Accommodating Pregnancy: An Interbranch Conversation

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This presentation will discuss recent developments concerning employers' obligations to provide accommodations for pregnant employees, an issue that is of great importance to many working women and that can serve as a test case to explore the interactions among agency, judicial, and legislator actors—at both the state and federal level—in setting policy.

The basic question is whether employers are required to provide accommodations for pregnant employees. A rapidly growing number of women serve as the primary or sole wage-earner for their families, meaning that it is crucially important that they be able to work through a pregnancy. Unfortunately, however, this can sometimes be difficult. Working-class women and women of color are disproportionately likely to be working in jobs that provide inadequate support for pregnancy and where they lack access to paid or unpaid leave either during pregnancy or after the child is born. Additionally, many women who ask for support at work, and are denied accommodations, end up being pushed out involuntarily onto unpaid leave under the Family and Medical Leave Act. This means not only that they lose their paychecks during their pregnancy, but also that they are forced to exhaust available leave prior to the birth of a child.

Legal regulation of pregnancy—a health condition that only affects women—sits at the nexus of employment policies addressing sex discrimination and those addressing disability discrimination. The Pregnancy Discrimination Act (PDA), enacted in 1978, mandates that employers "shall" treat pregnant employees "the same for all employment-related purposes" as other employees "similar in their ability or inability to work." In previous work (Gilbert *Redux*, 46 U.C. Davis L. Rev. 961 (2013)), I explored the interaction of the PDA with the Americans with Disabilities Act (ADA), enacted originally in 1990 and amended significantly in 2008. In that earlier work, I argued that although the PDA is traditionally understood as merely requiring "formal equality" for pregnant employees, the "same treatment" language creates an accommodation mandate—albeit a comparative one—that should ensure that pregnant employees get the same level of support as other employees with health conditions that affect work. I contend that this is true even if other employees receive accommodations pursuant to other legal mandates, such as the ADA. In this respect, the PDA deftly navigates the special treatment/equal treatment debate that has long framed questions of how to address pregnancy within the workplace.

Some courts, however, have misinterpreted the PDA to hold that employees accommodated pursuant to a light duty policy for workplace injuries or the ADA are not appropriate comparators for PDA analysis. This has long been a simmering issue, but the amendments made to the ADA in 2008, which greatly expanded the scope of disabilities covered under that statute, gave it new urgency. The reasoning employed in these cases means that the enhancement of protection for

employees with disabilities has the perverse effect of decreasing employers' obligations to pregnant employees by reducing significantly the pool of potential comparators.

There have been several significant developments in the year and a half since I published Gilbert *Redux*. In June 2014, the Supreme Court granted certiorari on a case that poses the question of how the PDA interacts with the ADA. Just a few weeks later, in July 2014, after the Court took the case but before it was briefed, the EEOC issued new guidance addressing a wide range of pregnancy discrimination issues. The guidance interprets the PDA to require employers to provide pregnant employees equal access to light duty policies or other workplace accommodations provided to employees with disabilities or workplace injuries (in other words, the interpretation of the PDA that I advocated in my article). But in public statements regarding the new guidance, EEOC commissioners openly disputed the propriety of issuing guidance addressing an issue that is currently pending before the Supreme Court. (Compare the public statement of EEOC Commissioner Chai Feldblum, http://chaifeldblum.com/wp-content/uploads/2014/07/Feldblum-Statement-on-Pregnancy-Guidance-07.14.14.pdf, with the public statement of Commissioner Victoria Lipnic, http://op.bna.com/dlrcases.nsf/id/kmgn-9lznpp/$File/lipnic.pdf, and Commissioner Constance Barker, http://op.bna.com/dlrcases.nsf/id/kmgn-9lznp5/$File/barkerdissent.pdf.) Thus, the issue is important not only for the substantive question of whether and when pregnant employees will receive support at work, but also for the statutory interpretation question of the extent to which the Court will defer to the agency's interpretation of the statute. Moreover, it may be significant that both the PDA and the ADA Amendments Act were enacted to supersede prior Supreme Court decisions. As I have explored in greater detail elsewhere, the Court often narrowly interprets override legislation, particular in the employment discrimination context.

At the same time as the agency and the Supreme Court have been grappling with the question, advocates have pressed state legislatures and Congress to enact legislation that explicitly requires accommodations for pregnant women (even in the absence of a comparator) and that also precludes forcing women who request accommodations onto unpaid leave. This legislation, generally known as Pregnant Workers Fairness Acts, has passed in several states, often unanimously. It has also been proposed in Congress, and endorsed by President Obama, but it has not been sponsored by a single Republican and thus is unlikely to advance. That said, a decision by the Supreme Court holding that ADA-accommodated employees are *not* appropriate comparators for PDA-analysis could push forward efforts in Congress to enact an override.

Since the Court has not yet decided the *Young* case, it is difficult to map out precisely how my project will develop. That said, I anticipate using the decision in *Young* (which may well be hot-off-the-presses at the time of the conference) as a launch pad to consider next steps in ensuring that pregnant women have access to accommodations at work, as well as the institutional role of agencies, courts, and the legislature in interpreting statutory language. Also, again depending on the decision and any Congressional response, I might explore the extent to which advocates increasingly look to state or local governments, rather than gridlocked Congress, to enact progressive employment legislation. This results in a growing number of workplace opportunities that women living in "blue" states enjoy but that are denied to women living in "red" states.