

Mom and Apple Pie: The EEOC and the High Court Take on Pregnancy Discrimination

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On July 1, 2014, the Supreme Court granted certiorari in *Young v. Untied Parcel Services, Inc.*, a case involving the Pregnancy Discrimination Act (PDA), which is on appeal from the Fourth Circuit.[1] Shortly thereafter, instead of waiting for the outcome of *Young*, the Equal Employment Opportunity Commission (EEOC) issued its first enforcement guidance on the PDA (the "Guidance") in over thirty years.[2] The Guidance is not without controversy as it directly contradicts the Fourth Circuit's ruling and the Supreme Court's decision in *Young* may end up mooting at least part of it. Nonetheless, the Guidance provides the EEOC's position on the PDA and at least for the time-being, that position will be enforced at the EEOC and it provides persuasive authority for pregnancy discrimination claims brought in court.

EEOC Issues Guidance Two Weeks After Supreme Court Grants Certiorari in Young

On July 14, 2014, the EEOC issued the Guidance which sets forth the EEOC's position on the PDA as well as the Americans with Disabilities Act (ADA) as it relates to pregnant workers.[3] Among other issues, the Guidance addresses and discusses the following:

- The fact that the PDA covers not only discrimination based on a current pregnancy, but also discrimination based on past pregnancy, pregnancy-related medical conditions, and a woman's potential to become pregnant;
- The PDA and ADA and the circumstances under which employers may have to provide light duty for pregnant workers who are similar in their ability or inability to perform the essential functions of the job as non-pregnant workers;
- The Family Medical Leave Act, and issues related to leave for pregnancy and for medical conditions related to pregnancy;
- Stereotyping and the PDA's prohibition against requiring pregnant workers who are able to do their jobs to take leave;
- When employers may have to provide reasonable accommodations for workers with pregnancy-related impairments under the ADA and the types of accommodations that may be necessary; and
- Best practices for employers to avoid unlawfully discriminating against pregnant workers, including sections on: hiring, promotion, leave and fringe benefits, terms and conditions of employment, and reasonable accommodations.[4]

The Fourth Circuit Holds that PDA Was Not Violated by Employer's Failure to Provide Light Duty to Pregnant Worker

Young involves the interplay of a number of United Parcel Service (UPS) policies that implicate both the PDA and the ADA.[5] The job description in *Young* required employees to be able to lift packages weighing up to 70 lbs.[6] However, the Collective Bargaining Agreement (CBA) to which UPS is a party provides that employees who suffer on the job injuries are to be afforded temporary light duty assignments, which do not include the lifting requirement.[7] A pregnant employee at UPS is not afforded these same light duty assignments, but may continue to work so long as she can perform the essential functions of the job (including the lifting requirement).[8]

In this case, the employee informed her boss that she was pregnant and she provided a doctor's note indicating that she should not lift more than 20 lbs.[9] As a result of the restriction, UPS determined that she was unable to perform the essential functions of her job and would not allow her to return to work until the restriction was lifted.[10] In accordance with its policies, UPS did not offer her light duty.[11]

Young brought suit under the ADA and PDA. The district court granted summary judgment in favor of UPS on both claims.[12] On appeal to the Fourth Circuit, the employee claimed that UPS impermissibly regarded her as disabled under the ADA and that UPS discriminated against her on the basis of her pregnancy in violation of the PDA by failing to offer her light duty work when UPS offers that work to other employees.[13] She claimed that the failure to offer her light duty violated the PDA's "command to treat pregnant employees the same 'as other persons not so affected but similar in their ability or inability to work.'"[14]

The Fourth Circuit concluded that the light duty accommodation for pregnant

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their proliferation or minimize their potential negative effects. I think this could be one of those circumstances where unrestrained competition, if allowed to be the driving force, may have a negative impact on existing local businesses.

So, for us the question is: once the door to video gaming is open, how far should it get pushed? ML

Ordinances *Cont'd from page 26*

The Michigan Supreme Court acknowledged that the Bonners had "a significant property interest within the protection of the Due Process Clause." However, the court's substantive due process analysis turned on the proposition that *property owners do not have a fundamental right to repair a structure that has been declared unsafe by a municipality*. Accordingly, governmental intrusion into that (non-fundamental) right only needs to be reasonably related to a legitimate governmental interest. Under this standard, the Brighton ordinance was not facially deficient; the "unreasonable-to-repair" presumption was reasonably related to the City's legitimate governmental interest in preserving the health and welfare of Brighton residents, reducing crime and maintaining property values. Demolition of an unsafe nuisance was not an arbitrary act; it was a legitimate exercise of the City's police power.

The Michigan Supreme Court also found adequate procedural due process in the Brighton ordinance scheme. While the Bonners had argued that BCO § 18-59 failed to give property owners the procedural protection of a repair option before demolition, the court stated that due process merely requires impartial "adjudication . . . preceded by notice and an opportunity to be heard . . . granted at a meaningful time and in a meaningful manner" before the deprivation of a property interest. The court held that procedural due process "was satisfied by giving plaintiffs the right to an appeal before the city council and the opportunity to appeal that decision to the circuit court."

Bonner v. City of Brighton, no. 146520 (Mich. Apr. 24, 2014). ML

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Implications-

Together, *Wainfleet Wind Energy Inc. v Wainfleet (Township)*, 2013 ONSC 2194, *Suncor Energy Products v. Town of Plympton-Wyoming*, 2014 ONSC 2934 and *East Durham Wind Inc.*, are strong judicial authority for the proposition that provincially approved renewable energy projects may be constructed despite municipal opposition.

City of Burnaby- Kinder Morgan At Odds Over Pipeline.

The Supreme Court of British Columbia has rejected the City of Burnaby's bid for a temporary injunction to stop survey work for an oil pipeline expansion project proposed by Kinder Morgan.

Kinder Morgan is proposing a $5.4 billion project to triple the capacity of its Trans Mountain pipeline, which currently carries oil products to a terminal in Burnaby from Alberta. The City of Burnaby has expressed its opposition with such expansion, and has attempted to block Kinder Morgan's survey work on Burnaby Mountain. The City of Burnaby alleges that Kinder Morgan violated municipal bylaws that protect trees and parkland, when Kinder Morgan workers toppled 13 trees, although Kinder Morgan indicated it was only seven trees. The City of Burnaby filed with the British Columbia Supreme Court to issue an injunction on the survey.

The City of Burnaby's action follows a previously upheld decision by the National Energy Board of Canada last month, allowing Kinder Morgan to access the Burnaby Mountain land under federal law. The National Energy Board Act stipulates that a company may enter into the land of any person that lies on the intended route to survey or otherwise ascertain whether the land is suitable. There is no requirement for companies to reach agreement with landowners, the Crown, or otherwise, before exercising the right to access land. Therefore, the National Energy Board held that Kinder Morgan does not need the City of Burnaby's permission to access Burnaby Mountain and can proceed with necessary studies of its preferred pipeline route through the mountain without the City's consent. In response to this holding, Kinder Morgan has filed a motion asking the National Energy Board to forbid the City of Burnaby from obstructing its crew. This decision is imminent.

On September 17, the British Columbia Supreme Court judge dismissed the application for an injunction against the Kinder Morgan survey crews on Burnaby Mountain. At the time of this publication, Judge Brenda Brown had not yet given her reasons for dismissing the injunction. ML

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employees was not required under the PDA even though it was offered to employees injured on the job.[15] The court reasoned that it was not Congress' intent to provide pregnant employees with greater rights than non-pregnant employees, which would be the result if the court adopted the employee's rationale.[16]

The employee in *Young* appealed to the Supreme Court and certiorari was granted on July 1, 2014. Oral arguments will be heard in December.

The EEOC's Guidance Conflicts with Fourth Circuit's Holding and Creates Controversy

As noted above, the timing of the Guidance is controversial given the impending Supreme Court decision on the subject, and in addition to that, some of the substance of the Guidance has garnered criticism. In fact, two EEOC Commissioners provided separate written dissents to the Guidance.[17] One point of contention is that according to the Guidance, Title VII requires that employers treat pregnant workers the same for all employment related purposes as other non-pregnant individuals who are similar in their ability or inability to work.[18] The Guidance therefore reasons that if an employer provides an accommodation to an employee with a disability, a pregnant employee who has similar limitations would be entitled to the same accommodation, regardless of whether the pregnant employee is actually disabled for ADA purposes.[19] This conclusion was one of the central points of criticism by Commissioner Victoria Lipnic in her dissent:

> The Guidance takes the novel position that under the language of the PDA, a pregnant worker is, as a practical matter, entitled to "reasonable accommodation" as that term is defined by the Americans with Disabilities Act ("ADA"). No federal Court of Appeals has adopted this position; indeed, those which have addressed the question have rejected it. Moreover, the Pregnancy Guidance

states that non-pregnant workers receiving such reasonable accommodations are the appropriate comparators for purposes of PDA compliance. This, too, is a position rejected by the majority of courts which have considered it. These positions represent a dramatic departure from the Commission's prior position, and perhaps more important, contravene the statutory language of the PDA.[20]

Although acknowledging that the amendments to the ADA broadened the ADA's coverage, Commissioner Lipnic continues her criticism of the Guidance's position that the PDA requires employers to provide the same accommodations for pregnant and non-pregnant employees, stating she is "hard-pressed to conclude that the ADAAA somehow 'back-doored' reasonable accommodation into the PDA."[21] On this point, she notes:

> In fact, the Commission's position for years has been consistent: a routine pregnancy is not a covered disability under the ADA (or ADAAA). While acknowledging that the ADAAA extends the ADA to cover a broader range of pregnancy-related impairments, the Commission has never in regulations or sub-regulatory guidance suggested that a routine pregnancy which is *not* a disability somehow entitles a pregnant worker to rights identical to those who have covered disabilities under the ADA. In light of this clear and consistent precedent, and the potential for confusion if contradicted, the Commission is ill-advised to take this position now.[22]

Another issue critics point to is the Guidance's position regarding light duty for pregnant workers. The Guidance specifically notes that a policy that only provides light duty for employees injured on the job would run afoul of the PDA as it would discriminate against pregnant workers who are similar in their ability or inability to work as the injured worker.[23] This point is contrary to the Fourth Circuit's holding in *Young* and may be mooted by the Supreme Court's decision this fall.

Suggestions for Employers

Until the Supreme Court's decision in *Young,* employers are left with conflicting information from the courts and the EEOC as to how to handle certain situations involving pregnant workers. While the EEOC guidance does not carry with it the force of law, employers should note that any pregnancy discrimination actions brought between now and when *Young* is decided would be subject to that Guidance at the Commission. However, for lawsuits brought in court, the EEOC Guidance is merely that, guidance. That being said, until *Young* provides the definitive rule on this issue, employers would be wise to review their policies and consider offering pregnant employees light duty as an accommodation if it is offered to other employees who are similar in their ability and inability to work.

Notes

1. Young v. United Parcel Service, Inc., 707 F.3d 437 (4th Cir. 2013).
2. EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014). This was the EEOC's first guidance on pregnancy discrimination in over thirty years. See EEOC Press Release, available at: http://www.eeoc.gov/eeoc/newsroom/release/7-14-14.cfm (last accessed on September 26, 2014). The EEOC also issued a Question and Answer document and Fact Sheet, available at: http://www.eeoc.gov/laws/guidance/pregnancy_qa.cfm (last accessed on September 25, 2014); http://www.eeoc.gov/eeoc/publications/pregnancy_factsheet.cfm (last accessed on September 25, 2014).
3. *See* EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014).
4. *Id.*
5. *Young, Supra.*
6. *Id.* at 439.
7. *Id.* at 439-40.
8. *Id.* at 440.
9. *Id.*
10. *Id* at 440-41.
11. *Id.*
12. *Id.* at 442.
13. *Id.* at 442-43.
14. *Id.* at 445. The PDA provides:
> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, ore related medical conditions: and 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. 42 U.S.C. §2000e(k).

15. *Id* at 446-49.
16. *Id.* at 448. For example, the court noted that an employee who injures himself off the job as a volunteer firefighter would not be entitled to the light duty accommodation under the company's policy. Id.
17. *See* Commissioner Constance Barker, Public Statement of Commissioner Constance S. Barker (July 14, 2014), available at: http://op.bna.com/dlrcases.nsf/id/kmgn-9lznp5/$File/barkerdissent.pdf; Commissioner Victoria Lipnic, Statement Of The Honorable Victoria A. Lipnic Commissioner, U.S. Equal Employment Opportunity Commission "Enforcement Guidance On Pregnancy Discrimination And Related Issues," (July 14, 2014) (hereinafter, "Lipnic Dissent"), available at: http://op.bna.com/dlrcases.nsf/id/kmgn-9lznpp/$File/lipnic.pdf.
18. *Id.* On this point, the Guidance states:
> ...consistent with the statutory language, a pregnant worker with a work restriction who challenges a denial of light duty should be able to establish a prima facie case of discrimination...by identifying any other employee who is similar in his or her ability or inability to work and who was treated more favorably, including employees injured on the job and/or covered by the ADA. EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014) (emphasis added).

19. *See* EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014).
20. *See* Lipnic Dissent
21. *Id.*
22. *Id.*
23. EEOC Enforcement Guidance: Pregnancy Discrimination and Related Issues, available at: http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm (last accessed on September 25, 2014). ML