer wrote for the court.

"Our view was promptly rejected by the Supreme Court," Lipnic said, adding during the session that her views as presented don't necessarily represent those of the commission. She spoke before more than 325 disability and human resources managers, attorneys and professionals attending the conference sponsored by DMEC, an employer-based nonprofit organization focusing on absence and disability management.

Burden-Shifting Framework Under PDA

In *Young*, the Supreme Court adopted the familiar *McDonnell Douglas* burden-shifting approach, said Jeff Nowak, a labor and employment practice co-chair at law firm Franczek Radelet in Chicago. The court held that the plaintiff first has to prove that she belongs to a protected class and sought an accommodation, the employer did not provide the accommodation, and the employer accommodated non-pregnant employees similar in their ability or inability to work, Nowak said.

"Under this framework, once the plaintiff has established these initial elements, under *Young*, the defendant then must provide a non-discriminatory reason as to why it refused the accommodation," said Nowak, who co-presented the general session with Lipnic.

The employer typically can't make the argument that it's more expensive or less convenient to offer the accommodation to pregnant employees, Nowak said. If the employer establishes that the denial was based on a non-discriminatory reason, then the plaintiff must establish that the employer's policies impose a significant burden on pregnant workers. The plaintiff must also prove that "the justification for not accommodating pregnant employees is not sufficiently strong, giving rise to an inference of intentional discrimination," Nowak said.

The majority opinion in *Young* supported an analysis under "long-standing Title VII principles in terms of pretext, but the real bottom line, in my view, is that you take a great risk if you are not providing accommodation to pregnant employees," Lipnic said. The Supreme Court "completely laid out a road map for potential plaintiffs to prove their case," she added. The majority opinion also introduced a new "significant burden standard."

Guidance Addressed 'Novel Issue.'

The EEOC issued the guidance before the Supreme Court ruled in the *Young* case because "as a federal agency that has to enforce the PDA, we wanted to have some policy document on record about what our views are in terms of enforcing the PDA," Lipnic said. "The issue about whether a pregnant worker should get light duty accommodation like other workers was a novel issue."

In July 2014, the commission adopted, by a 3-2 vote, revised enforcement guidance under the PDA. The Republican commissioners, Constance Barker and Lipnic, opposed the revised guidance.

Lipnic said she objected to the guidance on the grounds that it was "going beyond what the statutory language required, and we, as an administrative agency, were in fact legislating." The proposed federal Pregnant Workers Fairness Act (S. 942/H.R. 1975) would require employers to provide reasonable accommodation to pregnant workers. The PDA amended Title VII, which doesn't address workplace accommodation.

"As a policy matter, I support the view that pregnant workers should get accommodation," Lipnic said. However, the decision should be left up to the Congress and not unelected government administrators, she added.

When evaluating a pregnancy accommodation request, Lipnic urged employers to assess who are the comparators of the pregnant employee. The language in the PDA states that the employer has to treat a pregnant worker the same as those similar in their ability or inability to work. Some pregnancy accommodation requests may require the employer to factor in the light-duty pregnancy analysis endorsed by the *Young* decision, but employers also should consider requests in light of the amended Americans with Disabilities Act, she advised.

New Legal Issues Will Emerge

The *Young* "decision itself raises more questions than answers. Although the Supreme Court rejected the notion that you absolutely have to provide light duty to pregnant employees, it is unclear at what point refusing to provide that accommodation constitutes a pretext, which is an inference of discrimination," Nowak said.

The majority opinion raised a key question that he believes federal trial court judges likely will pose as to why an employer that accommodates many workers couldn't accommodate a pregnant worker: "Why, when the employer accommodated so many, could it not accommodate the pregnant women as well?" Nowak said. "We employers must be prepared to address this question, so it should be central to our discussions now about how we implement the *Young* decision in our workplaces."

He reminded attendees that the Supreme Court declined to address whether and how the amended ADA might be applied to the *Young* case and others like it. The amended ADA broadened the definition of a disability, so "many pregnancy-related impairments will fall within the realm of the ADA," Nowak said." If these cases are analyzed under an ADA framework, they render the whole burden shift moot," he said. "It's now an ADA question, rather than a PDA question."

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