The Do's and Don'ts of Litigating Pregnancy and Breastfeeding Accommodation Claims After Young v. UPS

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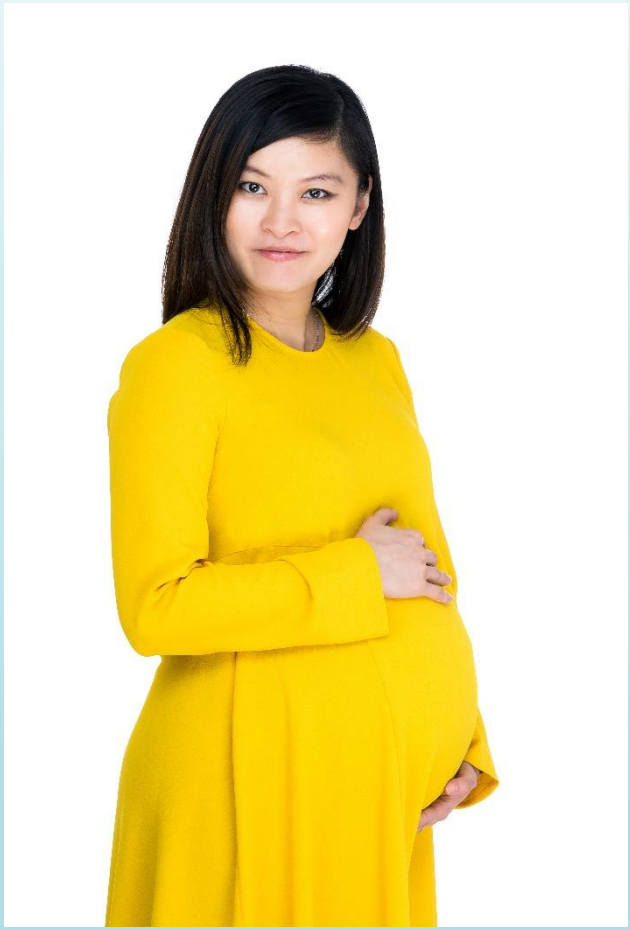

Pregnancy and Breastfeeding Accommodations, Then and Now

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Agenda

- Overview: *Young v. UPS* & PDA
- Discovery and Trial Tips
- Breastfeeding & Lactation Claims
- Other Laws
- Q&A

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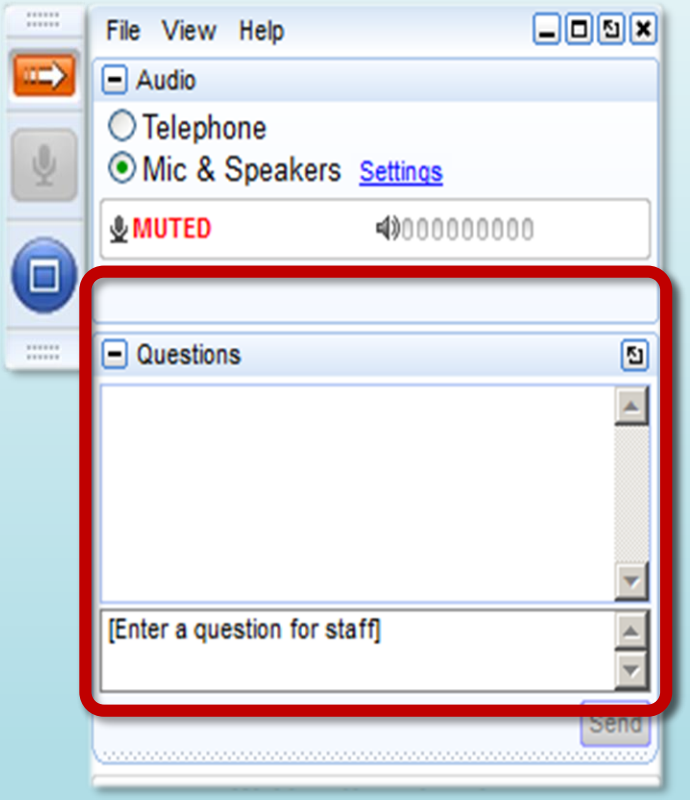

Pregnancy Accommodation Claims

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Pregnancy Discrimination Act (PDA)

Amended the "Definitions" section of Title VII:

"The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and

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 benefits programs, as other persons not so affected but similar in their ability or inability to work." (Emphasis added.)

Young v. United Parcel Service, Inc.

- Pregnant driver with lifting restriction denied accommodation
- UPS policies granted accommodation to 3 categories of workers:
  - Workers entitled to accommodation under ADA
  - Workers injured on the job
  - Workers who had lost their commercial driver's license
- D. Ct. granted summary judgment, Fourth Circuit affirmed
- Three categories were "pregnancy-neutral" = no animus
- Young not "similar" to workers in 3 categories = not entitled to "same" treatment

Young v. United Parcel Service, Inc. (cont'd)

- After reviewing history of PDA, Supreme Court reverses
- Announces modified *McDonnell Douglas* framework
- *Prima facie* case:
  - Pregnant
  - Sought accommodation
  - Employer denied accommodation
  - Employer accommodated others "similar in their ability or inability to work"

Young v. United Parcel Service, Inc. (cont'd)

Prima facie standard:

- Is "not intended to be an inflexible rule"
- Is "not onerous"
- Is "not as burdensome as succeeding on 'an ultimate finding of fact as to' a discriminatory employment action"
- Does not require the plaintiff to show that she and those who were accommodated "were similar in *all* but the protected ways"

135 S. Ct. at 1353-54 (emphasis added)

Young v. United Parcel Service, Inc. (cont'd)

Prima facie standard:

"[A]n individual plaintiff may establish a prima facie case by 'showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is *more likely than not* that such actions were based on a discriminatory criterion illegal under' Title VII."

135 S. Ct. at 1354 (emphasis added)

Young v. United Parcel Service, Inc. (cont'd)

New limitation on employer's "legitimate, non-discriminatory reason":

- Won't pass muster if it's based solely on cost or convenience
- Court notes that this standard is "consistent with the [PDA's] basic objective"

135 S. Ct. at 1354

Young v. United Parcel Service, Inc. (cont'd)

Plaintiff creates material question of fact on pretext by:

- "[P]roviding sufficient evidence that the employer's policies impose a *significant burden* on pregnant workers"; *and*
- "that the employer's . . . [stated] reasons are *not sufficiently strong* to justify the burden but rather – when considered along with the burden imposed – give rise to an inference of discrimination."

135 S. Ct. at 1354 (emphasis added)

Young v. United Parcel Service, Inc. (cont'd)

For instance, sufficient question of fact on pretext where:

- "[E]vidence the employer accommodates a *large percentage of nonpregnant workers* while failing to accommodate a *large percentage of pregnant workers*."
- Court expressly notes that UPS's "multiple policies" for accommodating non-pregnant workers suggested its reasons for excluding pregnant workers "not sufficiently strong" and thus could create jury question

135 S. Ct. at 1354-55 (emphasis added)

Young v. United Parcel Service, Inc. (cont'd)

In sum, pretext analysis is one of *feasibility* and *fairness*:

> "[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?"

135 S. Ct. at 1354

Young v. United Parcel Service, Inc. (cont'd)

Final points about *prima facie* case, post-*Young*:

- It's not a high bar
- It's not the time for a merits analysis
- Specific individual comparators need not be identified; it's only whether the employer has a *policy* of accommodating any nonpregnant employees
- Comparators need not be *identical* to be "similar"

Young v. United Parcel Service, Inc. (cont'd)

Final points about proving pretext, post-*Young*:

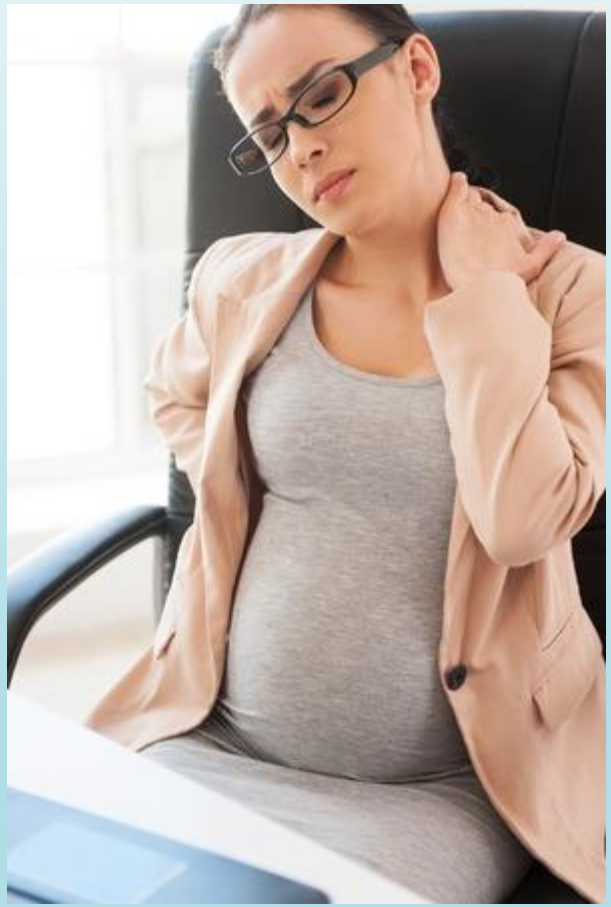
- Don't *only* need comparators; traditional methods for proving pretext remain
  - Statements showing animus
  - Treatment of plaintiff before and after request for accommodation
  - Employer's failure to comply with own policies
  - Shifting reasons
  - Reasons unworthy of credence

Young v. United Parcel Service, Inc. (cont'd)

- Don't need to show *all* comparators were accommodated and *all* pregnant workers were not – just a "large percentage"
  - Again – don't need *actual* comparators; use employer *policies* to show how comparators are (or would be) treated
  - Again – don't need *identical* comparators
- Burden of non-accommodation on plaintiff outweighs burden on employer of accommodating her

And remember: You don't need the *McDonnell Douglas* framework at all if you have direct evidence that pregnancy bias was sole or motivating factor in accommodation denial.

Post-*Young* Cases



Legg v. Ulster Cty., 820 F.3d 67 (2d Cir. 2016)

Reversing judgment for defendant that denied light duty to corrections officer, finding questions of fact as to pretext because of:

- Shifting reasons for denying light duty
- Significant burden on pregnant worker, who was forced on leave
- Reason for employer's policy of only accommodating workers with on-the-job injuries – per state WC law – not "sufficiently strong" to justify burden

Post-*Young* Cases, cont'd

Jackson v. J.R. Simplot Co. No. 16-8044, 2016 WL 7240136 (10th Cir. Dec. 15, 2016)

Affirming summary judgment for employer that denied accommodations to worker at fertilizer plant who feared chemical exposure, because:

- Plaintiff's doctor had disqualified her from all jobs exposing employees to chemicals – which defined all the available positions in the plant
- Five co-workers who got light duty jobs due to lifting restrictions not "similar" to plaintiff because they did not need to avoid chemical exposure
- The good news:
  - Plaintiff deemed to satisfy prima facie case without discussion
  - Court reaffirmed availability of traditional methods of showing pretext (e.g., departure from established policies)

Post-*Young* Cases, cont'd

Luke v. CPlace Forest Park SNF, LLC, No. 13-00402-BAJ-EWD, 2016 WL 4247592 (M.D. La. Aug. 9, 2016), *on appeal*, No. 16-30992 (5th Cir.) (summary judgment granted against certified nursing assistant with lifting restriction)

- At *prima facie* stage, required plaintiff to show others were *actually* accommodated *in the same manner* as plaintiff sought to be accommodated
- Did not require employer to engage in dialogue with employee about what accommodations were possible or available
- Rejected plaintiff's evidence that employer had previously accommodated her and other pregnant employees

Common Fact Patterns, Employer Defenses, & Undecided Issues

- Employer only accommodates workers injured on the job
  - *Legg v. Ulster Cty.*, 820 F.3d 67 (2d Cir. 2016) (judgment for employer reversed; not "sufficiently strong")
  - *Bray v. Town of Wake Forest*, No. 5:14-CV-276-FL, 2015 WL 1534515 (E.D.N.C. Apr. 6, 2015) (denying motion to dismiss because policy inconsistently applied)
  - Potential for disparate impact claim

Common Fact Patterns, Employer Defenses, & Undecided Issues cont'd

- Employer claims plaintiff didn't request accommodation, or that requested accommodation didn't exist
  - *Sanchez-Estrada v. MAPFRE PRAICO Inc.,* 126 F. Supp. 3d 220 (D.P.R. 2015) (granting summary where employer argued maternity uniform's expense made accommodation impossible)
  - *Luke v. CPlace Forest Park SNF, LLC*, No. 13-00402-BAJ-EWD, 2016 WL 4247592 (M.D. La. Aug. 9, 2016) (summary judgment against certified nursing assistant who allegedly only asked for "light duty," rather than other potential accommodations, such as lifting assistance)
  - Is the obligation on the plaintiff to request a particular accommodation? *All* possible accommodations? Or does the employer have the obligation to engage in dialogue?

Common Fact Patterns, Employer Defenses, & Undecided Issues, cont'd

How "similar" must a nonpregnant comparator be to the plaintiff?

- *Taylor v. C&B Piping, Inc.*, No. 2:14-cv-01828-MHH, 2017 WL 1047573 (N.D. Ala. Mar. 20, 2017) (denying motion to dismiss where plaintiff alleged only that male comparators with lifting restrictions were accommodated; finding she was not required also to allege "when [defendant] provided other alleged accommodations, how the requests were made, what medical conditions or impairments required them, the identity of [plaintiff's] comparators, how they were similarly situated, or how they were treated more favorably").

- *Luke v. CPlace Forest Park SNF, LLC*, No. 13-00402-BAJ-EWD, 2016 WL 4247592 (M.D. La. Aug. 9, 2016) (refusing to consider evidence of pregnant workers afforded accommodations because they were not "outside" the plaintiff's protected group, even though accommodated workers had "easy"/"normal" pregnancies while the plaintiff's pregnancy was "complicated").

Common Fact Patterns, Employer Defenses, & Undecided Issues, cont'd

- *Martin v. Winn-Dixie Louisiana, Inc.*, 3:13CV00682-JWD-SCR, 2015 WL 5611646 (M.D. La. Sept. 23, 2015) (finding two male comparators sufficiently "similar" because they "held the same job over roughly the same time period, at suburban Winn–Dixie stores, located within the same cultural and economic area," and two pregnant female comparators could be utilized to show pretext)
- *Jackson v. J.R. Simplot Co.*, No. 16-8044, 2016 WL 7240136 (10th Cir. Dec. 15, 2016) (plaintiff with doctor's directive to limit exposure to chemicals not "similar" to co-workers with lifting restrictions granted light duty).
- Are employers granted accommodations under the ADA "similar"?

Common Fact Patterns, Employer Defenses, & Undecided Issues, cont'd

What is the "substantial number" of non-pregnant comparators afforded accommodation that will prove pretext, per *Young*?

- *Bray v. Town of Wake Forest*, No. 5:14-CV-276-FL, 2015 WL 1534515 (E.D.N.C. Apr. 6, 2015) (two male officers granted light duty constituted sufficient proof to withstand motion to dismiss).
- *Martin v. Winn-Dixie Louisiana, Inc.*, 3:13CV00682-JWD-SCR, 2015 WL 5611646 (M.D. La. Sept. 23, 2015) (accommodation of four comparators, including two pregnant women, deemed sufficient to withstand summary judgment)

Common Fact Patterns, Employer Defenses, & Undecided Issues, cont'd

Are actual comparators necessary, post-*Young? Yes or no…*

No

- *Legg v. Ulster Cty.*, 820 F.3d 67 (2d Cir. 2016) (shifting reasons for why accommodations granted only to those with on-the-job injuries sufficient to create pretext)
- *Allen-Brown v. District of Columbia*, No. 13-1341, 2016 WL 1273176, at *11 (D.D.C. Mar. 31, 2016) (rejecting the idea that statistical evidence is required to demonstrate a "substantial burden" under *Young* and looking to "traditional evidence" proving pretext).
- *Lawson v. City of Pleasant Grove*, No. 2:14-cv-0536-JEO, 2016 WL 2338560 (N.D. Ala. Feb. 16, 2016) ("[T]he Eleventh Circuit has recognized that a PDA plaintiff need not necessarily present [comparator] evidence in order to prevail. Rather, a plaintiff 'does not have to show a comparator if she can show enough non-comparison circumstantial evidence to raise a reasonable inference of intentional discrimination.'") (Citation omitted.)
- *Martin v. Winn-Dixie Louisiana, Inc.*, 313CV00682JWDSCR, 2015 WL 5611646 (M.D. La. Sept. 23, 2015) (pregnant grocery store director survived MSJ because evidence showed employer accommodated not only men with temporary impairments but two other pregnant women)
- *LaSalle v. City of New York,* No. 13-civ-5109, 2015 WL 1442376 (S.D.N.Y. Mar. 30, 2015) (denying motion to dismiss where complaint by morgue van driver alleged accommodation of first pregnancy but denial of accommodation of second pregnancy; plaintiff could serve as *own* comparator)

Common Fact Patterns, Employer Defenses, & Undecided Issues, cont'd

Are actual comparators necessary, post-*Young*? *Yes or no…*

Yes

- *Anfeldt v. UPS,* No. 15-c-10401, 2007 WL 839486 (N.D. Ill. Mar. 3, 2017) (granting motion to dismiss claim by UPS worker challenging same policies at issue in *Young* because plaintiff could not identify specific comparators granted accommodations; policies themselves insufficient)
- *Mercer v. Virgin Islands Dep't of Ed*., No. 2014-50, 2016 WL 5844467 (D.V.I. Sept. 30, 2016) (granting judgment to defendant where plaintiff compared employer's failure to accommodate her post-childbirth restrictions with its granting of such accommodations during her pregnancy; court holds only non-pregnant workers are comparators)
- *Luke v. CPlace Forest Park SNF, LLC*, No. 13-00402-BAJ-EWD, 2016 WL 4247592 (M.D. La. Aug. 9, 2016) (court refuses to consider accommodation of plaintiff during her first pregnancy as comparator in evaluating failure to accommodate during her second pregnancy; also refuses to find accommodations made to other pregnant employees to be probative evidence of pretext regarding availability of accommodations)

Litigation Practice

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Legg v. Ulster County

- Pregnant county jail employee
- Doctor said no contact with inmates, accommodation denied because she did not have a work-related injury
- Trial court ruled after trial that policy was facially neutral
- Second Circuit applied *Young* and reversed

Legg v. Ulster County: Key Points

Key points from the Second Circuit ruling:

- Plaintiffs can use the *Young* prima facie case and can show pretext the traditional way
- Shifting explanations

Legg v. Ulster County: Key Points, cont.

Plaintiffs can also show pretext the *Young* way: Burden

- Compare the number of pregnant employees denied accommodations to the total number of pregnant employees (not the number of all employees)
- Health scare and forced leave can also be a significant burden
- Where non-accommodation places pregnant employees at risk of violent confrontations, the risk can be a significant burden

Legg v. Ulster County: Key Points, cont.

- Jury could conclude that employer's reason for non-accommodation was not sufficiently strong to justify the burdens on plaintiff
  - Employer may have been motivated by cost (insufficient; but partial motivation is okay)
- Accommodation of few non-pregnant employees might undermine intent

Traditional Ways to Show Pretext

Challenge the employer's justification:

- Factually wrong
- Did not actually motivate the denial of accommodation
- Disparate treatment

Other Traditional Ways to Show Pretext

- Negative comments about pregnancy, maternity leave, or motherhood
- Shifting explanations for adverse action
- Employer's failure to follow procedures
  - In *Jackson v. J.R. Simplot*, plaintiff did not have evidence to show regular procedures existed, or that they weren't followed

Legg v. Ulster County: Remand

- At trial: verdict for employer on disparate treatment claim
- Disparate impact claim still pending before judge
  - No intent necessary
  - Disparate impact on women, no business necessity
- DI claims can be tricky; WorkLife Law is a resource

Gathering Evidence: What's Relevant?

Employer policies

- Accommodation policies (disability, worker's comp, etc.)
- Safety policies to prevent worker injuries
- Policies about transfers, flexible work (shows what alternatives are possible)

More Evidence

Employer knowledge of plaintiff's condition and ability to work

- Requests for accommodation
- Medical certifications
- Observations and conversations

More Evidence

- What accommodations were possible?
- What positions were open?
  - Was plaintiff qualified for open position(s)?
- What assistance was available?
- What job modifications could have been made?

More Evidence

- Were non-pregnant employees accommodated?
  - When? How?
  - What were their positions?
  - In what ways were they unable to work?
  - Why were they accommodated (law, policy, CBA)?
- Work rosters, documents related to requests for accommodation

More Evidence

Would accommodation have burdened the employer?

- Defense for employer to make
- Be prepared to rebut it
  - Employer provided similar accommodations to others
  - Burden on plaintiff outweighed burden on employer
  - Refusal to accommodate usually not justified by cost or convenience

More Evidence

How did the denial of accommodation affect the plaintiff?

- Financially
- Medically
- Emotionally

More Evidence

- Were other pregnant employees also denied accommodation?
- How did denial of accommodation affect them?

More Evidence

Evidence relevant to damages:

- Medical records
- Therapist records
- Testimony about psychological harm
- Costs
- Lost wages, benefits, retirement
- Future wages
- Mitigation efforts

Discovery Tips

Depositions

- Supervisor:
  - Knowledge of plaintiff's condition
  - Job duties plaintiff could still do
  - Ability to modify job duties, transfer, provide light duty
  - Other employees who received accommodations and what their ability to work was
  - Employer policies and practices with respect to accommodation
  - Plaintiff's request for accommodation and response
  - Reason for response
  - Evidence related to traditional pretext

More Discovery Tips

Depositions, cont.

- Non-pregnant employees who were accommodated
  - What their condition or inability to work was
  - What their accommodation was
  - The process by which they obtained the accommodation
  - Their position
  - Their supervisor
- Pregnant employees who were accommodated
  - Same as left, plus whether they had pregnancy-related medical conditions

More Discovery Tips

Depositions, cont.

- Corporate representative (Rule 30(b)(6)):
  - Accommodations provided to non-pregnant employees
  - The non-pregnant employees' ability to work
  - Their positions
  - Availability of particular accommodations
  - Process used to determine whether accommodations were available for plaintiff
  - Why accommodation was denied
  - Evidence to dispute employer's proffered reason for not accommodating
  - Evidence related to any claim of burden

Jury Instructions

- No pattern instructions yet
- Use traditional instructions, particularly for intent
- Add *Young* concepts to instructions

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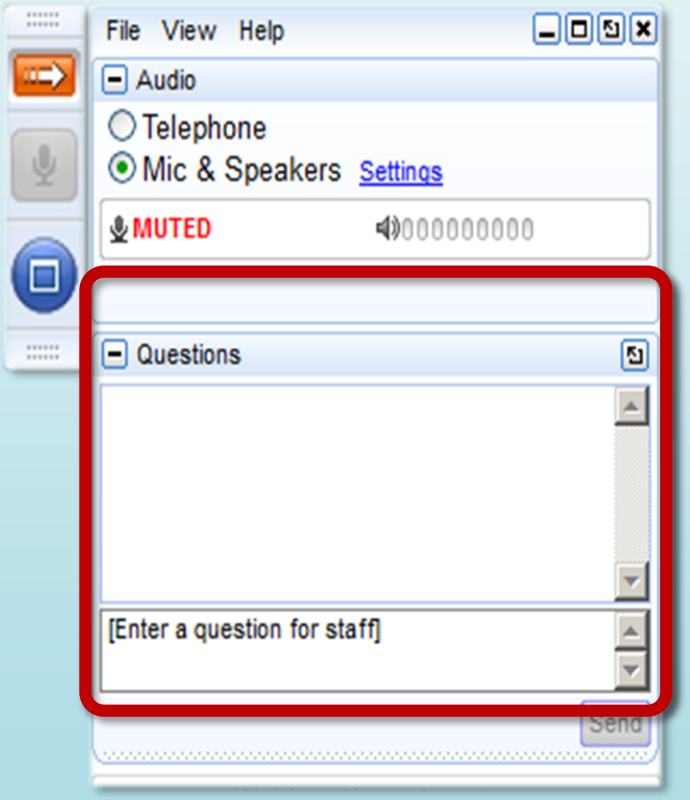

Breastfeeding and Lactation Accommodation Claims

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Evolution of Lactation Coverage under Title VII

Old case law: Some court cases said "sex" did not include lactation—lactation is not a "medical condition" that's "related" to pregnancy and childbirth

- *Wallace v. Pyro Mining*: breastfeeding not medically necessary
- *Martinez v. NBC*: not all women are breastfeeding—and no comparable men—so this is not sex discrimination
- *EEOC v. Houston Funding* (district court): Lactation not related to pregnancy because the woman is no longer pregnant

Evolution of Lactation Coverage under Title VII cont.

More recent cases have recognized that it is covered:

- EEOC v. Houston Funding II, Ltd.:
  - Lactation, like pregnancy is sex-linked, so covered as sex discrimination under reasoning of dissent in Gilbert, majority in Newport News
  - Lactation is a "medical condition": includes any physiological condition, and lactation is a physiological process caused by hormonal changes associated with pregnancy and childbirth
  - But fn (pre-Young): no special accommodations necessary
- Other courts have focused on adverse action, not accommodation, to find employer liability
- EEOC enforcement guidance states that it is covered

Evolution of Lactation Coverage under Title VII cont.

Hicks v. City of Tuscaloosa:

- Lactation is a medical condition related to pregnancy
- Denial of private space did not violate Title VII because no comparators
- Job reassignment could have been retaliatory
- Refusal to assign to desk job may be a denial of an accommodation given to others
- Being forced to choose between patrolling without a vest and giving up breastfeeding amounted to constructive discharge
- Verdict for plaintiff, currently on appeal

Evolution of Lactation Coverage under Title VII cont.

Allen-Brown v. District of Columbia:

- Similar facts to *Hicks*
- Applied *Young* prima facie case to claim of failure to accommodate lactation with limited duty assignment
- Lactation is covered by the PDA as a related medical condition
- *Skidmore* deference to EEOC Guidance
- That continuation of breastfeeding is a choice is not relevant to analysis
- Used traditional evidence of pretext, including that explanations were inconsistent and that other officers were provided accommodation
- Denied summary judgment and the case settled

Pleading & Proving Breastfeeding Claims

- Look for facially discriminatory policies—*direct discrimination claims, such as:*
  - No pumping while on duty
  - "Breastfeeding does not qualify for medical leave"
- Consider pattern & practice
  - Requests for light duty/medical leave from breastfeeding moms routinely denied

Pleading & Proving Breastfeeding Claims cont.

McDonnell Douglas framework: *Prima facie* case

- Issues arise under "qualified for the position" and "member of protected class" even after *Houston Funding*
- Adverse action:
  - Can be outright discrimination, e.g. *Houston Funding*
  - Constructive Discharge: *Hicks v. Tuscaloosa* or *Ames v. Nationwide* ("go home and be with your babies")
  - Failure to accommodate*, Allen-Brown*
    - Failure to engage in interactive process
    - CASES PREDATING *YOUNG* HOLDING NO CLAIM FOR FAILURE TO ACCOMMODATE ARE NO LONGER GOOD LAW

Pleading & Proving Breastfeeding Claims cont.

Comparators for disparate treatment claims:

- Other individuals provided light/modified duty, additional breaks
- Policies that allow for light duty or reasonable accommodations for employees injured on the job or with disabilities
  - *Gonzales v. Mariott* (denying MTD where employee alleged that others including individuals with disabilities or medical conditions requiring breaks, as well as other breastfeeding women, were provided breaks but she was not)

Pleading & Proving Breastfeeding Claims cont.

Pretext analysis:

- Traditional evidence of discriminatory motive like sex stereotypes or negative statements about breastfeeding—"can't you just feed your child formula?"
- *Young* framework:
  - Others provided accommodation (or engaged in dialogue)
  - Degree of burden: being forced onto unpaid leave, forced to terminate breastfeeding, being forced to endure pain, reduction in milk supply, and possible infection for inability to pump

“Reasonable Break Time for Nursing Mothers Act”

- Affordable Care Act Amendment to Fair Labor Standards Act
- Covered employers must provide “reasonable break time” and a “private location other than a restroom each time such employee has need to express” for 1 year after birth
- Pay not required, but employees can use paid breaks
- Affirmative “undue hardship” defense for employers with 50 or fewer employees

Nursing Mothers Act Limitations

- Only applies to those covered by FLSA overtime protections
- Categorically excludes many types of workers
- Lacks a strong enforcement mechanism: Remedies only for **retaliation** or **unpaid wages/overtime**
  - *Lico v. TD Bank*: plaintiff missed work to nurse, compensable
  - *Hicks*: Plaintiff could not recover even though she was deprived of wages by being constructively discharged because compensation limited to unpaid "minimum wages and overtime"
- Does not protect against straight-up discrimination:
  - The "I'm breastfeeding" → "You're fired" scenario
  - Sexual harassment

State Laws

28 states, DC, and Puerto Rico have workplace breastfeeding laws or expansive pregnancy accommodation laws:

- Arkansas, California, Colorado, Connecticut, Delaware, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Minnesota, Mississippi, Montana, New Mexico, New Hampshire, New York, North Dakota, Oklahoma, Oregon, Rhode Island, Tennessee, Texas, Utah, Vermont, Virginia, Washington and Wyoming
- National Conference of State Legislatures: http://www.ncsl.org/research/health/breastfeeding-state-laws.aspx

Common Statutory Language

State laws typically require employers to:

- Provide reasonable breaks for expressing milk
- Provide private, clean spaces other than bathrooms for doing so
- Prohibit discrimination or retaliation for requesting or using break time to express milk
- Frequently do not specify enforcement mechanism or provide private right of action

Litigation Tips for Breastfeeding Accommodation Cases

- Same issues on pleading policies/comparators
- Consider both FLSA and Title VII/parallel state antidiscrimination law claims
- Consider whether there's retaliation (both FLSA and Title VII)
- Constructive discharge issues
- Include state "affirmative breastfeeding accommodation/PWFA" claims

Litigation Tips for Breastfeeding Cases cont.

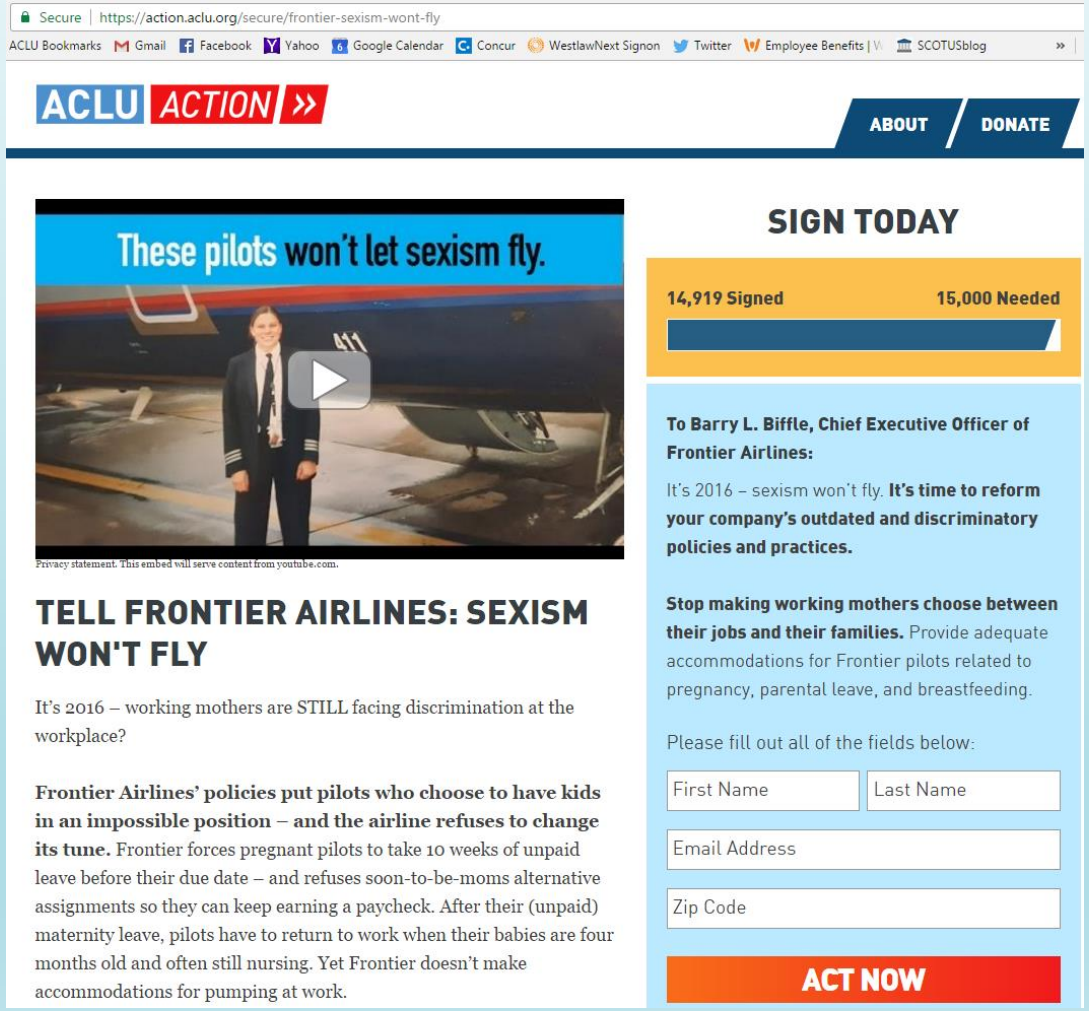
- Educate employer, EEOC investigators, opposing counsel, court, and jury about facts:
  - Why breastfeeding is important to many women and to your client
  - Medical basis for preferring breastfeeding: recommended for **at least a year.** Use public health and public policy statements by APA, APHA, Academy of Breastfeeding Medicine, WHO, Surgeon General, and others
  - Mechanisms of lactation as related to pregnancy
  - Physical need to express milk when away from baby—focus on needs of the **woman**, not the baby
  - Consequences for **woman** of not pumping on a regular schedule
  - What a breast pump is and how it works
- Include these allegations *in your pleadings* and prepare to submit evidence to prove them
- Use expert witnesses: Physicians and/or Int'l Board Certified Lactation Consultants

Litigation Tips for Breastfeeding Cases

Don’t forget disparate impact:

- A critical tool if there are *no* policies or your client does not know of any comparators
- Denominator is all women who are breastfeeding—in the alternative, all women affected by pregnancy
- Cases involving failure to provide bathroom facilities to women in male-dominated fields like construction
- Rebut business necessity: think creatively and create record of less discriminatory alternatives—use demand letters

Example: ACLU Frontier Airlines Case



- Inadequate maternity leave forces them back to work at 4 months—breastfeeding recommended for at least a year by all major medical associations
- No on-the-job accommodations, denied "physiological needs breaks"
- No accommodations in "outstations"
- Denied access to medical or personal leave

Example: Frontier Airlines Case

Legal claims:

- Title VII & CADA: disparate treatment *and* disparate impact
- Colorado Pregnant Workers Fairness Act (PWFA)
- Colorado Workplace Accommodations for Nursing Mother's Act (WANMA)
- (Exempt from FLSA so no federal "Nursing Mothers Act" claim)

Other Ways to Plead and Prove Accommodation Claims

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PDA: Harassment

Example: Refusing accommodation to force employee to quit

Must show:

- Objectively and subjectively hostile environment
- Severe or pervasive harassment
- Occurred because of pregnancy

ADA: Disability

- ADA amendment effective 2009
- Healthy pregnancy not a disability
- Temporary impairments can be a disability
- “Substantially limits” downplayed
- “Major life activity” expanded to include more activities, major bodily functions
- Note: cases relying on pre-amendment ADA may not be good law

ADA: Disability, cont.

An employee may have a disability that requires accommodation if:

She has an **impairment** (e.g., a pregnancy related condition such as prenatal depression or carpal tunnel syndrome)

That **substantially limits** (not a restrictive standard; *i.e.* limits compared to the general population)

ADA: Disability, cont.

A **major life activity** (including caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working." EEOC added: sitting, reaching, and interacting with others)

OR

A **major bodily function** (including the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions; EEOC added: special sense organs, skin, genitourinary, cardiovascular, hemic, lymphatic, and musculoskeletal functions).

ADA: Disability, cont.

Now the following can be disabilities:

- Pregnancy-related conditions
- Childbirth-related conditions (*Wanamaker*)
- Open question: possibly lactation
  - *Allen-Brown* opens the door for an ADA claim based on breastfeeding: "this condition… can be quite disabling"
  - *Brooks v. BPM* assumed diminished milk production was a disability

ADA: Disability, cont.

Example: Pregnant employee cannot stand for more than a short time because her feet are very swollen, which causes pain and numbness

- Old law: No disability because not substantially limited in a major life activity
- Amended law: May have a disability because she is substantially limited compared to the general population in her ability to stand, which is a major life activity
  - (Additionally, swelling involves the major bodily system of the cardiovascular system)

ADA: Disability, cont.

Example: Pregnant employee with high blood pressure at end of her pregnancy needs bed rest

- Old law: Short duration, high blood pressure isn't rare in pregnancy, so no disability
- Amended law: High blood pressure can be a disability even if it is expected to last just a few weeks until delivery, irrelevant that is related to pregnancy

ADA: Disability, cont.

Notes:

- Plaintiff must be otherwise qualified for job
- Employer and employee must engage in interactive process to find accommodation
  - Employee not entitled to accommodation of choice
  - Employee's duty to initiate unless need is obvious
  - Employer can request medical certification if requests of all employees seeking accommodation
- Employer can claim undue hardship

FMLA

- Leave under the FMLA can be an accommodation
- BUT:
- It should be an accommodation of last resort, if no other accommodations will enable the plaintiff to work
- FMLA provides that prenatal conditions (morning sickness) and medical appointments are covered
- Intermittent leave is possible

States with Pregnancy Accommodation Laws:

Alaska
California
Colorado
Connecticut
Delaware
District of Columbia
Hawaii
Illinois
Louisiana
Maryland
Minnesota
Nebraska
New Jersey
New York
North Dakota
Rhode Island
Texas
Utah
West Virginia

State Laws: California

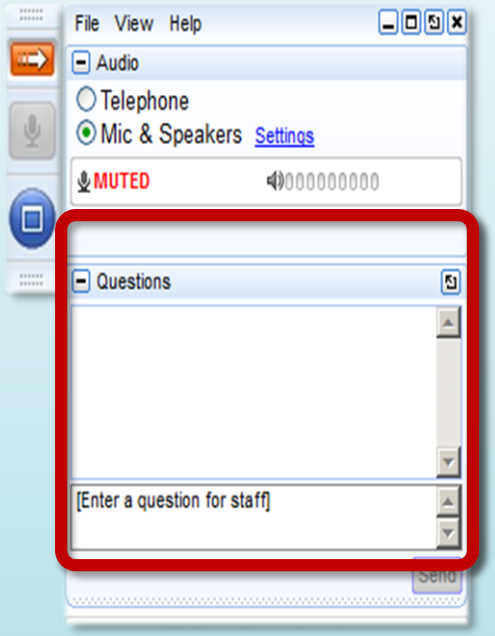
- Employer cannot refuse to provide reasonable accommodations to an employee for a condition related to pregnancy, childbirth, or related medical conditions
- Californians can also receive a transfer to a less strenuous or hazardous position, if the request is reasonable

Questions? Comments?

Type questions in the questions box on your webinar screen

-- Or --

Email them to questions@worklifelaw.org



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