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ERR ON THE SIDE OF ACCOMMODATING PREGNANT EMPLOYEES

Maureen Minehan

9.1♦ Why not accommodate? That's the question Evie Jeang, a Los Angeles-based attorney asks, in the wake of *Young v. United Parcel Service, Inc.,* U.S. Supreme Court decision involving pregnancy discrimination.

"Companies would be smart to realize that failure to provide accommodations to pregnant women, or a failure to truly understand what it means to provide these accommodations, could result in pricey lawsuits not just in compensatory and punitive damages if the plaintiff wins, but also in attorneys' fees even if the employer prevails. In contrast, providing accommodations to pregnant women are usually relatively short-term and probably inexpensive for the employer. So why not accommodate?"

Young vs. UPS

That's the same question Peggy Young, a part-time driver for United Parcel Service (UPS) asked in her suit against the delivery company. Young's responsibilities at UPS included pickup and delivery of packages that had arrived by air carrier the previous night. In 2006, after suffering several miscarriages, she became pregnant. Her doctor told her that she should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter.

Unfortunately for Young, UPS required drivers like Young to be able to lift parcels weighing up to 70 pounds (and up to 150 pounds with assistance) and company managers told Young she could not work while under a lifting restriction. Young consequently stayed home without pay during most of the time she was pregnant and eventually lost her employee medical coverage.

Young sued under the Pregnancy Discrimination Act (PDA), arguing that because UPS assigned temporarily disabled employees who were not pregnant to light duty, it was discriminatory to deny the same accommodations to pregnant women. UPS countered that their policy clearly provided light duty opportunities in only three circumstances—when the need arose because of an on-the-job injury, because the employee lost his or her Department of Transportation certification, or because the employee was disabled under the terms of the Americans With Disabilities Act (ADA). Because pregnancy fell outside those categories, light duty was not an option, the company said.

Burden of proof

When a District Court and the U.S. Court of Appeals for the Fourth Circuit sided with UPS, Young appealed to the Supreme Court. To succeed on her claim, the Court said, Young would have to make a *prima facie* case that met the criteria found in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668, 5 Fair Empl. Prac. Cas. (BNA) 965, 5 Empl. Prac.

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Dec. (CCH) P 8607 (1973) (*holding modified by,*)*Hazen Paper Co. v. Biggins*, 507 U.S. 604, 113 S. Ct. 1701, 123 L. Ed. 2d 338, 16 Employee Benefits Cas. (BNA) 1881, 61 Fair Empl. Prac. Cas. (BNA) 793, 61 Empl. Prac. Dec. (CCH) P 42186 (1993), a prior Supreme Court decision that established burdens of proof in discrimination cases. Under this framework, Young would need to show she belongs to a protected class, that she sought accommodation, that UPS did not accommodate her and that the company did accommodate others "similar in their ability or inability to work."

Once she's done that, the Court said, "The employer may then seek to justify its refusal to accommodate the plaintiff by relying on 'legitimate, nondiscriminatory' reasons for denying accommodation. That 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 whom the employer accommodates." Plaintiffs in these cases are then given a chance to argue the reasons cited by the employer were "pretextual," or just excuses use to hide or justify discriminatory behavior.

"The plaintiff may reach a jury on this issue by providing sufficient 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, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination," the Court said.

In addition, the 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. This approach is consistent with the longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons."

Prior rulings vacated

Under this interpretation of the PDA, the Court said in its 6-3 ruling, the Fourth Circuit's judgment must be vacated. "The record here shows that Young created a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from hers. It is left to the Fourth Circuit to determine on remand whether Young also created a genuine issue of material fact as to whether UPS's reasons for having treated Young less favorably than these other nonpregnant employees were pretextual."

Takeaways for employers

While the Court noted any ambiguity about the need to accommodate pregnant women in these circumstances will likely disappear given the expansion of the term "disability" under the Americans With Disabilities Act Amendments Act of 2008, a law that passed after this case was first filed, Gerald C. Waters, Jr., an attorney with Meltzer Lippe in New York, says there are still important takeaways for employers from the case, including:

Everyone is vulnerable: "If it can happen to UPS, it can happen to any company, large or small. UPS has the resources to hire the top attorneys from the top employment law firms, and they were still vulnerable."

Exclusion matters as much as inclusion: As the saying goes, no good deed goes unpunished and in the quest to write policies to cover certain employees, employers sometimes forget that their good intentions could look discriminatory if they have a disparate impact on a protected class of employees. "UPS had policies in place, but they neglected to consider whether they were applying these policies equitably across the employee population," Waters says.

Pregnancy should be considered the same as any other temporary disability: "The Equal Employment Opportunity Commission (EEOC) currently requires a pregnancy-based medical condition be addressed by an employer the same way the employer addresses any other temporary disability," Waters notes. "Get as close to this standard as you can as Pregnancy Discrimination Act claims will likely first be reviewed by the EEOC before proceeding to federal litigation."

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Consistency is crucial: Waters says inconsistent decisionmaking across the organization is a common misstep employers make when accommodating pregnant employees. "One manager may provide a certain accommodation at one work site, while another at a different location may not. Employers need to accommodate employees consistently and equitably. It can't be willy-nilly—Manager A does this, Manager B does that." One solution is to provide guidance to managers for accommodating common pregnancy-related issues such as the increased need for bathroom breaks.

The bottom line

Nearly three out of 10 charges filed with the EEOC in 2014 involved sex discrimination, including pregnancy discrimination. Employers should take a close look at their policies and practices related to accommodating pregnant employees and ensure they are complying with both the Pregnancy Discrimination Act (PDA) and the amended version of the ADA. As Jeang points out, even when you win an employment suit, the enormous costs of launching a defense can make it a hollow victory.

EEOC—PREGNANCY DISCRIMINATION

9.2♦ *(Editor's Note: The overview below is from http://www.eeoc.gov/laws/types/pregnancy.cfm. The page also includes a notice that certain portions of the Enforcement Guidance on Pregnancy Discrimination and Related Issues are affected by the Supreme Court's decision issued on March 25, 2015 in Young v. UPS, and that the Commission is studying the decision and will make appropriate updates.)*

Pregnancy discrimination involves treating a woman (an applicant or employee) unfavorably because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth.

Pregnancy Discrimination & Work Situations

The Pregnancy Discrimination Act (PDA) forbids discrimination based on pregnancy when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment.

Pregnancy Discrimination & Temporary Disability

If a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the employer or other covered entity must treat her in the same way as it treats any other temporarily disabled employee. For example, the employer may have to provide light duty, alternative assignments, disability leave, or unpaid leave to pregnant employees if it does so for other temporarily disabled employees.

Additionally, impairments resulting from pregnancy (for example, gestational diabetes or preeclampsia, a condition characterized by pregnancy-induced hypertension and protein in the urine) may be disabilities under the Americans with Disabilities Act (ADA). An employer may have to provide a reasonable accommodation (such as leave or modifications that enable an employee to perform her job) for a disability related to pregnancy, absent undue hardship (significant difficulty or expense). The ADA Amendments Act of 2008 makes it much easier to show that a medical condition is a covered disability. For more information about the ADA, see http://www.eeoc.gov/laws/types/disability.cfm. For information about the ADA Amendments Act, see http://www.eeoc.gov/laws/types/disability_regulations.cfm.

Pregnancy Discrimination & Harassment

It is unlawful to harass a woman because of pregnancy, childbirth, or a medical condition related to pregnancy or childbirth. Harassment is illegal when it is so frequent or severe that it creates a hostile or offensive work environment or when it results in an adverse employment decision (such as the victim being fired or demoted). The harasser can be the victim's supervisor, a supervisor in another area, a co-worker, or someone who is not an employee of the employer, such as a client or customer.

Pregnancy, Maternity & Parental Leave

Under the PDA, an employer that allows temporarily disabled employees to take disability leave or leave without pay, must allow an employee who is temporarily disabled due to pregnancy to do the same.

An employer may not single out pregnancy-related conditions for special procedures to determine an employee's ability to work. However, if an employer requires its employees to submit a doctor's statement concerning their ability to work before granting leave or paying sick benefits, the employer may require employees affected by pregnancy-related conditions to submit such statements.

Further, under the Family and Medical Leave Act (FMLA) of 1993, a new parent (including foster and adoptive parents) may be eligible for 12 weeks of leave (unpaid or paid if the employee has earned or accrued it) that may be used for care of the new child. To be eligible, the employee must have worked for the employer for 12 months prior to taking the leave and the employer must have a specified number of employees. See http://www.dol.gov/whd/regs/compliance/whdfs28.htm.

Pregnancy & Workplace Laws

Pregnant employees may have additional rights under the Family and Medical Leave Act (FMLA), which is enforced by the U.S. Department of Labor. Nursing mothers may also have the right to express milk in the workplace under a provision of the Fair Labor Standards Act enforced by the U.S. Department of Labor's Wage and Hour Division. See http://www.dol.gov/whd/regs/compliance/whdfs73.htm.

For more information about the Family Medical Leave Act or break time for nursing mothers, go to http://www.dol.gov/whd, or call 202-693-0051 or 1-866-487-9243 (voice), 202-693-7755.

ANXIETY DISORDER CAN BE DISABLING

Maureen Minehan

9.3♦ Add social anxiety to the list of issues you may need to accommodate if an employee says the disorder make it difficult for them to do their job. A recent decision by the U.S. Court of Appeals for the Fourth Circuit [*Jacobs v. North Carolina Administrative Office of the Courts* (No.13-2212, 3/12/15)] makes it clear that social anxiety disorder can be disabling under the Americans With Disabilities Act (ADA) as amended in 2008.

Promotion brings challenges

Christina Jacobs was hired to be an office assistant in the criminal division of the North Carolina Administrative Office of the Courts (AOC). Initially, her duties consisted of microfilming and filing, but after a promotion to deputy clerk just one month into the job, she was required to spend four days a week providing customer service at the division's front counter.

Soon after accepting the promotion and beginning desk duty, Jacobs told one of her supervisors that interacting with the public was triggering her social anxiety disorder, a condition that had first been diagnosed in her childhood. Jacobs said she was experiencing extreme stress, nervousness and panic attacks while working at the front counter.

The supervisor encouraged Jacobs to seek treatment from a doctor who had helped her with this condition in the past, a suggestion Jacobs followed. Still, four months later, Jacobs continued to feel overwhelmed and she sent an e-mail to her three immediate supervisors requesting an accommodation that would allow her to perform other work as a clerk and limit her front desk duty to one day per week. The supervisors said a higher-level manager who was out for three weeks would need to be consulted before any action could be taken. When that manager returned, she called Jacobs to a meeting and terminated her, citing poor performance even though Jacobs' file showed no evidence she had ever been disciplined for or made aware of performance issues.

A favorable ruling

Jacobs sued for discrimination and retaliation. While a district court initially dismissed her case, the Fourth Circuit found a reasonable jury could conclude that Jacobs' termination was tied to her accommodation request and remanded the case back to a lower court to be heard in its entirety.

An important takeaway from the decision is the need to take social anxiety disorder seriously. Defined by the American Psychological Association (APA) as a state of mind characterized by a "marked and persistent fear of . . . social or performance situations in which [a] person is exposed to unfamiliar people or to possible scrutiny by others," the condition qualifies as disabling under the ADA when it substantially limits one or more major life activities, including the major life activity of "interacting with others."

Substantially limits vs. always limits

In its ruling, the Fourth Circuit took particular issue with AOC's argument that Jacob's social anxiety could not be considered disabling because Jacobs successfully interacted with others in other settings and on social media.

"The AOC misapprehends both the meaning of 'substantially limits' and the nature of social anxiety disorder," the justices wrote in their ruling. "A person need not live as a hermit in order to be 'substantially limited' in interacting with others."

"According to the APA, a person with social anxiety disorder will either avoid social situations or 'endure the social or performance situation . . . with intense anxiety. Thus, the fact that Jacobs may have endured social situations does not *per se* preclude a finding that she had social anxiety disorder. Rather, Jacobs need only show she endured these situations "with intense anxiety,' " the Court said.

The bottom line

Up to 13% of individuals will experience social anxiety disorder at some point during their lives, according to the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), so employers must be prepared to treat the condition as they would any potential disability under the ADA. Confirming the disability and engaging in an interactive process to determine whether accommodations are possible will reduce the likelihood of a disability discrimination claim.

