Thursday, April 2, 2015

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Trials&TRIBULATIONS

U.S. Supreme Court disregards EEOC guidelines

Agency guidance was enacted in the face of litigation

A recent decision of the U.S. Supreme Court has redefined guidance to employers dealing with employees' requests for pregnancy accommodations. In its decision, the Supreme Court criticized the Equal Employment Opportunity Commission for changing its long-standing guidance without adequate explanation, and in response to litigation accepted for review by the Supreme Court.

By LAURA MYERS
Daily Record Columnist

On March 25, the Supreme Court reversed the decisions of both the Fourth Circuit and the United States District Court for the District of Maryland, which granted defendant United Parcel Service summary judgment on a claim for pregnancy discrimination brought by UPS employee Young, *Young v. United Parcel Service, Inc.*, __ S. Ct. __, 2015 WL 1310745 (March 25).

Plaintiff Young, a part-time driver for UPS, was advised by her doctor after becoming pregnant, that she should not lift more than 20 pounds during the duration of her pregnancy. UPS requires all of its drivers to be able to lift parcels weighing up to 70 pounds. Young, therefore, requested a "light work" accommodation, which would limit her to lifting 20 pounds or less. UPS denied that request and informed Young she could not return to work for UPS during her pregnancy because she could not satisfy UPS' lifting requirements. Young was not paid during her leave of absence.

Young filed a complaint with the EEOC, and then a lawsuit against UPS in federal court, alleging that she was subjected to pregnancy discrimination in violation of the Americans with Disabilities Act and the Pregnancy Discrimination Act, among other claims. Young argued that through direct evidence she could prove intentional discrimination by UPS. As an alternative, Young also alleged she could establish a prima facie case of discrimination under the burden shifting standard set forth in *McDonnell Douglas Corp. v. Green*, 311 U.S. 792 (1973).

After conducting discovery, UPS filed for summary judgment and argued it was not required to accommodate Young because it only accommodated drivers under designated circumstances, and Young's request did not satisfy any of those circumstances. Specifically, UPS acknowledged pursuant to its Collective Bargaining Agreement with employees, it routinely accommodated employees, who (1) became disabled on the job, (2) lost their Department of Transportation certifications, or (3) suffered from a disability covered by the ADA, *Young v. United Parcel Service, Inc.*, 2011 WL 665321, at *2 (D. Md. Feb. 14, 2011). UPS argued that since pregnancy did not fall into any of these categories, Young was not entitled to accommodation, *Id*.

In response, Young argued that the statement made by her manager that she was a "liability," along with a request for a doctor's note, and UPS' "no-light-duty-for-pregnancy" policy, served as direct evidence of UPS' intentional discrimination, *Id*. at *10-11. In the alternative, Young argued that she could establish a prima facie case of pregnancy discrimination by UPS and that UPS' alleged non-discriminatory justification for its adverse action against her was merely a pretext.

The District Court agreed with UPS and found that Young could not provide direct evidence of intentional discrimination, and could not make a prima facie case of discrimination under *McDonnell Douglas*. The court concluded that Young could not establish direct evidence of intentional discrimination because UPS' light duty policy for three categories of employees, including those employees injured on the job, with ADA disabilities,

Continued ...

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...

and employees who lost their DOT certifications, was gender neutral and therefore "pregnancy-blind," *Young*, 2011 WL 665321 at *12. The District Court also concluded that Young could not establish a prima facie case of pregnancy discrimination pursuant to the burden shifting standard forth in *McDonnell Douglas Corp*.

For a plaintiff to establish a prima facie case pursuant to the framework set forth in *McDonnell Douglas*, she must prove: (1) she is a member of a protected class; (2) she was qualified for the job and performed it satisfactorily; (3) she suffered an adverse employment action; and (4) she was treated differently than similarly situated employees outside the protected class, *Young*, 2011 WL 665321 at *12.

The only issue in contention before the District Court, was the fourth factor, that Young was treated differently than "similarly situated" employees. UPS argued that Young had not presented the court with a "comparator" or a "similarly situated" employee who had been treated differently, *Id*. at *13. The District Court agreed that the other employees Young had compared herself to, including those with on the job injuries, ADA disabilities, or DOT restrictions were too different to qualify as a "similarly situated" employee, and Young had failed to establish a prima facie case, *Id*. at *14. The court further opined that even if Young had established a prima facie case, she would not be able to show that UPS' non-discriminatory rationale for its decision was pretextual, *Id.*

The Fourth Circuit affirmed the District Court's decision, finding that there was no direct evidence of discrimination because UPS had crafted a policy that treated pregnant workers and non-pregnant workers alike, and had therefore complied with the PDA, *Young v. United Parcel Service, Inc*., 707 F.3d 437, 449 (4th Cir. 2013).

The Fourth Circuit similarly concluded that Young's arguments under the *McDonnell Douglas* framework failed to establish a prima facie case of discrimination, and instead concluded that UPS had provided all of its employees with a "pregnancy-blind policy." It also agreed with the District Court that Young could not show that "similarly-situated employees outside the protected class received more favorable treatment than Young," *Id*. at 450.

Young filed a petition for certiorari requesting review of the Fourth Circuit's interpretation of the PDA, and the Supreme Court granted that request. The court focused its analysis on the interpretation of the PDA provision, which states that employers are forbidden from discriminating against individuals in employment and specifically requires that employers treat "women affected by pregnancy … 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-2(a)(1); 42 U.S.C. §2000e(k); *Young*, 2015 WL 1310745 at *5. While each of the parties argued their interpretations of this provision, the Supreme Court disagreed with both of those interpretations.

Young argued that where an employer provides accommodations to only a subset of workers, pregnant workers who are similar in their ability to work, must be afforded the same accommodations, *Young*, 2015 WL 1310745 at *10-11. The court disagreed with this analysis, noting that the "problem with Young's approach is … it seems to say that the statute grants pregnant workers a 'most-favored-nation' status," requiring any employer who provides an employee with an accommodation to extend that accommodation to all pregnant workers, *Id.* at *11. The court concluded this could not have been Congress' intent in passing the PDA.

The solicitor general filed an amicus brief in the case, urging the Supreme Court to consider newly enacted EEOC guidance interpreting the PDA. The recent EEOC guidance was issued in July 2014 and was designed to address ambiguity within the PDA that gave rise to the litigation between Young and UPS.

The EEOC guidance states "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations," *Id.* at *13. The EEOC provided an example, which contained the same facts presented in *Young v. United Parcel Service, Inc*., and advised that "an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job-injuries," *Id.* The solicitor general argued that the court should give special, if not controlling weight to this guidance.

In reviewing the EEOC's guidance, the Supreme Court noted the weight placed on an agency's guidance should be based upon "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control," *Id*. at *13. The court elaborated that those qualifications "are relevant here and severely limit the EEOC's July 2014 guidance's special power to persuade."

The court specifically raised its concerns with the EEOC guidance's timing, consistency and thoroughness of consideration, *Id*. Specifically, the court noted that the guidance was issued after the Supreme Court had granted certiorari, and took a position where prior guidance had been silent, seemingly without expla-

Continued ...

Thursday, April 2, 2015

THE DAILY RECORD

WESTERN NEW YORK'S SOURCE FOR LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

Continued ...

nation. Further, the court noted that the EEOC failed to explain the basis, in the law, or otherwise for the issuance of the recent guidance. In essence, the court concluded that without further explanation, it could "not rely significantly on the EEOC's determination," *Id*. at *13.

In reaching its final determination, the Supreme Court noted that the *McDonnell Douglas* framework requires the plaintiff to make out a prima facie case for discrimination, but that is "not intended to be an inflexible rule," *Id*. at *15. The court further noted that where the plaintiff can show "she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work,'" she has made out a prima facie case of discrimination, *Id.* at *15.

The court concluded that Young established the first three criteria, and there was a genuine issue of material fact as to whether "UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished" from the plaintiff's, *Id*. at *3. The Supreme Court then remanded the case to the Fourth Circuit to decide the next step under the *McDonnell Douglas* framework; whether *Young* also created a genuine issue of material fact regarding whether UPS' reasons for treating Young less favorably than other nonpregnant workers was pretextual.

One of the most interesting aspects of this decision, is the Supreme Court's disregard for the EEOC's recent July 2014 guidance on the enforcement standards for the PDA. While it is clear that certain provisions of this guidance that were directly addressed in *Young* will be unenforceable, including its guidance that "an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job-injuries," it is uncertain what other non-fact specific provisions of the guidance may still be viable. A full copy of the EEOC's July 14, 2014 guidance can be found at www.eeoc.gov/law/guidance/pregnancy_guidance.cfm.

Laura Myers is an associate at the Wolford Law Firm LLP, where she practices in the areas of business, commercial and employment litigation.