Congratulations to Peggy Young, But Pregnant Women Need Stronger Protections

April 1st, 2015 | Rebecca Pontikes and Liz Friedman

The Supreme Court decision in Young v. UPS is an important victory for Peggy Young. Young brought suit because, she needed a restriction on lifting packages over 21 pounds during her pregnancy, but UPS refused her. One of UPS' Division Mangers told her she had to leave work because she was "too much of a liability" while pregnant, and could "not come back" until she "was no longer pregnant." Despite the Division Managers statement, UPS claimed that its policy was "neutral" because it did not specifically, and literally, exclude pregnant women. Although Young presented evidence that non-pregnant employees injured off the job were accommodated, that an employee who lost his license for driving drunk was accommodated, and a shop steward gave testimony that the *only* time that accommodation of disabilities became an issue under UPS' policy was with pregnant women, UPS told the courts that it was impossible for Young to prove it had discriminatory intent.

The Supreme Court found otherwise. Significantly, the Court questioned why, if UPS' accommodation policy covered a driver who lost his license for drunk driving, it did not cover a pregnant worker like Young, particularly since UPS has a duty to treat pregnant workers the same as others similar in their ability to work. The Court decided a plaintiff may get to trial if she shows the employer's policy imposes a significant burden on pregnant workers and that the employer's reasons for the policy do not justify that burden. Under this test, a jury will now decide if UPS discriminated against pregnant women. Given this decision, employers are well advised to revise their policies and ensure immediate accommodation of pregnant workers or potentially face years of litigation over whether their policies place too much of a burden on pregnant women.

But, the decision from the Supreme Court falls short in its protections of pregnant workers because it does not guarantee accommodations. The Supreme Court did not find that employers are *always* required to accommodate a pregnant worker, even if the employer accommodates other workers. The majority agreed with UPS that there are situations where employers can make distinctions. An employer still has discretion to decide what types of physical conditions to accommodate. The landscape leaves a huge hole for pregnant workers to fall into.

Once a worker is fired, the burden is on *her* to fight to get her job back, or instead, to get lost wages. Young's child, Triniti, whom she was carrying in 2007 is now seven years old. It has been seven long years in which Young has been caught up in litigation to secure back wages and lost opportunities. How many women have the financial and emotional resources to devote to this many years to litigation? How many want to?

What an employer insists is a reasonable accommodation policy or a hardship to accommodate might not ultimately measure up under Young. But, employer discretion, once exercised, is expensive to reverse. While women like Young might ultimately prevail, an employer can usually come up with a reason to support a policy that distinguishes among accommodations and that excludes a pregnant woman. The best option to keep pregnant women on the job is for her not to have to fight her employer in the first place. Clear rules that ensure pregnant workers the rights to reasonable accommodation are required.

It is for these reasons that many states have passed laws requiring accommodation of pregnant workers. Alaska, California, Illinois, Hawaii, Connecticut, Louisiana, Michigan, Minnesota, New Hampshire, and Texas have passed laws

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with various degrees of protection for their pregnant workers. In Massachusetts, Representative Ellen Story of Amherst, has introduced the Pregnant Workers Fairness Act (PWFA) which would provide clear rules for employers to follow when a pregnant employee (or an employee affected by pregnancy—including needing to lactate) requests an accommodation. The PWFA would allow women to ask for reasonable accommodations when pregnant, protect pregnant workers from having to accept an accommodation that she does not want, and prevent employers from forcing an employee to take leave if another reasonable accommodation can be provided without undue hardship to the employer.

Most importantly, the bill lists many types of accommodations that are presumed to be reasonable, including:

- More frequent or longer breaks,
- Time off to recover from childbirth,
- Acquisition or modification of equipment,
- Seating,
- Temporary transfer to a less strenuous or hazardous position,
- Job restructuring,
- Light duty,
- Break time and private non-bathroom space for expressing breast milk,
- Assistance with manual labor, or
- Modified work schedules.

All of these accommodations will keep most pregnant women—as well as women returning from birth who need to lactate–on the job and earning money to support their families.

There are clear benefits to laws like the one proposed in Massachusetts. A study done in California after the enactment of their accommodations protection legislation by the non-profit group Equal Rights Advocates, showed that low-wage hourly workers in fungible jobs with rigid schedules stand to benefit the most from pregnancy accommodation laws. This is because they lack the flexibility and control professional, managerial, and white-collar employees have over their work environments and thus have the least ability to negotiate and advocate for their physical needs during pregnancy. Significantly, after the law's passage, the number of lawsuits filed in California (after passage of the pregnancy accommodation law) went *down* 7% while the number of federal pregnancy discrimination claims *shot up* 54%.

It is our hope that Massachusetts will follow in the footsteps of the many states that have decided to eliminate the ambiguity left open in Young and instead ensure that pregnant workers have the protections then need. The passage of the Massachusetts Pregnant Workers Fairness Act will provide an unmistakable rule, and ensure that *no* woman is ever forced to choose between her job and the health of her pregnancy.

About the Author: Rebecca Pontikes has been practicing law since 1997. She has a passion for employment law and civil rights that drives her practice. In addition to employment, she also has brought suit under Title IX on behalf of a sexually assaulted student. She is a graduate of the University of Michigan Law School and of Tufts University and is admitted to the Massachusetts bar, the Federal District of Massachusetts, and the First Circuit. Her peers selected her as a "SuperLawyer" in 2004, 2007, 2008, 2009, 2010, and 2011. Massachusetts Lawyer's Weekly named her aTop Woman in Law in 2012. She lives in Cambridge with her husband.

Liz Friedman, MFA. Liz first became a mother in 2002 and founded the Postpartum Support Initiative of MotherWoman in 2007. As Program Director of MotherWoman, Liz is a leading voice in advocating for fair policies for mothers and with Annette Cycon, developed the MotherWoman Support Group Model which provides a safe forum for mothers to speak their truths. Liz serves on the MA Postpartum Depression Commission, is a co-investigator on research pertaining to postpartum depression and in 2013 published a chapbook entitled, "You are exactly the right mother." Liz says, ""I want for my daughter what I want for ALL of us. That she will be heard when she speaks her own truths as a woman and, if she chooses, as a mother." You can find Liz at liz@motherwoman.org and at www.motherwoman.org

Tags: pregnancy accommodation, Young v. UPS

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