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SEEKING ACCOMMODATIONS FOR PREGNANT WORKERS

Despite some protection under the Pregnancy Discrimination Act and a recent U.S. Supreme Court decision, female employees still face discrimination. Here is how you can use the statute and relevant case law to help clients who have been treated unfairly.

By || **Jeannette Vaccaro**

Women face a unique barrier in the workplace: unequal treatment due to their childbearing abilities. This differential treatment does not always start when a woman becomes pregnant. Rather, a woman's childbearing abilities alone may impact her chances at landing a job. Potential employers have been known to discriminate against women who are likely to become pregnant and request leave, or they even screen out all women of childbearing age from certain positions because of potential harm to a future pregnancy.

If a worker becomes pregnant, she may face exclusion from the workplace or unnecessary limitations, such as restricted travel or removal from preferential assignments. If a woman suffers from pregnancy-related medical complications, she risks losing her job. Finally, new mothers often are marginalized and stereotyped as being less competent and less committed, which inhibits their advancement potential.[1]

Although the passage of the Pregnancy Discrimination Act (PDA) in 1978 made it illegal for companies with 15 or more employees to discriminate against women who are or may become pregnant, women embarking on motherhood still face unequal treatment in the workplace.

Before taking on a pregnancy discrimination case, you should understand some of the recent developments in pregnancy discrimination law related to workplace accommodations and how the PDA can be used to protect employees before, during, and after pregnancy.

A Brief History of the PDA

Title VII of the Civil Rights Act prohibits employment discrimination based on race, color, religion, national origin, or sex.[2] However, prior to the PDA, it was unclear whether discrimination based on sex applied to pregnancy discrimination.

When the issue came before the U.S. Supreme Court in *General Electric Co. v. Gilbert*, the Court held that an employer's practice of excluding pregnant employees from its temporary disability plan did not constitute sex discrimination in violation of Title VII.[3] In direct response to *General Electric*, Congress passed the PDA, amending Title VII to clarify that pregnancy-based discrimination falls within the ambit of prohibited sex discrimination.[4]

The PDA specifies that an employer must treat women affected by pregnancy or childbirth in the same way it treats other employees who are similarly situated unless the employer can demonstrate that a nonpregnant employee is required for the position—for example, there is a "bona fide occupational qualification that is reasonably necessary to the normal operation of that particular business or enterprise."[5]

Many early PDA cases involved so-called "fetal protection policies"—employer policies designed to protect pregnant employees and their unborn children.[6] In contrast, more recent cases address pregnancy accommodations in

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the workplace and the meaning of the second clause of the PDA, which requires employers to treat pregnant workers the same as other workers "similar in their ability or inability to work."[7] A clear circuit split developed on the issue of accommodations for pregnant workers.[8]

Young v. UPS

The issue of pregnancy accommodations came to a head in 2015, when the U.S. Supreme Court decided *Young v. United Parcel Service, Inc.*[9] Peggy Young challenged the company's refusal to grant her light-duty work assignments while she was pregnant. Based on evidence that other employees with similar lifting restrictions were given light-duty assignments, Young argued that UPS's actions violated the PDA's equal treatment requirement.[10] Despite the evidence of differential treatment, the district court granted UPS summary judgment.

Historically, a claim brought under the PDA was analyzed like any other Title VII claim on summary judgment. A plaintiff could either present direct evidence of discrimination or go through the burden-shifting framework of *McDonnell Douglas Corp. v. Green*.[11] A prima facie case required a plaintiff to show that (1) she is a member of a protected class; (2) she was qualified for the position; (3) she suffered an adverse employment action; and (4) other similarly situated employees outside her protected class were treated more favorably.[12]

Upon making this prima facie showing, the burden shifts to the employer to demonstrate a "legitimate nondiscriminatory reason" for the adverse action taken.[13] If the employer provides such a reason, the burden shifts back to the plaintiff to show the employer's proffered nondiscriminatory reason was a pretext for discrimination.[14]

The Supreme Court fashioned a new approach to the *McDonnell Douglas* burden-shifting framework. *Young*

announced that a PDA plaintiff may establish a prima facie case—the first prong of the *McDonnell Douglas* test—by submitting evidence that (1) she belongs to a protected class; (2) she sought an accommodation; (3) the employer did not accommodate her; and (4) the employer accommodated others "similar in their ability or inability to work."[15]

With regard to the second prong of the *McDonnell Douglas* test, *Young* clarified that the employer's proffered reason "cannot simply consist of a claim that it is more expensive or less convenient to add pregnant women to the category of those who the employer accommodates."[16]

Finally, under *Young*, a PDA plaintiff may satisfy the third prong of the *McDonnell Douglas* test by adducing evidence that "the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden."[17]

The Court explained that a "plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[18]

Many have lauded *Young* as clarifying pregnant workers' rights to accommodations, but under the decision, pregnant workers' rights often will depend on the specific employer policies—whether the employer already accommodates a large percentage of nonpregnant workers while denying accommodations to a large percentage of pregnant workers.

For example, in *Young*, the Court found instructive the fact that UPS accommodated most nonpregnant workers with lifting limitations while categorically failing to accommodate pregnant employees with lifting restrictions.[19] As a result, pregnant women still face uncertainty about their rights under this framework. Despite this uncertainty, *Young* helps flesh out the types of evidence that courts may find instructive in determining whether unlawful discrimination has taken place.

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THE NUMBER OF STATES, INCLUDING THE DISTRICT OF COLUMBIA, THAT REQUIRE SOME EMPLOYERS TO PROVIDE PREGNANT WORKERS WITH REASONABLE ACCOMMODATIONS.

Practice Tips

Although it typically protects pregnant workers, the PDA can be used more broadly. It also prohibits discrimination based on a woman's *intent* to become pregnant—including discrimination based on infertility treatments or an employer's assumption that a woman will become pregnant.[20]

For example, the Eighth Circuit held that comments such as "You better not be pregnant again!" and "I suppose we'll have another little Garrett [her son's name] running around" by a supervisor to an employee were sufficient to show pregnancy discrimination.[21]

The PDA also can apply to postpartum terminations when there is a causal link.[22] For example, if a woman is terminated shortly after returning from parental leave and the employer's reason is not believable, a violation of Title VII may be found.[23] Additionally, discrimination based on lactation and breastfeeding is prohibited sex-based discrimination.[24]

Also, always consider bringing related claims, including those under the Americans With Disabilities Act (ADA), the Family Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), and their state analogs.[25]

Pregnancy itself is not a disability under the ADA, but certain pregnancy-related medical conditions can qualify as disabilities, such as gestational diabetes, preeclampsia, pregnancy-related anemia, or sciatica.[26] The FMLA also may be relevant in some circumstances—typically relating to medical leave for complications arising during pregnancy and for postdelivery baby bonding.

In addition, the FLSA requires employers to provide reasonable break time and a location other than a bathroom for nursing mothers to express milk.[27] Finally, always check state and local laws, as they often provide greater protections—16 states, the District of Columbia, and four cities require some employers to provide pregnant workers with reasonable accommodations.[28]

The Pregnant Workers Fairness Act

In an effort to solidify protections for pregnant women, members of Congress introduced the federal Pregnant Workers Fairness Act (PWFA) in both the House and the Senate in 2013.[29] In June 2015, after the *Young* decision, the PWFA was reintroduced in Congress with bipartisan support.[30]

Modeled after the ADA, the PWFA would require companies with 15 or more employees to provide employees and job applicants with reasonable accommodations for known limitations due to pregnancy, childbirth, and related medical conditions, unless doing so would cause undue hardship.[31] The PWFA also would require employers

to engage in an "interactive process" to determine appropriate reasonable accommodations. Engaging in the interactive process requires communication and good-faith exploration of possible accommodations between employers and individual employees.[32] Employers would be prohibited from forcing employees to accept an accommodation or to take leave if another reasonable accommodation is available. Finally, the PWFA would protect pregnant workers from retaliation, coercion, intimidation, threats, or interference if they request or use an accommodation, or if they report a violation of the law. Unfortunately, the PWFA is still being held up in Congress.

Despite the PDA and subsequent case law, pregnancy discrimination is still a problem. In 2015, more than 3,500 complaints of pregnancy discrimination were filed with the Equal Employment Opportunity Commission.[33] Although a growing number of states and cities have passed laws requiring some employers to provide reasonable accommodations to pregnant workers, federal legislation—such as the PWFA—would enhance and clarify employers' responsibilities to all pregnant employees in the United States, so that women are not forced to choose between having a child and having a job.

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NOTES

1. *See, e.g., Zambrano-Lamhaouhi v. N.Y. City Bd. of Educ.*, 866 F. Supp. 2d 147, 172 (E.D.N.Y. 2011) (recognizing "the real-world prevalence of the stereotype that pregnant women and young mothers will make undesirable employees" and noting that "[t]he frequency of such stereotypes has been confirmed in numerous studies").
2. 42 U.S.C. §2000e-2(a) (West 2015).
3. *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).
4. 42 U.S.C. §2000e(k).
5. 42 U.S.C. §2000e-2(e). Essentially, the employer argues that the pregnancy prevents the employee from performing her job. *See United Auto. Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991).
6. *See United Auto. Workers*, 499 U.S. 187.
7. 42 U.S.C. §2000e(k).
8. *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996); *E.E.O.C. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548–49 (7th Cir. 2011); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1313 (11th Cir. 1999); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998). For a discussion of this split in authority, see the