Northwest Ohio Human Resource Association

AFFILIATE OF SHRM SOCIETY FOR HUMAN RESOURCE MANAGEMENT

LEGISLATIVE UPDATE

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Supreme Court rules on accommodations under Pregnancy Discrimination Act

In *Young v. United Parcel Service*, the U.S. Supreme Court is was asked to rule on whether, and under what circumstances, an employer is required to offer light duty work to pregnant employees when that employer offers accommodations to non-pregnant employees who are "similar in their ability or inability to work."

In the *Young* case, UPS acknowledged that it provided accommodations to employees who were injured on the job, required accommodation under the ADA, and those employees who lost their DOT certification (which was often the result of non-work related medical conditions). The plaintiff, who sought a light duty accommodation because of a high risk pregnancy, was refused an accommodation and not permitted to work by UPS during the entirety of her pregnancy. The plaintiff presented evidence that suggested the only time UPS refused to provide light duty work was in the case of pregnancy.

"… women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work …"

_-excerpt from 42 U.S.C.§ 2000e(k), the clause at issue in Young v. UPS

Young and UPS presented widely different arguments on what they believed the Pregnancy Discrimination Act required from employers. The Supreme Court rejected both interpretations, and crafted their own middle-ground, holding that discrimination claims based upon indirect evidence are subject to the *McDonnell Douglas* burden shifting test, commonly employed in other Title VII discrimination claims. The test requires the claimant to show that she was a member of a protected class, here because of pregnancy, that she sought an accommodation but was denied, and that the employer provided accommodations for others "similar in their ability to work." The employer may then show that its reasons for denying accommodation were based on legitimate, nondiscriminatory reasons, which must be something more than showing the accommodation was more expensive or less convenient than refusing the accommodation. Finally, the claimant may show that the employer's reasons were merely a pretext for discrimination. On this last point, the Supreme Court stated it could be shown with evidence that that the employer accommodates a large number of nonpregnant employees, while failing to accommodate a large percentage of pregnant employees. The Supreme Court sent the case back to the trial court for further proceedings.

Something missing from the Supreme Court's opinion was a ruling on whether pregnancy is considered a disability under the ADA. The Court acknowledged the issue but stated it couldn't rule on it because Young's pregnancy pre-dated the 2009 amendment to the ADA, which greatly expanded the definition of "disability."

In light of the court's ruling, employers should review their policies on accommodations to determine whether they provide for pregnancy related accommodations in the appropriate setting.

"Associational bias" under the disability discrimination laws

Most employers are well aware of their obligation to avoid discriminatory treatment of employees with a "disability," and the need to consider reasonable accommodations for such employees. However, many employers are not aware that federal disability discrimination laws also protect employees who have a "relationship or association" with a person who has a known disability. This issue most recently appeared in the case of *Mannon v. 878 Education, LLC*, (SDNY, March 4, 2015).

In *Mannon*, the company's newly hired receptionist had a young daughter who was very ill. In fact, the daughter had been diagnosed with reactive airway disease, described as the childhood equivalent of adult asthma. As a result of her daughter's illness, the employee was often late to work by several hours, or absent for several days at a time, so that she could stay home and care for her daughter when the asthmatic attacks happened. When confronted with her poor attendance record, her boss allegedly said "What will it be, your job or your daughter?" When she chose her daughter, she was fired and a wrongful discharge suit followed soon thereafter.

A specific provision of federal law protects an employee, regardless of that employee's own health, from discriminatory treatment if the employee has a "relationship or association" with a person with a known disability. In the *Mannon* case, the employer was aware of the daughter's condition. As a result, and because of the employer's comment connecting the daughter's health to the employee's job, the court concluded that the employer's comment was direct evidence of a violation of the law, and rejected the employer's argument that the discharge was the result of the receptionist's admittedly "horrible attendance" during her first few months of employment.

Although the *Mannon* case involved a close family member of the employee, that type of relationship is not required. According the EEOC, business, social and "other" types of relationships or associations are also enough. Therefore, great care should be taken whenever considering discharge, or even discipline, of employees in a type of relationship or association with persons who have a known disability.

NLRB issues guidance on employee handbooks

On March 18, 2015, the General Counsel for the National Labor Relations Board issued an opinion memo on permissible employee handbook language. Despite the fact that the NLRB issued the memo, it reaches beyond unionized workforces to non-union employers as well.

The General Counsel's memo provides guidance and illustrative examples of lawful and unlawful language pulled from real employee handbooks, that may affect employees rights to discuss wages, hours, and terms and conditions of employment. Generally, the NLRB will find an employer's work rule unlawful if it could reasonably be interpreted by employees as restricting their right to discuss wages, hours, or terms and conditions of employment with each other or with third parties.

The memo suggests that broad sweeping rules (e.g., prohibiting employees from "[d]isclosing … details about the [Employer]") are unlawful; while specific, narrow rules (e.g. no unauthorized disclosure of "business secrets or other confidential information") are more likely lawful. The memo covers topics including rules related to confidentiality; employee conduct toward the company, supervisors, and other employees; employee interaction with third parties; and restricting photography and recording.

A copy of the General Counsel's memo can be found here: apps.nlrb.gov/link/document.aspx/09031d4581b37135

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