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U.S. Supreme Court Holds Pregnancy Limitations Must Be Accommodated

The United States Supreme Court has just issued a significant decision affecting all Employers across the country in holding that Employers must accommodate workers with pregnancy limitations the same as any other light duty accommodation, even if the pregnancy does not have any medical complications. In the case of *Young v. United Parcel Service*, the Supreme Court reversed a decision of the Lower Court which had held in favor of UPS, and found that the Pregnancy Discrimination Act gives protection to all pregnant workers, even if the pregnant worker does not have any particular medical complications attributable to the pregnancy.

In the *Young* case, Young was a part-time driver for UPS. When she became pregnant, her doctor advised her that she should not lift more than 20 pounds. However, UPS required drivers like Young to be able to lift up to 70 pounds. UPS informed Young that she could not work while under a lifting restriction. However, evidence showed that UPS would accommodate other workers who were injured on the job, both suffering from ADA disabilities and those who had lost their D.O.T. certification. The evidence showed that UPS had a light-duty policy for other persons with injuries, but not with respect to pregnant workers.

Previously, certain Federal Court decisions had held that the pregnant worker did not need to be accommodated unless there was a showing of a medical restriction due to a complication in the pregnancy. However, the United States Supreme Court decided this case based upon the Pregnancy Discrimination Act. The United States Supreme Court stated that the Pregnancy Discrimination Act demonstrated a Congressional intent to protect the pregnant worker in the workplace.

Further, the United States Supreme Court found that if an Employer accommodates a large percentage of non-pregnant workers while failing to accommodate pregnant workers, it can be evidence of discrimination
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Pregnancy Limitations

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under the Pregnancy Discrimination Act.

Importantly, the Supreme Court noted that under the Pregnancy Discrimination Act, a worker suing under this Act can use “circumstantial proof” to rebut an Employer’s alleged legitimate, non-discriminatory reason for treating these individuals differently than those outside the protected class. The Supreme Court held that since UPS accommodated non-pregnant workers with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations, it can be in violation of the Pregnancy Discrimination Law. The United States Supreme Court, in its opinion, specifically chastised UPS when it stated “that is, why, when the employer accommodated so many, could it not accommodate pregnant women as well?”

The implications of this decision are very far-reaching for all Employers. Generally, most Employers have light-duty policies in order to comply with the Americans With Disabilities Act. If a woman who becomes pregnant presents the Employer with lifting restrictions and the job that the employee performs involves significant lifting, this decision places a burden on that Employer to accommodate that pregnant woman during the term of the pregnancy.

Employers will need to be diligent in reviewing medical restriction forms as well as relating those restrictions to the essential functions of the job in question in evaluating obligations to accommodate pregnant workers.

One of the key questions for Employers in light of this decision is the extent or percentage of lifting that may be done in the job that involves the pregnant worker. If, for example, the woman only does lifting in a small percentage of the job functions, the Employer may be able to easily accommodate that worker continuing to work within the position. However, if, like UPS, lifting is an essential function of the job on a regular basis, the Employer is faced with attempting to find a different position for the pregnant woman during the period of the pregnancy.

“Spouse” Definition Under FMLA Updated by D.O.L.

The Regulations interpreting the word “spouse” under the FMLA has been revised by the Department of Labor in light of the ruling of the United States Supreme Court and other Federal Courts in providing protection for same-sex marriages.

The new Regulation of the Department of Labor, which took effect on March 27, 2015, redefines the word “spouse” as being based on the place where the marriage was entered into rather than the state where the employee resides. Thus, if an employee enters into marriage in any state where same-sex marriage is legally permitted, the employee is entitled to FMLA leave to care for his/her spouse with a serious health condition, regardless of where the spouse resides.

In addition, this new rule of the Department of Labor will allow employees in legal same-sex marriages to take FMLA leave to care for his/her stepchild, even where the employee does not stand in loco parentis to the child.

Likewise, this rule also applies in situations where the employee’s parent has a same-sex spouse who is a step-parent, therefore, allowing the employee to take FMLA leave to care for the step-parent, even where the step-parent never stood in loco parentis to the employee.

Under this new rule of the Department of Labor, Employers may still require documentation to support entitlement to the leave. For example, an Employer could require the employee to merely provide a simple statement asserting that the marriage exists, or the Employer could require a marriage certificate or court document. However, we recommend that if the Employer is going to require a marriage certificate or court document for those who are asserting a same-sex marriage, the Employer must be consistent in requiring such documents for those asserting FMLA that are not same-sex marriages.

The Department of Labor has indicated that this new rule will help Employers by reducing their

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New NLRB Election Rules Survive Congressional Challenge

President Obama vetoed legislation on March 31, 2015, that would have invalidated the National Labor Relations Board Rule streamlining Union-organizing elections.

This new NLRB Rule, effective April 14, 2015, is a huge procedural change in the Union-organizing process. This Rule change will significantly streamline elections by allowing certain election documents to be filed electronically instead of by mail. Further, this new Rule delays the opportunity for legal challenges from Employers, such as whether certain workers are eligible to vote, until after workers have cast their ballots in an organizing election.

Prior to President Obama's veto, both the House and Senate had passed a Resolution nullifying this new Rule promulgated by the NLRB. Given the fact that there are only 54 Senate Republicans, there will not be a sufficient number of votes to override the veto, thus, this new NLRB Rule will go into effect. There is litigation that has been filed by the various

business groups, including the U.S. Chamber of Commerce, challenging the issuance of the NLRB Rule. However, that litigation will not be determined until well after the Rule goes into effect.

These changes in the NLRB Rules will speed the election process and limit the time Employers have to make their case to employees about the potential for unionization. Often, the Union organizes employees behind the scenes, and the Employer may not know about the Union organization until the NLRB Petition is filed. It is anticipated that the time between the formal filing of the petition and election itself could be shortened to 25 days or less under the new Rules, which is two weeks short of the 2013 median of 38 days in uncontested elections.

Consequently, under the NLRB Rule, there is a greater burden placed on Employers in attempting to state its case to the workers on the reasons it may believe the workers should reject the Union in an NLRB election.

“Spouse” Definition *Continued from Page 2*

burden administratively when they operate in more than one state since Employers will no longer need to consider the laws of an employee's state of residence when making eligibility determinations.

As a result of this new Department of Labor Regulation, we recommend that Employers should review their FMLA policies, and make sure that any references to “spouse,” “step-child,” or “step-parent”

comply with this new Department of Labor Regulation, and authorize leave for employees in legal same-sex marriages and/or with parents in legal same-sex marriages. In addition, FMLA policies should clearly state the extent to which documentation will be required for evidence of a worker's “spouse” and that such documentation will be administered on a consistent basis.

Employer May Fire Workers and Offer Contract Positions With Release

An employer can proceed to fire its employees, and offer them their jobs back as independent contractors under the condition that they release any claims they may have against the Employer, including discrimination claims, according to a recent decision of the U. S. Court of Appeals for the Third Circuit. In the case of *EEOC v. Allstate Insurance*, the Court upheld the right of Allstate to terminate its employees and offer as part of a severance package with a release the right to work for Allstate as independent contractors.

The EEOC had challenged Allstate on this procedure and alleged that Allstate's offers violated anti-retaliation laws. The EEOC had argued that refusing to sign a release would constitute opposition to unlawful discrimination. The EEOC had argued that the practice of offering benefits to fired employees in exchange for their release of claims is restricted to "severance benefits" and would not extend to continued employment on an independent contractor basis. The Third Circuit rejected that argument,

saying that the offer from Allstate accounted for suitable "consideration for the release," meaning that it offered a fair exchange to the workers.

The Third Circuit, in rejecting the EEOC position, stated that "according to the EEOC, Allstate could have complied with the anti-retaliation statutes by simply firing all its employee agents for good, instead of giving them the opportunity to sell Allstate insurance in a different capacity. We are confident that federal laws designed to protect employees do not require such a harmful result."

This decision again reaffirms the right of Employers to enter into agreements with a release of claims of discrimination laws in exchange for either financial concerns or the opportunity to even work as an independent contractor for the same company. Of course, Employers must be careful if they are releasing age discrimination claims to assure compliance with the Older Workers Benefit Protection Act in giving the necessary days for the employee to consider the agreement, as well as the seven-day revocation period.

Stray Remarks Do Not Make Age Discrimination Case

Stray remarks, such as an Employer's comments about creating a "modern" office, are insufficient to create an inference of age-based discrimination, according to the recent Federal District Court case out of the Eastern District of Pennsylvania in *Gallen v. Chester County*.

In the *Gallen* case, shortly after Thomas Hogan was elected District Attorney, he proceeded to discharge a 65-year old experienced Assistant District Attorney and a 57-year old Chief Deputy District Attorney.

The Court initially found that the Plaintiffs had established a prima facie case of age discrimination,

since they produced evidence that they were 40 years of age or older, that they were discharged, that they were qualified, and they were replaced by individuals who were sufficiently younger.

However, The District Attorney's office provided non-discriminatory reasons for the discharges in noting that Chief Deputy Miller had not performed well on a murder case, and that Gallen had also lacked sufficient performance.

The Court, in rejecting the claims for discrimination, noted that the comment by the District Attorney that he wanted a "modern prosecutor's (continued next page)

Employee Prevails on Retaliation and Sex Harassment Claim

An employee was found to have prevailed on a claim of retaliation when there was just an interval of a few weeks between the employee complaining about alleged sexual harassment and the Employer's decision to discharge the employee. The Federal District Court for the Eastern District in the case of *Jodlowski v. Soar Corporation*, has recently held that the timing between the complaints of discrimination and the discharge can establish a causal connection for purposes of retaliation.

In this particular case, the Executive Director of the Employer-Defendant commented how lucky the Plaintiff's husband was to be able to make love to her, took her face in his hands, and asked why she was so pretty, claiming he would include wearing a skirt or dress as a job requirement for her. The Plaintiff had made it clear to this Executive Director that this conduct was not welcome, and the Executive Director proceeded to inform her that he could hire and fire anyone.

A few weeks after the Plaintiff complained about this harassment to a new supervisor, the Plaintiff was accused of planning to steal confidential client information and was fired. After a jury verdict of \$85,000 to the Plaintiff, the Employer appealed. However, the Court upheld the verdict and found that the Plaintiff was subjected to severe and pervasive sexual harassment, in that the Executive Director's sexually suggestive conduct took place almost daily for a four-to-six week period and had a severe detrimental effect. The Employer attempted to argue that the Plaintiff failed to take advantage of workplace procedures to complain about sexual harassment and a hostile work environment. However, the Court noted that the individual in Human Resources to whom the Plaintiff allegedly could have complained, was the Executive Director's child.

In addition, the Court emphasized the principle of "temporal proximity," in noting that "the short interval of just a few weeks between the protected

activity and adverse actions that occurred is unusually suggestive of the necessary causal connection." This interval of only a few weeks after complaining of alleged sexual harassment made a clear case of retaliation under Title VII of the Civil Rights Act as well as the Pennsylvania Human Relations Act.

Stray Remarks

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office" was insufficient to establish age-based animus. These stray remarks were held to be insufficient to prove an inference of discrimination.

In addition, the Court noted that the District Attorney had hired two individuals in their early 40's, and they were in the protected class of individuals who were 40 and older. The Court noted that "the Defendants' favorable treatment of people in the protected class creates an inference that the Defendants lacked age-based animus."

Since the Employer could provide performance issues as to why the older Assistant District Attorneys were terminated, the Court found there needed to be more than a stray comment about a "modern office" to establish a pretext for age discrimination.

However, this Court shows that Employers must be careful in evaluating the termination or layoff of employees who are within the protected class, and are replaced with individuals substantially younger than those being terminated.

Striking Sexual Harasser Does Not Bar Retaliation Claim

In a case of first impression, a Federal District Court in Pennsylvania has held that an employee does not forfeit her retaliation rights under Title VII by physically defending herself against a sexual advance and striking the individual committing sexual harassment.

In the case of *Speed v. WES Health Systems*, the Federal District Court for the Eastern District of Pennsylvania found that the employee who struck the sexual harasser in the face after being exposed to continued and pervasive sexual harassment for a period of time was not barred from pursuing a retaliation claim. In this case the Plaintiff, Speed, was continually harassed by a co-worker who would regularly rub his body against hers.

After one occasion when the employee rubbed his hands on Speed's leg, Speed warned him that if he touched her again she would defend herself. When the employee reached out to touch Speed following this warning, Speed struck the harasser on the side of his face. The Employer terminated Speed for physically assaulting the other employee who committed the sexual harassment. The Employer attempted to defend the hostile work environment and retaliation lawsuit on the basis of the physical assault that the woman committed.

However, the Court defended the Plaintiff, Speed, and found that she had every right to defend herself against harassment, particularly since she had reported the conduct to her supervisors and the supervisors failed to take reasonable measures to prevent or correct the harassment.

This case stands for the principle that an employee who is subjected to continual sexual harassment can defend herself, even to the point of a physical assault, and not be barred from bringing a sexual harassment and retaliation lawsuit under Title VII.

Andrews and Beard Employment Law Update

This *Employment Law Update* is designed to provide general information relating to new developments in Employment Law. It should not be construed as comprehensive coverage, or as legal advice concerning any specific factual issue. A legal opinion should be sought from an attorney of choice regarding any specific factual situation.

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