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SECOND CIRCUIT REVIEW

Expert Analysis

Applying Newly Announced Test For Proof of Pregnancy Discrimination

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This month, we discuss *Legg v. Ulster County*,[1] in which the U.S. Court of Appeals for the Second Circuit, in an issue of first impression, found that the denial of a light-duty accommodation to the pregnant employee of a county correctional facility was sufficient to support an inference of discrimination under the Supreme Court's recently announced "significant burden" standard for proof of pregnancy discrimination under Title VII, as amended by the Pregnancy Discrimination Act of 1978 (PDA).[2]

This case involved a county sheriff's refusal to provide a light-duty accommodation to the county's only pregnant corrections officer, despite a policy of providing such accommodation to workers injured on the job. The circuit examined for the first time whether such a denial would impose a "significant burden" on pregnant employees without sufficient justification, supporting an inference of discrimination under the Supreme Court's 2015 ruling in *Young v. United Parcel Service*.[3]

In an opinion by Judge Barrington D. Parker, joined by Judges Gerard E. Lynch and Susan L. Carney, the court held that under *Young*, which was decided during the pendency of plaintiff's appeal of the district court's dismissal of her claims, a reasonable jury could have concluded that defendants' purported reasons for denying her a light-duty accommodation were a pretext for discrimination.[4]

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Background

Plaintiff Ann Marie Legg had been employed as a corrections officer for the Ulster County Jail for 12 years when she became pregnant in 2008. Because her pregnancy was considered high-risk, her doctor recommended light duty and no contact with inmates. The county maintained a policy of providing light-duty assignments to employees injured on the job, but that accommodation (as implemented by defendant Paul J. VanBlarcum, the Sheriff) did not extend to pregnant women. As a result, when Legg sought an accommodation, a supervisor informed her that her options were to obtain medical clearance for full duty, or to use accrued time and to apply for state benefits. (The county's official policy also allowed pregnant women to use Family and Medical Leave Act or disability leave.)

The same day, however, another supervisor told Legg that if she obtained full-duty clearance, he would nevertheless assign her to light duty. Legg requested and obtained a revised clearance from her doctor, and was in fact placed on light duty. She eventually was reassigned to a cell block. While seven months pregnant, Legg encountered two inmates fighting, and was "bumped" as one ran past her. She left work and did not return until after giving birth.

Prior Proceedings

In May 2009, Legg sued the county, Sheriff VanBlarcum, and several other officials, claiming that their denial of a light-duty accommodation

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constituted pregnancy discrimination in violation of Title VII. Legg and others also brought claims under Title VII and 42 U.S.C. §1983 alleging a hostile work environment.

Legg's pregnancy discrimination claim was among those that survived summary judgment and was tried before a jury.[5] Legg and the other plaintiffs presented their case in chief over four days. On Aug. 18, 2014, at the close of their evidence (and before defendants' presentation), Judge Frederick J. Scullin of the Northern District of New York granted defendants' motion for judgment as a matter of law on Legg's PDA claim, dismissing that claim for lack of legally sufficient evidence pursuant to Rule 50. Judge Scullin explained in open court his conclusion that there was no evidence of discrimination because the county's policy of limiting light-duty accommodations applied "across the board" to all employees who were not injured on the job.[6]

Second Circuit's Decision

The Second Circuit reviewed de novo the district court's grant of judgment as a matter of law in favor of defendants.

The Pregnancy Discrimination Act provides that pregnant women "shall be treated the same" as others "similar in their ability or inability to work." The Second Circuit noted that pregnancy discrimination can be proved under either a disparate treatment or disparate impact theory, and that the former can be established either by direct evidence or through the three-part McDonnell Douglas burden-shifting framework that governs statutory discrimination claims.[7] Under that framework, a plaintiff bears the initial burden of establishing a prima facie case of discrimination. If she does, the employer then must articulate legitimate, non-discriminatory reasons for the difference in treatment. The plaintiff then must prove by a preponderance of the evidence that those reasons were a pretext for discrimination.[8]

The Second Circuit explained that the Supreme Court's 2015 decision in *Young* had "resolve[d]" how the PDA's requirement for identical treatment is to be applied in a disparate treatment case. The plaintiff in *Young* had been refused a light-duty accommodation despite the provision of such accommodations to co-workers who had been injured on the job, lost their certifications, or suffered from disabilities covered by the ADA. In considering the extent of the PDA's protection, the Supreme Court in *Young* rejected both the defendant's argument that the PDA allowed any facially neutral accommodation policy, on one hand, and the plaintiff's argument that it effectively grants "most favored nation" status to pregnant workers, on the other.

First, in what the Second Circuit characterized as a "modified" McDonnell Douglas analysis, the Young Supreme Court held that when examining evidence of pretext (i.e., intent) under the PDA, a plaintiff may rebut the justification offered by an employer by providing evidence that the employer's refusal to accommodate would "impose a significant burden on pregnant workers" and that the employer's proffered reasons "are not sufficiently strong to justify the burden."

A plaintiff may make this showing "by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers," including (as in *Young*) where an employer accommodates "most" similarly situated nonpregnant workers, but "categorically" denies the accommodation to pregnant workers.[9] The Supreme Court also expressly noted that "consistent with the Act's basic objective," an employer's purported legitimate reasons for refusing an accommodation "cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those…whom the employer accommodates."[10]

Applying this doctrine, the Second Circuit agreed that Legg had adduced evidence sufficient for a jury to have considered whether the refusal to accommodate her was motivated by discriminatory intent.[11] Analyzing the first two steps of the McDonnell Douglas framework, the court first noted that Legg had established a prima facie case because she had asked for an accommodation available to similarly situated co-workers and had been refused one, and that defendants had met their burden to proffer justification by pointing to the provision of New York Workers' Compensation law that requires municipalities to pay corrections officers who are injured on the job.[12]

Turning to the third step of *McDonnell Douglas*, the court noted that a plaintiff can establish pretext through "significant inconsistencies" in an employer's justification.[13] The court then closely examined the justifications that had been offered at trial. For example, defendant VanBlarcum had testified that Legg had been refused an accommodation because he "did not 'believe'" in providing accommodation to those injured off the job; by contrast, another supervisor had testified that the decision was made for Legg's safety. Moreover, defendants' principal justification on appeal—that the policy was justified by the requirements of New York law—had only been raised in passing before the jury.

The court next examined the sufficiency of Legg's evidence of pretext, i.e., of discriminatory intent, under

the largely quantitative "significant burden" standard set forth in *Young*. As the court noted, Legg was the only one of the 176 corrections officers employed during VanBlarcum's tenure who had been pregnant. According to the court, this constituted "categorical[]" denial of light duty to pregnant women, suggesting a "significant burden" on pregnant employees as a whole. The court held that the percentage of non-pregnant employees who were accommodated was not material, and rejected as "perplexing[]" the defendants' argument that the policy did not impose a significant burden because only one employee had been affected.

The court read *Young* to focus on the percentage of pregnant employees who are denied accommodation, and called that metric the best indicator of whether there is a significant burden on pregnant women as a category. In other words, as in this case, "if an employer has just one pregnant employee and she has been adversely affected, then it has undoubtedly imposed a significant burden on its pregnant employees—it has burdened the only one it has."[14]

Next, the court rejected defendants' argument that Legg had not suffered a significant burden because she had been able to perform her duties but had chosen to stop working. Conceding that this was "one view" of the record, the court held that a reasonable jury could have concluded that her initial decision to return to work had reflected her need to work rather than her ability. Noting the inherent risk of "violent confrontations" in Legg's work and characterizing her decision to leave work as the result of a "serious health scare," the court found sufficient evidence to conclude that categorical exclusion from the accommodation was a significant burden on her.

Finally, revisiting *Young's* balancing requirement, the court observed that a reasonable jury could have found defendants' reasons for denying the accommodation were not "sufficiently strong" compared to the burden imposed. Despite having found compliance with New York Workers' Compensation law to be sufficient justification at step two of *McDonnell Douglas*, the court expressly rejected the notion at the third step that compliance with that law necessarily justified denying the same accommodation to pregnant employees. It also would have been reasonable to find that cost was a factor in the decision, as VanBlarcum had admitted at trial.

The court made clear that a policy that burdens only a small number of employees nevertheless can constitute a 'categorical' denial and therefore be found to impose a significant burden.

In reaching its conclusion, the court emphasized that if Legg's claims had not been dismissed on the defendants' Rule 50 motion, the jury would not have been required to find in favor of Legg, and that the legality of a policy providing light-duty accommodation to some workers to the exclusion of pregnant workers depends upon a careful analysis of the facts. But on the facts in the record before it, the Second Circuit held that Legg was entitled to have had the issue considered by a jury.

Conclusion

The Second Circuit's decision in *Legg* was the first time the circuit had an opportunity to apply the Supreme Court's newly announced test in *Young* that focused on whether pregnant women were "categorically" denied accommodation and indicated how courts must approach defendants' proffered justifications for excluding pregnant women from an accommodation policy. In so doing, the court made clear that a policy that burdens only a small number of employees nevertheless can constitute a "categorical" denial and therefore be found to impose a significant burden.

It remains to be seen how the Young inquiry will be applied to employment settings posing less obvious and inherent threats to the safety and well-being of employees, pregnant or otherwise. What is clear is that the Second Circuit (along with the Supreme Court) has given substance to the PDA's mandate that pregnant employees are to be treated the same as those with similar ability to work.

1. *Legg v. Ulster Cty.*, No. 14-3636 (2d Cir. April 26, 2016).
2. Pub. L. 95–555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. §2000e(k)).
3. *Young v. United Parcel Serv.*, ___ U.S. ___, 135 S. Ct. 1338 (2015).
4. In an unrelated analysis, the court also reversed the district court's denial of certain post-trial motions filed by the defendants as untimely, holding that although Rule 6 limits the district court's authority to extend post-trial deadlines, that limitation is not jurisdictional and is therefore subject to waiver and equitable exceptions.
5. *Meadors v. Ulster Cty.*, 984 F.Supp.2d 83 (N.D.N.Y. 2013).
6. *Legg*, No. 14-3636, slip op. at 5 (2d Cir. April 26, 2016) (citing Joint App'x at 675-76).
7. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
8. See, e.g., *Young*, 135 S. Ct. at 1341.
9. Id. at 1354.
10. Id.
11. The court did not reach her disparate impact arguments, and also held that Legg had not adduced sufficient direct evidence of discriminatory intent because the challenged policy was facially neutral with respect to pregnancy. See *Legg*, No. 14-3636, slip op. at 10-11 (2d Cir. April 26, 2016) (citing *Tyler v. Bethlehem Steel Corp.*, 958 F.2d 1176, 1183–85 (2d Cir. 1992)).
12. N.Y. Gen. Mun. Law §207-c (McKinney).
13. *Zann Kwan v. Andalex Grp.*, 737 F.3d 834, 846 (2d Cir. 2013).
14. *Legg*, No. 14-3636, slip op. at 14 (2d Cir. April 26, 2016).