

## High court rejects EEOC's pregnancy bias guidance

By David C. Henderson



On March 25, the U.S. Supreme Court delivered a major rebuke to the Equal Employment Opportunity Commission by unanimously rejecting the EEOC's most recent, and supposedly comprehensive, guidance on pregnancy discrimination enforcement.

The rebuke was delivered in *Young v. United Parcel Service, Inc.* And it was almost exactly what two dissenting EEOC commissioners anticipated last July, when they made public statements against the new guidance then being championed by the other three commissioners.

Moreover, underscoring agency embarrassment even further is that the court takes pains in *Young* to explain that the unpersuasiveness of the commission's guidance stems from its "difficulties" in terms of "timing, consistency, and thoroughness of 'consideration.'"

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*David C. Henderson is a partner in the litigation department and a member of the labor, employment and benefits practice group at Nutter McClennen & Fish in Boston.*

*Young* thus can be seen as unsettling a substantial body of law. The Supreme Court had granted certiorari to review UPS's award of summary judgment on its employee's Pregnancy Discrimination Act claim. In the court's ruling, six justices voted to vacate the award and remand the case for further proceedings in the lower courts, while three justices would have upheld the award.

But all nine justices rejected the EEOC's guidance, and they did so notwithstanding the solicitor general's amicus argument that the guidance should be accorded special, if not controlling, weight. It thus is apparent that additional agency guidance soon will follow.

The claim in *Young* arose before the Americans With Disabilities Act's definition of "disability" expanded as a result of the ADA Amendments Act of 2008.

The plaintiff was a part-time UPS driver who, because of her pregnancy, sought a light-duty accommodation for a job requirement that she be able to lift 70 pounds.

UPS had a policy of accommodating performance limitations stemming from on-the-job injury, loss of Department of Transportation certification, or disability. But it had no comparable accommodation policy covering pregnancy.

As a result, UPS rejected the requested light-duty accommodation, and the driver

filed a charge with the EEOC, arguing that the Pregnancy Discrimination Act's amendment of Title VII of the Civil Rights Act of 1964 required UPS to provide the same light-duty accommodation for pregnancy that it provided for equivalent limitations caused by other circumstances.

Both the trial and appeals courts found that UPS should be awarded summary judgment. Their reasoning was that the other employees being compared by the driver were not "similarly situated," and that UPS's "pregnancy blind" policy therefore was lawful.

The EEOC guideline would have led to the opposite result. It would have resulted in a ruling in the driver's favor, because it provides that "[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 (e.g., a policy of providing light duty only to workers injured on the job)."

But the Supreme Court unanimously found the EEOC guideline unpersuasive. The court specifically noted that the commission had promulgated the guideline after the Supreme Court granted certiorari in *Young*, the guideline takes a position on which previous agency guidelines have been silent, the guideline is incon-

sistent with positions long advocated by the government, and the EEOC fails entirely to explain the guideline's basis.

The Supreme Court then clarified how such a case should be handled on remand. According to the court, proper analysis begins with acknowledgement that this driver's claim is one of disparate treatment, and that liability in a disparate treatment case "depends on whether the protected trait actually motivated the employer's decision."

Further, as with any disparate treatment claimant, the driver can avoid an adverse summary judgment either (1) by direct evidence that a workplace policy, practice or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework established by the Supreme Court more than four decades ago in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

Whenever a plaintiff uses the *McDonnell Douglas* framework, he or she normally must begin by proving its first prong — a prima facie case. According to the court, that first prong is "not intended to be an inflexible rule," however, and it does not "require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways."

As a result, the driver, alleging that the denial of an accommodation constitutes disparate treatment under the relevant

clause of the Pregnancy Discrimination Act, can make a prima facie case merely by showing that (1) she belongs to the protected class, (2) she sought accommodation, (3) the employer did not accommodate her, and (4) the employer did accommodate others "similar in their ability or inability to work."

Also, whenever a plaintiff makes such a prima facie case, the second prong of the *McDonnell Douglas* framework allows the employer to seek to justify its refusal to accommodate by showing that the failure was based on "legitimate, nondiscriminatory" reasons.

But a "legitimate, nondiscriminatory" reason "normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates."

Finally, in the third prong of the *McDonnell Douglas* framework, if the employer offers an apparently "legitimate, nondiscriminatory" reason for its failure to accommodate, the plaintiff has the opportunity to show that the proffered reason is, in fact, pretextual.

Accordingly, the UPS driver may reach a jury on that final issue by providing sufficient evidence that (1) the employer's policies impose a significant burden on pregnant workers, and (2) the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong

to justify the burden, but rather — when considered along with the burden imposed — give rise to an inference of intentional discrimination."

The court explained this as follows:

"Here, for example, if the facts are as Young says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. Young might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong — to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination."

Young's unsettling of the law thus is apparent. There will be no "bright line" rule that will govern. Instead, the lower courts must employ a "balancing test" to determine whether UPS's "legitimate, nondiscriminatory" reasons for its policy outweigh the burden placed by the policy on pregnant workers.

And as the three dissenting justices in *Young* argued, the result may be a conflation of disparate treatment and disparate impact law and the injection of "unnecessary confusion" into the long-accepted *McDonnell Douglas* framework. **NEH**

