

PREGNANCY DISCRIMINATION IN THE WAKE OF *YOUNG V. UPS*

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INTRODUCTION

In cases where a pregnant worker is temporarily unable to physically perform some of her job duties, and is denied a workplace accommodation by her employer, her main avenue for relief is to seek redress under the Pregnancy Discrimination Act (PDA).¹ The PDA provides, in part, that an employer must treat a pregnant worker “the same for all employment-related

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¹ 42 U.S.C. § 2000e et seq. (1991).

purposes . . . as other persons not so affected but similar in their ability or inability to work . . .”² In other words, unlike some areas of federal discrimination law,³ the PDA does not affirmatively require that an employer reasonably accommodate pregnancy and its related conditions; instead, the law simply mandates that businesses treat their pregnant workers equally as compared to other similarly situated, nonpregnant employees.⁴ The key issue in these cases, then, is determining who is similarly situated to the pregnant worker so that the court may then decide whether those other employees have received preferential treatment in violation of the PDA.

For instance, imagine that a pregnant worker is unable to engage in heavy lifting due to her pregnancy and therefore requests that she be temporarily placed in a lighter-duty position. In determining whether the employee is entitled to her requested accommodation under the PDA, one must consider how the employer has accommodated other employees with similar lifting restrictions. Suppose, for example, that the employer has three employees with similar lifting limitations: (i) an employee who sustained an on-the-job back injury; (ii) an employee who lost a limb through a non-occupational injury, and who thus qualifies as disabled under the Americans with Disabilities Act (ADA); and (iii) an employee who threw out her back while playing tennis. Now assume that the employer accommodates the first and second employees—that is, those with an occupational injury and an ADA-qualifying disability—but does not accommodate the employee with the tennis injury.

Lower courts have struggled to decide how to properly compare a pregnant employee to her co-workers in these situations. A majority of circuit courts of appeals that have considered the issue have held that even if an employer accommodates those with on-the-job or ADA-qualifying injuries, the PDA does not require the company to provide the same benefit to pregnant workers because the employer has not singled pregnancy out for exclusion, but instead has merely treated pregnant workers similarly to those with non-occupational injuries or conditions (*e.g.*, like the worker with the tennis injury in the hypothetical above).⁵ On the other hand, one circuit court of appeals has adopted the plaintiff-friendly position that the plain language of the PDA requires a pregnant worker to receive an accommodation comparable to those enjoyed by employees with similar work limitations irrespective of their cause.⁶

In *Young v. United Parcel Service, Inc.*, the U.S. Supreme Court granted certiorari to resolve the circuit split regarding how to identify the appropriate comparator in cases alleging

² 42 U.S.C. § 2000e(k) (1991).

³ For example, the Americans with Disabilities Act imposes an affirmative obligation requiring employers to reasonably accommodate disabled employees, so long as such an accommodation will not impose an undue hardship on the company. *See* 42 U.S.C. § 12112(a) (2003); *see also* Stephen F. Befort, *Reasonable Accommodation and Reassignment Under the Americans with Disabilities Act: Answers, Questions and Suggested Solutions After U.S. Airways, Inc. v. Barnett*, 45 ARIZ. L. REV. 931, 934-35 (2003) (“The ADA’s discrimination prohibition differs from that of other employment discrimination statutes . . . in that it requires an employer to gauge an employee’s qualifications only after providing a reasonable accommodation designed to assist employee performance.”).

⁴ *See, e.g.*, *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338, 1344 (2015) (finding that the PDA “requires courts to consider the extent to which an employer’s policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work.”).

⁵ *See, e.g.*, *Serednyj v. Beverly Healthcare, L.L.C.*, 656 F.3d 540, 548 (7th Cir. 2011); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1313 (11th Cir. 1999); *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998).

⁶ *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996).

disparate treatment under the PDA.⁷ *Young* involved a pregnant parcel delivery driver who was denied a light-duty accommodation because she did not fall within any of the various categories of employees covered by her employer's workplace accommodation policy.⁸ In deciding the case, the *Young* Court explicitly rejected the plaintiff's position that if *any* worker receives an accommodation for a work limitation, then a pregnant worker with a similar work limitation must be accommodated in the same manner under the PDA.⁹ But the Court also recognized that if an employer is already accommodating many employees with work limitations similar to those affecting the pregnant worker, then the employer must present a sufficient justification for why it cannot likewise accommodate the pregnant employee.¹⁰

Along these lines, the *Young* Court adopted a new standard for disparate treatment cases arising under the PDA. Assuming that the plaintiff has established a prima facie case of discrimination, the Court held that the pregnant plaintiff may then establish that her employer's justification for not offering an accommodation was pretextual "by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers," and therefore that the employer's "reasons are not sufficiently strong to justify the burden."¹¹ In particular, the Court stated that a plaintiff can establish that her company's policy significantly burdens pregnant workers "by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."¹²

While this new standard is certainly more worker-friendly than the approach previously espoused by a majority of circuit courts, the Court's new formulation nevertheless fails to clarify how a plaintiff identifies the appropriate comparator when meeting her initial burden of establishing a prima facie case of unlawful discrimination under the PDA. In other words, returning to the hypothetical example above, does the plaintiff establish a prima facie case of discrimination by comparing her treatment to the employee with the tennis injury or the employee with an occupational injury? Or by comparing her treatment with both? Unfortunately, the majority opinion merely parrots the language of the PDA without resolving this issue. Moreover, following *Young*, it remains unclear precisely how dramatic the differential between an employer's treatment of pregnant and nonpregnant workers must be for a plaintiff to successfully prove that the employer's policy significantly burdens pregnant employees, and that the employer's justifications for the policy are thus pretextual and constitute illicit discrimination under the PDA.

This Article explores these issues by providing one of the first critical analyses of the Supreme Court's 2015 decision in *Young v. United Parcel Service, Inc.* In particular, it asserts that Justice Alito's concurring opinion in the case provides a clearer methodology for determining

⁷ 135 S.Ct. at 1348 ("In light of lower-court uncertainty about the interpretation of the Act, we granted the petition [for certiorari].").

⁸ *Id.* at 1344.

⁹ *Id.* at 1349.

¹⁰ *Id.* at 1354-55 ("[T]he fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.").

¹¹ *Id.* at 1354.

¹² *Id.*

the appropriate comparator when establishing a prima facie case of pregnancy discrimination under the PDA. Quite simply, as Justice Alito notes,¹³ the plaintiff's treatment should be more appropriately compared to those co-workers who both (i) perform the same or a similar job, and (ii) suffer from a similar work limitation. From there, the Article goes on to examine whether the recent enactment of the Americans with Disabilities Act Amendment Act of 2008 (ADAAA)¹⁴ will largely render the *Young* decision moot (as the Court itself intimated).¹⁵ Unfortunately, although the ADAAA did expand the definition of a disability to potentially encompass many pregnancy-related conditions, courts have nevertheless refused to apply the law in most cases involving pregnancy-related conditions. Therefore, the Article concludes that the PDA remains an important source of relief for pregnant employees seeking redress under the law, meaning that the *Young* decision's shortcomings will vex litigants and courts for the foreseeable future.

The Article proceeds in three parts. First, Part I reviews the Pregnancy Discrimination Act of 1978, discussing both the origins and the subsequent interpretation of the law by the courts. Part II then examines the Supreme Court's recent decision in *Young v. United Parcel Service, Inc.* Finally, Part III concludes by critically assessing the majority decision in *Young*, finding that the Court failed to sufficiently resolve the key issue posed in the case. In addition, it contends that despite the *Young* majority's suggestion to the contrary, pregnant workers in most cases will not be able to secure their requested workplace accommodations by relying on the ADAAA, magnifying the effects of the *Young* decision's shortcomings.

I. PREGNANCY DISCRIMINATION ACT OF 1978

A. Pregnancy Discrimination Pre-PDA

In 1978, Congress enacted the PDA by amending Title VII of the Civil Rights Act of 1964 "to prohibit sex discrimination on the basis of pregnancy."¹⁶ The PDA was passed as a direct legislative repudiation of the U.S. Supreme Court's 1976 decision in *General Electric Co. v. Gilbert*,¹⁷ which was rooted in the reasoning of its 1974 opinion in *Geduldig v. Aiello*.¹⁸

In *Geduldig*, the Court analyzed whether the state of California's disability insurance system—which denied coverage for disabilities caused by pregnancy—was unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution.¹⁹ The Court held that the program did not deny benefit eligibility based on gender (which would have garnered a stricter standard of review) because "[t]here is no risk from which men are protected

¹³ *Id.* at 1357-58 (Alito, J., concurring).

¹⁴ 42 U.S.C. § 12102 (2009).

¹⁵ *Young*, 135 S.Ct. at 1348 ("We note that statutory changes [the ADAAA] made after the time of *Young*'s pregnancy may limit the future significance of our interpretation of the [PDA].").

¹⁶ Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified as amended at 42 U.S.C. § 2000e et seq. (1991)).

¹⁷ 429 U.S. 125 (1976).

¹⁸ 417 U.S. 484 (1974).

¹⁹ *Id.*

and women are not.”²⁰ Instead the Court concluded that the policy was gender-neutral because it distinguished between pregnant women and nonpregnant persons, which included members of both sexes.²¹ The Court reasoned that California’s cost concerns provided a legitimate, reasonable basis for denying coverage for pregnancy-related disabilities, and thus that the state had not violated the Equal Protection Clause.²²

Two years later, the Court faced a similar issue, only this time in the Title VII context, in *Gilbert*.²³ *Gilbert* involved a challenge to a private employer’s (General Electric (“GE”)) disability-benefits plan, under which pregnancy-related disabilities were excluded from the plan’s coverage.²⁴ Relying on its reasoning in *Geduldig*, the Court concluded that GE’s plan was merely an under-inclusive package, and not facially discriminatory on the basis of gender in violation of Title VII.²⁵ The *Gilbert* court reiterated *Geduldig*’s rationale that there was “no risk from which men are protected and women are not.”²⁶ Instead, the Court determined, the policy simply chose to cover some risks and not others, including a physical condition—pregnancy—associated exclusively with women.²⁷ Excluding a gender-specific risk from coverage, the Court maintained, was not discriminatory because pregnancy was different than the other covered conditions in that it was not a disease but instead “often a voluntarily undertaken and desired condition.”²⁸ Given these unique characteristics and related cost concerns, the Court held there were legitimate reasons for excluding pregnancy from coverage that did not mask an underlying pretext for gender discrimination.²⁹ GE’s failure to compensate pregnant women, the Court reasoned, “does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks.”³⁰

The majority opinion in *Gilbert* generated two noteworthy dissents. First, Justice Brennan’s dissenting opinion argued that the majority’s conclusion that GE’s policy was “a neutral process of sorting risks” ignored the district court’s findings that GE had a history of discriminatory employment practices targeted at women.³¹ Moreover, Justice Brennan disagreed that there was anything gender-neutral about GE’s exclusion of pregnancy benefits. First, the so-called voluntary nature of pregnancy should not have served as a basis for exclusion, he asserted, given that GE covered other voluntary conditions including sports injuries, attempted suicides,

²⁰ *Id.* at 496-97.

²¹ *Id.* at 496 n.20.

²² *Id.* at 496.

²³ *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

²⁴ *Id.* at 127.

²⁵ *Id.* at 138.

²⁶ *Id.*

²⁷ *Id.* (internal citation omitted).

²⁸ *Id.* at 136.

²⁹ *Id.*

³⁰ *Id.* at 139.

³¹ *Id.* at 150 (Brennan, J., dissenting).

and elective cosmetic surgery.³² Second, the fact that pregnancy is not a disease should not have been a determinative factor in finding neutrality in GE's policy given that GE also excluded diseases and severe complications occurring during pregnancy.³³

Further bolstering Justice Brennan's disagreement with the majority that GE's policy was a "sex-neutral assignment of risks" was the fact that although all conditions suffered by both sexes were covered, pregnancy was the only sex-specific condition singled out for exclusion in GE's policy; indeed, the plan covered male-specific procedures such as vasectomies and circumcisions.³⁴ Therefore, Justice Brennan concluded that GE's policy violated Title VII in light of the fact that it was "expressive of the secondary status of women in the company's labor force," especially considering "the history of [GE's] employment practices and the absence of definable gender-neutral sorting criteria"³⁵

In a separate dissenting opinion, Justice Stevens found *Geduldig* inapposite both because the earlier case involved the heavier burden of proving a constitutional, as opposed to a statutory, violation and because it had been decided a decade after Title VII was enacted.³⁶ Justice Stevens furthermore concluded that it was unnecessary (although persuasively argued in Justice Brennan's dissent) to address GE's underlying motives for its policy when the case was a simple matter of statutory construction. Put simply, he believed *Gilbert* posed the question: "Does a contract between a company and its employees which treats the risk of absenteeism caused by pregnancy differently from any other kind of absence discriminate against certain individuals because of their sex?"³⁷ Justice Stevens answered the question in the affirmative because pregnancy is a uniquely female condition, and thus by definition GE's policy explicitly discriminated on the basis of gender in violation of Title VII.³⁸

B. The PDA as a Legislative Response to *Gilbert*

The dissenting opinions in *Gilbert* ended up carrying the day legislatively as Congress overruled the decision in 1978 by enacting the PDA.³⁹ Congress clearly intended for the PDA to be read as rejecting the holding and reasoning of *Gilbert*,⁴⁰ with proponents of the bill emphasizing that they agreed with the dissenting opinions in the case.⁴¹ The House Report

³² *Id.* at 151.

³³ *Id.*

³⁴ *Id.* at 152-53.

³⁵ *Id.* at 153.

³⁶ *Id.* at 160-61 (Stevens, J., dissenting).

³⁷ *Id.* at 161.

³⁸ *Id.* at 161-62.

³⁹ 42 U.S.C. § 2000e(k) (1978).

⁴⁰ See *Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 678 (1983) ("When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision.").

⁴¹ See *id.* at 679 ("Many of [the proponents of the bill] expressly agreed with the views of the dissenting Justices.").

accompanying the bill that would become the PDA stated, for instance, “It is the committee’s view that the dissenting Justices correctly interpreted the [Civil Rights] Act,”⁴² while the Senate Report expressed the view that the dissenting opinions in *Gilbert* “correctly express both the principle and the meaning of [T]itle VII.”⁴³

In order to overturn the decision, the PDA added two clauses to the definitional section of Title VII. The first clause clarifies that “[t]he terms ‘because of sex’ or ‘on the basis of sex’” both include discrimination occurring “because of or on the basis of pregnancy, childbirth, or related medical conditions.”⁴⁴ Thus, this portion of the PDA was merely intended to reaffirm the principle that pregnancy discrimination is a form of sex discrimination and “reestablish[] the law as it was understood prior to *Gilbert*.”⁴⁵ Indeed, when the PDA was introduced on the floor of the House, Representative Hawkins noted that “it seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy.”⁴⁶

Meanwhile, the second clause of the PDA asserts that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work”⁴⁷ In other words, this passage was intended to clarify that pregnant workers should be treated in the same manner as others similarly unable to work, thereby ensuring equal treatment of pregnant workers in the workplace.⁴⁸ Along these lines, the House Report accompanying the bill that would become the PDA noted:

[The PDA] unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, and specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work. . . . This bill would prevent employers from treating pregnancy, childbirth and related medical conditions in a manner different from their treatment of other disabilities. In other words, this bill

⁴² H.R. REP. NO. 95-948, at 2 (1978).

⁴³ S. REP. NO. 95-331, at 2-3 (1977); *see also* 123 CONG. REC. 7541 (1977) (statement of Sen. Mathias) (“I am pleased to join today with several of my distinguished colleagues in both Houses in introducing legislation to counteract the Supreme Court’s decision in *General Electric versus Gilbert*.”).

⁴⁴ 42 U.S.C. § 2000e(k) (1978).

⁴⁵ S. REP. NO. 95-331, at 8 (1977).

⁴⁶ 123 CONG. REC. 10581 (1977) (statement of Rep. Hawkins).

⁴⁷ 42 U.S.C. § 2000e(k) (2012).

⁴⁸ *See* Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 33 (2009) (“The second clause specifically requires equal treatment with a defined comparison group—workers who are temporarily disabled by causes other than pregnancy, but similar in their ability or inability to work.”) (internal quotation marks omitted); Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 1013 (2013) (“Moreover, as opposed to a prohibition on discriminatory adverse actions—that is, setting forth what employers may not do—the second clause of the PDA places an affirmative obligation on employers. They shall treat pregnant employees the same as other employees with similar abilities.”).

would require that women disabled due to pregnancy, childbirth or other related medical conditions be provided the same benefits as those provided other disabled workers.⁴⁹

Thus, as the U.S. Supreme Court has noted, the PDA's second clause was intended "to illustrate how discrimination against pregnancy is to be remedied."⁵⁰

C. Applying the PDA's Second Clause to Discriminatory Acts

Because the PDA takes the form of a definitional amendment to Title VII, rather than a separate substantive statute, it is embedded in the existing Title VII framework⁵¹ and thus "finds force through the substantive sections of [Title VII]."⁵² In other words, the same Title VII principles that apply to sex discrimination apply to pregnancy discrimination under the PDA.⁵³ As such, pregnant workers have asserted two main types of claims under the law. First, a pregnant worker alleging discrimination can assert that her employer has engaged in intentional, "disparate treatment" discrimination.⁵⁴ Second, a pregnant worker can allege that the employer's practices, although facially neutral and not intended to discriminate, in fact disproportionately affected pregnant workers, *i.e.*, a disparate impact discrimination claim.⁵⁵

1. Disparate Treatment Liability

A plaintiff alleging disparate treatment must show that an employer intentionally discriminated against her because she was pregnant.⁵⁶ Either direct or indirect evidence can

⁴⁹ H.R. REP. NO. 95-948, at 3, 5 (1978). *See also* Mary DeLano, *The Conflict Between State Guaranteed Pregnancy Benefits and the Pregnancy Discrimination Act: A Statutory Analysis*, 74 GEO. L.J. 1743, 1751-52 & 1751 n.50 (1986) (providing an exhaustive list of references to equal treatment in the PDA's legislative history).

⁵⁰ *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987).

⁵¹ *See* DeLano, *supra* note 49, at 1747 ("By including pregnancy in the definition of sex, the PDA's first clause incorporates title VII's substantive principles on sex discrimination.").

⁵² *Scherr v. Woodland Sch. Cmty. Consol. Dist. No. 50*, 867 F.2d 974, 978 (7th Cir. 1988).

⁵³ *Id.* at 978-79; *see also* Jeanette R. Blair, *Pregnancy Discrimination*, 2 GEO. J. GENDER & L. 595, 602 (2001) ("Pregnancy claims take the same form as those available generally under Title VII.").

⁵⁴ *See Scherr*, 867 F.2d at 979 ("Because the PDA is part of Title VII and derives its substance and procedures from the Act as a whole, a claim of pregnancy discrimination, like any other claim of discrimination under Title VII, may be based either on a theory of disparate treatment or a theory of disparate impact."); Jamie L. Clanton, *Toward Eradicating Pregnancy Discrimination at Work: Interpreting the PDA to "Mean What It Says"*, 86 IOWA L. REV. 703, 710 (2001) ("Under the PDA, a pregnant worker has two avenues for maintaining a valid claim of pregnancy discrimination: she can provide evidence demonstrating either disparate impact or disparate treatment.").

⁵⁵ *See, e.g., Ricci v. DeStefano*, 557 U.S. 557, 577-78 (2009) (discussing disparate treatment compared to disparate impact cases generally); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312-14 (11th Cir. 1999) (explaining disparate treatment versus impact in the context of pregnancy discrimination).

⁵⁶ *See, e.g., Garcia v. Woman's Hosp. of Texas*, 143 F.3d 227, 231 (5th Cir. 1998) (concluding the plaintiff failed to show her employer's "policies or their application intentionally treated her differently than non-pregnant employees because of her pregnancy (*i.e.*, disparate treatment). . . ."); *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308,

establish intentional discrimination.⁵⁷ Evidence is direct “if it establishes discriminatory motive with no need for an inference or a presumption.”⁵⁸ Direct evidence of pregnancy-based sex discrimination, for instance, would include an explicit policy classifying pregnant workers differently than other workers or excluding pregnant workers from a job opportunity.⁵⁹ Alternatively, discriminatory statements made by the employer, particularly during a decisional process, can also be direct evidence of discrimination.⁶⁰

If a plaintiff does not have any direct evidence of discrimination, she can instead pursue a disparate treatment claim with indirect or “circumstantial evidence from which an inference of intentional discrimination may be drawn.”⁶¹ The first step to creating an inference of intentional discrimination is to establish a prima facie case under the burden-shifting framework established by the U.S. Supreme Court in *McDonnell Douglas Corp. v. Green*,⁶² a Title VII racially discriminatory hiring case.⁶³ A plaintiff using indirect evidence to ferret out a discriminatory motive can establish a prima facie case by demonstrating: (i) her membership in a protected class; (ii) that she suffered an adverse employment action; (iii) that she is otherwise qualified; and (iv) that others similarly situated but outside the protected class were more favorably treated.⁶⁴

Once the prima facie case is established, the burden shifts to the employer to provide, by a preponderance of evidence, a “legitimate, non-discriminatory reason for” treating employees outside the protected class better than employees within the protected class.⁶⁵ The plaintiff may

1313 (11th Cir. 1994) (identifying two separate theories—disparate treatment or intentional discrimination and disparate impact—for pregnancy discrimination claims).

⁵⁷ See, e.g., *Armstrong*, 33 F.3d at 1313 (“If direct evidence of discriminatory intent is not available, a plaintiff may present circumstantial evidence from which an inference of intentional discrimination may be drawn.”); *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994) (“Different kinds and combinations of evidence [including direct and circumstantial] can create a triable issue of intentional discrimination.”).

⁵⁸ *Young v. United Parcel Service, Inc.*, 707 F.3d 437, 446 (4th Cir. 2013).

⁵⁹ 29 C.F.R. § 1604.10(a) (2012) (“A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of title VII.”); *Garcia*, 143 F.3d at 231 (“Intentional disparate treatment may be achieved via a policy which on its face classifies pregnant employees differently from other non-pregnant employees.”).

⁶⁰ Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act*, 38 AM. BUS. L.J. 819, 845 (2001) (“Discriminatory statements made by the employer can be direct evidence of discrimination if made during a key decisional process, but if these comments are made outside the decisional process or are not causally related to the decision making process itself, they are viewed as isolated comments.”) (internal quotation marks omitted).

⁶¹ *Armstrong*, 33 F.3d at 1313.

⁶² *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

⁶³ *Young*, 707 F.3d at 446; *Gerner v. Cnty. of Chesterfield*, 674 F.3d 264, 266 (4th Cir. 2012).

⁶⁴ *Young*, 707 F.3d at 449–50; *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998); see also Jessica Carvey Manners, *The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 66 OHIO ST. L.J. 209, 213 (2005) (stating that in a PDA case, the fourth prong of a prima facie case “incorporates the second clause of the PDA” and rather than proving the plaintiff was replaced by a nonpregnant employee, “a PDA plaintiff asserts ‘that others similarly situated were more favorably treated.’”).

⁶⁵ *Tex. Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (quoting *McDonnell Douglas*, 411 U.S. at 802).

then respond by establishing that a preponderance of the evidence shows that the employer's allegedly legitimate reasons for the discrimination were, in fact, pretextual and not the true reason for the differential treatment.⁶⁶

2. Disparate Impact Liability

Alternatively, even if the employer lacked a discriminatory motive, a plaintiff can still pursue a case if the effect of the employer's facially neutral policy was nonetheless discriminatory in that it disproportionately negatively impacted pregnant workers.⁶⁷ To establish a prima facie disparate impact claim, "the plaintiff must identify the specific employment practice that allegedly has a disproportionate impact" and "demonstrate causation by offering statistical evidence sufficient to show that the challenged practice has resulted in prohibited discrimination."⁶⁸ The employer can then defeat liability by showing that the practice is job-related and represents a business necessity.⁶⁹

Courts have been hesitant to accept disparate impact claims in pregnancy discrimination cases, frequently requiring statistical evidence to support a contention that a neutral policy is being applied in a discriminatory manner; thus most plaintiffs pursue disparate treatment claims.⁷⁰ For instance, in a case involving a pregnant nurse's assistant who sought a lifting accommodation, the court held that the employee failed to establish a disparate impact claim because she did not provide any statistical evidence showing that her employer's modified duty policy of only accommodating employees injured on the job disproportionately impacted pregnant workers.⁷¹

In another case, a school district's leave policy—which "barred teachers from taking maternity leave immediately following a period of disability for which they used sick leave"—was challenged as disparately impacting pregnant teachers because it effectively prevented them from using their sick days for pregnancy-related disabilities, causing them to accumulate a greater number of sick days than nonpregnant teachers.⁷² The court concluded, however, that the plaintiff

⁶⁶ *Id.*

⁶⁷ *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312, 1314 (11th Cir. 1999).

⁶⁸ *Id.* at 1314 (internal citations omitted).

⁶⁹ *Id.*; 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2012); *Watson v. Ft. Worth Bank and Trust*, 487 U.S. 977, 986–99 (1988) (explaining plaintiff's burden when establishing a prima facie disparate impact case in the context of racial discrimination).

⁷⁰ See Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA's Pregnancy Exclusion*, 27 WIS. J.L. GENDER & SOC'Y 1, 7 (2012) ("[C]ourts have been historically reluctant to apply disparate impact analysis to workplace policies that disproportionately affect pregnant women because they have viewed such challenges as a 'backdoor' route to preferential treatment for pregnant women."); Clanton, *supra* note 54, at 710 n.43 ("Even more challenging [than identifying a facially nondiscriminatory policy implemented in a discriminatory fashion] is then finding statistical evidence to support a disparate impact claim."); Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 485–88 (2011) (noting courts are "particularly reluctant to recognize [pregnancy] disparate-impact claims" and providing numerous theories for this hostility); Laura Schlichtmann, *Accommodation of Pregnancy-Related Disabilities on the Job*, 15 BERKELEY J. EMP. & LAB. L. 335, 381 (1994) ("[S]everal cases applying disparate impact analysis under the PDA have set exceedingly stringent criteria for the plaintiff's initial showing of differentially adverse impact.").

⁷¹ *Spivey*, 196 F.3d at 1314.

⁷² *Maganuco v. Leyden Cmty. High Sch. Dist.* 212, 939 F.2d 440, 442 (7th Cir. 1991).

had failed to provide any evidence that pregnant women accumulated a greater number of sick days than their nonpregnant counterparts, defeating her disparate impact claim.⁷³ Meanwhile, in *Stout v. Baxter Healthcare Corp.*, an employer's strict absenteeism policy, where workers were fired if they missed more than three days of work during a probationary period, was found to not disparately impact pregnant workers because there was no evidence pregnant workers were treated any differently than other probationary employees who missed work.⁷⁴

Admittedly, although rare, a few pregnant women have had success asserting a disparate impact claim against their employers. For instance, female police officers have successfully asserted that a police department's failure to grant light-duty assignments for off-the-job injuries or conditions disparately impacted pregnant police officers.⁷⁵ Nonetheless, given the difficulty in establishing the requisite statistical evidence in support of a disparate impact claim, most pregnant workers whose employers failed to provide accommodations have sought redress under a disparate treatment theory of liability.⁷⁶

3. Conflicting Circuit Court Treatment of Disparate Treatment Cases Under the PDA

Recall that the PDA's second clause provides that employers must treat pregnant employees "the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . ."⁷⁷ If a pregnant worker is seeking a lifting accommodation at work, for instance, the court must look at how the employer treats other nonpregnant employees with similar lifting restrictions. As a result, much of the disparate treatment litigation arising in a pregnancy discrimination context has centered on the employee's and employer's differing visions for who is similarly situated to the plaintiff—or, in other words, who is an accurate comparator—in order to determine whether that person or group is receiving more favorable treatment than the pregnant employee, as required under the fourth prong of *McDonnell Douglas*.

Unfortunately for would-be plaintiffs, prior to the U.S. Supreme Court's decision in *Young v. United Parcel Service, Inc.*, lower courts were split regarding how to identify the proper comparator in a case asserting disparate treatment under the PDA. In particular, while the Sixth Circuit Court of Appeals adopted a broad view of the relevant comparator, most circuits had taken a much more restrictive view of who the plaintiff must show had received more favorable treatment.

⁷³ *Id.* at 444.

⁷⁴ 282 F.3d 856, 859–61 (5th Cir. 2002).

⁷⁵ *Lochren v. Cnty. of Suffolk*, No. CV 01-3925 (ARL), 2008 WL 2039458, at *1 (E.D.N.Y. May 9, 2008) (following the jury trial, the County entered into a consent decree with the plaintiffs allowing light duty for pregnant police officers).

⁷⁶ *See Clanton*, *supra* note 54, at 710 ("Because proving disparate impact often is very difficult, most plaintiffs opt instead to show that their employers intentionally discriminated against them under a disparate treatment analysis.").

⁷⁷ 42 U.S.C. § 2000e(k) (2012).

a. Sixth Circuit Court of Appeals' Focus on Similarity of Work Limitation

In *Ensley-Gaines v. Runyon*, the Sixth Circuit Court of Appeals adopted the most plaintiff-friendly view of the accurate comparator under the PDA, holding that the plaintiff should be compared to “nonpregnant employees similarly situated with respect to their ability to work.”⁷⁸ In *Ensley-Gaines*, the plaintiff, a U.S. Postal Service mailhandler, was granted light-duty status after her doctor advised her to lift no more than fifteen pounds and refrain from standing for more than four hours at a time during her pregnancy.⁷⁹ Plaintiff maintained, however, that her light-duty status was “in name only” because although she could have performed a full day’s worth of work sitting down, she was only allowed to work while standing and therefore had to go home after working only four hours each day, requiring her to use sick leave, annual leave, or take leave without pay.⁸⁰

The Sixth Circuit explained that although “Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated ‘in all respects,’ . . . the PDA requires only that the employee be similar in his or her ‘ability or inability to work.’”⁸¹ The court found the plaintiff met her burden of establishing a prima facie case of discrimination in the case because she had identified various individuals receiving preferential treatment who had similar lifting restrictions, including mailhandlers with on-the-job injuries who were given accommodations for a full eight-hour workday.⁸²

In sum, then, rather than focusing on how a worker sustained an injury or condition—*i.e.*, whether or not it was an occupational injury—the Sixth Circuit believed that courts should focus instead on whether other workers suffer a similar work limitation. Thus, if a nonpregnant worker with a lifting restriction is accommodated, a pregnant worker with a similar lifting restriction should likewise be accommodated.

b. Majority of Circuit Courts' Focus on the Source of the Injury/Condition

However, every other circuit court to consider the issue of who constitutes the relevant comparator under the PDA had adopted a different approach. These courts focused instead on the source of the injury by comparing the pregnant worker’s treatment to those employees who had sustained a non-ADA-qualifying, off-the-job injury. For example, in *Urbano v. Continental Airlines*, the Fifth Circuit considered a case in which an airline ticketing agent had requested a transfer to a service center position, which did not involve lifting baggage, due to her doctor’s orders to refrain from lifting more than twenty pounds during her pregnancy.⁸³ While the plaintiff argued that she should be treated the same as employees injured on the job who were granted lifting accommodations, the Fifth Circuit disagreed that employees with occupational injuries were the accurate comparison group. Instead, the court found that the airline’s decision to deny

⁷⁸ *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (emphasis omitted) (quoting *Int’l Union v. Johnson Controls*, 499 U.S. 187, 204–05 (1991)).

⁷⁹ *Id.* at 1222-23.

⁸⁰ *Id.* at 1223.

⁸¹ *Id.* at 1226 (internal citations omitted).

⁸² *Id.*

⁸³ *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 205 (5th Cir. 1998).

her request did not violate the PDA because she was treated the same as any other employee with a non-occupational injury or condition.⁸⁴ In the court's view, the accurate comparators were thus employees with off-the-job injuries who were not accommodated, and because she was treated the same as those employees, the airline was judged not to have run afoul of the PDA. To hold otherwise, the court reasoned, would be to grant pregnant workers preferential treatment when the PDA merely requires equal treatment with those similar in their inability to work.⁸⁵

Likewise, in *Serednyj v. Beverly Healthcare, LLC*, a nursing home activity director's doctor told her that she should not engage in heavy lifting after she experienced spotting and cramping during her pregnancy, and had previously suffered a miscarriage.⁸⁶ She submitted a request to the nursing home that she be excused from certain activities associated with her job, such as wheeling patients to activities, moving tables, and standing on a stool to update an activity calendar.⁸⁷ However, the employer's modified work policy only accommodated those with on-the-job injuries or employees with non-work-related injuries who qualified for accommodation under the ADA.⁸⁸ Because the employee did not fall into either category, the employer denied her request and terminated her employment because she could no longer perform the essential functions of her job.⁸⁹ After the employee sued, the Seventh Circuit found that there were no "similarly-situated nonpregnant employees" who were treated more favorably than plaintiff—*i.e.*, no worker with a non-ADA-covered, off-the-job injury was granted a light-duty accommodation—and thus that the plaintiff had not established a prima facie case of pregnancy discrimination.⁹⁰

Similarly, in *Spivey v. Beverly Enterprises, Inc.*, the Eleventh Circuit also found that the appropriate comparator to a pregnant nurse's assistant needing a lifting accommodation was an employee with non-occupational injuries.⁹¹ The court held that the proper analysis was for an employer to ignore the pregnancy and treat the plaintiff like any other employee injured off the job.⁹² Because the plaintiff had failed to show that her employer had accommodated any colleagues who had been similarly injured off the job, the court denied her disparate treatment claim.⁹³

Thus, under the majority view of the PDA, even if an employer accommodated those injured on the job, it was not required to similarly accommodate a pregnant worker because she was not similarly situated to that subclass. In other words, a pregnant worker was only entitled to be treated as well (or as poorly) as those injured off the job.⁹⁴ Courts often justified using this

⁸⁴ *Id.* at 206.

⁸⁵ *Id.* at 207.

⁸⁶ 656 F.3d 540, 546 (7th Cir. 2011).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.* Plaintiff had not worked for her employer long enough to qualify for FMLA leave. *Id.*

⁹⁰ *Id.* at 552.

⁹¹ 196 F.3d 1309, 1313 (11th Cir. 1999).

⁹² *Id.*

⁹³ *Id.* at 1313-14.

⁹⁴ *See* *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) ("Employers can treat pregnant

subclass of employees (with non-ADA qualifying, off-the-job injuries) as a comparator by noting that the PDA requires only equal treatment and not an affirmative mandate to reasonably accommodate pregnancy or provide preferential treatment compared to similarly-situated employees, *i.e.*, those injured off the job.⁹⁵ Absent evidence of pretext, a pregnancy-blind policy (such as only providing light duty to on-the-job injuries) would thus be upheld because pregnant workers were being treated the same as others injured off the job.

c. Scholarly Concern with the Prevailing Circuit Court Interpretation of Accurate Comparators

Some scholars were critical of the fact that, prior to *Young v. United Parcel Service, Inc.*, a majority of the circuit courts used nonpregnant employees with non-ADA, off-the-job injuries as the relevant comparative baseline to pregnant workers seeking accommodations.⁹⁶ In particular, these scholars contended that the majority rule's line of reasoning, in which courts attempt to avoid giving preferential treatment to pregnant workers by narrowing the class of valid comparators, had "virtually closed the door on pregnancy discrimination claims, except in the most egregious cases."⁹⁷ One scholar noted that women find themselves in a "catch twenty-two" when trying to find a perfect comparator because "[o]ften there is no one else who has been in plaintiff's situation, or, if there are others, they are all members of the protected class—pregnant women."⁹⁸

In addition, some have argued that comparing pregnancy to non-occupational injuries is flawed because pregnancy is "a natural, likely occurrence for many women of childbearing age" and thus qualitatively different than a pulled muscle occurring outside work.⁹⁹ Scholars maintain

women as badly as they treat similarly affected but nonpregnant employees . . .").

⁹⁵ See, e.g., *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 643 (6th Cir. 2006) ("The district court correctly noted that [plaintiff's] view of the law demands preferential, not equal treatment, and therefore finds no support in the Act."); *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998) ("[Plaintiff's] claim is thus not a request for relief from discrimination, but rather a demand for preferential treatment; it is a demand not satisfied by the PDA."); *Dinner, supra* note 70, at 483-84 ("Courts that limit the appropriate comparison group to employees with non-occupational injuries interpret the PDA to establish a mere prohibition on unequal treatment, incompatible with a claim for accommodation. . . . Another court characterizes the majority of courts as holding that the PDA 'does not impose an affirmative obligation on employers to grant preferential treatment to pregnant women.'") (citing *Urbano*, 138 F.3d at 207).

⁹⁶ See, e.g., Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67, 87 (2013) ("In what appears to be a growing trend, courts have undercut pregnant workers' rights under clause two [of the PDA] by carving out exceptions from the classes of workers to which pregnant women may compare themselves."); *Dinner, supra* note 70, at 484 ("Advocacy for a broad comparison group in disparate-treatment cases regarding light-duty accommodations represents not a departure from the PDA's norms but rather continuity with the goals of activists who mobilized for the legislation."); *Widiss, supra* note 48, at 962 ("The unduly narrow conception of comparators currently used by some courts interpreting the PDA risks relegating pregnancy once again to the basement.").

⁹⁷ *Clanton, supra* note 54, at 728.

⁹⁸ Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 241 (1998).

⁹⁹ *Clanton, supra* note 54, at 732; see also *Greenberg, supra* note 98, at 243-44 ("Although it is unusual for a court to admit that there is no comparable group of nonpregnant employees with whom the plaintiff can compare herself, locating such a group is frequently very difficult. This is because pregnancy is a unique condition and imposes unique

that this is why the drafters of the PDA avoided these artificial distinctions regarding the source of the condition and focused instead on the effects of the condition, with the statutory language comparing employees “similar in their ability or inability to work.”¹⁰⁰ Consequently, many have argued that, in line with the plain language of the PDA, courts should focus on the employee’s ability to work rather than the source of the injury when determining the proper comparator.¹⁰¹

II. YOUNG V. UPS

In *Young v. United Parcel Service, Inc.*, the U.S. Supreme Court entered the fray to resolve the circuit split regarding who is the appropriate comparator for purposes of determining whether pregnant women are being treated equally as required by the PDA. In order to provide the necessary context for a discussion of the Supreme Court’s opinion, a brief summary of the facts and procedural history of the case is instructive.

A. Background and District Court Opinion

Peggy Young worked as a part-time air driver for UPS, a job consisting of picking up and delivering packages arriving by air carrier.¹⁰² This position required Young to be able to lift seventy pounds, although Young maintained that she rarely had to lift more than twenty pounds.¹⁰³ When Young became pregnant, her doctor advised her to lift no more than twenty pounds and Young requested a reassignment to a light-duty position at UPS.¹⁰⁴ UPS’s policy, however, was to only grant such an accommodation to employees who: (i) had been injured on the job; (ii) were eligible for an accommodation under the ADA; or (iii) had lost their Department of Transportation (DOT) certification as a commercial driver because of a failed medical exam, lost driver’s license, or involvement in a motor vehicle accident.¹⁰⁵ Because Young did not fall into any of these categories, UPS denied her requested light-duty accommodation. As a result, because she could no longer perform the essential functions of an air driver due to her lifting restriction, she was forced to take an extended leave of absence without pay or medical coverage.¹⁰⁶ She returned to work after giving birth and ultimately filed a complaint in federal

burdens on women who become pregnant. When else would you find a previously satisfactory worker who suddenly begins to be egregiously late for work (because of morning sickness), whose lateness can be expected to continue for numerous weeks, who has a scheduled leave coming up, and who can be expected to return after that leave with no further lateness issues?”).

¹⁰⁰ Clanton, *supra* note 54, at 732 (citing 42 U.S.C. § 2000e(k) (1978)).

¹⁰¹ *Id.* at 731 (“Because the referent used in *Ensley-Gaines* for the disparate treatment analysis best advances the meaning and purpose of the PDA, that approach [based on ability to work] should be adopted.”); Greenberg, *supra* note 98, at 254 (“The crucial step in protecting pregnant employees from adverse employment decisions based on discriminatory stereotypes is to force courts and employers to focus on the employees’ abilities.”).

¹⁰² *Young v. United Parcel Service, Inc.*, 707 F.3d 437, 440 (4th Cir. 2013).

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Brief for United States as Amicus Curiae Supporting Petitioner at 5, *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015) (No. 12-1226), 2014 WL 4536939.

¹⁰⁶ *Id.*

district court alleging, among other things, disparate-treatment pregnancy discrimination under Title VII.¹⁰⁷

The district court granted UPS's motion for summary judgment because Young had failed to show any direct evidence of pregnancy discrimination. In particular, the court emphasized the fact that none of the three categories of accommodated employees under UPS's policy in any way referenced gender.¹⁰⁸ The court also concluded that Young had failed to establish a prima facie case of discrimination with indirect evidence because she could not identify a similarly situated comparator who received more favorable treatment, *i.e.*, one who had been granted a light-duty accommodation.¹⁰⁹ The court found Young was not similarly situated to the three categories of accommodated employees under UPS's policy because (i) she was ineligible for an ADA accommodation; (ii) she did not sustain an on-the-job injury; and (iii) she "possessed a physical impairment that stymied her ability to lift" rather than a legal obstacle that prevented her from driving like those employees who had lost their DOT certification.¹¹⁰ Because UPS treated Young and "some class of non-pregnant employees equally harsh," in the district court's view there could be no reasonable inference that UPS had "animus directed *specifically* at pregnant women," defeating her disparate treatment claim.¹¹¹

B. Fourth Circuit Court of Appeals' Opinion

The Fourth Circuit Court of Appeals affirmed the district court's grant of summary judgment. With regards to the direct evidence of discrimination, the court found that UPS's light-duty policy was "pregnancy-blind" as it treated pregnant and nonpregnant workers alike and thus did not provide direct evidence of discriminatory animus.¹¹²

As to establishing a prima facie case of disparate treatment discrimination using indirect evidence, the court focused on the main issue in dispute: the requirement under the *McDonnell Douglas* framework that Young establish that "similarly-situated employees outside the protected class received more favorable treatment than [her]."¹¹³ The court held that the PDA did not require accommodation of pregnant employees just because some—but not all—similarly-situated nonpregnant workers were accommodated.¹¹⁴ To hold otherwise, the court reasoned, would be to grant pregnant workers a "most favored nation" status compared to any other class protected by Title VII, with any benefit provided to a nonpregnant worker constituting evidence of discrimination if not also provided to any and all pregnant workers.¹¹⁵

¹⁰⁷ *Id.* at *6.

¹⁰⁸ Young v. United Parcel Service, Inc., No. DKC 08-2586, 2011 WL 665321, at *10-12 (D. Md. Feb. 14, 2011).

¹⁰⁹ *Id.* at *14.

¹¹⁰ *Id.* at *13.

¹¹¹ *Id.* at *14.

¹¹² Young v. United Parcel Service, Inc., 707 F.3d 437, 446-48 (4th Cir. 2013).

¹¹³ *Id.* at 450.

¹¹⁴ *Id.* at 446-47.

¹¹⁵ *Id.* at 446.

At the same time, the court concluded that Young was not similar in her ability to work to the three categories of employees entitled to accommodation under UPS's policy, and thus that those workers were not accurate comparators for determining liability under the PDA. Specifically, because Young's "lifting limitation was temporary" and not eligible for accommodation under the ADA, she was viewed as being dissimilar to the first category of ADA-accommodated employees under UPS's policy.¹¹⁶ Second, she was also viewed as being dissimilar to those who had lost their DOT certification not only because "no legal obstacle stands between her and her work," but also because those individuals "maintained the ability to perform any number of demanding physical tasks."¹¹⁷ Finally, she was "not similar to employees injured on the job because, quite simply, her inability to work [did] not arise from an on-the-job injury."¹¹⁸

Instead, the Fourth Circuit found Young was more similar to "an employee who injured his back while picking up his infant child or . . . an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter," neither of whom were eligible for accommodation under UPS's policy.¹¹⁹ Without showing a similarly-situated employee received more favorable treatment, the court held that Young had failed to establish a prima facie case for pregnancy discrimination using indirect evidence, and as a result affirmed the district court's decision.¹²⁰

C. U.S. Supreme Court Decision

The Supreme Court granted certiorari to resolve how to interpret the requirement in the second clause of the PDA that pregnant women "be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."¹²¹ Specifically, the Court was tasked with deciding how the PDA "applies in the context of an employer's policy that accommodates many, but not all, workers with nonpregnancy-related disabilities."¹²² Despite ultimately rejecting both parties' proposed interpretation of the PDA, a six-to-three majority of the Court voted to reverse the Fourth Circuit decision.

In particular, Young argued that if "an employer accommodate[d] only a subset of workers with disabling conditions," then any "pregnant workers [with similar limitations must] receive the same treatment even if still other nonpregnant workers do not receive accommodations."¹²³ The Court held that such an interpretation of the PDA went too far, however, reasoning that it would require the accommodation of pregnant workers even if an employer was accommodating only a small group of nonpregnant employees whose injuries, for

¹¹⁶ *Id.* at 450.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 450-51.

¹¹⁹ *Id.* at 448.

¹²⁰ *Id.* at 451.

¹²¹ *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338, 1344-45 (2015) (citing 42 U.S.C. § 2000e(k)).

¹²² *Id.* at 1344.

¹²³ Brief for Petitioner at 28, *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338 (2015) (No. 12-1226), 2014 WL 4441528.

instance, had been sustained while performing extra-hazardous work for the company.¹²⁴ In line with the reasoning expressed by a majority of the circuit courts, the court found the intent of the PDA was not “to grant pregnant workers an unconditional most-favored-nation status.”¹²⁵ Indeed, because the second clause of the PDA used the phrase “other persons,” the Court determined that it should not be read to “say that the employer must treat pregnant employees the ‘same’ as ‘any other persons.’”¹²⁶

Yet, at the same time, the Court also found UPS’s reading of the PDA—which viewed the second clause of the statute as merely clarifying that pregnancy discrimination is a form of sex discrimination—to be too narrow.¹²⁷ The Court held that this reading of the provision would render it superfluous because the PDA’s first clause already makes clear that discrimination on the basis of sex includes differential treatment occurring due to pregnancy.¹²⁸ Moreover, the Court noted, the clear intent of the PDA was to “overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied.”¹²⁹ Interpreting the PDA to merely clarify that pregnancy discrimination is a form of sex discrimination would not accomplish that objective.¹³⁰

After refusing to adopt either party’s interpretation of the PDA’s second clause, the Court instead fashioned a new approach to the *McDonnell Douglas* framework in cases asserting disparate treatment under the PDA via indirect evidence. Under the new formulation, which the Court limited solely to the PDA context,¹³¹ plaintiff’s initial four-part burden is still the same. She must show that: (i) she is a member of a protected class; (ii) she sought an accommodation; (iii) the employer failed to accommodate her, and (iv) “the employer did accommodate others ‘similar in their ability or inability to work.’”¹³² As before, the burden then shifts to the employer, who may justify the disparate treatment by proffering legitimate, non-discriminatory reasons for failing to accommodate the plaintiff.¹³³ However, the Court noted that these reasons “normally cannot consist simply of a claim that it is more expensive or less convenient” to accommodate pregnant workers.¹³⁴

Assuming the employer makes this showing, the plaintiff may then establish that the

¹²⁴ *Young*, 135 S.Ct. at 1349-50.

¹²⁵ *Id.* at 1350.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1352.

¹²⁸ *Id.*

¹²⁹ *Id.* at 1353 (citing *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285 (1987)).

¹³⁰ *Id.*

¹³¹ *Id.* at 1355 (“This approach, though limited to the Pregnancy Discrimination Act context, is consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an employer’s apparently legitimate, nondiscriminatory reasons for treating individuals within a protected class differently than those outside the protected class.”).

¹³² *Id.* at 1354.

¹³³ *Id.*

¹³⁴ *Id.*

employer's alleged justifications are pretextual.¹³⁵ This is the stage at which the *Young* majority hoped to provide additional clarity to the *McDonnell Douglas* framework for a PDA claim. Specifically, the Court held that a plaintiff can make this showing "by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers" and that the employer's "reasons are not sufficiently strong to justify the burden."¹³⁶ Along these lines, the majority clarified that a plaintiff can create a genuine issue of material fact that the policy significantly burdens pregnant workers "by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."¹³⁷

Thus, the *Young* majority effectively sidestepped the issue of who courts should focus on as the accurate comparator when establishing a prima facie case of disparate treatment under the PDA. Instead, the Court created a new percentage-based test, wherein the plaintiff can establish that an employer's policy significantly burdens pregnant workers by comparing the aggregate treatment of pregnant employees to all of the employer's nonpregnant workers. However, this new standard does not apply until after a plaintiff has met the initial hurdle of establishing a prima facie case of disparate treatment and is attempting to prove that the employer's proffered neutral business reasons justifying the discriminatory treatment are pretextual.

At the same time, the Court also suggested that recent developments in disability law might overshadow the decision. Specifically, the Court noted that the ADAAA—enacted in 2008 after *Young* had initiated her lawsuit—had "expanded the definition of 'disability' under the ADA to make clear that 'physical or mental impairment[s] that substantially limi[t]' an individual's ability to lift, stand, or bend are ADA-covered disabilities."¹³⁸ Without affirmatively ruling that the ADA, as amended, would have applied to *Young* had it been in effect at the time of her pregnancy, the Court nevertheless implied that this change might have impacted the case.¹³⁹

In any event, the Court ultimately vacated the Fourth Circuit's decision because *Young* had created a genuine issue of material fact "as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from *Young*'s," satisfying the fourth prong of *McDonnell Douglas*.¹⁴⁰ The Fourth Circuit subsequently remanded the case to the district court,¹⁴¹ who will now have to determine whether UPS's justifications for the disparate treatment were pretextual, and thus consider whether the combined effects of its accommodations policy significantly burdened pregnant workers.¹⁴² Or, in the words of the *Young* majority, the lower court must resolve "why, when the employer accommodated so many, could it not accommodate pregnant women as well?"¹⁴³

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.* at 1348.

¹³⁹ *Id.* (recognizing that the ADAAA "requires employers to accommodate employees whose temporary lifting restrictions originate off the job," but ultimately "expressing no view on these statutory and regulatory changes.").

¹⁴⁰ *Id.* at 1355.

¹⁴¹ *Young v. United Parcel Service, Inc.*, No. 11-2078, 2015 WL 2058940 (4th Cir. Apr. 28, 2015).

¹⁴² *Young*, 135 S.Ct. at 1355-56.

¹⁴³ *Id.* at 1355.

D. Justice Alito's Concurring Opinion

Justice Alito's concurrence agreed with the *Young* majority that the PDA's second clause, preceded by the word "and," must set out an additional requirement for employer conduct.¹⁴⁴ As Justice Alito noted, the second clause is written in the affirmative—the "employer 'shall' provide equal treatment"—while the first clause is [written in] the negative (it prohibits discrimination)," indicating that the clauses were to accomplish different objectives instead of the second merely clarifying the first clause.¹⁴⁵ Thus, Justice Alito disagreed with UPS that the PDA's second clause merely solidified the notion that pregnancy discrimination is a form of gender discrimination. Instead, Justice Alito concluded "that the second clause does not merely explain the first but adds a further requirement of equal treatment irrespective of intent."¹⁴⁶

As far as how to determine whether pregnant workers are receiving equal treatment, Justice Alito considered it illogical to conclude that if an employer provides leave for an injured worker whose job involves heavy lifting, for instance, then the employer must provide the same leave to a pregnant employee with a desk job.¹⁴⁷ Therefore, Justice Alito would have found that those performing the same or very similar work as the pregnant worker were the appropriate comparators.¹⁴⁸

At the same time, Justice Alito contended that it would be too broad a reading of the PDA to require pregnant workers to be similarly accommodated to workers who had analogous limitations and job duties irrespective of the reasons for the accommodation.¹⁴⁹ For instance, he noted that a worker might be accommodated after performing an act of heroism for the employer (such as saving employees from a workplace fire), and believed that an employer should not have to provide a comparable accommodation to a pregnant worker in a similar job.¹⁵⁰ Otherwise, the PDA "would go beyond anything demanded by any other antidiscrimination law";¹⁵¹ thus, he interpreted the phrase "similar in the ability or inability to work" to mean "similar *in relation* to the ability or inability to work."¹⁵² If an employer has a neutral business reason for providing preferential treatment to a nonpregnant worker performing similar tasks, then in Justice Alito's view the employer would not violate the PDA.¹⁵³

Turning back to the facts of the case, Justice Alito found that UPS did have a valid, neutral reason for accommodating both workers injured on the job (in order to allow the company to avoid paying out workers' compensation benefits) and those needing ADA accommodations

¹⁴⁴ *Young*, 135 S.Ct. at 1357 (Alito, J., concurring).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1358.

¹⁴⁸ *Id.* at 1357-58.

¹⁴⁹ *Id.* at 1358.

¹⁵⁰ *Id.* at 1358 n.3.

¹⁵¹ *Id.*

¹⁵² *Id.* at 1359.

¹⁵³ *Id.*

(because the law mandates such an accommodation).¹⁵⁴ However, he concluded that UPS had failed to provide “any plausible justification for treating [drivers who lost DOT certification] more favorably than drivers who were pregnant.”¹⁵⁵ The Fourth Circuit’s rationale that there was a legal obstacle preventing these workers from driving was unpersuasive in his view because it only explained why these workers were not allowed to drive and not why UPS felt obligated to accommodate them.¹⁵⁶ He also disagreed with the Fourth Circuit’s conclusion that drivers who lost DOT certification still maintained the ability to perform physically demanding tasks, making their situation distinguishable from Young. Justice Alito believed it was “doubtful” that all drivers losing DOT certification could still perform physically demanding tasks, as one may lose DOT certification for a host of reasons, including epilepsy, cardiovascular disease, or a lost limb.¹⁵⁷ Because these workers were presumably accommodated with less physically demanding work, Justice Alito did not believe that UPS had adequately explained why pregnant workers could not have received comparable accommodations.¹⁵⁸ Therefore, he agreed the case should be remanded as it was “not at all clear that [UPS] had any neutral business ground for treating pregnant workers less favorably than at least some of its nonpregnant drivers”¹⁵⁹

E. Justice Scalia’s Dissenting Opinion: Majority Conflates Disparate Treatment and Disparate Impact Liability

Justice Scalia’s dissent took issue with the majority’s interpretation of the second clause of the PDA. Specifically, he found no basis in the PDA’s text for the majority’s interpretation of the second clause, wherein when evaluating disparate treatment liability “courts must balance the significance of the burden on pregnant workers against the strength of the employer’s justifications for the policy” to determine if the employer’s alleged neutral policy is pretextual.¹⁶⁰ Moreover, he contended that this new test conflates disparate treatment and disparate impact liability by focusing on the effects of the employer’s policy on pregnant workers.¹⁶¹ Given that an employer is already not allowed, absent a business necessity, to utilize a practice that disparately impacts pregnant workers, Justice Scalia maintained the majority’s newfangled significant-burden balancing test was unnecessary.¹⁶² In addition, he believed this new test would serve to allow plaintiffs to increasingly bring claims for Title VII disparate treatment liability and its attendant enhanced remedies—including punitive damages—in cases where the more appropriate course would be to assert a claim under Title VII’s disparate impact provisions instead.¹⁶³

¹⁵⁴ *Id.* at 1360.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 1360-61.

¹⁵⁸ *Id.* at 1361.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 1364 (Scalia, J., dissenting).

¹⁶¹ *Id.* at 1365.

¹⁶² *Id.* at 1365-66.

¹⁶³ *Id.* at 1365.

Justice Scalia instead interpreted the PDA's second clause to mean that pregnancy cannot be the reason for treating pregnant women and other workers with similar limitations differently.¹⁶⁴ Young, he contended, was not treated differently because of her pregnancy; she would have been accommodated if she lost her DOT certification, for instance, and thus was treated the same as any other driver.¹⁶⁵ Employers are allowed to draw distinctions among employees when accommodating injuries, he believed, so long as they follow an "evenhanded policy" because Title VII simply requires equal, not favored, treatment.¹⁶⁶

Justice Scalia argued that his reading of the second clause would, consistent with one of the PDA's express purposes, overturn *Gilbert* because the disability plan at issue did not, as the majority claimed, exclude pregnancy on a neutral ground.¹⁶⁷ Instead, he asserted that the *Gilbert* plan "single[d] pregnancy out for disfavor" by not covering sicknesses related to pregnancy or childbirth (or even sicknesses unrelated to pregnancy or childbirth that happened to coincide with the recovery from childbirth) and thus would be unlawful under his reading of the PDA.¹⁶⁸ As far as the argument that his reading of the second clause would be superfluous as the first clause already defined pregnancy discrimination as a form of sex discrimination, Justice Scalia countered that "laws often make explicit what might already have been implicit."¹⁶⁹

III. IMPACT OF *YOUNG* AND ITS INTERSECTION WITH DISABILITY LAW

A. *Shortcomings of Young*

Although the *Young* decision is laudable in that it allowed the plaintiff to proceed with her case, there remains ambiguity in the wake of the decision as to how to properly apply the Court's new methodology. While the Supreme Court definitively rejected both *Young*'s and UPS's interpretation¹⁷⁰ of the most appropriate similarly-situated comparator for determining whether a pregnant worker has been treated equally, it failed to provide clarity regarding which type of employee provides the relevant point of comparison at the stage in which a plaintiff is establishing a prima facie case of disparate treatment under the PDA. Instead, the Court merely reiterated the statutory language that one looks to whether the "employer did accommodate others 'similar in their ability or inability to work.'"¹⁷¹

Although the Court found that *Young* had established a prima facie case because "UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from *Young*'s," it failed to mention how these "some employees" should be

¹⁶⁴ *Id.* at 1362 (stating that Title VII does "not [] prohibit employers from treating workers differently for reasons that have nothing to do with protected traits.").

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 1363.

¹⁶⁷ *Id.* at 1364.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1363.

¹⁷⁰ *Id.* at 1349, 1352.

¹⁷¹ *Id.* at 1354.

properly identified in future cases.¹⁷² Thus, confusion will likely remain as to whether courts should compare a pregnant worker's treatment to nonpregnant employees with similar work limitations or to nonpregnant employees with a similar source of injury (non-occupational, non-ADA) in determining a prima facie case of pregnancy discrimination. In short, lower courts will continue to face ambiguity about the appropriate comparative baseline following *Young*.

The Court apparently hoped to sidestep this issue by finding that if the employer "accommodates a large percentage of nonpregnant workers" without providing comparable accommodations to pregnant workers, the plaintiff can create a genuine issue of material fact regarding whether any alleged non-discriminatory reasons that her employer asserted in its defense were, in fact, pretextual.¹⁷³ There are several problems with this approach. For starters, this factor does not come into play until a plaintiff has already established a prima facie case of disparate treatment, meaning that the Court failed to elucidate who plaintiffs should compare themselves to when attempting to meet their initial burden under the *McDonnell Douglas* test.

Further, there are likely to remain instances where even if the pregnant worker successfully identifies similarly situated employees receiving preferential accommodations, she would nevertheless be unable to show pretext because there are not a large enough number of accommodated employees to show that the policy has significantly burdened pregnant workers. In other words, if the employer has accommodated merely two employees with similar limitations, and this proof were found to meet the standard for establishing a prima facie case under the PDA (despite the lack of guidance from the *Young* Court), there would not be enough of a critical mass of workers to establish pretext or a significant burden on pregnant employees. This would be the case even though the pregnant worker is being treated differently than these two workers who are similar in their ability to work, in direct contravention of the language of the PDA. Indeed, as noted above, the difficulty in compiling this sort of statistical evidence has historically prevented plaintiffs from asserting analogous disparate impact claims.¹⁷⁴

Moreover, the Court's new approach is arguably at odds with the PDA's statutory text. As the majority noted in its opinion, the second clause of the PDA used the phrase "other persons," rather than "any other person,"¹⁷⁵ thus suggesting that Congress did not intend to grant pregnant women a most-favored-nation status, entitling them to any accommodation an employer has made for any other worker. While the majority presumably believed its new formulation overcame this problem by shifting the focus from individual employees to a company's workforce as a whole, by doing so the Court has instead effectively interpreted the relevant language as "all other workers," equally in contravention of the text of the statute. Indeed, there may be cases in the future where a prospective plaintiff could show that a critical mass of her similarly situated colleagues have received her requested accommodation—suggesting some sort of pretext or animus on the part of her employer—but nevertheless be unable to establish the same level of disparity of treatment when comparing herself to thousands of workers in differing positions company-wide. Under the Court's new interpretation of the PDA, this plaintiff would not prevail in her case, even though she had been subject to disparate treatment when compared to a number

¹⁷² *Id.* at 1355.

¹⁷³ *Id.* at 1354.

¹⁷⁴ *See supra* Part I.C.2.

¹⁷⁵ *Young*, 135 S.Ct. at 1350 ("The second clause, when referring to nonpregnant persons with similar disabilities, uses the open-ended term 'other persons.' It does not say that the employer must treat pregnant employees the 'same' as 'any other persons' (who are similar in their ability or inability to work) . . .").

of relevant “other persons.”

The Court may have fashioned this new wrinkle in *McDonnell Douglas* for PDA claims—*i.e.*, the balancing of the significance of the burden on pregnant workers against the strength of the employer’s justifications for the policy—in order to create a more malleable standard. This could give courts more wiggle room to take into account the specifics of a given instance of alleged discrimination without being bound to a rigid formula. Nevertheless, along with Justice Scalia’s contention that this new balancing test risks conflating disparate treatment and disparate impact liability,¹⁷⁶ it more fundamentally fails to resolve the circuit split regarding how to identify the relevant comparator when establishing a prima facie case of disparate treatment under the PDA and thus potentially risks creating even more confusion.

Instead, the better course of action for the majority may have been to follow the approach suggested by Justice Alito in his concurrence. Indeed, Justice Alito’s opinion would have provided more guidance to plaintiffs and courts regarding how to analyze the fourth prong of *McDonnell Douglas* in a PDA case, and thus would have imparted a clearer methodology for courts to follow. Specifically, under Justice Alito’s approach, one would determine whether a pregnant worker is receiving less favorable treatment by comparing her to employees with similar work limitations who are *performing the same or similar job*.¹⁷⁷ Limiting the scope to other employees performing the same or similar jobs removes the problem that would arise when an employer accommodates its CEO (due to her seniority or importance to the company), thus arguably entitling more rank-and-file pregnant employees to the same accommodation. Similarly, it is also reasonable to conclude that just because a worker whose job rarely involves lifting is provided an accommodation (*e.g.*, a receptionist), the same accommodation would not necessarily need to be given to a pregnant worker whose job entails more frequent lifting (*e.g.*, a delivery driver) where the accommodation would more greatly impact productivity.

Consequently, although the Supreme Court’s decision in *Young* certainly enhanced the rights of pregnant women under the PDA by finding that *Young* had established a prima facie case of pregnancy discrimination, the decision unfortunately failed to sufficiently resolve the key issue upon which the Court agreed to hear the case.

B. Young Remains Important Despite the ADAAA

Although the U.S. Supreme Court’s decision in *Young* failed to clarify who courts should consider as the relevant comparator in disparate treatment cases relying on indirect evidence under the PDA, the *Young* Court suggested that the ultimate impact of its decision may be relatively modest in light of recent developments in disabilities law.¹⁷⁸ Specifically, in 2008, Congress expanded the definition of a disability with the Americans with Disabilities Act Amendment Act (ADAAA), arguably bringing many pregnancy-related conditions within the scope of the law. Unfortunately, contrary to the *Young* Court’s suggestion, most lower courts have not been amenable to pregnancy-related claims brought under the amended ADA, and thus it is doubtful whether the modified law will offer most pregnant women much relief. Therefore, the PDA remains an important source of relief for pregnant employees moving forward.

¹⁷⁶ *Id.* at 1365 (Scalia, J., dissenting) (“Having ignored the terms of the same-treatment clause, the Court proceeds to bungle the dichotomy between claims of disparate treatment and claims of disparate impact.”).

¹⁷⁷ *Id.* at 1357-58 (Alito, J., concurring).

¹⁷⁸ *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338, 1348 (2015).

1. History of Pregnancy Under the ADA

The Americans with Disabilities Act (ADA) of 1990 generally prohibits employers from discriminating against disabled employees in part by requiring employers to make “reasonable accommodations to the known physical or mental limitations of an otherwise qualified” disabled employee, unless such accommodation would constitute an “undue hardship” on the employer.¹⁷⁹ In order to qualify as disabled, the employee must show that she suffers from “a physical or mental impairment that substantially limits one or more [of her] major life activities.”¹⁸⁰ In determining whether an individual is substantially limited in a major life activity, courts considered “[t]he duration or expected duration of the impairment; and [t]he permanent or long-term impact . . . of or resulting from the impairment,”¹⁸¹ denying ADA protection to transitory conditions (typically those lasting less than six months).¹⁸²

Historically, pregnancy and pregnancy-related medical conditions were generally not considered to be qualifying disabilities under the ADA because pregnancy and its associated complications were viewed as both (i) being too temporary in duration and (ii) not sufficiently limiting of a major life activity to meet the statutory definition.¹⁸³ Instead, to qualify for a reasonable accommodation under the ADA, courts typically required that pregnant workers have a “medical condition that predated her pregnancy and was exacerbated by it.”¹⁸⁴ In fact, many women’s rights advocates expressed concern with the idea that pregnancy would be recognized as a disability under the ADA, fearing that such a classification would solidify stereotypes that women were unfit for the workplace without accommodation.¹⁸⁵

¹⁷⁹ 42 U.S.C. § 12112(b)(5)(A) (2012).

¹⁸⁰ 42 U.S.C. § 12102(1)(A) (2012).

¹⁸¹ *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 196 (2002) (citing 29 C.F.R. §§ 1630.2(j)(2)(ii)-(iii) (2001)).

¹⁸² See Jeannette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 462-63 (2012) (“Courts frequently denied ADA class membership to persons whose physical or mental impairments caused substantial limitations that lasted less than six months.”).

¹⁸³ See Cox, *supra* note 182, at 467-68 (2012) (“Prior to the ADAAA, the short-term and modest nature of pregnancy limitations meant that a healthy pregnant worker’s only route to ADA coverage was through the ADA’s ‘regarded as disabled’ prong, which allowed a plaintiff to argue that although her limitations did not rise to the level of an ADA disability, her employer terminated her based on an inaccurate belief that they did.”); Joan C. Williams, *A Sip of Cool Water: Pregnancy Accommodation after the ADA Amendments Act*, 32 YALE L. & POL’Y REV. 97, 109 (2013) (“Prior to the ADAAA, many courts held that pregnancy-related impairments that subsided shortly after the termination of pregnancy and left no lasting harm were not substantially limiting. . . . Another obstacle to establishing disability based on a pregnancy-related condition was the severe set of requirements courts applied for a condition to qualify as ‘substantially limiting’ a ‘major life activity’ under the pre-amendment ADA.”).

¹⁸⁴ Williams, *supra* note 183, at 110 (citing *Patterson ex rel. Patterson v. Xerox Corp.*, 901 F. Supp. 274 (N.D. Ill. 1995)).

¹⁸⁵ See, e.g., Greenberg, *supra* note 98, at 250 (“[B]ringing pregnancy under the ADA would reinvigorate the stereotype of pregnant women as disabled and not fit for work.”); Colette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193, 194 (1993) (“The claim that the rights and needs of pregnant workers should be sought under disability law doctrines, instead of under theories of gender discrimination, invites suspicion. Although many feminists wish to secure tangible benefits for pregnant workers, they fear the characterization of pregnancy as a disability.”); Schlichtmann, *supra* note 70, at 358 n.167

In 2008, Congress expanded the definition of a disability by enacting the ADAAA, which was intended to make it easier for plaintiffs to prove they are disabled under the ADA.¹⁸⁶ First, the ADAAA broadens the definition of a “major life activity” to include an individual’s ability to lift, stand, bend, or operate a major bodily function.¹⁸⁷ The EEOC’s implementing regulations also loosened the definition of “substantially limits” by providing that “[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting.”¹⁸⁸ Moreover, the EEOC now recognizes eligible impairments of six months or less in duration as ADA disabilities,¹⁸⁹ eliminating one of the major hurdles to pre-ADAAA accommodation of pregnant workers due to the transitory nature of pregnancy-related conditions.¹⁹⁰

While pregnancy itself is not an ADA-covered disability under the new law,¹⁹¹ impairments related to pregnancy may now qualify as ADA disabilities if they substantially limit a major life activity, which “is not meant to be a demanding standard.”¹⁹² As a result, at least one scholar has concluded that under the ADAAA “there is considerably less danger that characterizing pregnancy as an ADA disability will revive assumptions that pregnancy precludes labor force participation . . . [as] pregnancy would be just one additional physical condition that may . . . necessitate accommodation.”¹⁹³

2. Courts Have Not Been Receptive to Pregnancy-Related Claims Filed Under the Amended ADA

While at first glance it would appear that many of the short-term conditions associated with pregnancy—such as lifting and standing limitations or nausea—would now fall within the ambit of the ADAAA’s reasonable accommodation mandate, courts applying the law in these cases have not been so generous.¹⁹⁴ For example, in *Serednyj v. Beverly Healthcare, LLC*, the

(“[D]efining pregnancy itself as a disability would reverse years of argument and pressure by many women against traditional stereotypes of this natural function.”).

¹⁸⁶ 42 U.S.C. § 12102 (2009); see also 29 C.F.R. Part 1630, App. § 1630.2(g) (2012); 154 CONG. REC. 13,765 (2008) (Joint Statement of Reps. Hoyer and Sensenbrenner on the origins of the ADA Restoration Act of 2008, H.R. 3195) (“[T]he primary purpose of the [ADAAA] is to make it easier for people with disabilities to obtain protections under the ADA.”).

¹⁸⁷ 42 U.S.C. § 12102(1)-(2) (2012).

¹⁸⁸ 29 C.F.R. § 1630.2(j)(1)(ii) (2012).

¹⁸⁹ 29 C.F.R. § 1630.2(j)(1)(ix) (2012).

¹⁹⁰ Cox, *supra* note 182, at 462-63 (“Courts frequently denied ADA class membership to persons whose physical or mental impairments caused substantial limitations that lasted less than six months.”).

¹⁹¹ See 29 C.F.R. § 1630.2(h) app. at 378 (2012) (failing to include pregnancy as an impairment in the ADA).

¹⁹² 29 C.F.R. § 1630.2(j)(1)(i), (ii) (2012); 29 C.F.R. Part 1630, app. 380-81 §1630.2(h) (2012); *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, EEOC.GOV, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited Dec. 28, 2015) (asking if pregnancy is a disability at Question 23).

¹⁹³ Cox, *supra* note 182, at 473-74.

¹⁹⁴ See *id.* at 465 (“The combined effect of the relaxation of the ADA’s severity and durational

only appellate-level decision to date, the court refused to consider most pregnancy-related complications as disabilities under the amended ADA.¹⁹⁵ Instead, the court drew a distinction between a normal and an abnormal pregnancy, holding that pregnancy-related complications must be a product of a physiological disorder (an abnormal functioning of the body or an organ) in order to qualify as a physical impairment under the ADA.¹⁹⁶ The court found that plaintiff's pregnancy-related complications, which included cramping, spotting, and the increased risk of miscarriage, supported an inference that she had a physiological disorder of her reproductive system.¹⁹⁷ Nonetheless, the court held she was not disabled because her impairments did not substantially limit the major life activity of reproduction and lifting because they were of a limited duration without any long-term impact.¹⁹⁸

Specifically, relying primarily on pre-ADAAA cases,¹⁹⁹ the Seventh Circuit found that the plaintiff's complications had lasted only four months during her pregnancy and did not cause any chronic limitations post-birth; thus, the court held that her impairments were too transitory in nature to qualify for relief under the ADA.²⁰⁰ Indeed, the court noted that given that pregnancy is, by definition, of a limited duration, "an ADA plaintiff asserting a substantial limitation of a major life activity arising from a pregnancy-related physiological disorder faces a tough hurdle."²⁰¹ Many lower courts considering the issue have reached similar conclusions,²⁰² clinging to a narrow definition of "substantially limits" under the ADA despite the fact that the EEOC eliminated this durational requirement in its regulations implementing the ADAAA.²⁰³

Even those courts that have been more amenable to recognizing a pregnancy-related claim under the amended ADA have nevertheless established a high threshold for success,

requirements is that the ADAAA brings into the ADA's protected class persons whose work limitations parallel the functional limitations pregnant workers may experience.").

¹⁹⁵ 656 F.3d 540 (7th Cir. 2011).

¹⁹⁶ *Id.* at 553 (citing *Hernandez v. City of Hartford*, 959 F. Supp. 125, 130 (D.Conn. 1997)).

¹⁹⁷ *Id.* at 554.

¹⁹⁸ *Id.*

¹⁹⁹ *Id.* at 555 (citing *Muska v. AT&T Corp.*, No. 96C5952, 1998 WL 544407, at *9 (N.D.Ill. Aug. 25, 1998) (holding that plaintiff's pregnancy-related complication of fetal distress did not substantially limit her in the major life activity of reproduction, because the impairment lasted only two months and did not affect her ability to carry a fetus to term in the future); *Gabriel v. City of Chicago*, 9 F. Supp.2d 974, 983 (1998) (finding an issue of fact as to whether plaintiff was substantially limited in the major life activity of standing when her complications persisted even after she gave birth)).

²⁰⁰ *Serednyj*, 656 F.3d at 555-56.

²⁰¹ *Id.* at 554.

²⁰² *Widiss*, *supra* note 48, at 1009 (noting that "some courts deciding cases after the effective date of the [ADAAA] have denied disability claims in pregnancy cases that include serious complications, relying on pre-ADA amendment case law and not even considering whether the amendments should change the analysis.").

²⁰³ *See, e.g., Sam-Sekur v. Whitmore Group, Ltd.*, 2012 WL 2244325, at *8 (2012) (finding "temporary impairments, pregnancies, and complications arising from pregnancy are not typically considered disabilities" and denying plaintiff's pregnancy-related ADA claim due, in part, to the duration of her illnesses); *Dantuono v. Davis Vision, Inc.*, No. 07-CV-2234 (TCP)(ETB), 2009 WL 5196151, at *3 (E.D.N.Y. Dec. 29, 2009) (holding the inability to lift more than ten pounds as a result of pregnancy was temporary, and therefore not a disability).

typically requiring the plaintiff's symptoms to be quite severe in nature in order to qualify as a disability.²⁰⁴ In *Mayorga v. Alorica, Inc.*, for instance, the court recognized that plaintiff's pregnancy-related complications—which included severe back and abdominal pain, premature uterine contractions, increased heart rate, multiple emergency room admissions, and three weeks of doctor-prescribed bed rest—might qualify as a disability under the ADA.²⁰⁵ The *Mayorga* court did imply, however, that the more common conditions associated with a “healthy pregnancy” might not qualify as disabilities entitled to an accommodation.²⁰⁶ Instead, the court noted that only “a medical condition aris[ing] out of a pregnancy and [that] causes an impairment separate from the symptoms associated with a healthy pregnancy, or significantly intensifies the symptoms associated with a healthy pregnancy” could qualify as a disability under the ADA.²⁰⁷

Thus, although the Supreme Court's majority opinion in *Young* suggested that the decision's practical impact may prove to be relatively modest in light of the ADA,²⁰⁸ as the case law outlined above reveals, plaintiffs hoping to assert a pregnancy-related disability case under the ADA continue to face an uphill battle. As a result, the PDA remains an important source of relief for plaintiffs in cases where an employer has refused to accommodate an employee's pregnancy. Consequently, the *Young* Court's failure to sufficiently clarify the law in this area will have a significant practical effect on plaintiffs moving forward.

Moreover, even if future courts were to become more amenable to pregnancy-related claims under the ADA, there would likely still be a number of cases in which plaintiffs would still fail to qualify for an accommodation under disability law. For instance, a woman seeking a light-duty accommodation, similar to that requested in *Young*, could still be denied the accommodation under the ADA if the employer does not have the resources or alternative positions necessary to meet the request without creating an undue hardship.²⁰⁹

Similarly, the ADA also would not offer relief to a plaintiff who is not suffering any impairment of her own due to the pregnancy, but instead is concerned for the health of her unborn child. For example, a pregnant surgeon performing a fluoroscopy procedure (image-guided surgery with radiation) may be concerned about exposing her fetus to radiation even while wearing a protective vest and seek to have an alternative surgeon perform the procedure. Under the ADA, however, the surgeon would not be considered disabled, and thus would not be entitled

²⁰⁴ See *Oliver v. Scranton Materials, Inc.*, No. 3:14-CV-00549, 2015 WL 1003981, at *8 (M.D. Penn. Mar. 5, 2015) (stating pregnancy-related complications can be a disability under the ADA but dismissing without prejudice pregnant worker's ADA claim for failure to state a claim as her complaint did not specify her specific complications).

²⁰⁵ No. 12-21578-CIV, 2012 WL 3043021, at *1, *6 (S.D. Fla. July 25, 2012).

²⁰⁶ *Id.* at *5.

²⁰⁷ *Id.* at *5. See also *Nayak v. St. Vincent Hosp. and Health Care Center, Inc.*, No. 1:12-cv-0817-RLY-MJD, 2013 WL 121838, at *3 (S.D. Ind. Jan. 9, 2013) (holding that a medical resident “sufficiently pled a plausible claim for disability discrimination” under the ADA when her employer failed to accommodate her pregnancy-related symphysis pubis dysfunction (misalignment of the pelvis) for two months postpartum); *Heatherly v. Portillo's Hot Dogs, Inc.*, 958 F. Supp. 2d 913, 921 (N.D. Ill. 2013) (ultimately granting summary judgment for the employer despite acknowledging that a high-risk pregnancy could “create a triable issue of fact . . . under the ADA.”).

²⁰⁸ *Young v. United Parcel Service, Inc.*, 135 S.Ct. 1338, 1348 (2015).

²⁰⁹ If this is the case, though, it is doubtful that the PDA would provide a remedy either, as the employer is unlikely to be accommodating other, similarly situated nonpregnant employees.

to any form of accommodation. However, if the employer accommodated other nonpregnant surgeons seeking reassignment for these same types of surgeries—due to concern that radiation exposure on uncovered areas of the body increases their own risk of skin cancer or eye disease, for instance—then the pregnant worker could argue under the PDA that she is entitled to similar treatment.²¹⁰ Thus, even if courts were to begin to more expansively apply the amended ADA to pregnancy-related claims in the future, the PDA would remain quite relevant to a number of women not covered by disability law.²¹¹

That having been said, for those women who can show severe pregnancy-related conditions rising to the level of a disability under the existing judicial interpretation of the ADAAA—or if courts begin to recognize that the ADAAA’s relaxation of the durational and severity requirements for the requisite disability now encompasses many pregnancy-related conditions—then disability law will likely provide the easier path for relief, for several reasons. First, unlike the PDA, the ADA does not require that plaintiffs identify a similarly situated comparator who has received preferential treatment. Instead, the pregnant worker’s condition merely has to meet the definition of a disability, while her requested accommodation must be reasonable and not pose an undue hardship on her employer. When these conditions are met, the worker will be entitled to an accommodation under the ADA. Given that many pregnant women seek minor accommodations for pregnancy-related conditions—such as being allowed to use a stool or carry a water bottle²¹²—they will almost certainly be deemed to have made a reasonable request that does not pose an undue hardship on their employers, entitling them to the requested accommodation under the expanded ADA.

Second, even if a plaintiff were able to identify a valid comparator receiving preferential treatment and thereby establish a prima facie case under the PDA, the employer may still be in accordance with the law if it has a legitimate, non-discriminatory reason for failing to accommodate the pregnant worker.²¹³ As noted above, the employee would then have to argue that this allegedly neutral reason is pretextual by showing that the effects of the policy significantly burden pregnant workers.²¹⁴ Conversely, the ADA has no analogous requirement forcing the plaintiff to analyze the effects of an employer’s accommodations policy, making the process for seeking an accommodation under the ADA more straightforward.

Nevertheless, because the ADA appears unlikely—at least under existing judicial interpretations—to provide sufficient relief to most women seeking reasonable accommodations for pregnancy-related conditions, plaintiffs will continue to be forced to rely on the PDA to obtain

²¹⁰ See Williams, *supra* note 183, at 136-37 (noting the need for the PDA and providing additional hypothetical examples where the ADA would fail to accommodate pregnant workers).

²¹¹ See also Brake & Grossman, *supra* note 96, at 70 (arguing “that there is still value in addressing the harm of pregnancy discrimination specifically as a sex equality right [through the PDA as opposed so the ADA] . . . [because] strengthening the sex equality foundations of the right may potentially strengthen the broader social and legal movements for gender equality and reproductive justice.”).

²¹² See, e.g., Wiseman v. Wal-Mart Stores, Inc., No. 08-1244-EFM, 2009 WL 1617669, at *1 (D. Kan. June 9, 2009) (pre-ADAAA case where employer denied pregnant sales associate’s request to carry a water bottle due to her pregnancy-related urinary tract infections).

²¹³ See *supra* notes 133-134 and accompanying text (noting the potential defense available to employers under the PDA).

²¹⁴ See *supra* notes 135-137 and accompanying text (discussing the new methodology through which plaintiffs can show pretext following *Young*).

workplace accommodations from their employer. As a result, the *Young* Court's failure to provide sufficient clarity in this area of the law will vex future plaintiffs and courts well into the future.

IV. CONCLUSION

This article has examined the U.S. Supreme Court's 2015 decision in *Young v. United Parcel Service, Inc.* Although the majority opinion in *Young* is certainly more worker friendly than had been the prior majority judicial interpretation of the PDA, pregnant employees may still struggle to satisfy the new standard formulated by the Court in pregnancy discrimination cases. Specifically, by failing to provide clarity regarding which colleagues pregnant workers should compare themselves to when asserting a case of disparate treatment under the PDA, plaintiffs (and courts) are likely to continue to struggle with this issue in the future. Although the *Young* Court suggested that recent developments in disability law—and the 2008 enactment of the ADAAA in particular—could render its decision moot, this is unlikely to be the case in light of existing judicial interpretations of the law. Consequently, the judiciary should take additional steps to provide further clarity—along the lines suggested by Justice Alito in his concurring opinion in *Young*—regarding which co-workers pregnant employees should compare themselves to in order to establish a prima facie case of disparate treatment under the PDA.