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***Pregnancy Discrimination***

# Panelists Discuss Implications for Employers Of Ruling in Pregnancy Accommodation Case

*By Katarina E. Klenner*

March 30 — Whether pregnancy is a disability that requires accommodation under Title VII of the 1964 Civil Rights Act, as amended by the Pregnancy Discrimination Act, is a question the U.S. Supreme Court left unanswered in its March 25 holding in *Young v. United Parcel Service, Inc.*, according to a reproductive rights law scholar.

The justices held that an employer may violate the Pregnancy Discrimination Act if it fails to offer a pregnant employee with work restrictions the accommodations it makes available to other, nonpregnant employees similar in their ability or inability to work (*Young v. United Parcel Service, Inc.*, 126 FEP Cases 765, 2015 BL 82478 (2015); 57 DLR AA-1, 3/25/15).

Speaking March 27 at the American University Business Law Review's 2015 Symposium, AU faculty member Jessica Waters said that in light of the court's holding, employers would be wise to provide reasonable accommodations for pregnant workers temporarily unable to perform their job duties. Panelists agreed.

The symposium, which was hosted by Arent Fox's Washington, D.C., office and moderated by Professor Susan Carle of the Washington College of Law, highlighted pregnancy discrimination issues in the workplace and the potential effects of *Young* on the Equal Employment Opportunity Commission's July 2014 enforcement guidance on pregnancy discrimination.

## Pregnancy Discussion 'Just Getting Started.'

Richard Schneider, an administrative judge for the EEOC since 1999 and professor at the Washington College of Law, initiated the discussion by noting that although EEOC statistics show an uptick in pregnancy discrimination claims in the private sector workforce, he hasn't heard many pregnancy-related federal sector employment cases—only one or two out of approximately 1,100, he said.

The federal sector EEO complaint process differs from the private sector. In the federal sector, after the employing agency has investigated a complaint, complainants may request an administrative hearing by an EEOC judge.

Echoing Judge Schneider's comments, Syeda Raza, in-house counsel for HMSHost Corp. in Bethesda, Md., said, "I haven't seen a whole lot of pregnancy cases in my ten years, so it's not a huge concern that we may not be doing something right."

"In a number of ways, I think the discussion is just getting started on the issue of pregnancy and related medical conditions," Raza added.

Panelist Keira McNett, a low-wage workers' rights advocate and co-founder of the nonprofit organization First Shift Justice Project, responded, "It's interesting to hear the sense that there are not a lot of pregnancy discrimination cases that make it to the point of litigation, and I wouldn't disagree with that."

"I think that's largely because it is incredibly difficult to pursue a claim, and that's particularly true if you're a woman in a low-wage job who just got fired and has a baby on the way or already has a child at home," McNett said. "The chances of you being able to successfully pursue that case through litigation—maybe even just to the point of filing an EEO claim—in my experience, that's a real uphill battle."

## Take Decision 'With a Grain of Salt.'

Panelists were asked to address how the PDA and the Americans with Disabilities Act intersect and how employers should approach performance issues related to pregnancy in view of current EEOC guidance—

which requires employers to provide reasonable accommodations—and the *Young* decision.

Employment attorney Karen Vladeck said the safest bet for employers is to treat pregnancy as a disability. Vladeck, an associate in Arent Fox's Commercial Litigation group and chair of the firm's associates committee, urged employers to take the Supreme Court's decision "with a grain of salt" and to reassess policies if they're not already providing accommodations to pregnant workers since "it seems like the law is really shifting towards treating pregnancy as a disability, even though no court, statute, or interpretation of any statute has so said."

Raza concurred with Vladeck and said that "the law is headed toward putting pregnancy on par with disabilities under the ADA." Doing so would simplify training on the issue, as such an approach would require employers to engage in an interactive process with pregnant employees and to accommodate those who are temporarily unable to perform job duties just as they would under the ADA's framework, Raza said.

For the purpose of providing reasonable workplace accommodations, McNett agreed "an interactive process is where we should be" but voiced concern in calling pregnancy a disability. She carefully distinguished "medical conditions that arise during pregnancy," which may qualify as disabilities under the ADA, from pregnancy itself.

Waters added that in the interactive context, definitional issues, such as the need to define conditions related to pregnancy that qualify as ADA disabilities, precede the issue as to whether an employee is entitled to accommodation.

**Case Arose Prior to ADA Amendments**

In addressing *Young*, Judge Schneider said that UPS "fell apart" when it drew the line as to who received reassignment and light duty work at pregnancy. He noted the company could not argue undue hardship "because it reassigned people all the time."

McNett emphasized the significance of this, stating, "The court really honed in on the fact that UPS was accommodating a large percentage of non-pregnant workers in various different ways."

The panelists pointed out that the *Young* case arose in 2007, before the amendments to the ADA. McNett speculated, "Under the 2008 amendments to the ADA, there is going to be a much larger pool of people who would be covered under the ADA. So most employers are going to have a relatively larger percentage of employees that they are accommodating if they're complying with the ADA."

McNett added, "I don't think the EEOC guidance that talks about the way pregnancy-related impairments may be covered under the ADA is affected by this decision."

**More Agency Guidance Welcome**

Carle asked the panel to contemplate the need for policy change and intervention in shaping the law in the pregnancy discrimination sphere.

Judge Schneider said that he expects the EEOC to revise its guidance, which the Supreme Court criticized in *Young*.

Raza responded that employers may be opposed to increased regulation but need more clarity—and "*Young* didn't give us that."

Beyond agency guidance, McNett said the Pregnant Workers Fairness Act (S. 942/H.R. 1975), which was introduced in 2013, "would go a long way" in empowering workers to raise issues, encouraging a constructive, interactive dialogue between employers and employees, and eradicating the stigma associated with caregiver responsibilities.

**Value of Training, Proactive Measures**

Offering insight into how employers can approach pregnancy-related issues in the workplace, Judge Schneider asserted, "It's not illegal to ask 'are you pregnant?' It's illegal to discriminate. A basic problem with an awful lot of employers is that they have work that has to get done. It's not so much, most of the time, that there is an intent to discriminate against someone who's pregnant (or about to be). It's just an indifference to the problem of pregnancy. They just want to know is the person going to be there. The reason why the person may leave is irrelevant."

Proactive measures, like counselling, may be very helpful to employers and employees in avoiding

pregnancy discrimination. "Having a robust EEO policy is very important," Arent Fox's Vladeck said. "Unconscious bias is a really, really big problem among employers, particularly in the pregnancy space," she said. "One thing that we've been moving employers to is unconscious bias training."

Waters espoused the value of interim measures, such as provision of childcare for employees, which would allow employers to retain trained workers and support men and women seeking to balance dual responsibilities of work and family.

**Larger Issues at Stake**

In her concluding remarks, McNett said, "We all deal with these issues … family responsibilities and the ways in which they butt up against work requirements."

"I feel that there should be this sense of solidarity among women regardless of where you are in the workforce," McNett said, urging employers or persons counseling employers to "bring some humanity, bring some of your own experience to it." She emphasized the importance of taking a proactive approach to managing work and family issues so that pregnant women in low-wage jobs may have a safe pregnancy and maintain their economic security at a time they need it most.

"I think it's important that we don't talk about these issues as women's issues—it's critically important that we expand that dialogue because discrimination on the basis of pregnancy or family status affects men and women—it affects them differently—but it affects men and women," Waters said.

In closing the discussion, Judge Schneider remarked, "The history of civil rights is in constant evolution—sometime moving faster, sometimes moving slower—but constantly evolving" and "employers, large and small, are becoming more enlightened. It keeps getting better, and hopefully it will continue to get better."

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