What Are Expecting Employees Expecting Under The New Pregnancy "Accommodation" Standard?

By Nicole Bermel Dunlap[i], FordHarrison LLP

Pregnant employees may know what to expect from their bodies, families, and doctors during pregnancy, but what do they expect from their employers? For some employees, the answer may now be a light-duty or alternate job. Recently, the U.S. Supreme Court delivered new life into pregnancy discrimination claims by requiring employers to offer the same accommodations to pregnant employees as those offered to non-pregnant employees with similar work restrictions.

Supreme Court's Opinion in *Young v. UPS*

In March of this year, the Supreme Court issued an opinion that redefined the standard for discrimination claims under the Pregnancy Discrimination Act (PDA), a federal law that prohibits discrimination against women affected by pregnancy, childbirth, or related medical conditions. The case involved a UPS driver (Young) whose position required that she be able to lift parcels weighing up to 70 pounds, although she generally transported lighter packages. After Young became pregnant, her doctor imposed a 20-pound lifting restriction, and because she could no longer satisfy the 70-pound lifting requirement, UPS placed her on unpaid leave until after the birth of her child.

Young sued UPS claiming the company violated the PDA because it refused to accommodate her by providing light-duty or an alternative work assignment during her pregnancy. Notably, because Young filed her lawsuit before the 2008 amendments to the Americans with Disabilities Act (ADA), she was not considered disabled under that law. Nevertheless, she claimed that because UPS provided light-duty or alternative work assignments to other, non-pregnant employees who were unable to perform their jobs (such as employees injured on the job, drivers who had lost their Department of Transportation certification, and employees who were disabled and unable to perform the essential functions of their job), UPS should similarly accommodate her inability to work. The Supreme Court agreed, finding that the PDA requires employers to accommodate pregnant employees if they accommodate non-pregnant employees who are "similar in their ability or inability work."

What Should Employers Expect?

The Supreme Court's new standard creates more ambiguity and uncertainty for employers. For example, there is now another statute that has been inextricably intertwined with the already perplexing Family and Medical Leave Act (FMLA) (which provides employees who suffer from a serious health condition with unpaid leave) and the ADA (which requires employers to accommodate disabled employees). Under the ADA, as amended, pregnant employees with a lifting restriction will likely be considered disabled and qualify for an accommodation. However

the ADA only requires employers to accommodate employees who can perform the essential functions of their job, which was not the situation in the Supreme Court case because Young was unable to meet the 70-pound lifting qualification. Instead, the accommodation that the Supreme Court has mandated under the PDA requires employers to provide pregnant employees with a *different* job than the one the employee was hired to perform, such as a temporary job or a light-duty position.

What Should Employers Do?

If an employer receives an accommodation request from a pregnant employee, it should assess the employee's request under both the ADA and the PDA. So if a pregnant employee with work restrictions qualifies as "disabled" under the ADA, her employer should consider whether she can still perform the essential functions of her job and, if so, determine what is a *reasonable* accommodation for her disability. *In addition*, the employer should consider whether it accommodates other employees who may be similar in their ability or inability to work, and, if it does it should provide a similar accommodation to the pregnant employee. Although an employer may be able to justify its failure to accommodate a pregnant employee based on a legitimate, nondiscriminatory reason, the Supreme Court expressly stated that the employer may not rely on the rationale that it was more expensive or less convenient to accommodate a pregnant employee than a non-pregnant worker.

Employers should also assess their own workforce to determine whether to extend policies they may have for light-duty assignments (that have likely been limited to employees injured on the job who are covered by workers' compensation laws) to pregnant employees who request them, or whether all light-duty positions should be eliminated entirely to avoid being required to provide them to a potentially unlimited group of employees. Regardless, employers should review their existing policies to ensure that they do not limit such job accommodations only to non-pregnant workers, such as employees covered by workers' compensation.

Finally, employers should always remember that the PDA still prohibits discrimination *based on* pregnancy, childbirth, or related medical conditions. Despite the Supreme Court's new accommodation requirement, employers cannot *force* a pregnant employee to accept an accommodation, even to protect the employee from working conditions that may be harmful to the employee or to the fetus (unless the employer can make the very difficult showing that gender is a bona fide occupational qualification necessary to the job). The best solution is to engage in an interactive process with the employee to determine what *reasonable* accommodation may be available. If agreement cannot be reached with the pregnant employee, long-term leave or even termination may be legally justifiable, but before taking such steps, the employer should be confident that it has diligently documented its attempts at accommodation, and if in doubt, legal counsel should be consulted to ensure compliance with all of the various accommodation and leave laws in place.

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[i] Nicole Bermel Dunlap is an attorney in the Tampa office of the law firm of FordHarrison LLP. She can be reached at 813-261-7849 or ndunlap@fordharrison.com.