No. 12-1226

IN THE
Supreme Court of the United States

PEGGY YOUNG,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

SUPPLEMENTAL BRIEF FOR RESPONDENT

EMMETT F. MCGEE, JR.
JILL S. DISTLER
JACKSON LEWIS LLP
2800 Quarry Lake Drive
Suite 200
Baltimore, MD 21209
(410) 415-2000

MARK A. PERRY
Counsel of Record
RACHEL S. BRASS
JENNA M. YOTT
MARISA C. MALECK
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Respondent

RULE 29.6 STATEMENT

The corporate disclosure statement included in the brief in opposition remains accurate.

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The petition for a writ of certiorari should be denied because, as the government explains, this case would have been decided the same in every circuit (U.S. Br. 17-20) and in any event the question presented does not warrant review in light of intervening legislation (*id*. at 20-22). Moreover, the government does not dispute that the collective bargaining agreement here makes this case a poor vehicle, particularly since petitioner pursues only a disparate treatment claim.

I. PETITIONER'S CASE IMPLICATES NO CONFLICT AMONG THE CIRCUITS

Petitioner contends that there is "longstanding disagreement in the circuits" regarding "whether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are 'similar in their ability or inability to work.'" Pet. i, 16 (capitalization altered); Pet. Supp. Br. 3. As UPS has previously explained (Br. in Opp. 22-29), petitioner is simply incorrect regarding this supposed circuit conflict. The government's brief confirms that this case would have been decided the same way in *every* circuit. *See* U.S. Br. 17-20.

The sole question presented is whether an employer intentionally violates the Pregnancy Discrimination Act amendment to Title VII, 42 U.S.C. § 2000e(k) ("PDA"), by adhering to a pregnancy-neutral policy that, pursuant to the terms of the applicable collective bargaining agreement covering the employee, does not allow for the requested accommodation. The courts of appeals unanimously recognize

that a policy under which physical restrictions resulting from on-the-job activity may be accommodated, while off-the-job restrictions are not, does not constitute disparate treatment. *See* Br. in Opp. 17-29.

As the government recognizes, the "majority of the courts of appeals" (including the Fourth Circuit in the decision below) have held that a pregnant employee cannot make out a *prima facie* case simply by relying on a pregnancy-neutral policy that provides accommodations to certain groups of persons. U.S. Br. 8. The only outliers are the Sixth and Tenth Circuits. *See id.* at 18-19. Petitioner stakes her bid for certiorari review on language from opinions of those two courts. Pet. Supp. Br. 3-4; Pet. 17-19.

Since UPS filed its brief in opposition, the Tenth Circuit has abandoned dicta in *Equal Employment Opportunity Commission* v. *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000), holding that a pregnant worker (whose condition does not result from an on-the-job injury) is "not similarly situated" to employees who were injured on the job. *Freppon* v. *City of Chandler*, 528 F. App'x 892, 902 (10th Cir. 2013). Moreover, even the Sixth Circuit does not accept petitioner's extreme suggestion that every employee who requests an accommodation must be treated identically. *See Raciti-Hur* v. *Homan*, 181 F.3d 103, 1999 WL 331650, at *6 (6th Cir. 1999) (per curiam) (unpublished table decision) (affirming finding that pregnant employee was not similar in her ability to work to two permanently disabled workers and finding it "appropriate under the Pregnancy Discrimination Act to consider, as one factor, the temporal nature of the plaintiff's disability").

Petitioner contends that the government "decisively agrees" that the PDA dos not permit employers to "'distinguish among employees based on the *source* of their work limitations.'" Pet. Supp. Br. 2 (quoting U.S. Br. 13). But the distinction between on-the-job injuries and off-the-job injuries is engrained in the American workplace, and enshrined in many collectively bargained agreements. Indeed, the government has consistently taken the position—in defending suits brought by *its own* employees—that the PDA does *not* require an employer to accommodate limitations resulting from off-the-job activity simply because it accommodates limitations resulting from on-the-job activity. *See*, *e.g.*, Reply Brief for Postmaster General at 8, *White v. Frank*, 8 F.3d 823 (4th Cir. 1993) (No. 92-1579) (a pregnancy-blind policy "in no way discriminates on the basis of pregnancy. Rather, the policy 'discriminates' on the basis of whether or not the disabling condition was or was not job-related."); *see also* Brief for Postmaster General at 27-28, *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996) (No. 95-1038) (same).

Even if there were more than a nominal circuit split on the comparator question at the *prima facie* stage of a pregnancy discrimination case, any difference in analytics would be inconsequential to the outcome in *this* case. The United States recognizes that proving a *prima facie* case does not end the analysis. U.S. Br. 14. Once an employee makes out a *prima facie* case, an employer may proffer a nondiscriminatory reason to deny the accommodation, and the employee must then show that the proffered reason is merely a pretext for discrimination. *Id.* at 14-17.

Petitioner's reliance on *Latowski v. Northwoods Nursing Center*, 549 F. App'x 478 (6th Cir. 2013)

(Pet. Supp. 4), underscores this point. There, the court held that the pregnant employee had made out a *prima facie* case, but nevertheless considered the rest of the *McDonnell-Douglas* framework and held that an employer's "economics-based policy of refusing to accommodate restrictions arising from injuries incurred outside the workplace" constitutes a "legitimate, nondiscriminatory reason" for an employment action. 549 F. App'x at 484; *see also Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006) (holding that a PDA claim failed because the application of a pregnancy-blind policy is a legitimate nondiscriminatory reason for an employment action and there was no evidence of pretext).

As the government correctly recognizes, at the *pretext* stage "petitioner's claim would not have fared any better" in *any* of the courts of appeals. U.S. Br. 17. All of the circuits, the United States explains, "would likely hold that an employer may accommodate on-the-job injuries without accommodating pregnancy-related limitations, at least absent other evidence of animus or any suggestion that the policy was not applied uniformly." *Id*. at 17-18. The government points to no evidence of pretext, nor does it dispute UPS's argument that there is no such evidence in the record. Br. in Opp. 27-28.

Petitioner nevertheless contends—at the eleventh hour—that there is "ample evidence" of pretext in the record. Pet. Supp. Br. 6. Specifically, petitioner points to a stray comment allegedly made by a UPS manager—who had no decisionmaking authority with respect to petitioner—to the effect that she was a "liability." *Id.* at 6-7. But this statement does not raise a genuine issue of material fact regarding pretext—as the district court expressly found. Pet. App. 62a. As that court explained, the complained-of

comment did not "cast doubt" on the validity of UPS's pregnancy-blind policy. *Id.* at 63a (citing *Holland v. Wash. Homes, Inc.*, 487 F.3d 208, 216 (4th Cir. 2007)). The Fourth Circuit did not question the district court's finding that "[t]here is no evidence of pretext" (*ibid.*), and factual quibbles with the district court's findings are not grounds for certiorari review. *See United States v. Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

Petitioner is also wrong to suggest that she was treated unlawfully in light of UPS's policy of accommodating drivers who lose their Department of Transportation ("DOT") certificates. Pet. Supp. Br. 6. Under that policy, UPS provides "temporary alternative work"—not necessarily the light duty work petitioner requested—to its employees who lose their DOT certification for whatever reason. *See* Br. in Opp. 3. This is a negotiated provision of the collective bargaining agreement ("CBA") between UPS and the Teamsters, which (like other accommodations) directly involves seniority rights of union members. Petitioner has not identified any evidence suggesting that her union and UPS intended to discriminate against pregnant women when crafting that policy. Moreover, all drivers who lose their DOT certification are dissimilar to petitioner because they are *legally precluded* from driving a UPS vehicle (*id.* at 7), making their physical abilities irrelevant. Indeed, many drivers lose their DOT certifications from events—such as vehicular citations or accidents—that have nothing to do with physical limitations. And many "inside jobs" provided to such employees involve lifting packages in excess of the limitations imposed on petitioner. Petitioner—who bore the burden of proof—not only failed to adduce competent

evidence that she was similarly situated to employees who lost their DOT certificates, but also that UPS's policy of providing different accommodations to those differently situated employees evidenced pretext.

II. THE ADAAA DEPRIVES THE QUESTION PRESENTED OF PRACTICAL SIGNIFICANCE

UPS previously explained that the enactment of the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") renders review of petitioner's claim under the PDA moot as a practical matter. Br. in Opp. 29. The government confirms the correctness of this position. U.S. Br. 20-21.

As the government recognizes, the ADAAA and its implementing regulations broadened the definition of disability to include disabilities of limited duration. *See* 42 U.S.C. § 12101; 29 C.F.R. § 1630.2(i), (j). While pregnancy per se is not an ADA-covered disability, temporary physical limitations imposed because of pregnancy may be within the ADA's reach—but as the amendments are not retroactive, the Fourth Circuit did not consider how the augmented framework might apply to petitioner's case. Pet. App. 11a, n.7. It is entirely possible, however, that the question presented in this petition will not recur: If courts construe the ADA (as amended) to cover pregnant workers subject to lifting restrictions like petitioner's, that statute, unlike the PDA, would expressly require accommodation.

Contrary to petitioner's suggestion otherwise (Pet. Supp. Br. 8-9), the Equal Employment Opportunity Commission ("EEOC") has recommended just this construction of the ADA. Indeed, it has stated that "[c]ertain impairments resulting from pregnancy . . . may be considered a disability if they substantially limit a major life activity." *See* EEOC, *Ques-*

tions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, Q. & A. 23, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited June 4, 2014). The EEOC specifically considers "[m]ajor life activities" to include "lifting" (29 C.F.R. § 1630.2(i)(1)(i)), and construes the term "substantially limits" "broadly in favor of expansive coverage" (*id*. § 1630.2(j)(1)(i)). Moreover, a pregnancy-related impairment may also meet the definition of a disability, according to the EEOC, if it acts as a "record of a substantially limiting impairment," or creates a circumstance where an employee is "regarded as" disabled, and is subsequently discriminated against by an employer. *See* 29 C.F.R. 1630.2. Additionally, the EEOC confirms that "[t]he ADA Amendments Act of 2008 makes it much easier to show that a medical condition is a covered disability." EEOC, *Pregnancy Discrimination*, http://www.eeoc.gov/laws/types/pregnancy.cfm (last visited June 4, 2014).

Petitioner's contrary argument regarding the ADAAA borders on the incomprehensible. Pet. Supp. Br. 8-11. Her conclusion is that "the ADAAA . . . does nothing for [her] and the many other pregnant workers like her." *Id.* at 9. If by that she means individuals who sued before the ADAAA was enacted cannot take advantage of the amendments, the point is tautological, but irrelevant. If she means that pregnant persons with lifting restrictions will not be entitled to accommodations under the ADAAA, she simply disagrees with the EEOC. What she cannot mean—and does not say—is that the ADAAA (which, unlike the PDA, is expressly focused on employer *accommodation* of physical impairment) has no role to play in future cases involving employer accommodation of pregnancy-related physical impairments. Indeed, the government represents that the EEOC is preparing more guidance that will further clarify

these issues related to pregnancy under the PDA and the ADA as amended. U.S. Br. 8, 21-22. Therefore, review of the decision in this case would be premature.

III. THIS CASE IS A POOR VEHICLE

Notably, the government does not dispute that the CBA between UPS and the Teamsters Union is a significant additional factor that militates against certiorari review in this case. *See* Br. in Opp. 29-33.

Some CBAs—like the one at issue in this case—directly address, in advance, an employer's obligation to provide light-duty work and other accommodations. These provisions must be viewed in light of the broader purposes of the National Labor Relations Act, 29 U.S.C. §§ 151-169, in affording workplace stability through comprehensively negotiated agreements.

The CBA governing the employment relationship between UPS and petitioner adds a layer of factual and legal complication that makes this case ill-suited for consideration. This Court could not address the issues in this case without considering the UPS-Teamsters CBA, including its bona fide seniority system and the express provisions made for light-duty (and other temporary alternative) work assignments in the context of an employment relationship that necessarily relies heavily on manual labor. *See* 42 U.S.C. § 2000e-2(h).

This is especially so because petitioner is preceding solely on a disparate *treatment* theory and thus must make the strained argument that the Teamsters Union—her bargaining representative, which is *not* a party to this litigation—engaged in intentional discrimination by not requiring (or permitting) light-duty work in her circumstances during the CBA negotiations. *See* Pet. Reply Br. 7-8. If the CBA itself

is not actionable as intentional discrimination, then UPS cannot be held liable for disparate treatment under the PDA by adhering to the CBA's terms and treating petitioner exactly the same as all its other employees—male and female—who are under a lifting restriction due to an off-the-job activity.

UPS's conduct in this case was entirely consistent with the litigating positions taken by the Department of Justice in PDA actions brought by Postal Service employees. The National Agreement between the United States Postal Service and the American Postal Workers Union AFL-CIO similarly limits light duty assignments to "employees who are temporarily or permanently incapable of performing their normal duties as a result of a job-related compensable illness or injury." USPS-APWU Joint Contract Interpretation Manual, art. 13.1 (2012). As explained above, the government has (correctly) drawn the same distinction between on-the-job and off-the-job impairments that the court below relied on to reject petitioner's disparate treatment claim.

UPS's conduct in this case was also entirely consistent with extant EEOC guidance, which is very clear on this point: "an employer that creates light duty positions for its employees with occupational injuries does not have to create such positions as a reasonable accommodation for employees with disabilities who have not been injured on the job." EEOC, *EEOC Issues Guidance Clarifying Relationship Between Workers' Compensation Laws and Disability Statute*, http://www.eeoc.gov/eeoc/newsroom/release/9-4-96.cfm (last visited June 4, 2014); *see* Br. in Opp. 25-26 & n.2. The EEOC guidance cited by the government (U.S. Br. 16), in contrast, does not deal with the distinction between off-the-job and on-the-job conditions, and thus—regardless of its correctness—it is inapplicable to the situation presented here. Indeed, the EEOC has previously, and express-

ly, "waived off" the argument that "any distinction between nonwork-related conditions and work-related conditions, in a modified duty policy, is per se unlawful." EEOC Br. in Resp. to Pet. for Reh'g En Banc, *Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (No. 98-2328), *available at* http://www.eeoc.gov/eeoc/litigation/briefs/horizon.txt (last visited June 4, 2013).

Given that the EEOC has recently announced that accommodating pregnancy-related limitations under the ADAAA and the PDA is among its top enforcement priorities (EEOC, *U.S Equal Employment Opportunity Commission Strategic Enforcement Plan FY 2013-2016*, http://www.eeoc.gov/eeoc/plan/sep.cfm (last visited June 4, 2014)), the government's recommendation that certiorari be denied in this case takes on special significance. The agency vested with primary authority to oversee this provision of Title VII has determined, for reasons stated and unstated, that petitioner's case does not warrant plenary review by this Court. UPS respectfully submits that, while we do not agree with every statement in the government's brief, the bottom line is correct: There is no compelling reason for the Court to review the question presented in this case at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

EMMETT F. MCGEE, JR.
JILL S. DISTLER
JACKSON LEWIS LLP
2800 Quarry Lake Drive
Suite 200
Baltimore, MD 21209
(410) 415-2000

MARK A. PERRY
Counsel of Record
RACHEL S. BRASS
JENNA M. YOTT
MARISA C. MALECK
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
mperry@gibsondunn.com

Counsel for Respondents

June 4, 2014