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Afterbirth: The Supreme Court's Ruling in *Young v. UPS* Leaves Many Questions Unanswered

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Verdict

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[content/uploads/2013/11/scotus_building.jpg](https://verdict.justia.com/wp-content/uploads/2013/11/scotus_building.jpg)) As we wrote in [Part One](https://verdict.justia.com/2015/03/31/forceps-delivery-the-supreme-court-narrowly-saves-the-pregnancy-discrimination-act-in-young-v-ups) (<https://verdict.justia.com/2015/03/31/forceps-delivery-the-supreme-court-narrowly-saves-the-pregnancy-discrimination-act-in-young-v-ups>) of this series, the Supreme Court just ruled, by a vote of 6-3, that Peggy Young, a pregnant UPS driver who was denied a light-duty accommodation that was routinely made available to other employees with similar lifting restrictions, should have the opportunity to prove on remand that this denial was discriminatory.

In this case, [Young v. UPS](https://supreme.justia.com/cases/federal/us/575/12-1226/) (<https://supreme.justia.com/cases/federal/us/575/12-1226/>), the Court considered the proper scope of the second clause of the Pregnancy Discrimination Act of 1978 (“PDA”), a law that has opened workplace doors to pregnant women but has faltered in the last decade under a series of narrow rulings by lower federal courts. The second clause states that employers shall treat pregnant employees the same as those “not so affected” but “similar in their ability or inability to work.” Young argued that UPS’s policy, which permitted light-duty accommodations to workers who were injured on the job, who were covered by the Americans with Disabilities Act, or who lost their DOT certification, violated this clause because it did not allow the same accommodation for her.

The Court rejected Young's claim that she was entitled to the same accommodations provided to any other similarly restricted workers, but also rejected UPS's argument that all "pregnancy-blind" policies were valid. Instead, it ruled that second-clause claims should be handled under the *McDonnell Douglas* proof structure, in which courts examine employer actions for evidence of discrimination. By pointing to a policy that provided accommodations to some similarly restricted workers, but not to pregnant women, Young had satisfied the prima facie case of discrimination. The burden now falls on UPS—at trial on remand—to articulate a legitimate, non-discriminatory reason for its refusal to accommodate Young's pregnancy-based lifting restriction. And when it attempts to do so, the majority wrote, it cannot use cost or convenience as an excuse. At the final stage, the fact finder must decide whether the employer's reasons are sufficiently weighty given the burden on pregnant women in that workforce. If not, the imbalance can give rise to an inference of intentional discrimination—and a violation of the PDA.

This ruling restores important protections under the PDA that lower courts had eviscerated, but it also leaves many questions unanswered. We explored some of these questions in the first part of this series—namely, how many comparators must be eligible for an accommodation before the PDA's right of comparative accommodation is triggered, what justifications for denying pregnant women accommodations will constitute "legitimate, non-discriminatory reasons," and what proof might suffice to show pretext. But those are only the tip of the iceberg. We explore here two additional questions: (1) How will the *McDonnell Douglas* proof structure operate in this context; and (2) what is the impact of the Court's refusal to follow the EEOC's interpretation of the second clause of the PDA?

“Direct” Versus “Indirect” Evidence: An Unhelpful (and Unnecessary) Dichotomy

In the *Young* opinion, the Court persists in a puzzling separation between direct and indirect evidence, distinguishing a method that relies on so-called “direct” evidence of discrimination from an “indirect” method that relies on the *McDonnell Douglas* pretext proof structure to smoke out discrimination. It is perplexing that the Court is so bent on categorizing evidence as either direct or indirect, with consequences for the applicable proof model flowing from the categorization.

Years ago in *[Desert Palace v. Costa](https://supreme.justia.com/cases/federal/us/539/90/)* (<https://supreme.justia.com/cases/federal/us/539/90/>) (2003), discussed [here](http://writ.corporate.findlaw.com/grossman/20030617.html) (<http://writ.corporate.findlaw.com/grossman/20030617.html>), the Court rightly recognized that direct evidence was not necessary to invoke the mixed-motive proof model for proving discrimination. This method, which was introduced in the Court's 1989 opinion in *[Price Waterhouse v. Hopkins](#)*

[\(https://supreme.justia.com/cases/federal/us/490/228/\)](https://supreme.justia.com/cases/federal/us/490/228/), and codified in the 1991 Amendments to Title VII, allows a discrimination plaintiff to hold an employer liable for discrimination as long as the protected characteristic, such as sex or pregnancy, was a motivating factor in the employer's decision to take adverse action. The employer might avoid paying money damages if it can show it would have taken the same action even apart from reliance on the protected characteristic, but it would still be liable for injunctive relief and attorneys' fees.

Since *Costa*, both direct and indirect evidence have been permitted to support a finding that the plaintiff's protected class status was a "motivating factor" for the decision. Prior to that decision, case law in the lower courts often used "direct evidence" as the gatekeeper for accessing the mixed motive framework, with confusing and incoherent results. Their efforts illustrated the futility of such labels in discrimination cases. It is hard to envision what would "directly" prove the employer's reason for acting. Anything short of an admission in litigation requires some set of inferences to prove the ultimate question. As a result, lower courts spent much ink and labored rationalizations in unsuccessfully attempting to coherently walk that line. Reviving a significance in the classification of evidence as either "direct" or "indirect" for purposes of pregnancy discrimination claims does not strike us as a good idea. Nor is it necessary. It has long been clear that both indirect and direct evidence can support a finding of pretext through the *McDonnell Douglas* method, so there is no reason to label a piece of evidence one or the other.

The Court's insistence on parsing direct and indirect evidence here seems to be window dressing to justify channeling PDA second-clause claims through the *McDonnell Douglas* proof method, instead of a one-step inquiry that would reveal pregnancy discrimination simply from the employer's policies treating pregnancy different from many other conditions. Filtering claims like *Young's* through the *McDonnell Douglas* method is a cumbersome way of proving disparate treatment in this kind of claim, which largely rests on the different treatment of pregnancy from other conditions affecting ability to work. As we explain below, however, the pretext model can—however meanderingly—ultimately reach the kind of disparate treatment of pregnancy that the second clause of the PDA prohibits. But labeling evidence as either "direct" or "indirect" does not advance the inquiry, nor should it interfere with the plaintiff's ability to prove discrimination. Any evidence, direct or indirect, may support an inference that the employer's reason is a pretext for discrimination.

Intent as the Differential Treatment of Pregnancy—Not as Conscious Animus

A disturbing trend in recent discrimination cases has been to turn the search for intentional discrimination into a search for animus—rather than simply deeming

differential treatment to be discrimination, as Title VII clearly provides. This opinion does take care not to turn the search for discrimination into a search for a subjective mindset of animus, but its language has the potential for misinterpretation. Hopefully the Court's use of the *McDonnell Douglas* proof structure will not inadvertently lead lower courts to require proof of hostility or bias towards pregnant women; properly understood, the Court's framework enables proof of differential treatment to violate the statute.

Although the Court does describe the ultimate issue as whether the plaintiff's protected trait "actually motivated" the employer, the opinion as a whole makes clear that this does not mean animus, but the mere fact of different treatment. A policy might cover all health conditions employees may have except for pregnancy, not because the employer has animus against pregnancy as a condition or against workers who become pregnant, but simply because the employer never thought about pregnancy at all. Under the Court's opinion, that policy would violate the statute even if it was passed out of indifference as opposed to animus. The Court describes the ultimate issue as turning on "whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination." As this passage makes clear, the intentional discrimination comes from the employer's treatment of pregnancy; the decision maker's subjective feelings toward pregnancy—hostile or amiable—are not the touchstone.

Treatment of Impact? Making Sense of the Court's "Balancing" as a Disparate Treatment Claim

The majority in *Young* wrote that a pregnancy discrimination plaintiff may convince a jury of pretext by showing "that the employer's policies impose a significant burden on pregnant workers, and that the employer's legitimate non-discriminatory 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." In his dissent, Justice Scalia accuses the majority, in crafting this approach, of "bungl[ing] the dichotomy between claims of disparate treatment and claims of disparate impact." On first glance, the majority's standard, by weighing the strength of the employer's justifications against the burden on pregnant women, does sound like it blurs the distinction between treatment and impact models. But the division between impact and treatment claims is not as stark as the dissent makes it sound. Nor should it be.

Courts have often understood the impact of a practice or policy on a protected group, combined with the lack of any persuasive justification for it, as part of the case for inferring intentional discrimination. In one case challenging a newly implemented strength test, in what might have been only a challenge to the test's disparate impact on women, the lower court noted that the utter lack of a justification for the test and the

negative effect on hiring women indicated an intent to discriminate on the part of the employer. Likewise, in one challenge to a broad “English-only” rule in the workplace, another lower court found the effect on Latino and Latino workers, given the lack of a business rationale to justify the broadly prohibitory policy, to support a claim for intentional discrimination. While these are unusual cases, to be sure, the point is that discrimination in the real workplace does not always precisely align with the crisp categorical boxes of disparate treatment and impact. Discrimination law should not be so formalistic as to insist on a clear line of distinction that does not exist.

Most importantly, the Court’s balancing approach, in this setting, is designed to capture the kind of intentional discrimination that is behind discriminatory refusals to accommodate pregnancy. Historically, as employers found it useful or necessary to accommodate other kinds of employee conditions, they left pregnant workers out of these reforms. They did so not out of a conscious animus toward pregnant workers by and large, but based on implicit stereotypes about the value of workers who become pregnant, and then mothers. When Congress passed the PDA, it had abundant evidence that employers judged pregnant workers less worthy of the kinds of investments in human capital made in other workers. Workers on the verge of motherhood were assumed to leave the workplace entirely, or reduce their commitment to paid labor. Because of this kind of stereotyping, employer policies reflexively treated pregnancy differently, despite similarity in workers’ present ability to work.

While a clean source-of-condition rule would have been a simpler way to define disparate treatment in this setting, the majority was unprepared to rule out the possibility that employers might have sufficient reasons for treating some classes of workers more favorably than pregnant employees. Having not taken that path, the Court had to decide how to give meaning to the Act’s second clause, which specifies the baseline for identifying the comparison class for defining disparate treatment based on pregnancy. The second clause was meant to solve the analogic crisis of pregnancy—the fact that there is nothing quite like pregnancy with which to compare—by specifying the proper comparison group. However, since it specifies “other persons” without clearly indicating which persons, the Court crafted a standard designed to sniff out when treating some, but not all, non-pregnant persons more favorably amounts to the kind of disparate treatment clause two addresses.

Might this foretell a broader rethinking of the categories of impact and treatment claims, and a further softening of the lines between them? Probably not. The majority opinion takes care to limit its adaptation of the pretext model here to PDA claims only. While there is, no doubt, some interpretation going on here to connect the second-clause guarantee of equal treatment to the kinds of fact patterns arising in cases like *Young*, it is

a far cry from the “poof” of magic wands that the dissent conjures up.

After all the back-and-forth between the majority and dissent about whether this is really a disparate impact or a disparate treatment claim, the key question in the end is the one the majority asks at the end of the opinion: “why, when the employer accommodated so many, could it not accommodate pregnant women as well?” That has always been the concern that the PDA was enacted to address. We expect that the majority’s proof model for second-clause-type claims will do a better job of answering that question than the lower courts have managed to do so far.

The EEOC’s Power to Persuade

As mentioned above, the Court in *Young* rejected the plaintiff’s interpretation of the second clause of the PDA, which would have found a per se violation of the statute whenever an employer provided for accommodations for some workers, but denied them to similarly restricted pregnant women. This was not just a theory she invented. It is supported by the plain text of the statute. Moreover, the Equal Employment Opportunity Commission, the agency charged with implementing Title VII, took that exact position in its formal pregnancy discrimination guidelines. Although the Supreme Court sometimes takes agency interpretations into account, it refused to do so here. The guidelines did not, in the Court’s view, have the power to persuade.

The Court’s disrespect for the EEOC’s position stems from its conclusion that the most recent guidelines were enacted after the Court granted the petition for certiorari in this case. They thus seemed strategic rather than reasoned, to the majority anyway. The reality is that the EEOC has taken a consistent approach to pregnancy accommodation since even before the PDA was enacted. Regulations adopted in 1972 provided that “[d]isabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.” And post-PDA guidance was consistent with this early statement and added the additional clarification that “[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.” But, in the Court’s view, this guidance did not resolve the question posed in *Young*—whether a pregnant employee is entitled to an accommodation offered to any other employee, or only to those offered to numerous other employees. In the majority’s view, this

“post-Act guidance . . . does not resolve the ambiguity of the term ‘other persons’ in the Act’s second clause. Rather, it simply tells employers to treat pregnancy-related disabilities like nonpregnancy-related disabilities, without clarifying how that instruction

should be implemented when an employer does not treat all nonpregnancy-related disabilities alike.”

The EEOC’s more recent guidance—promulgated in July 2014—does address this question specifically, providing that “[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee’s limitations (e.g., a policy of providing light duty only to workers injured on the job).” 2 EEOC Compliance Manual § 626–I(A)(5), p. 626:0009 (July 2014). Examples make clear that the EEOC would have required UPS to grant someone like Peggy Young a light-duty accommodation given that it made the same accommodation to other employees with a different source of injury. It is this interpretation that the *Young* majority refused to follow because it found difficulties with timing, consistency, and thoroughness of the agency’s consideration of the issue. In part, it was troubled by the fact that the federal government has taken a different position when defending itself against a pregnancy discrimination claim in court.

This rejection of the EEOC’s position merits three brief notes. First, it is hardly fair to attribute the government’s self-serving litigation position (in a case, *Ensley–Gaines v. Runyon* (<http://law.justia.com/cases/federal/appellate-courts/F3/100/1220/475796/>), in which a postal service workers sued for pregnancy discrimination) to the agency in its rulemaking and administrative enforcement capacity. Inconsistency is to be expected between those two very different contexts, and from different departments of government. Second, the EEOC’s clarification in July 2014 was not in any way contrary to the interpretation it has urged since the PDA’s initial passage—and its position on pregnancy discrimination even before 1978. While it did address a specific example at issue in the *Young* case, that same issue had been the centerpiece of several federal appellate decisions dating back almost twenty years. Third, the Court’s decision not to follow the interpretation suggested in one example should not undermine the rest of the EEOC’s pregnancy discrimination guidance, which provides a comprehensive interpretation of the PDA. All but the one sentence mentioned above should continue to have the full force of an agency interpretation.

Conclusion

It is not uncommon for the Supreme Court’s employment discrimination rulings to invite more litigation, and the *Young v. UPS* ruling is no exception. The Court, however, has set the stage for broader protection for pregnant workers—and a more disciplined approach to ensuring their rights under the PDA are enforced.



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