What's Good for the Goose Is Good for the Gander: The Supreme Court's Decision in Young v. UPS

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Does an employer have to offer a pregnant employee exactly the same physical accommodations as it does to "other" employees? Which "other" employees? And how many "other" employees? In a case involving the Pregnancy Discrimination Act, the U.S. Supreme Court's 6-3 decision today in *Young v. United Parcel Service, Inc.*, No. 12–1226, 575 U. S. ___ (2015) raises these questions without really answering them – leaving a lot of work for the lower courts, and parties in litigation, to do. The Court's decision today, however, makes clear that an employer who grants accommodations to non-pregnant employees should think twice before denying them to pregnant employees. According to the Supreme Court, that denial may amount to evidence of intentional (and unlawful) discrimination.

Peggy Young, a UPS driver, became pregnant in 2006. Her doctor told her that she should not lift packages weighing more than 20 pounds during her first 20 weeks of pregnancy and not more than 10 pounds after that. UPS allowed light-duty assignments for certain employees, including drivers who had become disabled on the job, drivers who had lost their Department of Transportation ("DOT") certifications, and employees who had disabilities covered by the Americans with Disabilities Act. But not for anyone else, including Peggy Young.

Young asked for the same light duty. UPS's occupational health manager told her that she would not be allowed to work during her pregnancy because she couldn't satisfy the lifting requirements (sometimes of packages weighing up to 70 pounds). Another manager confirmed that she was "too much of a liability."

So Young stayed home for the remainder of her pregnancy. She also promptly sued UPS, alleging that UPS's refusal to give her light duty was intentional discrimination. Her theory was that UPS gave light duty to certain other employees, but not pregnant employees. That, she claimed, violated the Pregnancy Discrimination Act ("PDA"), a 1978 law amending Title VII of the Civil Rights Act of 1964, which prohibits intentional sex discrimination. The PDA contains these magic words: "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work[.]"

In court, Young argued that UPS's refusal to give her light duty meant that she was not "treated the same" as "other persons" (like disabled employees, or those who had lost DOT certifications) who were "similar in their . . . inability to work." UPS said that, since Young was not in the categories of employees for whom UPS gave light duty, UPS hadn't discriminated against her at all – it had simply treated her like any other "relevant" person who didn't fall within a covered category. UPS's

argument convinced the trial court, which granted summary judgment, and the Fourth Circuit Court of Appeals, which affirmed the lower court's decision.

But today, the Supreme Court disagreed. Justice Stephen Breyer's majority opinion was, in some sense, critical of the positions of both Young and UPS. Young's argument that as long as an employer accommodates only a subset of workers, pregnant workers must receive the same treatment "proves too much": according to the Court, the fact that the PDA requires an employer to treat pregnant workers the same as "other persons" doesn't mean it must treat a pregnant worker the same as "*any* other person." That means that if an employer grants an accommodation or benefit to a single employee, the law doesn't require an employer to automatically give pregnant employees the same thing.

But the real impact of the Court's decision was its rejection of UPS's position. The Court held that if an employer accommodates a "large percentage" of non-pregnant workers but refuses to offer the same to pregnant workers, that refusal may amount to evidence of intentional discrimination – at least enough evidence to survive summary judgment and create an issue for trial. In this case, Justice Breyer wrote, UPS granted light duty to "numerous" employees who could not drive or lift packages, but not for pregnant employees.

So it's clear that Peggy Young is back in the game and is heading back to the trial court, thanks to the Supreme Court. What is much less clear is the standard an employer is supposed to use in determining when it must offer a pregnant employee the same accommodations as non-pregnant employees. The Court found that the fact that "numerous" "other employees" got light duty was potential evidence of intentional pregnancy discrimination. How many employees are "numerous," and which "other employees" an employer should take a look at, will be resolved only through more litigation in the lower courts. As a practical matter, employers should eye any policy treating pregnant workers differently from significant groups of other employees with suspicion.