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# The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After *Young v. UPS*

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## INTRODUCTION

It is commonplace, in today’s world, for pregnant women to work until very close to their due date, and many don’t need any changes on the job. But sometimes women may request accommodations — such as being able to sit on a stool or avoid heavy lifting — to permit them to work safely and productively through a pregnancy. Legal claims in this area have skyrocketed in recent years.<sup>1</sup> In 2013, I published an

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<sup>1</sup> See CYNTHIA THOMAS CALVERT, CAREGIVERS IN THE WORKPLACE: FAMILY RESPONSIBILITIES DISCRIMINATION LITIGATION UPDATE 2016, at 15 (2016),

article, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, in this journal that explored this topic in depth.<sup>2</sup> I argued that lower courts were misinterpreting the Pregnancy Discrimination Act (“PDA”) — which mandates that pregnant employees be treated “the same” as other employees “similar in their ability or inability to work”<sup>3</sup> — by permitting employers to treat pregnant employees less favorably than employees with other kinds of health conditions, so long as the employer could point to a “pregnancy-blind” basis for the distinction. My concern was spurred by the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”), which greatly expanded the range of health conditions that could qualify as disabilities under the ADA.<sup>4</sup> As I explained in *Gilbert Redux*, the erroneous interpretation endorsed by some courts that ADA-accommodated employees could not be used as comparators under the PDA meant that the enhanced support for individuals with disabilities would have the perverse effect of decreasing employers’ obligations to pregnant employees.<sup>5</sup>

The legal landscape has changed dramatically in the four years since I published *Gilbert Redux*. Most centrally, the Supreme Court issued a major decision, *Young v. United Parcel Service, Inc.* (UPS), interpreting the PDA’s “same treatment” language as it applies to requests for accommodations.<sup>6</sup> Additionally, new regulations from the Department of Labor and new guidance from the Equal Employment Opportunity Commission (“EEOC”) each discuss the issue;<sup>7</sup> a growing number of courts have considered how the amended ADA applies to pregnancy-related conditions;<sup>8</sup> and many states have enacted new laws that explicitly require reasonable accommodations for pregnancy.<sup>9</sup> This

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<http://worklifelaw.org/pubs/FRDupdate2016.pdf> (reporting 315% increase in pregnancy accommodation claims in 2006–2015, as compared to the previous decade).

<sup>2</sup> Deborah A. Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 UC DAVIS L. REV. 961 (2013) [hereinafter *Gilbert Redux*].

<sup>3</sup> 42 U.S.C. § 2000e(k) (2012).

<sup>4</sup> See Americans with Disabilities Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

<sup>5</sup> Widiss, *Gilbert Redux*, *supra* note 2, at 1023-25.

<sup>6</sup> *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

<sup>7</sup> See 41 C.F.R. § 60-20.5 (2016); U.S. EQUAL EMP. OPPORTUNITY COMM’N (EEOC), ENFORCEMENT GUIDANCE 915.003: PREGNANCY DISCRIMINATION AND RELATED ISSUES (2015), [https://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm).

<sup>8</sup> See *infra* Part IV.

<sup>9</sup> See *infra* Part IV.

essay explores the implications of the Supreme Court's decision in *Young* and these other developments for the PDA–ADA interaction I analyzed in *Gilbert Redux*.<sup>10</sup>

*Young* makes clear that lower courts erred in holding that employees accommodated pursuant to “pregnancy blind” policies could not be used as comparators in analysis under the PDA.<sup>11</sup> *Young* requires that lower courts probe any such justifications to determine whether the employer's refusal to accommodate the pregnant employee was infected by discriminatory bias.<sup>12</sup> Such scrutiny is required even if an employer asserts (as UPS did) that its justification for differential treatment was compliance with a different statutory mandate, such as the ADA or a workers' compensation law. (Justice Alito, concurring in the judgment, suggests otherwise, but in this respect his interpretation differs from that of the majority and thus should not be followed by lower courts.)<sup>13</sup> Crucially, the Court specifies that evidence that the employer routinely accommodates other health conditions but refuses to provide support for pregnancy is itself strong circumstantial evidence of discrimination.<sup>14</sup> Thus, in many cases, if a pregnant employee denied an accommodation can show that, under the employer's policies, other employees receive support for limitations like those she experienced, summary judgment should be inappropriate.

However, the Court stopped short of endorsing the interpretation advocated by Peggy Young and the United States as *amicus curiae* (and also the interpretation I had advocated in *Gilbert Redux*) that intent

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<sup>10</sup> Other post-*Young* commentary that addresses similar issues includes: Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as It Approaches Full Term*, 52 IDAHO L. REV. 825, 849-60 (2016) (concluding that *Young* helpfully resolved clear misinterpretations of the PDA but also highlighting the limitations of the PDA's comparative approach); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1066-101 (2015) (historical review of accommodation law up to and including *Young* that emphasizes the potential disadvantages for women in advocating for pregnancy-specific supports); Eliza H. Simon, *Parity by Comparison: The Case for Comparing Pregnant and Disabled Workers*, 30 COLUM. J. GENDER & L. 254, 284-93 (2015) (using intersectionality and disruption theory to support claim that ADA-accommodated employees can be used as comparators in PDA analysis); Lynn Ridgeway Zehrt, *A Special Delivery: Litigating Pregnancy Accommodation Claims After the Supreme Court's Decision in Young v. United Parcel Service, Inc.*, 68 RUTGERS U. L. REV. 683, 706-16 (2016) (arguing the standard in *Young* is ambiguous and does not fully repudiate pre-*Young* limitations in the case law).

<sup>11</sup> See *infra* Part II.

<sup>12</sup> See *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 1353-56 (2015).

<sup>13</sup> See *id.* at 1356-61; see also *infra* Part II.B.

<sup>14</sup> See *Young*, 135 S. Ct. at 1354-55.

was irrelevant, so long as a plaintiff could show other workers received more favorable treatment. Justice Breyer, writing for the majority, expressed the concern that this interpretation would “grant[] pregnant workers a ‘most-favored-nation’ status,” whereby an employer’s decision to provide support for a few exceptional employees would require that pregnant employees receive the same support, and pregnant employees would accordingly be treated much better than workers with other kinds of health conditions.<sup>15</sup> Justice Alito’s concurring and Justice Scalia’s dissenting opinions expressed the same concern.<sup>16</sup>

Because the facts in *Young* arose prior to the effective date of the ADAAA, the Court had no cause to consider how the ADAAA affected its analysis.<sup>17</sup> The significant changes that statute made to disability law means that the “most-favored-nation” concern that so engaged many of the Justices in *Young* is (now) largely a strawman. Under the ADAAA and its implementing regulations, an impairment that substantially limits an individual’s ability to lift, bend, walk, stand, or engage in other major life activities — even on a temporary basis — is a covered disability that must be reasonably accommodated by an employer, unless doing so would impose an undue hardship on the employer.<sup>18</sup> Thus, the question going forward is not whether pregnant employees will be treated *better* than employees with other health conditions, but rather whether they will routinely be treated *less well* than other employees. Compliance with the ADA or other statutes may explain why some other employees receive certain accommodations; the question in a PDA case, however, is why, when such accommodations are obviously feasible, does an employer refuse

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<sup>15</sup> See *id.* at 1349-50.

<sup>16</sup> See *id.* at 1358 & n.3 (Alito, J., concurring); *id.* at 1363 (Scalia, J., dissenting).

<sup>17</sup> See *id.* at 1348 (explicitly declining to discuss the significance of the ADAAA).

<sup>18</sup> See 42 U.S.C. § 12102 (2012); 29 C.F.R. § 1630.2(i) & (j) (2016); 29 C.F.R. pt. 1630 app. (2016). Although the statute does not state explicitly that temporary conditions are covered, the EEOC’s regulations take the position that this is the reasonable interpretation of the statutory language, and that duration is simply a factor to be considered in assessing whether the impairment “substantially limits” an individual’s ability to engage in a major life activity. There is some disagreement among courts as to whether to defer to the EEOC’s interpretation. Compare, e.g., *Summers v. Altarum Institute, Corp.*, 740 F.3d 325, 331-33 (4th Cir. 2014) (holding temporary disabilities may be covered and that the EEOC’s regulations merit *Chevron* deference), and *Heatherly v. Portillo’s Hot Dogs, Inc.*, 958 F. Supp. 2d 913, 920-21 (N.D. Ill. 2013) (holding temporary restriction on lifting due to a high risk pregnancy could be covered), with *Mastrio v. Eures Servs., Inc.*, No. 3:13-cv-00564, 2014 WL 840229, at \*3-6 (D. Conn. Mar. 4, 2014) (holding temporary conditions are generally not covered).

to provide the same level of support to pregnant employees. The Supreme Court has specified that an employer cannot deny support to pregnant employees simply because it would entail extra costs or administrative burdens.<sup>19</sup> Courts, and ultimately juries, must carefully scrutinize the rationales for any such differential treatment to assess whether they are based on discriminatory attitudes towards pregnancy, such as stereotypes that pregnant women are less capable or less committed to work than other employees.

This essay proceeds as follows. Part I briefly discusses the historical context for the PDA and the structure of its statutory mandate. Part II analyzes the majority and concurring opinion in *Young* in detail. Part III looks at how lower courts have begun applying *Young*, with particular attention to a Second Circuit decision that offers the fullest discussion (to date) of how courts should assess claims that accommodations for non-pregnant employees were provided to comply with distinct statutory mandates. Part IV briefly summarizes other recent legal developments that may also require employers to provide accommodations for pregnant employees. I conclude by suggesting that Congress should clarify employers' duties — and ensure more uniform support for pregnant workers — by enacting the proposed Pregnant Workers Fairness Act.<sup>20</sup>

### I. THE PDA'S "SAME TREATMENT" CLAUSE

The Pregnancy Discrimination Act ("PDA") was enacted in 1978 to supersede the Court's decision in *Gilbert v. General Electric Co.*, which had held that GE's exclusion of pregnancy from an otherwise comprehensive temporary disability policy did not violate Title VII's prohibition on discrimination on the basis of "sex."<sup>21</sup> The PDA amends the definition of "because of sex" that is operative in Title VII. It contains two clauses. The first makes explicit that discrimination because of "pregnancy, childbirth, or related medical conditions" is a form of sex discrimination.<sup>22</sup> The second clause provides that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including

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<sup>19</sup> *Young*, 135 S. Ct. at 1354.

<sup>20</sup> See H.R. 2654, 114th Cong. (2015); S. 1512, 114th Cong. (2015). This bill will likely be reintroduced in the 115th Congress, which convened in January 2017.

<sup>21</sup> See 429 U.S. 125, 145-46 (1976), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

<sup>22</sup> 42 U.S.C. § 2000e(k) (2012).

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receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work.”<sup>23</sup>

Gilbert *Redux* discusses the PDA’s application to pregnancy accommodation claims in detail. I argued that many lower courts had erred in holding that policies that were “pregnancy blind” — such as limiting light duty positions to employees with workplace injuries or compliance with the ADA — were always permissible.<sup>24</sup> I suggested that the more natural reading of the PDA’s “same treatment” clause was that pregnant employees needed to receive the same level of support from their employers that employees with comparable limitations caused by other health conditions received, and that it was immaterial that such accommodations were sometimes a response to workers’ compensation laws or the ADA.<sup>25</sup>

I bolstered this plain text argument with a review of the historical context for the PDA. The PDA came on the heels of a dramatic growth in employer support for other kinds of health conditions; much of this was spurred by statutory law, like state statutes mandating workers compensation (which in turn encouraged employers to create light duty positions) or short-term disability benefits. Review of the Congressional record makes clear that the PDA was intended to ensure that comparable benefits were extended to pregnant employees.<sup>26</sup> I argued that the PDA’s same treatment language should be interpreted to ensure that pregnant employees, similarly, benefit from the expansion of support for other health conditions that arose from the 2008 amendments to the ADA.

## II. *YOUNG V. UPS*

In *Young*, UPS-driver Peggy Young challenged her employer’s refusal to permit her to transfer to a light duty position during her pregnancy. UPS routinely provided light duty options for employees who were injured on the job, employees who had ADA-qualifying disabilities (applying the pre-ADAAA standard), and employees who lost their Department of Transportation licenses. Peggy Young argued UPS should likewise accommodate her pregnancy.<sup>27</sup> The district court and the Fourth Circuit granted summary judgment in favor of UPS, reasoning that these other policies were “pregnancy blind” and accordingly that

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<sup>23</sup> *Id.*

<sup>24</sup> See Widiss, *Gilbert Redux*, *supra* note 2, at 1018-25.

<sup>25</sup> See *id.* at 1025-35.

<sup>26</sup> See *id.* at 989-98, 1025-35.

<sup>27</sup> See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1347 (2015).

UPS's denial of Peggy Young's request did not violate the PDA.<sup>28</sup> The Court vacated and remanded.<sup>29</sup> Justice Breyer authored the decision for a five-justice majority of the Court, with Justice Alito concurring in the judgment, and Justices Scalia, Kennedy, and Thomas dissenting. This Part explains the Court's interpretation of the "same treatment" language and then addresses a question not before the Court: How does it affect the interaction of the PDA and the amended ADA?

#### A. *Modified McDonnell Douglas Test*

In its briefs to the Supreme Court, UPS argued that the Fourth Circuit had properly applied Title VII, and that, so long as the denial of accommodations was pursuant to a neutral policy, it was permissible.<sup>30</sup> The Supreme Court flatly rejected UPS's approach as untenable. The Court explained that this interpretation would suggest that GE's disability plan would pass muster — and there was no doubt that the PDA was enacted to supersede the decision in *Gilbert* and make clear that such exclusions were unlawful.<sup>31</sup>

Peggy Young, and the United States as *amicus curiae*, argued, by contrast, that the analysis should simply turn on whether the employer had provided accommodations for non-pregnant employees with similar limitations; they contended that, if so, pregnant employees must receive the same kind of supports.<sup>32</sup> Young's position was consistent with that espoused by the EEOC in guidance issued shortly after the Court granted *certiorari* in the case.<sup>33</sup> It was also largely consistent with the approach I proposed in *Gilbert Redux*.<sup>34</sup>

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<sup>28</sup> See *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 449-51 (4th Cir. 2013); *Young v. United Parcel Serv., Inc.*, No. DKC 08-2586, 2011 WL 665321, at \*12-14 (D. Md. Feb. 14, 2011).

<sup>29</sup> *Young*, 135 S. Ct. at 1356.

<sup>30</sup> See Brief for Respondent at 28-29, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 5512140.

<sup>31</sup> See *Young*, 135 S. Ct. at 1353.

<sup>32</sup> See Petitioner's Brief at 20-21, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 4441528; Brief for the United States as Amicus Curiae Supporting Petitioner at 15-16, *Young*, 135 S. Ct. 1338 (No. 12-1226), 2014 WL 4536939.

<sup>33</sup> See EEOC Pregnancy Guidance, Pt. I.A.5, Pt. I.C. (July 14, 2014); see also Widiss, *Gilbert Redux*, *supra* note 2, at 1018-20 (discussing the EEOC's earlier statements reaching similar conclusions). The EEOC has since revised its guidance to conform with the interpretation of the PDA set forth in *Young*.

<sup>34</sup> See generally Widiss, *Gilbert Redux*, *supra* note 2, at 1025-35. Indeed, both the petitioner and the United States cited analysis from my article in support of the interpretation they put forward. See Petitioner's Brief, *supra* note 32, at 42 n.16; Brief for the United States as Amicus Curiae Supporting Petitioner, *supra* note 32, at 23-24.

The Court rejected this interpretation as well. It expressed concern that this would grant pregnant employees “most-favored-nation” status,” where an employer’s decision to provide a few workers with accommodations — for example, employees who worked in particularly hazardous jobs or held particularly crucial positions in the workplace — would create a requirement to provide comparable accommodations to all pregnant employees, but not for other non-pregnant employees.<sup>35</sup> The Court believed this result was not intended by Congress.<sup>36</sup> Further, as a textual matter, the Court contended it was ambiguous how the statutory mandate to treat pregnant employees “the same as other employees . . . similar in their ability or inability to work” should apply in a situation in which an employer accommodated *some* employees with health conditions that caused limitations similar to those caused by pregnancy, but also did *not* accommodate some *other* employees with health conditions that caused limitations similar to those caused by pregnancy.<sup>37</sup> In that context, to which employees should the pregnant employees be compared?

The answer, the Court suggested, turned on whether the employee could show that the denial of accommodations to pregnant employees was motivated by discriminatory intent. Importantly, however, it modified the *McDonnell Douglas* proof framework typically applied to intentional discrimination claims to incorporate the “same treatment” language mandate. To make out the *prima facie* case, a pregnant employee needs to show that she belonged to the protected class (i.e., that she was pregnant); that she sought accommodations; that the employer did not accommodate her; and that the employer did accommodate other employees who were “similar in their ability or inability to work.”<sup>38</sup> If a plaintiff makes this showing, the employer is required to articulate a “legitimate, nondiscriminatory” rationale for the difference in treatment.<sup>39</sup> The plaintiff may then, as in any other

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<sup>35</sup> *Young*, 135 S. Ct. at 1349-50.

<sup>36</sup> *See id.* at 1350.

<sup>37</sup> *See id.* at 1351. As a factual matter, it was unclear how many, if any, employees at UPS fell into the category of non-pregnant employees who were denied accommodations. *See id.* at 1347 (summarizing evidence showing non-work injuries were sometimes accommodated and quoting the deposition of a UPS shop steward who asserted that the only time light duty requests were an issue was “with women who were pregnant”).

<sup>38</sup> *Id.* at 1354 (quoting 42 U.S.C. § 2000e(k) (2012)).

<sup>39</sup> *Id.*



disparate treatment case, present evidence that suggests that the employer's proffered reasons are not credible.<sup>40</sup>

In articulating this standard, the Court highlighted several points. First, the Court emphasized that making out a *prima facie* case under the *McDonnell Douglas* framework is not intended to be an "onerous" burden, and that it does *not* require a plaintiff "to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways."<sup>41</sup> These observations about the flexibility of the *McDonnell Douglas* test are applicable to *any* disparate treatment case. The Court then applied this general concept to pregnancy accommodations under the PDA. It specified that the comparative aspect of this first step could be satisfied simply by showing that some other employees received accommodations for limitations like those experienced by the pregnant employee, regardless of what rationale an employer might offer for having providing such support. This functionally overruled circuit precedent that had held that employees provided light duty after a workplace injury could not be used as comparators in the plaintiff's *prima facie* case.<sup>42</sup>

Second, the Court stated flatly that an employer's legitimate non-discriminatory rationale "normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates."<sup>43</sup> This

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<sup>40</sup> In *Young*, the Court suggests that the plaintiff would need to establish that the employer's proffered rationale was "pretextual." *See id.* However, since the Court frames the issue as a variant of a standard disparate treatment claim, a plaintiff should be able to establish liability by demonstrating simply that her pregnancy was a "motivating factor" in a decision to deny her an accommodation, even if it was not the only factor that affected the decision. *See* 42 U.S.C. § 2000e-2(m) (2012). A showing by the employer that it would have taken the same action even if it had not considered her pregnancy could, however, limit the remedies that would be available. *See* 42 U.S.C. § 2000e-5(g)(2)(B) (2012).

<sup>41</sup> *Young*, 135 S. Ct. at 1354. These statements are supported to citations to non-PDA Title VII cases and thus emphasize that the *prima facie* case should be a flexible standard in *any* Title VII case. However, it is also important to emphasize that discrimination can occur without a comparator present. *See generally* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 *YALE L.J.* 728 (2011).

<sup>42</sup> Professor Lynn Ridgeway Zehrt argues that it is not clear whether *Young* resolved the pre-existing circuit split as to whether employees with workplace injuries could be used in the *prima facie* case. *See* Zehrt, *supra* note 10, at 706-07. I disagree. As explained in the text, and *infra* at text accompanying notes 70-71, I think that the Court's application of its standard to the facts in *Young* makes clear employees accommodated after a workplace injury may be comparators for the *prima facie* case. *See also* Grossman, *supra* note 10, at 853-55 (also contending *Young* superseded prior circuit case law holding otherwise).

<sup>43</sup> *Young*, 135 S. Ct. at 1354.

interpretation of the PDA was appropriate, the Court explained, because the PDA was enacted to “overturn ‘both the holding and the reasoning of the Court in the *Gilbert* decision.’”<sup>44</sup> The Court observed, correctly, that the employer in *Gilbert* could have argued<sup>45</sup> — and in fact, did argue<sup>46</sup> — that its refusal to provide temporary disability benefits to pregnant employees stemmed from a desire to reduce its costs. The PDA was enacted to supersede *Gilbert* and to make clear that such exclusions were a form of sex discrimination.<sup>47</sup> Indeed, it was well recognized at the time that the PDA was enacted that it would increase the costs that employers bore.<sup>48</sup>

Further, the Court specified that a plaintiff can reach a jury by providing evidence that “the employer’s policies impose a significant burden on pregnant workers, and that the employer’s ‘legitimate non-discriminatory’ reasons are not sufficiently strong to justify that burden, but rather — when considered along with the burden imposed — give rise to an inference of intentional discrimination.”<sup>49</sup> A showing that the employer “accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers” is one way (but, as discussed below, not the only way)<sup>50</sup> to create a genuine issue of material fact, and thus preclude a grant of summary judgment in favor of the defendant, even if the defendant can point to a plausible legitimate non-discriminatory rationale for the distinction.<sup>51</sup>

Writing in dissent, Justice Scalia roundly criticized the majority’s reasoning on this point, alleging that it improperly mixed the standards employed in disparate impact cases and disparate treatment

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<sup>44</sup> *Id.* at 1353 (quoting *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983)).

<sup>45</sup> *Id.* at 1354.

<sup>46</sup> See Widiss, *Gilbert Redux*, *supra* note 2, at 992 n. 138 (discussing GE’s arguments concerning increased costs in covering pregnancy).

<sup>47</sup> In *Gilbert Redux*, I focused on the same point and argued that this suggested that intent should be irrelevant in deciding a claim brought under the “same treatment” clause. See *id.* at 1026-28. I continue to believe that the interpretation I advocated in *Gilbert Redux* is more consistent with the text and history of the PDA, and that it would be easier to apply than the interpretation adopted in *Young*. However, as a practical matter, proper application of the *Young* test will often result in the same outcome, at least in so far as whether a plaintiff may survive a motion to dismiss or a motion for summary judgment. See *infra* Part II.B.

<sup>48</sup> See Widiss, *Gilbert Redux*, *supra* note 2, at 996-97.

<sup>49</sup> *Young*, 135 S. Ct. at 1354.

<sup>50</sup> See *infra* text accompanying notes 103–06.

<sup>51</sup> *Young*, 135 S. Ct. at 1354.

cases.<sup>52</sup> While somewhat unusual, the Court's approach makes good practical sense. Pregnant women have long been discounted and disparaged as marginal workers.<sup>53</sup> Even though the PDA was enacted more than thirty years ago, such biases remain prevalent. Pregnancy discrimination claims are routinely filed with the EEOC,<sup>54</sup> and there is extensive research documenting the pervasiveness of conscious and unconscious stereotypes about pregnant women's lack of capacity and commitment to work.<sup>55</sup> When an employer, such as UPS, regularly accommodates many workers with health conditions that impact their ability to work, but refuses to accommodate pregnant workers, it is appropriate to probe carefully the basis of that decision. The fact that an employer may be able to articulate a plausible pregnancy-neutral justification for the distinction does not discount the likelihood that its lack of support for pregnant workers is infected by bias. As the Court put it, "[w]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?"<sup>56</sup>

### B. *Interaction of the PDA and the ADA after Young*

The facts in *Young* arose before the effective date of the ADAAA. Accordingly, the Court had no call to address explicitly the particular question that animated my analysis in *Gilbert Redux*: How the significant expansion in the scope of disabilities covered under the amended ADA would affect claims brought by pregnant employees seeking accommodations?

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<sup>52</sup> See *id.* at 1365-66 (Scalia, J., dissenting).

<sup>53</sup> See Widiss, *Gilbert Redux*, *supra* note 2, at 972-73, 988-89, 995 (reviewing history of discrimination and bias against pregnant workers); see also Grossman, *supra* note 10, at 857 (making a similar argument as to why the Court's approach in *Young* is warranted).

<sup>54</sup> See *Pregnancy Discrimination Charges FY 2010 – FY 2015*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [https://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy\\_new.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy_new.cfm), (last visited Dec. 21, 2016); see also *Fact Sheet on Recent Pregnancy-Discrimination Litigation*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, [https://www.eeoc.gov/laws/guidance/pregnancy\\_fact\\_sheet\\_litigation.cfm](https://www.eeoc.gov/laws/guidance/pregnancy_fact_sheet_litigation.cfm) (last visited Dec. 21, 2016) (identifying significant court victories and settlements in cases brought by the EEOC).

<sup>55</sup> See, e.g., Stephen Benard et al., *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1368-72 (2008) (collecting and discussing studies showing bias against pregnant employees); Amy J.C. Cuddy et al., *When Professionals Become Mothers, Warmth Doesn't Cut the Ice*, 60 J. SOC. ISSUES 701 (2004) (demonstrating pregnant women are rated as less competent than other employees); Jennifer Cunningham & Therese Macan, *Effects of Applicant Pregnancy on Hiring Decisions and Interview Ratings*, 57 SEX ROLES 497, 504-06 (2007) (showing pregnancy makes it less likely that applicants will be hired for jobs).

<sup>56</sup> *Young*, 135 S. Ct. at 1355.

As far as potential coverage under the ADA directly, the Court simply mentioned that the changes made to the ADA might make claims under the Court's interpretation of the PDA in *Young* less important, in that the amended act clarifies that impairments that substantially limit an individual's ability to lift, stand, or bend are ADA-covered disabilities.<sup>57</sup> The Court then referenced the EEOC's regulations implementing the amendments, which specify that employers are required to accommodate employees with "temporary lifting restrictions [that] originate off the job."<sup>58</sup> The EEOC and commentators have taken the position that these changes to the ADA mean that many conditions associated with pregnancy, childbirth, and lactation can be qualifying disabilities,<sup>59</sup> and courts are beginning to agree.<sup>60</sup> Thus, many pregnant employees should receive accommodations pursuant to the amended ADA.

However, the EEOC has re-affirmed, in regulations issued after the ADAAA, that it does not consider pregnancy itself to be an ADA-qualifying disability because it is not an impairment.<sup>61</sup> There will likely be some pregnant employees who could legitimately benefit from an accommodation but who will not be able to show that they have an ADA-qualifying disability, even if that standard is construed broadly.<sup>62</sup> In these cases, the question of how courts should assess a claim that other employees were accommodated pursuant to an ostensibly "pregnancy blind" policy, such as compliance with the ADA or providing light duty positions only for workplace injuries,<sup>63</sup> remains crucial.

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<sup>57</sup> See *id.* at 1348.

<sup>58</sup> *Id.* (citing 29 C.F.R. pt. 1630, app. §1630.2(j)(1)(ix) (2016)).

<sup>59</sup> See EEOC, ENFORCEMENT GUIDANCE 915.003, *supra* note 7 ("[U]nder the amended ADA, it is likely that a number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though they are only temporary."). See generally Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 114-19 (2013).

<sup>60</sup> See *infra* text accompanying notes 133-34.

<sup>61</sup> See 29 C.F.R. pt 1630, app. § 1630.2(h) (2016).

<sup>62</sup> At a minimum, this likely includes pregnant women seeking transfers away from potentially hazardous exposure, without any showing of any kind of pregnancy complication. See Williams et al., *supra* note 59, at 136. More generally, courts may remain resistant to categorizing relatively commonplace effects of pregnancy, such as morning sickness or back pain, as disabilities, even under the amended ADA. *But see id.* at 137-38, 142-48 (demonstrating many of these kind of impairments are properly encompassed within the ADA's expanded understanding of disability).

<sup>63</sup> Vicki Schultz argues that a policy of limiting light duty positions to workplace injuries should be considered "facially discriminatory" in that it "excluded virtually all

The majority opinion and Justice Alito's concurrence take different positions as to the proper analysis in such situations. It is important to highlight these distinctions and emphasize that lower courts (of course) must follow the majority's approach, rather than Justice Alito's. Justice Alito's concurrence deals with the question more directly, but I believe that the glosses on the PDA's language that he suggests unreasonably narrow the plain language of the statute and undermine its purpose. First, he proposes that pregnant women can only be compared to employees whose jobs involve the "performance of same or very similar tasks."<sup>64</sup> This construction is clearly in tension with the majority's repeated emphasis that making out a *prima facie* case is not intended to be "onerous"; indeed, as explained above, the majority explicitly rejects the contention that a plaintiff would need to be "similar in all but the protected ways."<sup>65</sup>

Second, Justice Alito proposes that the language be interpreted to mean "similar *in relation* to the ability or inability to work," and he specifies that groups would "not [be] similar in the relevant sense if the employer has a neutral business reason for treating them differently."<sup>66</sup> In applying the test that he has crafted to the facts in *Young*, Justice Alito simply states, without any explanation, that is "obvious" that compliance with the ADA, and providing light duty positions to employees who are injured on the job, are acceptable "neutral" reasons for providing accommodations to some employees but declining to provide them to pregnant employees.<sup>67</sup> (This is not "obvious" at all; rather, as discussed below, it is clearly contradicted

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pregnant workers, without ever mentioning pregnancy, by using rules that served as definitional proxies." Schultz, *supra* note 10, at 1089. This is a creative argument, but it is probably unlikely to gain traction in the lower courts since the *Young* Court implicitly rejected it.

<sup>64</sup> *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1357-58 (2015) (Alito, J., concurring). Justice Alito suggests that this interpretation is appropriate because otherwise an employer that provided paid leave to employees with injuries in jobs that require heavy lifting might also have to provide paid leave to a pregnant employee in a desk job, even though her job did not require heavy lifting. *See id.* This concern is specious. In that instance, the pregnant employee is not "similar in her ability or inability to work" to the employees in the jobs that require lifting, even if they have similar lifting restrictions. That is because the employees in the jobs that require heavy lifting are *not* able to work, while the pregnant employee is fully able to work because her job does not require lifting. Thus, she would not have a claim for the accommodation.

<sup>65</sup> *Id.* at 1353-54 (majority opinion).

<sup>66</sup> *Id.* at 1359 (Alito, J., concurring).

<sup>67</sup> *See id.* at 1360.

by the historical record for the PDA.<sup>68</sup>) In contrast to the majority opinion, Justice Alito suggests that courts would not need to probe the veracity of such “neutral” reasons. Rather, he focuses the pretext analysis solely on the question of whether UPS could adequately justify its decision to provide accommodations to drivers who lost their DOT certifications, while denying comparable accommodations to pregnant employees, apparently because he does not deem this distinction to be a comparably “neutral” justification.<sup>69</sup>

But the majority rejects Justice Alito’s interpretation of how the analysis should proceed. Following the plain language of the statute, the majority states that at the *prima facie* stage, the only question is whether employees who received accommodations are “similar in their ability and inability to work.”<sup>70</sup> This includes employees who receive accommodations pursuant to the ADA or to light duty policies for on-the-job injuries. This is made clear by the Court’s application of the standard to the facts in *Young* itself, where it referenced UPS’s “three separate accommodation policies (on-the-job, ADA, DOT)” and stated that on remand the Fourth Circuit would need to assess the “combined effects of these policies” and whether “UPS’ reasons for having treated Young less favorably than it treated these other non-pregnant employees were pretextual.”<sup>71</sup> In other words, there is no question that the majority in *Young* considered employees accommodated pursuant to all three of these policies as potential comparators to Peggy Young herself.

The majority opinion does not speak to whether compliance with a statutory mandate could be claimed as a legitimate non-discriminatory rationale (as discussed below, it is difficult to separate such claims conceptually from concern over costs, which is disallowed).<sup>72</sup> But even assuming it could be, the majority’s test states that, after an employer puts forward a legitimate non-discriminatory reason, a plaintiff has an

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<sup>68</sup> See *infra* text accompanying notes 80–81; see also Widiss, Gilbert *Redux*, *supra* note 2, at 997.

<sup>69</sup> *Young*, 135 S. Ct. at 1360 (Alito, J., concurring). In this respect, Justice Alito differed from the Fourth Circuit, which had held the DOT policy was also a “neutral, pregnancy-blind” policy. *Young v. United Parcel Serv., Inc.*, 784 F.3d 192, 205 (4th Cir. 2013). This disagreement highlights the uncertainty of the line that Justice Alito suggests courts should be able to discern between legitimate “neutral” rationales and non-legitimate “neutral” rationales, since the distinction apparently does not turn solely on whether or not the policy references pregnancy (in that the DOT policy also did not reference pregnancy).

<sup>70</sup> *Young*, 135 S. Ct. at 1354.

<sup>71</sup> *Id.* at 1355-56.

<sup>72</sup> See *infra* text accompanying notes 121–24.

opportunity to show it is pretextual and that this may be done by showing that the “employer’s policies impose a significant burden” on pregnant workers that is not adequately justified by the employer’s legitimate non-discriminatory reason.<sup>73</sup> A plaintiff can create a “genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers.”<sup>74</sup> In other words, a factfinder must have the opportunity to probe whether the statutory requirements are the *real* reasons for the solicitude the employer has shown to non-pregnant workers and, even if they *are* the real justifications, why, having made such accommodations for others, the employer refuses to provide comparable support for pregnant employees. Thus, *in most instances, even if an employer can point to compliance with a statutory mandate as a justification for treating pregnant employees differently from other employees, summary judgment will not be appropriate.*

The majority’s approach differs somewhat from the analytical framework I proposed in *Gilbert Redux*, but it shares certain strengths. Importantly, it incorporates truly legitimate — i.e., truly pregnancy-neutral — cost considerations into the analysis but separates them from the bias that so often affects decisions regarding pregnant employees.<sup>75</sup> That is, the ADA already incorporates a cost-based analysis: accommodations are only required if they are reasonable and they do not impose an undue hardship on an employer.<sup>76</sup> Light duty positions for workers with on-the-job injuries are typically provided because they reduce employer costs under workers’ compensation statutes.<sup>77</sup> Employers who provide accommodations in a more *ad hoc* manner likewise do so based on a cost-benefit analysis that the modification is worthwhile (even if that “pay off” is intangible, such as the goodwill and loyalty that it instills in employees). In all of these contexts, some accommodations will be deemed too expensive. For example, under the ADA, an employer generally is not required to create a new position to

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<sup>73</sup> *Young*, 135 S. Ct. at 1354.

<sup>74</sup> *Id.* at 1354.

<sup>75</sup> See Widiss, *Gilbert Redux*, *supra* note 2, at 1028 (discussing this aspect of the PDA’s comparative mandate).

<sup>76</sup> See 42 U.S.C. § 12112(5)(A) (2012).

<sup>77</sup> See Widiss, *Gilbert Redux*, *supra* note 2, at 985 (discussing how light duty positions reduce workers’ compensation costs); see, e.g., 28 R.I. GEN. LAWS § 28-33-18.2 (2016) (describing suitable “alternative employment” provisions that can reduce or remove the requirement to pay workers’ compensation payments).

accommodate a disability.<sup>78</sup> But, once an employer has provided an accommodation to at least some other employees, it is clear that the cost is *not* inherently prohibitive, and evidence that the employer routinely provides such benefits to many employees makes this all the more apparent. Thus, although providing the same support to pregnant employees will marginally increase the costs, that increase was anticipated by Congress when it enacted the PDA.<sup>79</sup>

Indeed, as I discussed in detail in *Gilbert Redux*, at the time that the PDA was enacted, there were already several state laws that required employers to provide insurance benefits for short-term disabilities, but did not require comparable support for pregnancy.<sup>80</sup> It was well understood (and has since been implemented for more than thirty years) that the PDA would require that pregnant employees receive comparable benefits under these laws.<sup>81</sup> In other words, even though employers were providing short-term disability benefits to other employees in order to comply with state laws, the PDA was properly interpreted to require them to provide comparable benefits to employees who were pregnant or had just given birth.

The interpretation of the PDA that the Court announced in *Young* was animated in part by its concern that an employer's decision to provide accommodations for a limited number of employees under exceptional circumstances, such as those with "particularly hazardous jobs," not confer on "pregnant workers an unconditional most-favored-nation status."<sup>82</sup> Justice Alito paints the supposedly devastating effects of the "most-favored-nation" problem even more vividly. In his view, it would mean that if an employer "had a policy of refusing to provide any accommodation for any employee who was unable to work due to any reason but . . . the employer wished to make an exception for several employees who were seriously injured while performing acts of extraordinary heroism on the job, [such as] saving the lives of numerous fellow employees," the employer would have to choose between "denying any special treatment for the heroic

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<sup>78</sup> See 29 C.F.R. pt. 1630, app. § 1630.2(o) (2016); see also, e.g., *White v. York Int'l Corp.*, 45 F.3d 357, 362 (10th Cir. 1995) (finding that the ADA does not require accommodations that fundamentally alter the nature of the job).

<sup>79</sup> See *Widiss, Gilbert Redux*, *supra* note 2, at 996-97 (discussing Congress's awareness that enactment of the PDA would increase employer costs).

<sup>80</sup> See *id.* at 988, 997, 1027.

<sup>81</sup> See *id.* at 997, 1019-20.

<sup>82</sup> *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1349-50 (2015).



employees or providing all the same benefit to all pregnant employees.”<sup>83</sup>

The ADA Amendments Act makes the scenario that the majority opinion and Justice Alito imagine — in which pregnant employees are treated much better than employees with other kinds of health conditions — impossible. An employer could not have the policy that Justice Alito suggests (that it would “refuse to provide any accommodation for any employee who was unable to work for any reason”) because that policy would be in patent violation of the ADA.<sup>84</sup> Rather, employers should now routinely accommodate even temporary health conditions (e.g., a back injury; a mobility impairment; diabetes; etc.) that cause limitations like those caused by pregnancy.

The converse concern, however, remains pressing. The erroneous assumption made by some lower courts prior to *Young*, and Justice Alito’s concurrence in *Young*, that ADA-accommodated employees could not be comparators under PDA analysis would mean that pregnant employees would be treated *less well* than employees with other health conditions that caused similar limitations. In other words, far from being treated as the “most favored nation,” pregnant employees would be treated as the “least favored nation.” To avoid this result, it is essential that courts implementing *Young* properly follow the analysis in the majority’s opinion, rather than Justice Alito’s contrary interpretation. Employees accommodated pursuant to the ADA, or a light duty policy for workplace injuries, may be comparators under the PDA. Moreover, showing that employers accommodate health conditions that cause limitations like those caused by pregnancy pursuant to such policies, while refusing to provide comparable accommodations to pregnant employees, is itself sufficient to raise a material issue of fact as to whether the refusal to accommodate pregnant employees is tainted by bias.

For pregnant employees who work for large companies, it will likely be relatively straightforward to identify potential comparators. But pregnant women who work for small employers may not be able to identify comparators who have *actually* been accommodated pursuant to the ADA, or other applicable policies. In *Gilbert Redux*, I argued

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<sup>83</sup> *Id.* at 1358 n.3 (Alito, J., concurring).

<sup>84</sup> *See* 42 U.S.C. § 12102(2) (2012). The ADA and Title VII (including the PDA) have almost identical provisions defining private employers that are covered by the statute. *Compare* 42 U.S.C. § 12111 (2012) (ADA), *with* 42 U.S.C. § 2000e(b) (2012) (Title VII). Accordingly, in almost all cases, any private employer bound to comply with the PDA must also comply with the ADA.

that if it were apparent that employers would be required to accommodate comparable limitations under the ADA, or under other policies adopted by the employer, they should offer the same support to pregnant employees.<sup>85</sup> Since UPS routinely accommodated numerous other employees, the Court in *Young* had no reason to address this question directly. However, the Court characterizes the statutory mandate as requiring “courts to consider the extent to which an employer’s *policy* treats pregnant workers less favorably than it treats non-pregnant workers similar in their ability and inability to work.”<sup>86</sup> An employer’s policies — often explicitly, but certainly implicitly — require compliance with the ADA. Thus, this phrasing suggests that showing comparable limitations would be accommodated under the ADA should be sufficient to trigger scrutiny of an employer’s rationale for denying accommodations to a pregnant employee.<sup>87</sup>

The federal Department of Labor’s recently-issued regulations on sex discrimination, which were revised to reflect the Court’s ruling in *Young*, make this point explicitly: The analysis turns on whether the employer *would* be required to accommodate comparable limitations under the ADA or other policies.<sup>88</sup> The Guidelines include a new section that addresses accommodations for pregnancy and related medical conditions.<sup>89</sup> They provide that Executive Order 11246 (which prohibits sex discrimination by federal contractors and sub-contractors) is violated if the employer denies accommodations to pregnant employees but:

provides, or is required by its policy or by relevant laws to provide, such assignments, modifications, or other accommodations to other employees whose abilities or inabilities to perform their job duties are similarly affected, and the denial of accommodations imposes a significant

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<sup>85</sup> See Widiss, Gilbert *Redux*, *supra* note 2, at 1033-35.

<sup>86</sup> *Young*, 135 S. Ct. at 1344 (emphasis added).

<sup>87</sup> See Joanna L. Grossman & Deborah L. Brake, *Forceps Delivery: The Supreme Court Narrowly Saves the Pregnancy Discrimination Act in Young v. UPS*, VERDICT (Mar. 31, 2015), <https://verdict.justia.com/2015/03/31/forceps-delivery> (drawing the same conclusion from the Court’s language on this point); see also Grossman, *supra* note 10, at 856 (“Although the Court did not say so expressly, courts should base this comparison on the number of employees eligible for any accommodation under the policy rather than the number who have actually requested and been given an accommodation, which, in any given workplace, might be a null set.”).

<sup>88</sup> See Discrimination on the Basis of Sex, 81 Fed. Reg. 39108, 39132-33 (June 15, 2016).

<sup>89</sup> See 41 C.F.R. § 60-20.5(c) (2016).

burden on employees affected by pregnancy, childbirth, or related medical conditions and the contractor's asserted reasons for denying accommodations to such employees do not justify that burden.<sup>90</sup>

The explanation of this section states that the highlighted language is “included to cover the situation where a contractor's policy or a relevant law (such as the ADA and Section 503) would require an alternative job assignment or job modification . . . [for a non-pregnant employee] who is similarly restricted in his or her ability to perform the job, even if no such employees have been accommodated under the policy or law.”<sup>91</sup>

The DOL's regulations directly govern actions by federal contractors and subcontractors. The DOL's interpretation should also be persuasive to courts considering PDA claims against companies that are not federal contractors. This is because the Department of Labor, an agency with considerable expertise in sex discrimination law, reached this interpretation after careful consideration of the Court's decision in *Young*, and extensive comments provided by interested groups as part of its formal rulemaking process.<sup>92</sup>

### III. LOWER COURTS APPLYING *YOUNG*

*Young* seems to have had an immediate — and dramatic — impact on how lower courts decide pregnancy accommodation claims. The National Women's Law Center has analyzed recent published federal court decisions that consider whether a denial of accommodations violated the PDA.<sup>93</sup> The Center's findings are striking. Between 2012 and the Court's decision in *Young* in March 2015, over 70% of such cases (in which the court considered the merits of the claim) were dismissed prior to trial, on an employer's motion to dismiss or a motion

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<sup>90</sup> *Id.* (emphasis added).

<sup>91</sup> Discrimination on the Basis of Sex, 81 Fed. Reg. at 39133.

<sup>92</sup> *Cf.* *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944) (“[T]he rulings, interpretations, and opinions [of the agency], while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort to guidance. The weight of such a judgment . . . will depend on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade . . .”).

<sup>93</sup> See *Pregnancy Accommodation in the Courts One Year After Young v. UPS*, NAT'L WOMEN'S L. CTR. (June 2016), <https://nwlc.org/resources/pregnancy-accommodation-in-the-courts-one-year-after-young-v-ups/>.

for summary judgment.<sup>94</sup> In the first year after *Young*, this trend was completely flipped, with 73% of claims allowed to proceed.<sup>95</sup> Of course, as the National Women's Law Center fact sheet emphasizes, the number of published cases on point is relatively low in any given year, so it is too soon to know whether this represents a true — and lasting — shift.<sup>96</sup> Nonetheless, the numerical change, combined with substantive analysis of the cases decided, suggests that lower courts *are* heeding *Young's* mandate to carefully scrutinize employers' claimed justifications for differential treatment of accommodation requests.<sup>97</sup> This section briefly analyzes the emerging case law, focusing on cases in which pregnant employees have suggested that individuals with light duty after on-the-job injuries or ADA-accommodated employees are appropriate comparators for PDA analysis.

First, lower courts are properly accepting a broad range of comparators at the *prima facie* stage. This includes cases in which the pregnant employee identified other employees who were granted light duty after workplace injuries,<sup>98</sup> or pursuant to the ADA,<sup>99</sup> as well as

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<sup>94</sup> See *id.* (reporting 18 out of 25 cases decided on the merits between March 2012 and March 2015 were dismissed prior to trial).

<sup>95</sup> See *id.* (reporting 8 out of 11 cases decided on the merits between March 2015 and March 2016 survived motions to dismiss or motions for summary judgment).

<sup>96</sup> That said, it is likely that these figures, which focus on reported cases, understate the effects of *Young*, in that it seems almost certain that *Young* increases the likelihood that employers would be willing to settle similar cases on relatively favorable terms to employees. More importantly, one would hope that more employers now routinely provide accommodations to pregnant employees, removing the need to file any kind of case at all. Indeed, many law firms emphasized to their clients that the *Young* decision means employers should carefully consider all pregnancy accommodation requests. See, e.g., *Divided Supreme Court Revives Pregnancy Discrimination "Light Duty" Case*, WINSTON & STRAWN LLP (Mar. 27, 2015), <http://www.winston.com/en/thought-leadership/divided-supreme-court-revives-pregnancy-discrimination-light.html> (“[A]s a practical matter, employers should . . . consider pregnant workers' accommodation requests, engaging employees in an interactive process if at all possible.”); Jeff Nowak, *Supreme Court Gives Pregnant Employees a Path Toward Securing Workplace Accommodations*, FMLA INSIGHTS (Mar. 26, 2015), <http://www.fmlainsights.com/supreme-court-gives-pregnant-employees-a-path-toward-securing-workplace-accommodations/> (“Employers also must take seriously and review thoughtfully all employee requests for pregnancy-related accommodations to minimize liability to pregnancy discrimination claims.”).

<sup>97</sup> I am grateful to the National Women's Law Center for sharing with me an unpublished memorandum analyzing this emerging case law. My analysis in this section draws on that memorandum.

<sup>98</sup> See, e.g., *Legg v. Ulster County*, 820 F.3d 67, 75-76 (2d Cir. 2016) (holding that police officers provided light duty positions after workplace injuries were potential comparators); *Bray v. Town of Wake Forest*, No. 5:14-CV-276-FL, 2015 WL 1534515, at \*6 (E.D.N.C. Apr. 6, 2015) (same); see also *McQuiston v. City of Clinton*, 872 N.W.2d 817, 830 (Iowa 2015) (interpreting an Iowa statute that tracks

individuals accommodated for other injuries not covered by the ADA (in many instances, because they arose prior to the ADAAA's effective date).<sup>100</sup> Additionally, *Young* superseded prior precedent in the Fifth and Eleventh Circuits that had suggested that pregnant plaintiffs seeking an accommodation could not proceed under the traditional characterization of the *McDonnell Douglas prima facie* case because they could not show that they were "qualified" for the position.<sup>101</sup> *Young* made clear that this approach was improper by articulating an alternative version of the *prima facie* case that does not include the "qualified" language at all. Rather, as discussed above, courts must simply consider whether the employer provided accommodations to non-pregnant employees "similar in their ability or inability to work" that it denied to pregnant employees.<sup>102</sup>

Second, lower courts have held, properly I believe, that the modified *McDonnell Douglas* test set forth in *Young*, which calls for balancing the extent of the burden borne by pregnant employees against the strength of the employer's rationale, is simply *one way* in which a plaintiff can establish the requisite discriminatory intent.<sup>103</sup> She may also do so by identifying any other form of evidence that suggests the employer's claimed rationale is not convincing. This could include derogatory comments about her pregnancy;<sup>104</sup> shifting explanations

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the PDA to permit a pregnant employee to use "all those temporarily disabled, not just those injured off the job" as potential comparators).

<sup>99</sup> See, e.g., *Gonzales v. Marriott Int'l. Inc.*, 142 F. Supp. 3d 961, 978 (C.D. Cal. 2015) (holding employees with "disabilities or medical conditions that require reasonable accommodations" could serve as comparators for lactating employee seeking comparable breaks during the day).

<sup>100</sup> See, e.g., *Martin v. Winn-Dixie La., Inc.*, 132 F. Supp. 3d 794, 820 (M.D. La. 2015) (holding employees with back injury and a broken leg could serve as comparators for a pregnant employee with a similar lifting restriction).

<sup>101</sup> See, e.g., *Grace v. Adtran, Inc.* 470 F. App'x 812, 814-15 (11th Cir. 2012) (holding that pregnant employee with a lifting restriction could not satisfy the *prima facie* case because she could not meet the qualifications for her position); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312 (11th Cir. 1999) (similar); *Elliott v. Horizon Healthcare Corp.*, No. 98-20711, 1999 WL 301346, at \*3 (5th Cir. 1999) (similar).

<sup>102</sup> *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

<sup>103</sup> See, e.g., *Allen-Brown v. District of Columbia*, 174 F. Supp. 3d 463, 476-78 (D.D.C. 2016) (holding "it misreads *Young* to assert that a plaintiff is *required* to show such disparities in order to survive summary judgment," and permitting plaintiff to rely on "traditional" evidence of pretext instead).

<sup>104</sup> Sometimes, such comments are classified as "direct" evidence of discrimination. See, e.g., *Martin*, 132 F. Supp. 3d at 818 (holding comment that plaintiff "couldn't do [her] [] job as Co-Director and be pregnant," constituted direct evidence of discrimination). Even if classified as "direct" evidence, courts should also consider

for the decision;<sup>105</sup> an expressed concern that she would not return to work after a maternity leave; or simply inconsistent application of a claimed policy — like limiting light duty positions to on-the-job injuries — that a defendant puts forward as an ostensibly legitimate non-discriminatory rationale.<sup>106</sup> Moreover, it would be reasonable to consider any such evidence in conjunction with the relative burden that the denial of an accommodation places on pregnant employees, and the strength of the employer’s justification for such distinctions, when assessing whether the decision was motivated by bias.

In terms of parsing the substantial burden test itself, lower courts, again appropriately I believe, have begun to develop a relatively flexible understanding of how this may be satisfied. Thus, for example, a corrections officer at a county jail who is told she can work but denied an accommodation that would protect her from violent altercations with inmates suffers the requisite burden.<sup>107</sup> A police officer who was denied light duty but told she could simply forego the bullet proof vest typically worn — but not technically required — by officers on patrol likewise met the standard.<sup>108</sup> As noted above, the *Young* Court specified that one way to show the requisite burden was evidence that an employer accommodates “a large percentage of

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whether such comments undercut any claimed non-discriminatory rationale in the context of the *McDonnell Douglas* analysis. *Cf. Ortiz v. Werner Enters., Inc.*, 834 F.3d 760, 765-66 (7th Cir. 2016) (“[W]e hold that district courts must stop separating ‘direct’ from ‘indirect’ evidence and proceeding as if they were subject to different legal standards.”). However, if such “direct” evidence is sufficiently strong to convince a factfinder that the decision to deny an accommodation was motivated by an employee’s pregnancy, courts need not employ the (modified) *McDonnell Douglas* framework at all. *See* EEOC, ENFORCEMENT GUIDANCE 915.003, *supra* note 7, at Part I.C. The ultimate question is simply whether the plaintiff can, using whatever combination of admissible evidence, convince a factfinder that the denial of accommodations was “because of” her pregnancy.

<sup>105</sup> *See, e.g., Legg v. Ulster County*, 820 F.3d 67, 75 (2d Cir. 2016).

<sup>106</sup> *See, e.g., Allen-Brown*, 174 F. Supp. 3d at 477 (denying summary judgment in case where evidence suggested employers did not consistently enforce their claimed policies related to light or modified duty).

<sup>107</sup> *Legg*, 820 F.3d at 76-77.

<sup>108</sup> *See Hicks v. City of Tuscaloosa*, No. 7:13-cv-02063-TMP, 2015 WL 6123209, at \*21 (N.D. Ala. Oct. 19, 2015). The court discusses this issue in the context of determining that the plaintiff, who resigned after her request for light duty was denied, could satisfy the constructive discharge standard, but the analysis suggests that the court likewise assumes that it also satisfies *Young*’s substantial burden test. This case also concerns a breastfeeding employee, rather than a pregnant employee (the bullet-proof vest, if fitting properly, interfered with her ability to breastfeed), but the court treats this as a PDA claim, on the ground that lactating is a related medical condition. *See also infra* text accompanying note 126.

nonpregnant workers while failing to accommodate a large percentage of pregnant workers.”<sup>109</sup> In applying this standard, the Second Circuit held that it could be satisfied by evidence showing that a *single* pregnant employee requested light duty and was denied it — meaning 100% of pregnant employees were not accommodated — as contrasted with an employer policy providing light duty to all employees with on-the-job injuries.<sup>110</sup> This was adequate even though the record did not seem to include information on how many non-pregnant employees had actually been accommodated pursuant to the light duty policy.

The same Second Circuit decision, *Legg v. Ulster County*, offers the most extensive analysis to date on the specific question of how courts applying *Young* should analyze an employer’s claim that its accommodation of other employees was pursuant to a statutory mandate.<sup>111</sup> *Legg* was brought by a police officer whose request for light duty to accommodate her pregnancy was denied. In the litigation, the employer alleged that it only provided light duty for on-the-job injuries, and this policy was justified by a New York state law that required cities to continue to pay corrections officers injured on the job.<sup>112</sup> The state law did not have comparable requirements regarding on-going pay for off-duty injuries, or for pregnancy. In this respect, it is similar to more general workers’ compensation statutes, under which employers’ costs are typically minimized if employees who suffer workplace injuries are provided light duty positions.<sup>113</sup> Moreover, the analysis would be quite similar in a case in which the employer claimed it provided accommodations to non-pregnant employees with disabilities to comply with the ADA.

The Second Circuit’s parsing and application of *Young* in this context is quite thoughtful. First, *Legg* emphasizes that even if, in the litigation, an employer identifies a statutory mandate as the basis for differential treatment, the veracity of this claim must be probed. At trial, *Legg*’s supervisor mentioned many shifting explanations for his refusal to transfer *Legg* to a light duty position, including concern for *Legg*’s safety and that of her “unborn child”; that it would be more costly to provide accommodations to pregnant employees; and that he

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<sup>109</sup> *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015).

<sup>110</sup> *Legg*, 820 F.3d at 76. The court also emphasized that this analysis must focus on how many pregnant employees were denied an accommodation in relation to all *pregnant* employees, not *all* employees. *See id.*

<sup>111</sup> *See id.* at 75-77.

<sup>112</sup> *Id.* at 74-75 (citing N.Y. GEN. MUN. LAW § 207-c(1) (2016)).

<sup>113</sup> *See generally*, Widiss, Gilbert *Redux*, *supra* note 2 (describing workers’ compensation statutes in more detail).

simply did not “believe” in offering light duty to employees with off-the-job injuries.<sup>114</sup> The relevant statute, by contrast, was barely mentioned. The court holds that this inconsistency, alone, would be sufficient for a reasonable jury to conclude that the defendant’s explanation — compliance with state law — was pretextual.<sup>115</sup>

The court went on to hold that, even assuming that the statutory mandate *were* proven to be the basis of the employer’s decision to provide light-duty for on-the-job injuries, that would not end the inquiry. This is because the key question is not whether the accommodation in question was provided in compliance with a statutory mandate, but rather the converse: *Did the statutory mandate preclude provision of the same accommodation to pregnant employees?* The answer in *Legg* was *no* — “of course nothing in the statute prevented [the police department] from offering the same accommodations to pregnant employees”<sup>116</sup> — and the answer will almost certainly be *no* in all other cases. An employer may opt to provide accommodations to pregnant employees if it chooses.<sup>117</sup>

Flipping the question around in this manner is useful, because it helps crystalize what is relevant when assessing whether a refusal to provide an accommodation violates the PDA. Imagine, for example, a cashier in the third trimester of a pregnancy who asks permission to sit on a stool because standing has become very uncomfortable and she has been advised by her medical provider that sitting will reduce the risk of preterm birth.<sup>118</sup> She points out that the employer has permitted a different employee, who has injured his back, to sit on the stool. The employer might claim that it only permitted the employee

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<sup>114</sup> *Legg*, 820 F.3d at 75.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 77.

<sup>117</sup> It is conceivable that a non-pregnant employee with a health condition that caused limitations similar to those caused by pregnancy, but denied a comparable accommodation, would allege that a pregnancy “preference” is an impermissible form of sex discrimination. However, the Supreme Court has held that pregnancy may be treated more favorably than other health conditions. *See* Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 285-92 (1987); *see also* Widiss, Gilbert *Redux*, *supra* note 2, at 998-1001 (discussing the special treatment/equal treatment debate in the context of the *Cal Fed* case); *cf.* Schultz, *supra* note 10, at 1087-88 (exploring the debate in the context of *Young*). As a practical matter, legal mandates, such as the ADA and the Family and Medical Leave Act, requiring support for health conditions generally mitigates this problem to a large degree.

<sup>118</sup> *See, e.g.*, M. Bonzini, *Risk of Prematurity, Low Birth Weight, and Pre-Eclampsia in Relation to Working Hours and Physical Activities: A Systemic Review*, 64 OCCUPATIONAL & ENVTL. MED. 228 (2007) (concluding that while evidence is mixed, it may be prudent to avoid prolonged standing, especially late in pregnancy).



with the back injury to sit on the stool because the ADA requires this as a reasonable accommodation. That assertion might be true. However, the question ultimately is why, having already made this accommodation, is the employer unwilling to make the same accommodation for a pregnant employee?<sup>119</sup> Certainly, the ADA does not *preclude* permitting the pregnant employee to sit on the stool. In this case, the burden on the pregnant employee is considerable and the justification for the employer's denial quite weak, in that the requested accommodation is virtually cost free. Thus, it would be reasonable to infer that a refusal to make such a minor accommodation reflects discriminatory bias, such as discomfort with having pregnant women in the workplace or skepticism that a pregnant employee would return to work after a maternity leave.

The analysis does not change simply because the accommodation in question may be more costly. In *Legg*, for example, the court recognized that, because New York state law requires that officers with on-the-job injuries continue to receive full pay, the department had a strong incentive to keep them working in some capacity, and that it didn't have the same financial incentive to keep Legg working.<sup>120</sup> Rather, permitting Legg to move to a light duty position might require the employer to find someone else to do the regular position, and pay that person as well.<sup>121</sup> The employer tried to argue that this made the distinction that it drew permissible — asserting that “[i]f there is an element of cost associated with the distinction, it is a result of New York State law and policy.”<sup>122</sup> The *Legg* court properly rejected this contention, referencing the Supreme Court's clear holding in *Young* that increased costs generally are *not* a legitimate basis for refusing to provide accommodations under the PDA.<sup>123</sup> Thus, it concluded, “to the extent the defendant's policy was motivated by cost, a reasonable jury could conclude that their purported justification for denying light duty accommodations to pregnant employees — compliance with state law — is pretextual.”<sup>124</sup>

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<sup>119</sup> Of course, one might reasonably wonder why an employer would refuse to provide such a low-cost accommodation for a pregnant employee even in the absence of a comparator. However, the PDA analysis turns on showing that an employer has accommodated, or would be required to accommodate, other employees with comparable limitations in the ability or inability to work.

<sup>120</sup> *Legg*, 820 F.3d at 77.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.* The *Legg* court suggests that if the evidence showed that the County accommodated very few injured workers under the light duty policy, and that many

In most instances, since compliance with other laws will not *preclude* providing accommodations to pregnant employees, resistance to providing comparable accommodations will stem from a concern about increased costs, or simply bias against pregnant employees, *not* a concern about compliance with the (other) law at issue. And thus, in most instances, this claimed defense should be rejected. The PDA is structured so that, once having borne costs to comply with one statutory mandate, an employer cannot refuse to provide comparable support to pregnant employees simply on the grounds that doing so would increase its costs. Indeed, I argued in *Gilbert Redux* that this was a key strength of the PDA's comparative mandate. It sidesteps debates over whether pregnancy should receive "special" treatment — which might spur increased discrimination against pregnant women or women in general — by focusing instead on ensuring that employers have truly legitimate justifications for refusing to provide pregnant women the same level of support that they are providing other employees with health conditions that affect work. This requires a careful, case-by-case analysis, and summary judgment on this ground would generally be inappropriate.

Finally, it is interesting to note that plaintiffs are succeeding in using the PDA, as interpreted in *Young*, to support claims that employers should accommodate lactation or breastfeeding. Although some older case law holds differently, there is a growing recognition in the courts that discrimination related to breastfeeding or lactation violates the PDA, in that breastfeeding and lactation fall within the "related medical conditions" portion of the PDA's language.<sup>125</sup> Building on this recognition, plaintiffs are successfully arguing that accordingly, if an employer routinely accommodates other needs for break time, it must similarly accommodate employees who are breastfeeding or expressing breastmilk.<sup>126</sup> The EEOC has reached the same conclusion in its recent guidance.<sup>127</sup>

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non-pregnant workers were denied accommodations, a jury might properly refuse to infer a discriminatory intent. A jury trial was held after the case was remanded by the Second Circuit, and Legg did not prevail in her intentional discrimination claim. Ariel Zangla, *Jury Rules for Ulster County in Jail Officer's Discrimination Case*, DAILY FREEMAN NEWS (Aug. 31, 2016), <http://www.dailyfreeman.com/general-news/20160831/jury-rules-for-ulster-county-in-jail-officers-discrimination-case>.

<sup>125</sup> The leading case is *Equal Employment Opportunity Commission v. Houston Funding II, Ltd.*, 717 F.3d 425, 428 (5th Cir. 2013) (holding "lactation is a related medical condition of pregnancy for purposes of the PDA").

<sup>126</sup> See, e.g., *Allen-Brown v. District of Columbia*, 174 F. Supp. 3d 463, 478-79 (D.D.C. 2016) (permitting claim related to failure to accommodate lactation to survive summary judgment where employee could point to comparators who had received

The PDA claim is, of course, comparative in nature; an employee must show that her request for support for breastfeeding or lactation was treated differently from other requests from employees with similar ability or inability to work, or that there is other evidence that the denial was motivated by bias. The Fair Labor Standards Act, by contrast, provides non-exempt employees (i.e., employees who are eligible for overtime) with an affirmative right for reasonable unpaid breaks and an appropriate room for expressing breastmilk.<sup>128</sup> While the rights under FLSA are thus, in some ways, more robust, Title VII claims may be an important complement to the FLSA provisions because there is uncertainty as to the extent to which FLSA provides a remedy to employees who do not receive the time off they should.<sup>129</sup> Additionally, PDA claims may be brought by any employee (who works for an employer with at least fifteen employees), whereas these FLSA claims are only available to non-exempt employees.

#### IV. OTHER LEGAL DEVELOPMENTS ALSO SUPPORTING PREGNANCY ACCOMMODATIONS

My focus in this essay, like my focus in Gilbert *Redux*, is how the PDA applies to claims brought by pregnant women challenging a denial of accommodations. But, since my article was published, there have been other developments that are also relevant to whether pregnant employees should be accommodated.

First, lower courts have now had several years to analyze pregnancy-related claims under the amended ADA. As noted above, the *Young* Court stated that the changes made to the ADA could “limit the future significance of [its] interpretation of the [PDA],”<sup>130</sup> and the EEOC’s

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accommodations); *Hicks v. City of Tuscaloosa*, No. 7:13-cv-02063-TMP, 2015 WL 6123209, at \*21 (N.D. Ala. Oct. 19, 2015) (same); *Gonzales v. Marriott Int’l, Inc.*, 142 F. Supp. 3d 961, 978 (C.D. Cal. 2015) (same with respect to a motion to dismiss).

<sup>127</sup> EEOC, ENFORCEMENT GUIDANCE 915.003, *supra* note 7, at Part I.A.4.b.

<sup>128</sup> Fair Labor Standards Act, 29 U.S.C. § 207(r) (2012).

<sup>129</sup> The DOL may bring an action for injunctive relief. See WAGE & HOUR DIV., U.S. DEP’T OF LABOR, BREAK TIME FOR NURSING MOTHERS UNDER THE FLSA, <http://www.dol.gov/whd/nursingmothers/#AdditionalResources>. If a plaintiff seeks to bring a private cause of action, however, she may run into a problem because the typical remedy for violations of this portion of FLSA is recovery of lost wages; since the break time for this purpose may be unpaid, there generally are not any lost wages (even if the employer has not complied with the statutory mandate at all). See *Lico v. TD Bank*, No. 14-CV-4729 (JFB)(AKT), 2015 WL 3467159 at \*2-4 (E.D.N.Y. June 1, 2015) (explaining the issue but emphasizing that a private right of action may be available if there are lost wages).

<sup>130</sup> *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1348 (2015).

regulations state that pregnancy-related impairments may qualify as disabilities.<sup>131</sup> The EEOC's guidance on pregnancy discrimination provides several examples: pregnancy-related sciatica (often the cause of back pain in pregnancy), pregnancy-related carpal tunnel syndrome, gestational diabetes, swelling in the legs, and depression.<sup>132</sup> Lower courts have begun to recognize explicitly that older decisions, which applied the pre-ADAAA disability standard and concluded that pregnancy-related claims were almost never viable, *must* be reconsidered.<sup>133</sup> Many courts have held that employees seeking accommodations for pregnancy-related complications under the ADA may succeed.<sup>134</sup>

Second, there has been an explosive growth in state laws that affirmatively require accommodations for pregnant employees, even in the absence of a comparator or any showing of bias. When I wrote *Gilbert Redux*, there were only a few such laws and they were relatively narrow in scope.<sup>135</sup> However, in the past four years, many more states passed laws on point. As of June 2016, eighteen states, the District of Columbia, and four cities, explicitly require at least some

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<sup>131</sup> See 29 C.F.R. pt. 1630, app. § 1630.2(h) (2016).

<sup>132</sup> EEOC, ENFORCEMENT GUIDANCE, *supra* note 7, at Part II.A.

<sup>133</sup> See, e.g., *Bray v. Town of Wake Forest*, No. 5:14-CV-276-FL, 2015 WL 1534515, at \*11 (E.D.N.C. Apr. 6, 2015) (holding pre-ADAAA circuit and lower court case law regarding pregnancy-caused lifting restrictions were inapposite); see also Deborah A. Widiss, *Still Kickin' After All These Years: Sutton and Toyota as Shadow Precedents*, 63 DRAKE L. REV. 919, 939-45 (2015) (identifying and critiquing lower court decisions that inappropriately continue to rely on pre-ADAAA standards more generally); Williams et al., *supra* note 59, at 112-35 (discussing the application of the amended ADA to pregnancy-related claims in detail).

<sup>134</sup> See, e.g., *Bray*, 2015 WL 1534515, at \*11 (holding ADA claim viable where pregnant employee was told to avoid lifting more than 20 pounds, running, or jumping); *McKellips v. Franciscan Health Sys.*, No. C13-5096MJP, 2013 WL 1991103, at \*4 (W.D. Wash. May 13, 2013) (holding severe pelvic pain caused by pregnancy could qualify as a disability); *Nayak v. St. Vincent Hosp. & Health Care Ctr., Inc.*, No. 1:12-cv-0817-RLY-MJD, 2013 WL 121838, at \*1-3 (S.D. Ind. Jan. 9, 2013) (holding ADA claim viable where pregnancy required bed rest and post-partum complications required physical therapy); *Alexander v. Trilogy Health Servs.*, No. 1:11-cv-295, 2012 WL 5268701, at \*11-12 (S.D. Ohio Oct. 23, 2012) (granting summary judgment in favor of plaintiff where employer failed to accommodate pregnancy-related hypertension); see also *Khan v. Midwestern Univ.*, 147 F. Supp. 3d 718, 722-23 (N.D. Ill. 2015) (holding Rehabilitation Act claim, incorporating the ADA standard, viable where pregnancy caused severe nausea, depression and anxiety). *But see* Simon, *supra* note 10, at 274-75 (suggesting that courts might continue to be reluctant to classify pregnancy-related conditions as ADA-qualifying disabilities).

<sup>135</sup> See Widiss, *Gilbert Redux*, *supra* note 2, at 1011 (discussing then-existing state laws).

employers to provide accommodations to pregnant workers.<sup>136</sup> Moreover, most of the new laws are far broader than the first generation of accommodation statutes, in that they require employers to provide reasonable accommodations for all pregnant employees, regardless of job category, unless doing so would impose an undue hardship on the employer.<sup>137</sup> Thus, in more than one third of the states, pregnant employees can use state laws to secure accommodations that let them work safely through a pregnancy.

Third, plaintiffs may be able to show that facially neutral policies that limit the availability of accommodations are unlawful because they cause a disparate impact on women.<sup>138</sup> In general, courts have been relatively hostile to disparate impact claims in the pregnancy context.<sup>139</sup> However, very few pre-*Young* cases considered how the doctrine would apply to light duty policies limited to on-the-job injuries,<sup>140</sup> and plaintiffs had succeeded in a few such cases.<sup>141</sup> At oral argument in *Young*, Justice Breyer suggested it would have been preferable for Ms. Young to have challenged the policy under a disparate impact framework.<sup>142</sup> Justice Scalia's dissent makes this point

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<sup>136</sup> See NAT'L P'SHIP FOR WOMEN & FAMILIES, REASONABLE ACCOMMODATIONS FOR PREGNANT WORKERS: STATE AND LOCAL LAWS (2016), <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf>.

<sup>137</sup> See, e.g., 775 ILL. COMP. STAT. 5/2-101, 102 (2017); N.Y. EXEC. LAW §§ 292, 296 (2016); UTAH CODE ANN. 1953 § 34A-5-106(g) (2016).

<sup>138</sup> See generally Camille Hebert, *Disparate Impact and Pregnancy: Title VII's Other Accommodation Requirement*, 24 J. GENDER, SOC. POL'Y & L. 107 (2016) (arguing that disparate impact provides stronger grounds than disparate treatment for accommodating pregnancy).

<sup>139</sup> See Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L.L. REV. 415, 485-90 (2011) (discussing and critiquing recent pregnancy discrimination cases that reject disparate impact claims).

<sup>140</sup> See, e.g., Joanna Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 41-46 (2009) (reviewing existing case law and arguing that disparate impact has "untapped potential" for challenging facially neutral policies that limit the availability of accommodations).

<sup>141</sup> See *Germain v. County of Suffolk*, No. 07-CV-2523 (ADS)(ARL), 2009 WL 1514513, at \*4 (E.D.N.Y. May 29, 2009) (holding plaintiff established a *prima facie* case that the employer's light-duty policy has a disparate impact on pregnant women); *Lochren v. County of Suffolk*, No. 01CV03925, 2006 WL 6850118 (E.D.N.Y. June 24, 2006) (verdict sheet). In both cases, however, there was also evidence of discriminatory intent, sufficient to support a disparate treatment claim.

<sup>142</sup> Transcript of Oral Argument at 8-9, *Young v. United Postal Serv., Inc.*, 135 S. Ct. 1338 (2015) (No. 12-1226) ("[I]t did seem to me there is a . . . quite easy way for you to win, and that would be to bring a disparate impact claim.").

more emphatically, arguing that she should not have been able to succeed under a disparate treatment framework at all, but that her claim might have been viable as a disparate impact claim.<sup>143</sup> The EEOC's recent pregnancy guidance and the DOL's new sex discrimination regulations likewise recognize that disparate impact claims may be cognizable in this context.<sup>144</sup> The support from multiple Supreme Court justices for this approach, combined with the new guidance issued by the relevant agencies charged with enforcing this law, suggests that disparate impact claims might be an additional viable strategy for securing employer support for pregnancy.

#### CONCLUSION

In *Young v. UPS*, the Court emphasized that refusals to accommodate pregnant employees should be carefully scrutinized. This is particularly true now that the amended ADA requires employers to provide support for a wide range of other temporary health conditions that can cause limitations like those caused by pregnancy. As discussed above, lower courts are routinely holding that summary judgment in such cases is inappropriate, and they are permitting claims under both the PDA and the ADA to move forward to trial. But the standard that the Court adopts in *Young* is somewhat difficult to parse, and the right to accommodations under the PDA remains comparative, not absolute. Thus, the absence of a clear statutory mandate on point means that both employers and employees may be confused about the extent of an employer's obligations under federal law.

In *Gilbert Redux*, I mentioned briefly that the Pregnant Workers Fairness Act ("PWFA") had been introduced in Congress. This bill would explicitly require employers to provide reasonable accommodations for pregnancy, childbirth, and related medical conditions, unless they could show that doing so would be an undue hardship.<sup>145</sup> In 2013, when I completed that earlier article, I was rather doubtful that PWFA would advance.<sup>146</sup> My pessimism may have been unfounded. I have been (pleasantly) surprised by the widespread

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<sup>143</sup> See *Young*, 135 S. Ct. at 1365-66 (Scalia, J., dissenting).

<sup>144</sup> 41 C.F.R. 60-20.5(c)(2) (2016) (specifying that denial of light duty or other accommodations pursuant to facially neutral policy may give rise to disparate impact liability); EEOC, ENFORCEMENT GUIDANCE, *supra* note 7, at I.C.1.b (same).

<sup>145</sup> See Pregnant Workers Fairness Act, H.R. 2654, 114th Cong. § 2 (2015); Pregnant Workers Fairness Act, S. 1512, 114th Cong. § 2 (2015). A new version of this bill will likely be introduced in the Congress that convened in January 2017.

<sup>146</sup> See *Widiss, Gilbert Redux*, *supra* note 2, at 1035.

support for comparable state laws. Many have been enacted by bipartisan, often unanimous, majorities, and they have passed in “red” states such as North Dakota and Utah, as well as “blue” states such as New York and California.<sup>147</sup> Polls find that 95% of Americans believe that it is reasonable for employers to provide minor accommodations to pregnant workers.<sup>148</sup> Congress should follow the lead of the states and pass the PWFA. In other words, I hope that the analysis above — about how the PDA interacts with the ADA — will soon become obsolete, superseded by a clear directive that employers provide reasonable support to their employees to make it possible to work safely and productively through a pregnancy.

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<sup>147</sup> See Statement of Debra Ness, President, Nat’l P’ship for Women & Families (June 4, 2015), <http://www.nationalpartnership.org/news-room/press-releases/reintroduction-of-bipartisan-pregnant-workers-fairness-act-is-essential-step-in-protecting-pregnant-workers-from-discrimination.html>; see also NAT’L P’SHP FOR WOMEN & FAMILIES, *supra* note 136.

<sup>148</sup> CTR. FOR AM. PROGRESS, SURVEY ON PREGNANCY DISCRIMINATION (Nov. 2014), <https://cdn.americanprogress.org/wp-content/uploads/2014/11/YoungPollingMemo.pdf>.