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2300 Wilson Blvd., 7th Floor
Arlington, VA 22201
703.525.4000
www.beankinney.com

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Does the Pregnancy Discrimination Act Require Employers to Provide Light Duty Accommodations to Pregnant Employees?

By Doug Taylor

Thirty-five years ago, the Pregnancy Discrimination Act ("PDA") established that it is unlawful for employers with fifteen or more employees to discriminate against pregnant workers "because of or on the basis of pregnancy, childbirth or related medical conditions." That remains the basic law of the land today. What has remained unclear, however, is whether Congress, in passing the PDA, meant to compel employers to provide pregnant employees who are not able to work for medical reasons with accommodations, such as a light duty job, to the same extent as similarly situated, non-pregnant employees.

The Supreme Court recently heard oral argument in a case brought by Peggy Young against United Parcel Service ("UPS") that is expected to provide some guidance as to whether and under what circumstances an employer may be required to accommodate pregnant employees under the PDA. Irrespective of what the court decides, however, covered employers should continue to ask whether such accommodations may still be necessary under recently implemented amendments to the Americans with Disabilities Act ("ADA").

The Young Case

Peggy Young, a Virginia resident, began driving a delivery truck for UPS in 2002. She picked up and delivered packages that had arrived by air carrier the previous night. Essential to the job was that Young have the ability to lift packages weighing up to 70 pounds on her own. In September 2006, Young became pregnant through *in vitro* fertilization. She provided her supervisor with a doctor's note indicating that she should not lift more than twenty pounds during the first twenty weeks of her pregnancy and no more than ten pounds thereafter. UPS advised Young that she would not be allowed to return to work because she was unable to perform one of the essential functions of her job – lifting at least 70 pounds.

She was not eligible for a light duty assignment under UPS's company-wide policy that restricted light duty work to those employees who were injured while on the job, suffering from a disability subject to coverage under the ADA, or were temporarily unable to drive under federal regulations. Young's pregnancy occurred outside of the work place, and the resulting 20 pound lifting restriction did not rise to the level of a "disability" under the ADA, in the company's view. When Young exhausted her Family and Medical Leave Act ("FMLA") leave in November 2006, UPS put her on extended leave without pay until sometime after she gave birth in late April 2007.

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Young sued UPS in federal court in 2008, alleging pregnancy discrimination under the PDA and disability discrimination in violation of the ADA. The trial court disagreed with Young, reasoning that UPS's leave policy was not discriminatory because the company had not treated her any less favorably due to her pregnancy than it would have treated any other similarly situated employee.

Young appealed to the U.S. Court of Appeals in Richmond, Virginia, where she continued to press her arguments that UPS's leave policy had a discriminatory impact on her on the basis of pregnancy, in violation of the PDA. A three-judge panel rejected Young's theory. By limiting light duty accommodations only to those employees injured on the job, disabled within the meaning of the ADA or stripped of their federal driving certifications, UPS had "crafted a pregnancy-blind policy[] . . ." based on "neutral and legitimate business practice[,]" the Court concluded. The PDA's mandate against pregnancy-related discrimination did not mean that an employer like UPS had an affirmative obligation to alter its light duty work policy solely for pregnant employees, which, the court found, would have had the effect of putting pregnant employees in a better position than other employees in need of light duty work because of injury or illness arising outside of the work place.

Young petitioned the U.S. Supreme Court to resolve the incongruity between the appeals court's conclusion that UPS's accommodations policy was "pregnancy-blind" and the PDA's mandate 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." The broad legal question facing the Supreme Court comes down to whether the PDA requires employers to provide reasonable accommodations to pregnant employees and, if so, under what circumstances must that be done. The debate before the Supreme Court was vigorous on both sides, and the Court's guidance will be welcome.

The Americans With Disabilities Act

Even if the Supreme Court rules that the PDA does not require employers to accommodate pregnant employees like Peggy Young, an important question for employers still remains: Under the ADA, and recently implemented amendments, is an employer required to make reasonable accommodations for its pregnant employees? The ADA prohibits employers with fifteen or more employees from discriminating against qualified individuals with a disability, *i.e.*, those employees or applicants for employment with a disability who can perform the essential functions of the job with or without a reasonable accommodation. "Disability" is defined as "a physical or mental impairment that substantially limits one or more major life activities." The term "major life activity" means a function such as caring for oneself, performing manual tasks, such as lifting, walking, seeing, hearing, speaking, breathing, learning and working. Under the pre-amendment ADA, the term "substantially limited" had come to be defined as "unable to perform a major life activity that the average person in the general population can perform" or "significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity."

In Peggy Young's case, the Court of Appeals offered that neither Young's pregnancy nor her twenty pound lifting restriction constituted a disability within the meaning of the ADA. Significant to the Court were the relative manageability of her lifting restriction and its short duration. That analysis may no longer be relevant, however, because of disability discrimination claims arising after the passage of the ADA Amendments Act of 2008 (ADAAA).

The ADAAA and the Carl Summers Case

In supplementing the ADA, Congress intended the term "disability" to be construed in favor of broad coverage and directed that the term "substantially limits" was "not meant to be a demanding standard[]" and "shall be construed broadly in favor of expansive coverage[.]" The EEOC passed implementing regulations under the ADAAA expressly providing that "effects of an impairment lasting or expected to last fewer than six months can be substantially limiting for purposes of proving an actual disability[,]" although "[i]mpairments that last only for a short period of time are typically not covered . . " unless they are "sufficiently severe."

The Court of Appeals in Richmond recently applied the ADA's expanded terminology in the case of Carl Summers, an analyst for the Altarum Institute, who fell and injured himself exiting a commuter train on the way to work, sustaining serious injuries - fractures and a torn tendon – to both of his legs. Doctors restricted Summers from putting any weight on his left leg for six weeks and estimated that he would not be able to walk normally for seven months at the earliest. Summers contacted Altarum to discuss accommodations that would allow him to gradually return to work. Altarum never told Summers that there was any problem with his proposed plan, nor did the company suggest any alternative reasonable accommodations. Instead, Altarum terminated Summers.

The Court concluded that Summers was disabled within the meaning of the ADAAA because his injuries, although temporary, were sufficiently severe. Illustrative for the Court was the EEOC's recent regulatory guidance, which provides that a back impairment that results in a 20-pound lifting restriction that lasts several months substantially limits the major life activity of lifting and is therefore covered as a "disability" under the ADAAA.

Conclusion

As the Summers case highlights, even a Supreme Court decision in favor of UPS in Peggy Young's case will not end the inquiry of whether and to what degree an employer may be required to provide accommodations to pregnant employees. UPS did not wait for the outcome of Young, announcing recently that it had revised its accommodation policies to include pregnant workers. WalMart is among the other major corporations that have also announced similar changes in pregnancy accommodation policies. The expanded definitions of what constitutes a disability under the ADAAA make it prudent for covered Virginia employers to consider making revisions to employee accommodation policies that exclude pregnancy as a disabling condition.

Doug Taylor is an associate attorney focusing his practice on employment law. He can be reached at 703.525.4000 or rdougtaylor@beankinney.com

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Contact Us

2300 Wilson Boulevard, 7th Floor
Arlington, Virginia 22201
703·525·4000 fax 703·525·2207
www.beankinney.com