High Court Looks To Pregnancy Law Post-Hobby Lobby

Publication
8.07.14

Just one day after the U.S. Supreme Court issued its controversial decision in Burwell v. Hobby Lobby, upholding the religious rights of closely held, for-profit employers to refuse to include certain contraceptives in their health plans, the court set the stage for fireworks next summer. In Young v. United Parcel Service Inc., the Supreme Court agreed to hear the appeal of a part-time UPS driver who sued her employer because she believed the company's failure to provide her a modified work schedule as a workplace accommodation violated the federal Pregnancy Discrimination Act. While the topic may not be as hot button as religion and contraceptives, the question of pregnancy discrimination is bound to get the cable news channel talking heads busy when the Court issues its decision, likely next June.

At issue in the case is the PDA, a subsection of Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on a number of protected characteristics, including race, gender, national origin and religion. When Title VII was first passed by Congress, pregnancy was not included. It was added in 1978 in reaction to another Supreme Court decision that created a stir, General Electric Co. v. Gilbert. In that case, the Supreme Court held that an employer's disability insurance plan did not violate Title VII's prohibition against gender discrimination even though it provided coverage for nonoccupational sickness or accidents, but not for pregnancy. Unhappy with the decision, Congress added a new section to Title VII, the first confirming that the terms "because of sex" and "on the basis of sex" in the statute included pregnancy and related medical conditions. Further, it included a provision that required that employers treat pregnant employees the same "for all employment-related purposes ... as other persons not so affected but similar in their ability or inability to work."

It's that second clause which is at issue in Young v. UPS. Peggy Young was a part-time delivery driver who originally sought and received a leave of absence to engage in fertility treatments so she could become pregnant. A few months later, Young's midwife wrote a note recommending that Young not lift more than 20 pounds at work.

UPS permitted light duty in certain circumstances, but pregnancy was not one of them. Specifically, employees at UPS could receive a modified work schedule in three circumstances under the terms of the collective bargaining agreement the company had reached with the union representing its drivers: (1) employees with limitations arising from on-the-job injuries; (2) employees considered "disabled" under the Americans with Disabilities Act; and (3) employees who temporarily lost U.S.

Department of Transportation certification. Since none of those circumstances applied to Young, UPS declined her request for light duty and placed her on unpaid leave until she returned two months after the birth of her child. During the time she was away from work, her health insurance lapsed.

Most federal anti-discrimination laws prohibit employers from treating employees differently based upon their membership in a protected class, but with a couple of exceptions do not require that the employer take affirmative steps to ensure "equal treatment." In other words, employers covered by federal anti-discrimination laws know that they may not make employment decisions for impermissible reasons, but as long as they are not motivated by the protected characteristic, their employment decisions will not be second-guessed.

But in two specific instances, employers are required by the law to do something more. The religious discrimination portion of Title VII requires that employers accommodate employees' bona fide religious beliefs and employers covered by the ADA as amended must extend reasonable accommodations to qualified persons with disabilities.

Generally speaking, a pregnancy without medical complications, such as Young's, is not considered a disability under the ADA. Therefore, UPS was under no obligation to extend an accommodation to her, since the ADA was not implicated. And since neither of the two remaining bases in the collective bargaining agreement applied — Young had not lost DOT certification and the pregnancy was obviously not an "on-the-job injury" — UPS determined it had no obligation to engage in the affirmative steps employers are expected to take in the cases of religious or disability status.

Young sued, alleging that UPS' refusal to offer accommodations like those offered to ADA-disabled persons, on-the-job injury victims and employees who lost DOT certification violated the PDA, in particular the second clause requiring that employers treat pregnant employees the same as nonpregnant employees "similar in their ability or inability to work." The district court granted summary judgment in favor of UPS and the 4th Circuit upheld the dismissal. Young asked the Supreme Court to overturn the 4th Circuit's ruling, and the petition for review was supported by womens' groups and female law professors who filed an amici curiae brief arguing that the 4th Circuit's interpretation of the PDA was far too narrow and that the appeals court had effectively read the second part of the PDA out of the statute.

For its part, UPS argued that it was applying a "pregnancy-neutral" policy, and that the PDA, unlike the ADA, did not require that employers provide reasonable accommodations. In essence, UPS argued that requiring it to treat pregnant employees as if they were ADA-disabled employees would add an affirmative "accommodation" component to the PDA that Congress never intended. Young and her attorneys countered in their briefs seeking high court review that the second clause of the PDA did precisely that, and to treat pregnant employees different than any other group with similar work limitations violated the express language of the PDA.

Interestingly, the Solicitor General, filing a brief on behalf of the government at the Supreme Court's

Interestingly, the Solicitor General, filing a brief on behalf of the government at the Supreme Court's invitation, generally supported the notion that pregnant employees deserve similar workplace accommodations, but suggested that the court pass on Young's case. Specifically, the brief pointed out that recent amendments to the ADA made it likely that temporary disabilities caused by pregnancy might be covered under the ADA going forward, bringing short-term disabilities caused by pregnancy under the ADA's "reasonable accommodation" framework. Thus, the government urged the Supreme Court not to review the Young case, since new rules recently issued by the U.S. Equal Employment Opportunity Commission address situations like Young's and accommodations that employers should make.

To the surprise of many Supreme Court watchers, the high court disregarded the government's suggestion and decided it would hear the case on its merits. That means the Supreme Court will review the 4th Circuit's suggestion that Young's reading of the PDA would grant "pregnant employees 'most favored nation' status." To illustrate its point, the court of appeals compared a pregnant employee like Young to an employee who injured her back picking up a child at home, and to an employee who sustained an injury off the job working as a volunteer firefighter. The court reasoned that under Young's interpretation of the PDA, only the pregnant employee would be eligible for the workplace accommodation.

Young's circumstance — physical limitations caused by pregnancy — is likely to become more common in the future, as females find themselves employed more often in what historically have been male-dominated industries. Moreover, taking unpaid time off to deal with pregnancy-related issues is a real economic burden on many Americans. Many employees are not covered by the Family and Medical Leave Act and, even if they are eligible under the FMLA, they are entitled only to 12 weeks off without pay.

While many U.S. employers offer some form of paid maternity leave, there is no federal statutory scheme that requires it. On this issue, at least, the U.S. is out of step with most of the rest of the world. According to the McGill Institute for Health and Social Policy, only the U.S., Sierre Leone, Papua New Guinea and Liberia do not require employers to offer at least some paid leave for expectant mothers. Several states, including Washington, New Jersey and California, currently mandate paid leave to new mothers in those states, and other states are likely to follow. While efforts at the federal level, most recently in 2011, to require paid maternity leave have failed, given the popularity of such measures with voters — especially women — Congress is sure to revisit the issue soon, probably before the 2016 presidential election.

This article appeared on August 7, 2014 in *Employment Law 360*.

Related People

Stephen J. Roppolo
Partner
713.292.5601
Email