

## Light Duty Takes Hard Hit

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Many employers have what they call “light duty” policies whereby they allow employees to continue working even though the employees are unable to perform some of the essential functions of their jobs. Very few employers can afford to have a large segment of their workforce on light duty at the same time, so usually there are limits. Sometimes the limits are durational, and sometimes the limits are based upon whether there is light duty work available that the employer needs to have performed. Another common limitation relates to the cause of the condition – some employers provide light duty only for work-related injuries as a means of keeping workers’ compensation costs down.

Recently, in *Young v. United Parcel Service*, the U.S. Supreme Court examined the issue of light duty within the context of a pregnancy discrimination claim, and the narrow majority issued a decision that makes light duty decisions very difficult for employers. Indeed, the dissenting opinion said the majority decision “crafts instead a new law that is splendidly unconnected with the text and even the legislative history” of the Pregnancy Discrimination Act and “gives us an interpretation that is as dubious in principle as it is senseless in practice.” Whether or not one agrees with the dissent, one conclusion is clear – the rules regarding when an employer must provide light duty are now in flux, and any employer who refuses light duty to a pregnant employee does so at its risk.

UPS requires its drivers to be able to lift parcels up to 70 pounds alone, and up to 150 pounds with assistance. When one of UPS’ drivers became pregnant, her physician restricted her from lifting more than 20 pounds

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during the first 20 weeks of her pregnancy and more than 10 pounds thereafter. UPS did not allow her to work with these restrictions. She filed a lawsuit against UPS, complaining that the company let other employees work light duty and was therefore discriminating against her based upon pregnancy.

UPS's position was that other employees who were allowed to work light duty were not similar to the plaintiff in their inability to work. UPS provided light duty work to (1) drivers who had become disabled on the job; (2) those who had lost their Department of Transportation certifications; and (3) those who suffered from a disability covered by the Americans with Disabilities Act. The district court granted summary judgment for UPS and the court of appeals affirmed the dismissal, but the Supreme Court reversed.

The Court held that if the plaintiff shows that the employer accommodates other employees with light duty restrictions, the "employer may then seek to justify its refusal to accommodate the plaintiff by relying on 'legitimate, nondiscriminatory' reasons for denying her accommodation.... But ... that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those (similar in their ability or inability to work) whom the employer accommodates." Moreover, the Court held that "the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' 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 other words, when employers provide light duty for anyone, it will probably impact their ability to use cost as a justification for not providing light duty to pregnant employees, and any other justification is subject to second guessing by a jury.

Although this was not an ADA case, employers should anticipate courts holding that the rationale should apply to employees with disabilities when their employers otherwise only provide light duty job assignment for employees with work-related injuries. As such, clients faced with light duty decisions are wise to explore the circumstances and options with counsel.