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Paradigm Shift: Triple Standard Of Reasonable Accommodations

April 30, 2015 | | Employment Discrimination,Pregnancy,Labor And Employment

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The old reliable rules seem less reliable these days. It is no longer enough to treat all employees the same. We have entered an era of interactive processes, individualized assessments and reasonable accommodation. The term "reasonable accommodation" flows most easily in connection with the Americans with Disabilities Act, as we note its 25th anniversary. But, as a reminder, it also applies to the religion clause of Title VII and now, thanks to a recent U.S. Supreme Court decision, we need to consider it in the context of pregnant employees. Trouble is, what it means under one law may be different than under another. Here's a quick summary. **Religion**. In employment, the concept of "reasonable accommodation" accompanied the 1972 amendment to the religion clause of Title VII, which provided that employers should accommodate religion unless *he is unable to reasonably accommodate to an employee's or prospective employee's religious observance or practice* ***without undue hardship*** *on the conduct of the employer's business*. A few years later, the Supreme Court established a *de minimis* standard, so that any accommodation that placed more than a *de minimis* burden on an employer was not required. Of course, not surprisingly, the definition of "*de minimis*" depends on the court. **Disability**. When Congress wrote the Americans with Disabilities Act, it specifically included "reasonable accommodation" in the law by requiring employers to accommodate disabilities unless they created an undue hardship. But, trying to prove "undue hardship" under the ADA is a higher standard for employers than the "*de minimis"* standard under religion. And, the "interactive process" is an essential element of the ADA, as is the individualized assessment of the employee's disability, the essential functions of the job, and the impact on an employer. In other words, for employers, trying to show that an accommodation is an undue hardship is not only difficult, it often isn't worth the effort. **Pregnancy**. In the wake of the Supreme Court's recent decision of *Young v. UPS*, we now have a new hybrid standard of reasonable accommodation regarding an employee's pregnancy. The Supreme Court specifically rejected the EEOC's Guidance, which had gone too far in giving pregnant employees what the majority called "most-favored nation status." Yet, the decision outlined a new analysis of pregnancy discrimination that now includes an element of *accommodating* pregnant employees—not quite as demanding as reasonable accommodation under the ADA, but certainly much more than that of religious accommodation. For example, employers who offer light duty assignments to employees *must have a policy rationale that substantially justifies the burden on pregnant workers*. Thus, we have a new balancing test—the rationale of the employer versus the burden on pregnant employees. Notably, we do not consider the level of undue hardship

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on the employer as a result of this “accommodation,” but rather the burden on the pregnant employee. Unfortunately, this new hybrid policy-rational-versus-burden balancing test analysis fails to outline the clear guidance employers seek. For now, it appears the safest route is to adopt exactly what the Supreme Court rejected—treating pregnant employees as if they are covered under the ADA, engage in the interactive process, and assess the job and the employee individually. Although this summary ignores the nuances, it is fair to predict we will see more (not less) requests for accommodation based on religion, disability, *and* pregnancy. Regardless of their source, remember that these accommodation requests trigger different standards and, theoretically, lead to different solutions. Treating everyone the same just won’t be enough.