

## **Young v. UPS: New Prima Facie Case for Failure-to-Accommodate Pregnancy Discrimination Claims**

### **Summary**

The Supreme Court's decision in *Young v. UPS*<sup>1</sup> revised the plaintiff's prima facie showing under the *McDonnell Douglas* burden shifting framework in pregnancy accommodation cases brought under the second clause of the Pregnancy Discrimination Act. **Now, a plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act's second clause may make out a prima facie case by showing that (1) she belongs to the protected class, (2) she sought accommodation, (3) the employer did not accommodate her, and (4) the employer did accommodate others "similar in their ability or inability to work."**<sup>2</sup> This is significant because it abrogates cases, primarily from the 5th and 11th Circuits, that had thrown out plaintiffs' failure-to-accommodate claims on the ground that the plaintiffs could not satisfy the elements of the old prima facie case, which required plaintiffs to show that they were qualified for their positions or performing satisfactorily. Under this old standard, some courts held that needing an accommodation to do one's job *necessarily* meant that one could not show she was qualified or performing satisfactorily.

### **Background**

The second clause of the PDA requires that employers treat pregnant employees the same as other employees who are similar in their ability or inability to work.<sup>3</sup> This means, for example, that an employer that allow employees who tire easily to take extra breaks to rest must also allow pregnant employees who tire easily to take extra breaks to rest, unless the employer has a strong, legitimate, nondiscriminatory reason for treating the nonpregnant employees more favorably.<sup>4</sup> Employers who refuse may be sued for pregnancy discrimination.<sup>5</sup>

Traditionally, plaintiffs who sought to prove pregnancy discrimination by circumstantial evidence have used the *McDonnell Douglas* burden shifting approach.<sup>6</sup> The first stage of this approach requires the plaintiff to demonstrate a prima facie case, which prior to *Young* was described as: 1) the plaintiff was pregnant; 2) the plaintiff was qualified for her position or was performing satisfactorily; 3) the plaintiff suffered an adverse action; and 4) similarly situated nonpregnant employees were treated more favorably.<sup>7</sup> The test is necessarily flexible to meet different factual patterns that might arise in a given

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<sup>1</sup> *Young v. United Parcel Service, Inc.*, \_\_\_ U.S. \_\_\_, 135 S. Ct. 1338 (2015).

<sup>2</sup> *Id.* at 298.

<sup>3</sup> 42 U.S.C.S. § 2000e(k).

<sup>4</sup> *See Young*, 135 S.Ct. at 1354 (describing the parties' burdens under *McDonnell Douglas* in a pregnancy accommodation case, and stating that the employer's proffered legitimate, nondiscriminatory reason must be stronger than the burden on the employee caused by the failure to accommodate).

<sup>5</sup> *Luke v. Cplace Forest Park SNF, LLC*, case no. 14-31347 (5th Cir. 2015).

<sup>6</sup> *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973).

<sup>7</sup> *See, e.g., Serednyj v. Beverly Healthcare LLC*, 656 F.3d 540, 551 (7th Cir. 2011). The fourth element has been also described as "a nexus between her pregnancy and the adverse employment decision." *E.g., Latowski v.*

case.<sup>8</sup> The Supreme Court has said that the prima facie case is “not onerous.”<sup>9</sup> If a plaintiff is unable to show these four elements, courts will grant summary judgment to her employer and dismiss her claim.<sup>10</sup>

In most circuits, prior to *Young*, the second prong of the prima facie case – that the plaintiff was qualified for her position or performing satisfactorily – required only a minimal showing.<sup>11</sup> Plaintiffs met their burden by pointing to their skills necessary for the job,<sup>12</sup> their time of service in the position,<sup>13</sup> satisfactory evaluations,<sup>14</sup> and raises.<sup>15</sup> Some courts held that the relevant time period for measuring qualification or satisfactory performance was either before the plaintiff became pregnant,<sup>16</sup> or before the employer took the adverse action that is the subject of the complaint.<sup>17</sup> Their purpose was to avoid dismissing the plaintiff’s case before she had an opportunity to challenge her employer’s actions.<sup>18</sup>

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Northwoods Nursing Ctr., 549 Fed. Appx. 478, 483 (6th Cir. 2013). The fourth element is flexible and does not require a comparator. For a discussion of the various ways the fourth element can be met, see Cynthia Thomas Calvert, Joan C. Williams and Gary Phelan, *FAMILY RESPONSIBILITIES DISCRIMINATION* (Bloomberg BNA 2014).

<sup>8</sup> *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 575 (1978).

<sup>9</sup> *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

<sup>10</sup> If the plaintiff can show the four elements of the prima facie case, the second stage requires the employer to state a legitimate, nondiscriminatory reason for its action, and the third stage requires the plaintiff to produce evidence that the employer’s state reason is not the real reason for the action but rather is a pretext for discrimination. *Young*, 135 S. Ct. at 1345.

<sup>11</sup> *E.g.*, *Cumpiano v. Banco Santander Puerto Rico*, 902 F.2d 148, 154 (1st Cir. 1990); *Gregory v. Daly*, 243 F.3d 687, 696 (2d Cir. 2001); *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 660 (6th Cir. 1999); *Davenport v. Riverview Gardens School Dist.*, 30 F.3d 940, 944 (8th Cir. 1994) (race discrimination case); *Fulkerson v. Amerititle, Inc.*, 64 F. App’x 63 (9th Cir. 2003); *EEOC v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184, 1194 (10<sup>th</sup> Cir. 2000).

<sup>12</sup> *E.g.*, *Gervais v. Franklin Pub. Schs.*, 2012 U.S. Dist. LEXIS 39554, \*37-38 (D. Mass. 2012) (plaintiff met “not onerous” showing for second prong with degrees and certification that qualified her for her position and no negative performance reviews).

<sup>13</sup> *E.g.*, *Gatten v. Life Time Fitness, Inc.*, 2013 U.S. Dist. LEXIS 45218, \*12 (D. Minn. 2103) (plaintiff showed she was qualified for her position where she held it for 10 months); *Wontrobski v. S. Huntington Union Free Sch. Dist.*, 2005 U.S. Dist. LEXIS 44688, \*11 (E.D.N.Y. 2005) (where plaintiff was employed for four years, she satisfied the qualification prong).

<sup>14</sup> *E.g.*, *EEOC v. Prof’l Bureau of Collections of Md., Inc.*, 686 F. Supp. 2d 1151, 1157 (D. Colo. 2010) (plaintiff satisfied second prong with evidence that she was told she was considered for a promotion and did not need performance help).

<sup>15</sup> *E.g.*, *Maxwell v. Kelly Servs.*, 730 F. Supp. 2d 1254, 1267 (D. Or. 2010) (plaintiff met second prong by showing she was given a similar position and a raise).

<sup>16</sup> *Fulkerson v. Amerititle, Inc.*, 64 F. App’x 63 (9th Cir. 2003) (plaintiff demonstrated satisfactory performance based on favorable evaluations received up to the time she revealed her pregnancy).

<sup>17</sup> *Tysinger v. Zanesville Police Dep’t*, 463 F.3d 569, 573 (6th Cir. 2006) (“For purposes of the *prima facie* case analysis, a plaintiff’s qualifications are to be assessed in terms of whether he or she was meeting the employer’s expectations prior to and independent of the events that led to the adverse action.”); *Amerson v. Pinkerton*, 2006 U.S. Dist. LEXIS 38671 (E.D. Mich. 2006) (prior to the time plaintiff was restricted from entering paint booth because of her pregnancy, plaintiff could enter booth and thus was performing satisfactorily).

<sup>18</sup> The courts thus kept separate the second prong of the prima facie case and the employer’s stated reason for its action in the second stage of the analysis. *Cline v. Catholic Diocese of Toledo*, 206 F.3d 651, 660-61 (6th Cir. 2000) (“when assessing whether a plaintiff has met her employer’s legitimate expectations at the prima facie stage of a termination case, a court must examine plaintiff’s evidence independent of the nondiscriminatory reason “produced” by the defense as its reason for terminating plaintiff.”); *MacDonald v. Eastern Wyoming Mental Health Ctr.*, 941 F.2d 1115, 1119 (10th Cir. 1991) (age discrimination case; “Short-circuiting the analysis at the prima facie stage frustrates a plaintiff’s ability to establish that the defendant’s proffered reasons were pretextual”). If the two were allowed to merge so that the employer’s reason for acting against the employee (e.g., she could not do her

In the Fifth and Eleventh Circuits, however, courts granted and affirmed summary judgment to employers in cases in which pregnant women who had lifting restrictions were terminated, holding that the inability to lift heavy weight meant the women were not qualified for their positions and the women therefore could not make out a prima facie case of discrimination.<sup>19</sup> As a result, the women were deprived of the opportunity to show, for example, that the employer allowed nonpregnant employees with lifting restrictions to continue to work.

### **The *Young* Decision**

The Supreme Court resolved this split in the circuits in the *Young* case by eliminating the qualification or satisfactory performance prong of the McDonnell Douglas prima facie case for pregnancy accommodation claims brought under the second clause of the PDA. It stated that a plaintiff in such a case must show: “that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others ‘similar in their ability or inability to work.’”<sup>20</sup>

As a result of this revision of the prima facie case, a plaintiff no longer needs to present evidence that she was qualified for her job or performing satisfactorily. She will be able to present a prima facie case even if she was unable to do her job without an accommodation, so long as she can show that she asked for an accommodation and did not receive one, and that her employer accommodated others who were similar in their ability or inability to work.

Once she makes this showing, the employer will have to state its “legitimate, nondiscriminatory” reason for not providing the accommodation.<sup>21</sup> The Court observed that the reason will not succeed if it “consist[s] simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those (‘similar in their ability or inability to work’) whom the employer accommodates.”<sup>22</sup>

The *Young* court made a further revision to the McDonnell Douglas analysis in second-clause PDA claims, this time to the third, or pretext, stage. It held that a plaintiff can defeat a summary judgment motion by “providing sufficient evidence that the employer’s policies impose a significant burden on pregnant

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job because of a pregnancy-related condition) was considered at the prima facie stage, the employee would be deprived of her opportunity to show that the employer discriminated (e.g., others who could not do their jobs because of medical conditions were accommodated). In essence, the court would be accepting as true the employer’s stated reason for the adverse action without giving the employee an opportunity to challenge the validity of the employer’s reason.

<sup>19</sup> *E.g.*, *Grace v. Adtran, Inc.*, 470 F. Appx. 812 (11th Cir. 2012); *Rhodes v. Rouses's Enters., LLC*, 2004 U.S. Dist. LEXIS 16449, *aff'd* 130 F. Appx. 678 (2005); *Elliott v. Horizon Healthcare Corp.*, 180 F.3d 264 (5th Cir. 2004); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312 (11th Cir. 1999); *McQueen v. AirTran Airways*, 2005 U.S. Dist. LEXIS 37461 (N.D. Fla. 2005); *Accord*, *Appel v. Inspire Pharmaceuticals, Inc.*, 428 F. Appx. 279 (5th Cir. 2011) (pregnant employee who was fired for being placed on bed rest could not make out prima facie case of pregnancy discrimination because she was not qualified for job in that she could not perform her duties); *Denton v. CSC Applied Technologies, LLC*, 2008 U.S. Dist. LEXIS 87661 (N.D. Miss. 2008) (plaintiffs not qualified for positions and could not make out prima facie case of discrimination due to physical restrictions placed on them by physicians due to pregnancy).

<sup>20</sup> *Id.* at 298.

<sup>21</sup> *Id.*

<sup>22</sup> *Id.*

workers, and that the employer’s ‘legitimate, nondiscriminatory’ reasons are not sufficiently strong to justify the burden, but rather – when considered along with the burden imposed – give rise to an inference of intentional discrimination.”<sup>23</sup> It provided an example: accommodating a large percentage of nonpregnant employees, such as those injured on the job, while failing to accommodate pregnant employees and the existence of multiple policies accommodating nonpregnant employees suggests that the employer’s reason is not sufficiently strong.<sup>24</sup>

### **Additional Notes for Future Cases**

The formulation of the prima facie case discussed above applies only to “failure to accommodate” claims brought under the second clause of the PDA, meaning only those claims that are based on allegations that the employer accommodated nonpregnant employees who were similar to the plaintiff in their ability or inability to work. A plaintiff could also bring a “failure to accommodate” claim under the *first* clause of the PDA, which provides that “sex” includes pregnancy, childbirth, and related medical conditions. To bring a claim under that clause, the plaintiff would be required to present evidence that she suffered an adverse action that was motivated in whole or in part by her pregnancy. For example, imagine a pregnant woman needs to sit down while working and requests a stool. Assume that her employer denies her request, saying, “Pregnant women are so lazy,” and that she was terminated because she could not stand continuously to do her job. She could sue for pregnancy discrimination under the first clause of the PDA and could argue stereotyping or a traditional McDonnell Douglas prima facie case (she was a member of a protected class, she was qualified for her job, she suffered an adverse action, and the adverse action occurred under circumstances that give rise to an inference of discrimination). In such a scenario, the pre-*Young* cases discussing the qualification prong may continue to be relevant, because whether the employee was qualified would be part of the inquiry.

A final noteworthy point is that, unlike the claim in *Young*, most pregnancy accommodation claims brought under the second clause of the PDA will be accompanied by other “failure to accommodate” claims. Most such claims will arise under the amended Americans with Disabilities Act (“ADA”),<sup>25</sup> which requires both parties to engage in good faith in an interactive process to determine whether the employer can provide a reasonable accommodation for an employee who has a pregnancy-related condition that meets the ADA’s broadened definition of “disability.” In addition, claims may arise under pregnancy accommodation statutes passed by a growing number of cities and states.<sup>26</sup> Some of these laws require accommodation even if pregnant employees do not have disabling conditions. For these reasons, providing accommodations to pregnant women who need them may be the least risky and least costly course of action for employers.

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<sup>23</sup> *Id.* at 299.

<sup>24</sup> *Id.*

<sup>25</sup> 42 U.S.C. §12201 et seq.

<sup>26</sup> For a list of states and cities that have pregnancy accommodation laws, see A Better Balance, State and Local Laws Protecting Pregnant Workers, available at <http://www.abetterbalance.org/web/ourissues/fairness-for-pregnant-workers/310>.