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Recent Employment Decisions Regarding Package Delivery Workers

In *Young v. United Parcel Service*,[1] the U.S. Supreme Court expanded the scope of pregnancy accommodation claims under the Pregnancy Discrimination Act (PDA). UPS, which had minimum lifting requirements for workers, provided light duty work to employees who were unable to perform lifting work because of an on-the-job injury and to employees to accommodate a physical impairment under the ADA. The plaintiff, who was pregnant, requested reassignment to light duty because her doctor said she should not lift more than 20 pounds. UPS denied her request because the light duty policy did not cover pregnancy.

The PDA requires employers to treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[2] UPS argued that it did not discriminate against the plaintiff because it treated her the same as all "other" relevant "persons," e.g., employees who could not fulfill the lifting requirements for any reason other than on-the-job injury or disability. The Supreme Court rejected this argument and held that under the PDA, a plaintiff can rebut an employer's articulated legitimate, non-discriminatory reason for denying an accommodation, if the employer's policies impose a "significant burden" on pregnant workers and the employer's reasons are "not sufficiently strong to justify that burden."

The Court suggested that a plaintiff can create a genuine issue of material fact as to whether a "significant burden" exists by providing evidence that the employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers. The Court further opined that an employer's legitimate, non-discriminatory reason "normally cannot consist of a claim that it is more expensive or less convenient" to provide an accommodation to pregnant women.

The Court ostensibly rejected the plaintiff's arguments that the PDA grants pregnant workers a "most-favored-nation" status, in that as long as "an employer accommodates only a subset of workers with disabling conditions," "pregnant workers who are similar in the ability to work [must] receive accommodations." In light of this decision, however, companies that provide accommodations to other employees—which would include almost all employers—must be extremely cautious about denying pregnant workers similar accommodations.

In *Carlson v. FedEx Ground Package Systems, Inc.*,[3] the Eleventh Circuit dealt a blow to the independent contractor model. FedEx Ground considered its drivers to be independent contractors and went to great lengths to ensure the arrangement complied with existing legal tests regarding independent contractor vs. employee status. For example, drivers entered into agreements in which they agreed to provide services "strictly as . . . independent contractors," and the company issued 1099 Forms instead of W-2 Forms.

More importantly, the drivers had significant control over many details of their day-to-day jobs. For example, they could hire replacement drivers or their own employees (although company approval was required). The drivers did not lease their trucks or equipment from FedEx and could use their trucks for other commercial or personal purposes (although the company reserved control over the type, configuration and appearance of the truck). The agreement stated that the "manner and means" of performing deliveries were "within the discretion

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of" the drivers, and they could also decide their hours of work, their routes and other details of performance (although the company required them to wear FedEx uniforms and dictated "an exhaustive and detailed list of procedures" that drivers had to follow). Drivers were not required to purchase scanners (although certain bonuses were dependent on their use). Drivers could even sell part or all of their service area or acquire service areas from other drivers (although 30-days notice had to be provided to the company).

The Eleventh Circuit noted that some facts supported FedEx's position and some supported the drivers' position (although, in reality, more factors weighed in favor of independent contractor status than in most independent contractor cases). However, given the summary judgment posture of the case, the court declined "to figure out what weight to give these conflicting facts on the critical question of control under Florida law." The court went so far as to declare that "whether a worker is an employee is usually a question of fact" for a jury. While the court did not decide whether the drivers were independent contractors, the ruling suggests that this issue will rarely be decided at the summary judgment stage, thereby significantly increasing the risks to companies that use the independent contractor model.

~ By Jay P. Lechner, Whittel & Melton, LLC

Endnotes

1 135 S. Ct. 1338 (2015).
2 42 U. S. C. §2000e(k).
3 No. 13-14979 (11th Cir. May 28, 2015).