[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-14687

D.C. Docket No. 4:16-cv-01604-ACA

KIMBERLIE MICHELLE DURHAM,

Plaintiff-Appellant,

versus

RURAL/METRO CORPORATION,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

(April 17, 2020)

Before ED CARNES, Chief Judge, and ROSENBAUM and BOGGS,[*] Circuit Judges.

PER CURIAM:

[*] The Honorable Danny J. Boggs, United States Circuit Judge for the Sixth Circuit, sitting by designation.

The Pregnancy Discrimination Act

evidence to raise a genuine issue of fact concerning whether Rural's stated reasons for treating Durham differently than other EMTs with lifting restrictions were pretextual. We therefore remand to the district court to make these assessments in the first instance.

I.

Since we are reviewing an order granting summary judgment in this appeal, we set forth the evidence in the light most favorable to Durham, as the non-moving party, and draw all reasonable inferences in her favor. *Pesci v. Budz*, 935 F.3d 1159, 1165 (11th Cir. 2019).

Rural provided private ambulance and fire-protection services in 21 states, including Alabama. Durham began working for Rural in St. Clair County, as an emergency medical technician ("EMT"), in the first week of March 2014

At the end of August 2015, Durham learned she was pregnant. At her next doctor's appointment, which occurred in September, Durham's doctor advised Durham not to lift more than 50 pounds during her pregnancy. So following that appointment, Durham told Mike Crowell, then the general manager for Rural's St. Clair operations,[1] about her pregnancy and the lifting restriction.

In response, Crowell informed Durham that she would not be able to work on the truck. Durham agreed. So Durham asked to work either light duty or dispatch.

Rural had a light-duty-type policy, called the Transitional Work Program ("Light-duty Policy"). Under that Policy, Rural would "temporarily modify an employee's existing position and/or work schedule, or provide transitional assignments that [would] accommodate the temporary physical restrictions identified by the [employee's] treating physician."

The Light

Rural’s Unpaid Personal Leave policy

of leave before her pregnancy was over and, according to the Unpaid Personal Leave Policy, forfeit her employment. She also understood the Policy to prohibit her from seeking another job or filing for unemployment. Because Durham could not be

have any Dispatch positions or shifts open or her restrictions would not allow her to

II.

We review *de novo* the district court's grant of summary judgment. *Pesci*, 935 F.3d at 1165. Summary judgment should be granted only if the moving party demonstrates that no genuine dispute exists over the material facts, and the moving party is entitled as a matter of law to judgment. Fed. R. Civ. P. 56(a).

III.

Among other things, Title VII, 42 U.S.C. § 2000e *et seq.*, prohibits employers from

and others of similar ability or inability *because of pregnancy*." *Id.* at 242 (Scalia, J., dissenting).

Congress responded to *Gilbert* with the PDA. *Young*, 575 U.S. at 222–23 (citing S. Rep. No. 95-331, p. 8 (1978)). In relevant part, the Act clarifies that the phrase "because of sex" includes "because of . . . pregnancy . . . ; and women affected by pregnancy . . . shall be treated the same for all employment-related

So Young sought a temporary work assignment during her pregnancy, but UPS rejected her request. *Id.* at 215. Instead, it informed her that she could not return to work while pregnant because she did not satisfy UPS's lifting requirements and she did not qualify for a temporary alternative work assignment. *Id.* UPS therefore required Young to take an unpaid leave of absence. *Id.* at 216.

Despite its refusal to accommodate Young, UPS gave other categories of employees who could not perform their normal work assignments temporary alternative work. *Id.* For example, among others, it accommodated employees injured on the job; employees disabled on the job [illegible]

do the job." *Lewis v. City of Union City, Ga.*, 918 F.3d 1213, 1228 n.14 (11th Cir. 2019) (en banc). Here, as in *Young*, Durham's temporary inability to lift more than 50 pounds and her colleagues' inabilities to lift more than 10 or 20 pounds rendered Durham, and her colleagues injured on the job, equally unable to perform the 100-pound lifting duties of an EMT. Thus, Durham and her colleagues who were injured on the job were "similar in their ability or inability to work." Also, Rural's Employee Handbook also left open the possibility that Rural similarly accommodated some of those disabled off the job, including those with resulting lifting restrictions. For these reasons, Durham has satisfied the fourth prong of her *prima facie* case.[6] *See Legg v. Ulster Ctyy18.5 (h1 (t9aw 0.547 8.2 (ns,827 (t)8.13.5 5 (ma f)8*

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light duty or a dispatcher position. Here, Rural offered two: Rural's Light-duty Policy applies to only those injured on the job, and Rural had no dispatcher positions available at the time Durham sought accommodation.

Therefore, to survive summary judgment, Durham must point to enough evidence to create a material issue of fact that Rural's stated reasons for denying accommodation are pretextual. *Young*, 575 U.S. at 229. One way she can do this is by demonstrating that Rural's policies that provide the basis for its rejection of Durham's request for accommodation "impose a significant burden on pregnant workers," and that Rural's reasons for its policies failing to accommodate pregnant employees such as Durham "are not sufficiently strong to justify the burden, but rather . . . give rise to an inference of intentional discrimination." *See id.* The district court never reached this part of the analysis because it stopped after determining that Durham had failed to establish a *prima facie*

additional evidence the district court may choose to allow the parties to present on this issue. *See, e.g.*, *Schwarz v. City of Treasure Island*, 544 F.3d 1201, 1228 (11th Cir. 2008).

III.

BOGGS, Circuit Judge, concurring:

employees ‘whose situation cannot reasonably be distinguished from Young’s.’” *Supra*, op. 16, quoting

reflect an intent to discriminate. And that is better evaluated in the *post-prima facie* stages.

For that exact reason, however, an employer can still make the argument that it has not discriminated by treating a pregnant employee the same as one injured off the job. Such an argument has been moved as to its proper placement, not done away with. *Young* eschews a "most-favored-nation" reading of the PDA, under which if any benefit were offered to some sub-class of workers, it must be offered to pregnant workers. *See Young*, 575 U.S. at 222; *see also id.* at 239–40 (Alito, J., concurring). "[T[he fundamental question in *Young*, as here, was whether the employer's actions gave rise to valid inference of unlawful discrimination." *Lewis*, 918 F.3d at 1228 n.14 (citing *Young*, 135 S.Ct. at 1354). It remains an open question, both as a matter of law and as to whether this is in fact what happened here. Such questions are left to the district court to decide in the legitimate-reasons and pretextual inquiries of the *Young* test, not at the *prima facie* stage.

With the nuances expressed above, I concur.