U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

Office of Commissioner Chai R. Feldblum

Statement of Commissioner Chai R. Feldblum on Approval of the Enforcement Guidance on Pregnancy Discrimination and Related Issues
July 14, 2014

I am pleased that the Commission has released today Enforcement Guidance on Pregnancy Discrimination and Related Issues (hereinafter the "Enforcement Guidance"). http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm

The Commission has been a leader in resolving charges of pregnancy discrimination and in litigating cases of pregnancy discrimination where necessary. Our Strategic Enforcement Plan for 2012-2016 also identifies the issue of accommodations for pregnant workers as an "emerging and developing" issue for focused attention by the Commission.

One essential element for ensuring focused attention on an issue is to provide updated enforcement guidance. In February 2012, the Commission held a hearing on pregnancy and caregiving where we heard from a number of witnesses regarding the type of discrimination faced by pregnant workers, the protection that existing laws, such as the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA), should be providing such workers, and the need for updated guidance to make such protections clear to both employees and employers. See http://www.eeoc.gov/eeoc/meetings/2-15-12/index.cfm for transcript and testimony from the February 2012 hearing.

At our February 2012 hearing, in both my opening and closing statements, I indicated my hope and anticipation that the Commission would quickly issue updated enforcement guidance in this area to convey our interpretation of these laws. See Excerpted Comments of Commissioner Feldblum at February 2012 hearing at http://ow.ly/z8Ozd.

Since our February 2012 hearing, I have been a forceful advocate within the Commission for the development and adoption of guidance that would address the accommodations that employers are legally obligated to provide to pregnant workers under the PDA and the ADA. I believed this guidance was particularly important in light of decisions by several circuit courts of appeals misinterpreting (in my view) the words of the PDA. The case of *Young v. UPS*, currently before the Supreme Court for review, had not been decided by the Fourth Circuit Court of Appeals at the time of our February 2012 hearing.

I am very pleased that, two years after that hearing, our Enforcement Guidance was issued on July 14, 2014. (See Appendix A for a brief timeline).

The guidance we release today covers a range of important issues. I urge readers to review all of the sections carefully. I would like to comment specifically, however, on the area in which the

Commission has adopted a position contrary to that reached by several circuit courts of appeal—the scope of the second clause of the PDA.

I worked extensively on this section and my conclusions in this area were shaped, in large part, by my eighteen years as a law professor, specializing in the area of statutory interpretation and agency regulation. In addition, my staff and I benefited from exchanges with the offices of the Chair, the Vice Chair, the General Counsel and the Legal Counsel. For those interested in a comprehensive historical perspective, I commend the law review article by Deborah Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 UC Davis L. Rev. 961 (2013). As a former law professor, I actually still enjoy reading law review articles and this one has much helpful information.

The Commission's position in its Enforcement Guidance is simple and relies on a plain text reading of the PDA —the words of the statute require that employers treat pregnant employees the same as they treat other employees similar in their ability or inability to work.

Under the PDA, "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. §2000e(k). There are no qualifications in this statement and no restricting or clarifying definition of the phrase "similar in their ability or inability to work."

As the Commission's Enforcement Guidance indicates, we believe that if an employer provides accommodations to employees under medical restrictions due to on the job injuries or non-job related disabilities, the text of the PDA requires that the employer provide the same accommodations to pregnant workers who are similarly limited in their ability or inability to work.

This view is consistent with the Commission's long-standing interpretation of pregnancy discrimination – both before and after enactment of the PDA.

The Commission's guidelines on sex discrimination issued before the Supreme Court decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976) stated that "[w]ritten and unwritten employment policies and practices . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities." 29 C.F.R. §1604.10(b) (1973). Similarly, in an appendix issued after Congress overturned the Supreme Court's decision in *Gilbert* through enactment of the PDA, the Commission advised that "[i]f other employees temporarily unable to lift are relieved of [job] functions, pregnant employees also unable to lift must be temporarily relieved of the function." 29 C.F.R. Pt. 1604 App. ¶ 5.

The Commission has repeated this position in other guidance materials as well. *See* 2 EEOC Compliance Manual § 626.1(c) (1983) ("the PDA added to the already-existing rights [to be free from pregnancy-based disparate treatment] the right to receive equal treatment with regard to disability and sick-leave benefits."); EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities II.B (May 2007) ("An employer also may not treat a pregnant worker who is temporarily unable to perform some of her job duties because of pregnancy less favorably than workers whose job performance is similarly restricted

because of conditions other than pregnancy.") *id.* (Example 12: stating that an employer who refuses to modify lifting duties for a pregnant woman violates the PDA when it modifies lifting duties for non-pregnant employees).

Indeed, as the Senate Report to the PDA itself noted, the bill "reject[ed] the view that employers may treat pregnancy [and the limits imposed by pregnancy] . . . without regard to its functional comparability to other conditions." Under the PDA "the treatment of pregnant women in covered employment must focus . . . on the actual effects of [pregnancy and related medical conditions on] their ability to work" and "[p]regnant women who are able to work must be permitted to work *on the same conditions as other employees*." S. Rep. No. 95-931 at 4 (emphasis added).

Several courts have confused the inter-relationship between the two primary clauses of the PDA. The latest court to do so has been the Fourth Circuit in *Young v. United Parcel Service, Inc.*, 707 F. 3d 437 (4th Cir. 2013). Now that the Supreme Court has accepted petitioner's request for certiorari in this case, we can look forward to the Justices of the Supreme Court delving into this statutory interpretation question for themselves.

In *Young*, the Fourth Circuit observed that although "[s]tanding alone, the second clause's plain language is unambiguous" and "[c]onfusion arises when trying to reconcile language in the first clause suggesting the PDA simply expands the category of sex discrimination (without otherwise altering Title VII), and language in the second clause suggesting the statute requires different—perhaps even preferential—treatment for pregnant workers," the court concluded that the second clause could not be read to provide any independent meaning due to the "anomalous consequences [such a] position would cause: pregnancy would be treated more favorably than any other basis, including non-pregnancy related sex discrimination, covered by Title VII." *Id.* at 447.

The Fourth Circuit is not alone in this conclusion. The Fifth, Seventh, and Eleventh Circuits have issued similar decisions. *See Serednyj v. Beverly Healthcare LLC,* 656 F. 3d 540 (7th Cir. 2011); *Spivey v. Beverly Enters., Inc.*, 196 F. 3d 1309 (11th Cir. 1999); *Urbano v. Continental Airlines, Inc.* 138 F.3d 204 (5th Cir. 1998). The Sixth and Tenth Circuits, while at least recognizing some role for the second clause in the statute, have also adopted legal theories that downplay the significance of the plain meaning of that text. *See Latowski v. Northwoods Nursing Ctr.*, 549 Fed. Appx. 478 (6th Cir., 2013); *Reeves v. Swift Transp. Co.*, 446 F.3d 637 (6th Cir., 2006); *EEOC v. Horizon/CMS Healthcare Corp*., 220 F.3d 1184 (10th Cir., 2000); *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996).

These decisions all rest on the faulty notion that the two clauses of the PDA must somehow be integrated and then reconciled. But as the House Report on the PDA points out, "[the PDA] unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, *and* specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work." H. Rep. 95-948 at 3 (emphasis added). "The 'same treatment' may include employer practices of transferring workers to lighter assignments." *Id.* at 5.

Thus, there is no need to engage in the metaphysics of integrating and then reconciling these two clauses. The first clause states that discrimination on the basis of sex encompasses discrimination

on the basis of pregnancy. That clause overturns the Supreme Court's contrary conclusion in the *Gilbert* case. The second clause then lays out a standard by which the treatment of pregnant workers is to be compared with the treatment of other workers—i.e., pregnant workers must be treated the same as other persons similarly limited in the ability or inability to work.

Unless Congress indicates in some manner that the second clause is subservient to the first clause, the second clause must stand on its own. And not only is there no indication in the plain language of the statute of such subservience of the second clause to the first clause, but the legislative history (as described above) indicates that Congress viewed these clauses as two independent statements of law.

In a case raising a different issue, the Supreme Court explicitly warned that courts should not "read the [PDA's] second clause out of the Act." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 205 (1991). A central canon of statutory interpretation is that courts should "give effect, if possible, to every clause and word of a statute, avoiding, if it may be, any construction which implies that the legislature was ignorant of the meaning of the language it employed." *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). Consequences that a court might find uncomfortable—such as the expanded access to certain accommodations for pregnant workers similar in their inability to work as other workers—do not amount to a sufficient excuse for ignoring this most basic statutory interpretation rule.

I have the highest respect for my colleagues, Commissioner Lipnic and Barker, and I am pleased that both have issued public statements making their substantive positions clear. I would have welcomed engaging with them in a public meeting on the interesting matters of law they raise in their statements.

Nevertheless, with all due respect, I must take issue with two comments made in these statements.

First, both Commissioners Lipnic and Barker suggest that the Commission should now wait for the Supreme Court to issue its decision in the case of *Young v. UPS* before presenting our views on the meaning of the words of the PDA. I strongly disagree.

Under our basic constitutional structure, Congress is responsible for passing a law; an agency that executes the law is responsible for issuing guidance to advise those with rights and responsibilities under the law; and courts, including the Supreme Court, have the final authority and responsibility to interpret the words of a statute as applicable in a particular case.

I would have preferred that the Commission issue updated enforcement guidance shortly after our hearing in February 2012. Indeed, perhaps the judges on the Fourth Circuit panel hearing the case of *Young v. UPS* might have welcomed the opportunity to review our analysis before the panel decided the case on January 9, 2013. At the very least, however, we owe it to the Supreme Court to present the results of our process. Under our constitutional system, doing so does not constitute "getting out ahead" of the Supreme Court; rather, it constitutes catching up with our responsibilities under Article II of the Constitution.

Second, Commissioner Barker noted in her memo to the Commission (that she has now made public with her statement) that the guidance "elevat[es] Pregnant Employees to a kind of super-status above that of individuals with disabilities" and, as a result, is a "insult to the disability

community and their years of working for legislation that ensured them the reasonable accommodations that they are now entitled to received by law."

Equal treatment, regardless of an individual's physical or mental limitation or perceived limitation, has always been at the heart of the disability rights movement. The Commission's enforcement guidance released today does nothing to undercut that goal. If anything, the guidance furthers that goal by explicating the accommodations that are required for an additional group of workers that Congress was also concerned about – pregnant workers.

The guidance the Commission issued today explains the protection that we believe exists in the plain words of the PDA. As a person with a disability, if I were asked whether providing accommodations to others with limitations similar to people with disabilities is a good or a bad thing, I would say that it is a good thing. I am confident that my colleagues in the disability community would feel the same.

Appendix A – Timeline of Public Actions and Requests for Action on Enforcement Guidance Regarding Pregnancy

February 8, 2012 – EEOC announces that it will hold a public meeting on the subject of pregnancy discrimination and caregiver issues at 9:30 am on Wednesday, February 15, 2012.

February 15, 2012 – EEOC holds a public meeting on pregnancy discrimination and caregiver issues where numerous participants advised the Commission on the need for updated guidance in this area. At the meeting, and in a press release issued after the meeting, the Commission states that it is holding the meeting record open for 15 days for public comment.

July 18, 2012 – EEOC holds a public meeting to solicit views on the Commission's Strategic Enforcement Plan. Pregnancy discrimination is mentioned as a potential enforcement priority. The Commission states at the meeting, and in a press release issued after the meeting, that it will hold the meeting record open for 15 days for public comment.

September 4, 2012 – EEOC releases a draft Strategic Enforcement Plan for a two-week public comment period. The draft Plan includes "accommodation of pregnancy" as a priority issue for the Commission in FY2012-FY2016. The draft notes that strategies for addressing priorities may include "a multi-pronged, coordinated enforcement, education and outreach, [and] research and policy effort."

December 18, 2012 – EEOC approves the Strategic Enforcement Plan for 2012-2016 which includes "accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA)" as a national priority.

June 17, 2013 – A Better Balance and the National Women's Law Center release a report on pregnancy discrimination titled "It Shouldn't Be a Heavy Lift: Fair Treatment for Pregnant Workers." The report calls for the EEOC to "issue strong and clear guidance on employers' legal obligation to accommodate pregnant workers" as a way to "follow through" on its recognition of pregnancy accommodations as a national enforcement priority.

June 26, 2013 – The National Women's Law Center submits a letter to the Commission signed by 4,802 persons urging the Commission to develop and issue guidance on pregnancy discrimination.

February 26, 2014 – The National Women's Law Center requests that its members and affiliates send messages to the EEOC asking the Commission to take "swift action" on policy guidance that "has been promised for many months."

May 19, 2014 – The U.S. Solicitor General submits a brief for the United States as Amicus Curiae in the case of *Young v. UPS*, No. 12-1226, noting that the "EEOC is currently considering the adoption of new enforcement guidance on pregnancy discrimination that would address a range of issues related to pregnancy under the PDA and the ADA."

July 14, 2014 – The Commission releases Enforcement Guidance on Pregnancy Discrimination and Related Issues.