

## PARITY BY COMPARISON: THE CASE FOR COMPARING PREGNANT AND DISABLED WORKERS

ELIZA H. SIMON\*

### *Abstract*

*In 2008, Congress enacted amendments to the Americans with Disabilities Act (“ADA”) that expanded the ADA’s definition of “disability,” requiring employers to provide reasonable accommodations to workers with temporary impairments. This Article argues that the expansion of the protections of the ADA effectively expanded the protections of the Pregnancy Discrimination Act (“PDA”), too. As the Supreme Court recently reinforced in *Young v. United Parcel Service*, the PDA generally requires employers to treat pregnant workers “the same” as non-pregnant workers who are similar in their ability or inability to work. Therefore, to the extent that pregnancy-related impairments mirror impairments that are accommodated under the expanded ADA, pregnant workers, too, should be entitled to reasonable accommodations.*

*Although some scholars and courts have suggested that ADA-covered employees cannot be proper comparators for PDA plaintiffs, I make the case that these workers can, and should, be compared. First, I argue that PDA precedent requiring employers to treat pregnant workers the same as other impaired workers, as well as the legislative history of the PDA, compel this comparison. Second, I draw on two theoretical approaches—intersectionality theory and “disruption” theory—to demonstrate that denying ADA comparators to PDA plaintiffs ignores the unique intersectional nature of pregnancy, and would invite stereotyping, segregation, and discrimination. In conclusion, I note that the Supreme Court signaled in *Young* that courts should take a more expansive view of the types of evidence that can support a PDA claim, opening the door to a broader approach to the comparator question.*

---

\* Law Clerk to the Honorable Amy Berman Jackson, United States District Court for the District of Columbia; J.D., Yale Law School, 2013. I am grateful to Professor Vicki Schultz for her invaluable guidance and insights, as well as to Professor Anne Alstott, Emily Read, Andrew Tutt, Elizabeth Wilkins, Clare Ryan, Zach Strassburger, Micah Ratner, Molly Weston, and the members of the Family, State, and Market II seminar for their feedback and suggestions. Many thanks also to the editors of the Columbia Journal of Gender and Law.

## INTRODUCTION

In the last two decades, the United States has seen an explosion in pregnancy discrimination claims. The number of pregnancy-related charges filed with the EEOC nearly doubled from 1992 to 2010,<sup>1</sup> even though the number of antidiscrimination cases as a whole has declined every year since 1998.<sup>2</sup> Congress enacted the PDA in 1978 to clarify that pregnancy discrimination constituted prohibited discrimination on the basis of sex under Title VII.<sup>3</sup> Yet the prevailing interpretation of the PDA has made it difficult for plaintiffs to establish a successful claim.<sup>4</sup> Moreover, many pregnant workers could work later into their pregnancies if their employers made even simple accommodations—but these accommodations are not currently required by law.<sup>5</sup>

Pregnant employees have lost their jobs for reasons directly related to their pregnancies. For example, pregnant workers have been fired for needing extra bathroom breaks<sup>6</sup> or

---

1 Specifically, pregnancy discrimination charges increased from 3,385 in FY 1992 to 6,119 in FY 2010. U.S. EQUAL EMP'T OPPORTUNITY COMM'N (EEOC), PREGNANCY DISCRIMINATION CHARGES: EEOC & FEPAs COMBINED: FY 1992–FY 1996; EEOC, PREGNANCY DISCRIMINATION CHARGES: EEOC & FEPAs COMBINED: FY 1997–FY 2011. The U.K. is seeing a similar trend. Myriam Francois-Cerrah, *Workplace Pregnancy Discrimination on Rise*, AL JAZEERA (Mar. 15, 2013), <http://www.aljazeera.com/indepth/opinion/2013/03/201331454320759501.html> [<http://perma.cc/32KH-MXGC>].

2 SOPHIA THOMAS CALVERT, CTR. FOR WORKLIFE LAW, FAMILY RESPONSIBILITIES DISCRIMINATION: LITIGATION UPDATE 2010 9 (2010), <http://www.worklifelaw.org/pubs/FRDupdate.pdf> [<http://perma.cc/82X5-PZHL>] [hereinafter CENTER FOR WORKLIFE LAW REPORT].

3 See 42 U.S.C. § 2000e(k) (2012).

4 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, 35 (2009).

5 See NOREEN FARRELL ET AL., EQUAL RIGHTS ADVOCATES, EXPECTING A BABY, NOT A LAY-OFF: WHY FEDERAL LAW SHOULD REQUIRE THE REASONABLE ACCOMMODATION OF PREGNANT WORKERS 3 (2012), <http://www.equalrights.org/wp-content/uploads/2013/02/Expecting-A-Baby-Not-A-Lay-Off-Why-Federal-Law-Should-Require-the-Reasonable-Accommodation-of-Pregnant-Workers.pdf> [<http://perma.cc/X4RX-RAVF>] [hereinafter ERA REPORT] (“[T]he data suggests that pregnant workers are seeking accommodations that are minor and easily met by employers after good faith negotiations.”).

6 EMILY MARTIN ET AL., NAT'L WOMEN'S LAW CTR. & A BETTER BALANCE, IT SHOULDN'T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS 4 (2013), [http://www.nwlc.org/sites/default/files/pdfs/pregnant\\_workers.pdf](http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf) [<http://perma.cc/8G9M-YHSS>] [hereinafter NWLC REPORT]; Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES (Jan. 30, 2012), <http://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html> [<http://perma.cc/8HHR-9MXD>].

to drink water on the job,<sup>7</sup> and have been denied light duty assignments despite doctor-ordered heavy-lifting restrictions.<sup>8</sup> The difficulties facing pregnant women<sup>9</sup> on the job have increasingly gained the attention of the EEOC,<sup>10</sup> the media,<sup>11</sup> legal scholars,<sup>12</sup> advocacy organizations,<sup>13</sup> and, most recently, the Supreme Court of the United States.<sup>14</sup>

---

7 Wiseman v. Wal-Mart Stores, Inc., No. 08-1244-EFM, 2009 WL 1617669, at \*1 (D. Kan. June 9, 2009).

8 Young v. United Parcel Serv., Inc., 707 F.3d 437 (4th Cir. 2013) (upholding the refusal to accommodate a pregnant worker with a doctor-ordered heavy lifting restriction), *vacated*, 135 S. Ct. 1338 (2015).

9 This is not to ignore the fact that transgender men and gender non-conforming people may also become pregnant. See, e.g., Guy Trebay, *He's Pregnant. You're Speechless*, N.Y. TIMES (June 22, 2008), <http://www.nytimes.com/2008/06/22/fashion/22pregnant.html> [<http://perma.cc/MX4U-SUB7>] (telling the story of Thomas Beatie, a transgender man who became pregnant). I attempt to acknowledge this possibility by using the terms “pregnant worker” and “pregnant employee” as much as possible, but I do also refer to pregnant “women” throughout this Article. I want to recognize in this “guilty footnote” that gender identity is distinct from reproductive capacity. Cf. Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 45 STAN. L. REV. 581 (1990) [hereinafter Harris, *Race and Essentialism*] (criticizing the work of Catherine MacKinnon and noting that “issues of race do not even appear in guilty footnotes”).

10 E.g., EEOC ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES (June 25, 2015), [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm#amer](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm#amer) [<http://perma.cc/X6FC-ZP5E>] [hereinafter 2015 EEOC ENFORCEMENT GUIDANCE]; EEOC, STRATEGIC ENFORCEMENT PLAN FY 2013–2016 9–10 (2012), <http://www.eeoc.gov/eeoc/plan/upload/sep.pdf> [<http://perma.cc/2KRC-LRN3>] [hereinafter EEOC STRATEGIC ENFORCEMENT PLAN] (identifying “accommodating pregnancy-related limitations under the Americans with Disabilities Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA)” as a priority “[e]merging and [d]eveloping [i]ssue[.]” for the EEOC).

11 E.g., Brigid Schulte, *Pregnant Women Fight to Keep Jobs via ‘Reasonable Accommodations,’* WASH. POST (Aug. 4, 2014), [http://www.washingtonpost.com/national/health-science/pregnant-women-fight-to-keep-jobs-via-reasonable-accommodations/2014/08/04/9eb13654-1408-11e4-8936-26932bcfd6ed\\_story.html](http://www.washingtonpost.com/national/health-science/pregnant-women-fight-to-keep-jobs-via-reasonable-accommodations/2014/08/04/9eb13654-1408-11e4-8936-26932bcfd6ed_story.html) [<http://perma.cc/8Q79-YEQV>]; Chris Roberts, *Pregnancy Discrimination Case at Lucasfilm Continues*, NBC BAY AREA (Mar. 28, 2013), <http://www.nbcbayarea.com/news/local/Pregnancy-Discrimination-Case-at-Lucasfilm-Continues-200462131.html> [<http://perma.cc/D8NF-DAU5>]; Eric Brown, *Oprah Hit With Lawsuit Over Pregnancy Discrimination*, INT’L. BUS. TIMES (Feb. 2, 2013), <http://www.ibtimes.com/oprah-hit-lawsuit-over-pregnancy-discrimination-1057584> [<http://perma.cc/56GU-DJV7>].

12 E.g., Jeanette Cox, *Pregnancy as “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443 (2012); 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 (2013); Joan C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL’Y REV. 97 (2013).

13 E.g., CENTER FOR WORKLIFE LAW REPORT, *supra* note 2; ERA REPORT, *supra* note 5.

14 Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015).

On March 25, 2015, the Supreme Court clarified the meaning of the PDA in *Young v. United Parcel Service*,<sup>15</sup> handing pregnant workers both a victory and a challenge. *Young* was a victory for pregnant employees because it announced an interpretation of the PDA that has the potential to reinvigorate the Act's protections. It presented a challenge, however, because it reinforced the primacy of the *McDonnell Douglas* burden-shifting framework as the method for proving most pregnancy discrimination claims.<sup>16</sup> Historically, pregnancy discrimination plaintiffs have found it difficult to prove their cases under *McDonnell Douglas* because success through that framework almost always depends on the ability to identify a "comparator"—a similarly situated non-pregnant worker who was treated better.<sup>17</sup> Workers seeking accommodations for the temporary impairments that can arise out of pregnancy have been hard-pressed to find comparators because the law has not required employers to provide accommodations to workers with temporary, non-pregnancy-related impairments, either, especially when the source of the impairment is unrelated to the worker's job. Yet in the wake of *Young*, it appears that the availability of adequate comparators for PDA plaintiffs is more important than ever before.

This Article argues that a new day has dawned for pregnancy discrimination claims thanks to the 2008 Americans with Disabilities Act Amendments Act ("ADAAA").<sup>18</sup> The ADAAA expanded the definition of "disability" under the ADA to include temporary impairments similar to the ones that sometimes accompany pregnancy.<sup>19</sup> Notably, pregnancy itself did not gain coverage under the employment provisions of the ADA through the ADAAA,<sup>20</sup> and it is not considered a disability by the courts or the EEOC.<sup>21</sup> But, as this

15 *Id.*

16 *See id.* at 1344; *see also infra* Part I.B for further discussion and explanation of the *McDonnell Douglas* framework.

17 *See* Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011).

18 *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a)–(b), 122 Stat. 3553 (codified as amended in scattered sections of 42 U.S.C. §§ 12111–12117).

19 *See, e.g.,* *Summers v. Altarum Inst., Corp.*, 740 F.3d 325, 327 (4th Cir. 2014) (leg injuries); *Cohen v. CHLN, Inc.*, No. 10-00514, 2011 WL 2713737, at \*3, \*11 (E.D. Pa. July 13, 2011) (back injury); *Fleck v. WILMAC Corp.*, No. 10-05562, 2011 WL 1899198, at \*1, \*6 (E.D. Pa. May 19, 2011) (ankle injury).

20 42 U.S.C. §§ 12111–12117 (2012).

21 *See* *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 553 (7th Cir. 2011) (collecting cases holding that "absent unusual circumstances, [pregnancy] is not a physical impairment"). In addition, EEOC enforcement guidance issued in 2015 states that "pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability," although "some pregnant workers may have impairments related to their pregnancies that qualify as disabilities under the ADA, as amended." 2015 EEOC ENFORCEMENT GUIDANCE,

Article shows, the ADA's expanded definition of "disability" provides PDA plaintiffs with a new pool of potential comparators: temporarily impaired workers receiving reasonable accommodations under the ADA. In other words, thanks to the ADA, PDA plaintiffs should be more likely to receive workplace accommodations because they can now point to workers with temporary impairments who receive accommodations under the ADA as comparators.<sup>22</sup> Indeed, the Supreme Court itself acknowledged this possibility in *Young*, although the Court did not consider it further because the facts of that case predated the ADAAA.<sup>23</sup>

Although the ADAAA was enacted in 2008, it does not appear that any court has permitted a PDA plaintiff to use an ADA-covered colleague as a comparator to date.<sup>24</sup> In addition, some courts and theorists have questioned whether ADA-covered employees can properly serve as comparators for PDA plaintiffs at all.<sup>25</sup> Essentially, their argument goes, workers who receive accommodations mandated by a federal statute are inherently dissimilar from, and therefore not comparable to, workers who do not. The most egregious example of this reasoning was found in the Fourth Circuit's opinion in the *Young* case—now vacated by the Supreme Court—which did not consider the impact of the ADAAA.<sup>26</sup> Still, it is not yet clearly established that temporarily disabled workers covered by the ADA may serve as comparators for PDA plaintiffs.

This Article draws on existing case law, including *Young*, legislative history, and employment discrimination law theories to make the case in favor of the use of ADA comparators in PDA cases. No scholar has addressed this question in depth or considered it in the context of the Supreme Court's opinion in *Young*.<sup>27</sup> Thus, this Article is the first to closely examine the availability of ADA-covered employees as comparators for PDA plaintiffs under current law.

---

*supra* note 10, at II.A.

22 Williams et al. have termed this approach the "'de facto' comparator theory." See Williams et al., *supra* note 12, at 120–22.

23 See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1348 (2015).

24 See Williams et al., *supra* note 12, at 123.

25 See *Serednyj*, 656 F.3d at 548; Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. OF GENDER L. & POL'Y 67, 95 (2013); Cox, *supra* note 12, at 469–71.

26 See *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 448–49 (4th Cir. 2013).

27 See, e.g., Cox, *supra* note 12; Brake & Grossman, *supra* note 25; Widiss, *supra* note 12; Williams et al., *supra* note 12.

Part I provides the social and legal context for the claim that the ADAAA has effectively expanded the PDA by enlarging the pool of available comparators. It begins by detailing the serious problems pregnant workers face and the ways employment discrimination law has failed them. Then, I explore the PDA, the *Young* opinion, the amended ADA, and the comparator issue in greater depth.

Part II shows that the use of ADA comparators in PDA cases finds support in the weight of PDA precedent, as well as the legislative history of the PDA. Indeed, as I will discuss, to prohibit the use of ADA comparators would defy the logic of the most prominent pre-*Young* PDA cases, which rest on the principle that the PDA does not require employers to treat impaired pregnant workers any differently than similarly-impaired non-pregnant workers. But if the ADAAA now requires employers to accommodate many more impaired non-pregnant workers, failing to accommodate similarly impaired pregnant workers would constitute treating them *worse* than their colleagues.

Part III will draw on theoretical approaches that highlight the dangers of oversimplifying and reinforcing identity differences. First, I discuss intersectionality theory,<sup>28</sup> and I argue that Title VII has failed pregnant workers in part because courts have not recognized that pregnancy discrimination is the product of the unique interaction between stereotypes about women, stereotypes about pregnancy, and the reality that pregnancy can sometimes cause impairments. For this reason, comparisons between pregnant and temporarily disabled workers are not only appropriate, but also necessary to fully address pregnancy discrimination.

Second, I engage with an emerging theoretical approach that views discrimination as part of a process of creating “difference” that operates by singling out certain groups for differential treatment. Scholars like Noah Zatz, Richard Thompson Ford, and especially Vicki Schultz argue that antidiscrimination law should target workplace practices that create these differences because creating difference leads to segregation and stereotyping. This new approach suggests that treating pregnant workers differently than other workers with similar impairments will undermine the purposes of the PDA

---

28 Intersectionality is a concept first introduced by critical race theorist Kimberlé Crenshaw. See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139 [hereinafter Crenshaw, *Demarginalizing the Intersection*]. Since then, many scholars have also embraced this approach. See, e.g., Beth Ribet, *Emergent Disability and the Limits of Equality: A Critical Reading of the UN Convention on the Rights of Persons with Disabilities*, 14 YALE HUM. RTS. & DEV. L.J. 155, 185 (2011).

by allowing employers and coworkers to marginalize pregnant women, thus promoting segregation, stereotyping, and discrimination.

## I. Pregnancy, Disability, and Work

### A. Pregnancy Discrimination Claims on the Rise

The Pregnancy Discrimination Act of 1978 established two important principles: first, that pregnancy discrimination constitutes discrimination “because of sex” in violation of Title VII;<sup>29</sup> and, second, that employers must generally treat pregnant workers “the same” as similarly impaired non-pregnant workers.<sup>30</sup> Despite the enactment of the PDA more than three decades ago, however, the number of pregnancy discrimination charges filed with the EEOC has nearly doubled in the past twenty years.<sup>31</sup> The cause of this uptick in filings is not entirely clear, but likely factors include the increased number of working mothers, the greater attention to pregnancy discrimination and work-life issues in the media, and the Civil Rights Act of 1991, which made increased damages and jury trials available to discrimination plaintiffs.<sup>32</sup> The EEOC has identified pregnancy discrimination as an enforcement priority,<sup>33</sup> and it issued new pregnancy discrimination guidance on June 25, 2015.<sup>34</sup>

---

29 See 42 U.S.C. § 2000e(k) (2012).

30 See *id.*; see also *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1341 (2015).

31 See *supra* note 1.

32 CENTER FOR WORKLIFE LAW REPORT, *supra* note 2, at 9. This report focuses not only on pregnancy discrimination, but also on the broader category of “family responsibilities discrimination.” Still, perhaps because of the large increase in pregnancy discrimination claims documented above, 67% of the cases reviewed in this study related to pregnancy and maternity leave. See *supra* note 2, at 10.

33 EEOC STRATEGIC ENFORCEMENT PLAN, *supra* note 10. The EEOC also recently won several large settlements on behalf of PDA plaintiffs. See, e.g., Press Release, EEOC, Merry Maids Franchise to Pay \$40,000 to Resolve EEOC Pregnancy Discrimination Suit (Sept. 16, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/9-16-14.cfm> [<http://perma.cc/2SRU-QBJW>]; Press Release, EEOC, Landau Uniforms Settles EEOC Pregnancy Discrimination Suit for \$80,000 (Apr. 8, 2013), <http://www.eeoc.gov/eeoc/newsroom/release/4-8-13a.cfm> [<http://perma.cc/6DBJ-R4KH>].

34 See Press Release, EEOC, EEOC Issues Updated Pregnancy Discrimination Guidance (June 25, 2015), <http://www.eeoc.gov/eeoc/newsroom/release/6-25-15.cfm> [<http://perma.cc/TZ9M-AN3E>]. The EEOC’s 2015 pregnancy discrimination guidance updated its 2014 pregnancy discrimination guidance in light of the Supreme Court’s opinion in *Young*. *Id.*

Many pregnant workers will experience at least some symptoms that could interfere with their job performance. For instance, even women with healthy pregnancies may suffer from morning sickness, or have difficulty lifting, pulling, climbing, pushing, standing, or sitting for long periods of time.<sup>35</sup> Workplace conflicts can arise when employees request simple accommodations to ease these discomforts,<sup>36</sup> and the PDA does not require employers to accommodate pregnant workers.<sup>37</sup>

Court opinions and news reports document the stories of numerous workers who would have been able to continue working with even minimal accommodations for their pregnancy-related impairments. For example, in 2007, Heather Wiseman was fired from her position as a sales floor associate at a Kansas Wal-Mart for “insubordination” because she refused to abide by a policy that prohibited non-cashier employees from carrying water bottles at work.<sup>38</sup> Ms. Wiseman’s doctor had recommended that she carry a water bottle because she was experiencing urinary and bladder problems associated with her pregnancy that required her to drink water regularly, but Wal-Mart was unyielding.<sup>39</sup> Similarly, in 1999, Maria Flores left her job as a cashier at a Philadelphia Home Depot because her employer refused to make simple accommodations for her pregnancy-related impairments.<sup>40</sup> Ms. Flores had produced three separate notes from her doctor explaining that she was restricted from some of her job requirements, which included standing for up to six hours without a break.<sup>41</sup> But her employer refused to accommodate her or to transfer her to a less strenuous position.<sup>42</sup>

---

35 See Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 4–5 (1995) (describing the physical changes and limitations women may experience during pregnancy); see also Williams et al., *supra* note 12, at 142–48 (appendix entitled “Some Pregnancy Conditions That Commonly Give Rise to the Need for Workplace Accommodations”).

36 See ERA REPORT, *supra* note 5, at 3 (“[T]he data suggests that pregnant workers are seeking accommodations that are minor and easily met by employers after good faith negotiations.”).

37 See Grossman & Thomas, *supra* note 4, at 33–34 (explaining that the PDA does not create affirmative rights for pregnant workers).

38 *Wiseman v. Wal-Mart Stores, Inc.*, No. 08-1244-EFM, 2009 WL 1617669, at \*1 (D. Kan. June 9, 2009).

39 *Id.*

40 *Flores v. Home Depot, Inc.*, No. CIV.A. 01-6908, 2003 WL 1793388, at \*1 (E.D. Pa., Apr. 3, 2003).

41 *Id.*

42 *Id.* Notably, the court denied the employer’s motion for summary judgment on Ms. Flores’ Title VII claims because of evidence that the employer had provided accommodations for pregnant employees who were white, but not for Ms. Flores, who was Hispanic. *Id.* at \*10–12. It is possible that the combination of



Ms. Wiseman and Ms. Flores are not alone. In recent years, courts have upheld the actions of employers that fired or failed to accommodate pregnant workers who requested extra bathroom breaks,<sup>43</sup> who needed schedule changes because of severe morning sickness,<sup>44</sup> and who presented doctor-ordered heavy-lifting restrictions.<sup>45</sup> And as some of these examples reflect, these failures to accommodate disproportionately plague women in low-income, blue collar, and traditionally male-dominated occupations.<sup>46</sup> Although pregnancy discrimination affects workers in all types of jobs,<sup>47</sup> lower-income workers generally have less flexibility and control over their workdays, making it more difficult to balance pregnancy limitations with work.<sup>48</sup>

The increasing centrality of women as wage earners further magnifies these problems. In 1960, only 20% of mothers worked;<sup>49</sup> today, 70.1% of mothers are either working or looking for work.<sup>50</sup> Moreover, working mothers are now the primary earners in 40% of families with children under age eighteen.<sup>51</sup> Of this group, 37% are married mothers who

---

Ms. Flores' pregnancy and her national origin made her particularly vulnerable to discrimination. See *infra* Part III.A for a discussion of the intersectional nature of pregnancy discrimination claims.

43 NWLC REPORT, *supra* note 6, at 4; Bakst, *supra* note 6. See also Cox, *supra* note 12, at 452–53 (listing examples).

44 E.g., *Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994).

45 *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 437 (4th Cir. 2013); see also ERA REPORT, *supra* note 5, at 4.

46 Grossman & Thomas, *Making Pregnancy Work*, *supra* note 4, at 22 (noting that college-educated women are more likely to work longer into their pregnancies); Laura Schlichtmann, *Accommodation of Pregnancy-Related Disabilities on the Job*, 15 BERKELEY J. EMP. & LAB. L. 335, 338 (1994) (“[W]omen in more physically demanding and lower-wage occupations – disproportionately women of color – are especially likely to need on-the-job accommodation . . . during pregnancy.”).

47 See, e.g., *Picard v. Louisiana*, No. 10-868-JJB, 2013 WL 1087620, at \*7 (M.D. La. Mar. 14, 2013) (pregnancy discrimination action brought against State of Louisiana by a former Assistant Attorney General).

48 ERA REPORT, *supra* note 5, at 22–23. Studies show that flexible scheduling is available to two-thirds of workers earning more than \$71,000 per year, but to less than one-third of workers earning less than \$28,000 per year. In addition, one-third of lower-income workers cannot choose the timing of their breaks and nearly 60% cannot decide when to arrive at work or leave. *Id.*

49 CENTER FOR WORKLIFE LAW REPORT, *supra* note 2, at 4.

50 Press Release, Bureau of Labor Statistics, *Employment Characteristics of Families—2014* (Apr. 23, 2015), <http://www.bls.gov/news.release/famee.nr0.htm> [<http://perma.cc/3GA8-RKTS>].

51 WENDY WANG, KIM PARKER & PAUL TAYLOR, *BREADWINNER MOMS 1* (May 29, 2013), <http://www>.

earn more than their spouses, and 63% are single mothers with an average income of \$20,000 a year.<sup>52</sup> Thus, when pregnant workers are forced to leave their jobs, the workers and the families they support suffer the consequences.

### B. The Pregnancy Discrimination Act: Clarifying Title VII

The Pregnancy Discrimination Act of 1978 clarified that pregnancy discrimination was discrimination “because of sex” in violation of Title VII.<sup>53</sup> Congress enacted the statute for the express purpose of repudiating the Supreme Court’s decision in *General Electric Co. v. Gilbert*.<sup>54</sup> In that case, the Court held that General Electric (“GE”) had not discriminated on the basis of sex by excluding pregnancy from its disability insurance plan.<sup>55</sup> Justice Brennan and Justice Stevens authored vigorous dissents, arguing that GE’s policy violated Title VII’s prohibition on sex discrimination,<sup>56</sup> and the PDA codified Congress’ agreement with the dissenting justices.<sup>57</sup>

The PDA added two new clauses to the “definitions” section of Title VII. The first clause states: “The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because or on the basis of pregnancy, childbirth, or related medical conditions . . . .”<sup>58</sup> This has been unambiguously understood to mean that discrimination on the basis of pregnancy constitutes prohibited discrimination on the basis of sex under Title VII. Therefore, employers may not lawfully discriminate against pregnant

---

pewsocialtrends.org/2013/05/29/breadwinner-moms/ [http://perma.cc/K7J8-CE8T].

52 *Id.* at 1 n.2. These single mothers are also more likely to be black or Hispanic, and younger than married mothers. *Id.* at 1.

53 *See* 42 U.S.C. § 2000e(k) (2012).

54 *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 144–45 (1976). Both the Senate and House Reports on the PDA cited the dissenting opinions of Justice Brennan and Justice Stevens as expressing the correct interpretation of Title VII. *See* S. REP. NO. 54-748, at 39–40 (1980); H.R. REP. NO. 95-948, at 2 (1978) [hereinafter LEGISLATIVE HISTORY OF THE PDA].

55 *Gilbert*, 429 U.S. at 144–45.

56 *Id.* at 146 (Brennan, J., dissenting); *id.* at 160 (Stevens, J., dissenting).

57 Both the House and Senate Reports cite the dissenting opinions in *Gilbert*. *See* LEGISLATIVE HISTORY OF THE PDA, *supra* note 54.

58 § 2000e(k).

workers in hiring, firing, pay, promotion, assignments, or any other term or condition of employment.<sup>59</sup>

The second clause of the PDA provides: “[W]omen 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.”<sup>60</sup> The meaning of the second clause has been contested,<sup>61</sup> and was only recently clarified by the Supreme Court in the *Young* decision.<sup>62</sup> Before *Young*, the Sixth Circuit interpreted the command that employers “shall” treat pregnant workers “the same” as similarly impaired non-pregnant workers to mean that employers were required to provide the same accommodations for pregnancy-related impairments as for similar non-pregnancy-related impairments, regardless of the source of the impairment.<sup>63</sup> Similarly, some scholars have argued that this clause provides a “comparative right of access to accommodations,”<sup>64</sup> noting that it emphasizes the usual equal treatment rule of Title VII.<sup>65</sup> But many other courts declined to recognize a meaningful distinction between the two clauses of the PDA, holding that the second clause permits employers to enact policies that provide workplace accommodations to some workers with impairments, but not

---

59 See Widiss, *supra* note 12, at 997.

60 § 2000e(k).

61 Compare *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4th Cir. 2013), *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011), *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309 (11th Cir. 1999), and *Urbano v. United Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998), with *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996).

62 See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1338 (2015).

63 *Ensley-Gaines*, 100 F.3d at 1226. In addition, the Sixth Circuit was not concerned that the source of the requirement to accommodate the similarly impaired non-pregnant workers in that case was another federal statute, and not just an employer policy. See *infra* Part II.A.2 for a more detailed discussion of this case and that issue.

64 Grossman & Thomas, *supra* note 4, at 33–34; see also Widiss, *supra* note 12, at 2.

65 Indeed, the PDA emerged at the height of the “equal treatment”/“special treatment” debate among feminist scholars. Feminists have long debated whether the path to gender equality is paved by “special treatment,” (which holds that biological and sociological differences between women and men require the law to treat them differently), or by “equal treatment” (which holds that women will achieve equality only when they are treated the same as men). See Wendy W. Williams, *Notes From a First Generation*, 1989 U. CHI. LEGAL F. 99 (describing and summarizing the debate). With its focus on same treatment, the PDA is generally considered a victory for the “equal treatment” camp. Widiss, *supra* note 12, at 5.

to pregnant workers.<sup>66</sup> As I will discuss below, the Supreme Court addressed this issue squarely in *Young*, and clarified that the second clause of the PDA does, in fact, require employers to accommodate pregnant employees in the same ways that they accommodate similarly-impaired, non-pregnant employees, under many circumstances.<sup>67</sup>

Pregnancy discrimination plaintiffs must prove their cases like other Title VII plaintiffs, and they almost always allege disparate treatment—that is, intentional discrimination based on a protected characteristic—since courts are generally inhospitable to disparate impact pregnancy discrimination claims.<sup>68</sup> Thus, unless a pregnancy discrimination plaintiff can establish direct evidence of discrimination, she must satisfy the *McDonnell Douglas* framework for disparate treatment claims.<sup>69</sup> This framework has three parts: first, the plaintiff must establish a prima facie case of discrimination; second, the employer may produce a “legitimate nondiscriminatory reason” that explains the apparent discrimination; and third, the plaintiff must prove that the reason offered by the employer is actually a pretext for discrimination.<sup>70</sup>

---

66 See, e.g., *Young*, 707 F.3d at 447 (“Although the second clause can be read broadly, we conclude that . . . it does not create a distinct and independent cause of action.”); see also Widiss, *supra* note 12, at 34 (discussing the issue). I note, however, that even before *Young*, the Supreme Court had stated that the second clause of the PDA had substantive significance. See *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 204 (1991) (noting that the PDA’s second clause requires that pregnant workers be treated like similarly capable non-pregnant workers); *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285 (1987) (“[W]e believe that the second clause was intended to . . . illustrate how discrimination against pregnancy is to be remedied . . . .”) (quoting *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 n.14 (1983) (“The meaning of the first clause is not limited by the specific language in the second clause, which explains the application of the general principle to women employees.”)).

67 *Young*, 135 S. Ct. at 1354–55.

68 In a small number of cases, courts have allowed pregnancy discrimination disparate impact claims to advance. See, e.g., *EEOC v. Warshawsky & Co.*, 768 F. Supp. 647, 655 (N.D. Ill. 1991) (holding that employer sick-leave policy had unlawful disparate impact when it resulted in the firing of 95.2% of pregnant workers). Still, many courts have rejected disparate impact claims as underhanded attempts to secure preferential treatment for pregnant workers. See Grossman & Thomas, *supra* note 4, at 42. See generally Reva Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 935 (1985) (arguing that a disparate impact cause of action for pregnancy discrimination is available and should be used).

69 *Young*, 135 S. Ct. at 1345.

70 *Id.* A number of scholars and judges have criticized the *McDonnell Douglas* framework for overly complicating antidiscrimination claims and for hamstringing plaintiffs who experienced discrimination but who cannot provide adequate comparators. See generally Goldberg, *supra* note 17; see also *Coleman v. Donahoe*, 667 F.3d 835, 863 (7th Cir. 2012) (Wood, J., concurring) (decrying the *McDonnell Douglas* framework as having “lost [its] utility” and arguing for a simpler alternative).

To establish a prima facie case, a plaintiff must show that: (1) she is a member of a protected class; (2) she performed her job satisfactorily; (3) she suffered an adverse employment action; and (4) the circumstances give rise to an inference of unlawful discrimination.<sup>71</sup> To raise an inference of unlawful discrimination, courts often require a plaintiff to show that the employer treated her less favorably than a “similarly situated comparator,” usually another employee with similar responsibilities who does not possess the protected characteristic.<sup>72</sup> A woman alleging sex discrimination in hiring, for instance, might be required to show that a man with similar qualifications was treated more favorably in the selection process. While comparators are not strictly necessary to establish a prima facie case,<sup>73</sup> the courts’ general preference for comparators, coupled with the expressly comparative language of the PDA, has made them a virtually required component of pregnancy discrimination lawsuits.<sup>74</sup> Thus, whether ADA-covered employees are available as comparators for PDA plaintiffs is critical to the availability of PDA claims at all.

### C. *Young v. UPS*: Clarifying the PDA

In *Young*, the Supreme Court clarified the meaning of second clause of the PDA, and at the same time reinforced the centrality of the *McDonnell Douglas* burden-shifting framework to pregnancy discrimination claims.<sup>75</sup> Peggy Young worked as a driver for UPS, and her job required her to be able to lift and load parcels weighing up to seventy pounds on her own.<sup>76</sup> After suffering several miscarriages, she became pregnant in 2006, and her doctor instructed that she should not lift more than twenty pounds during the first twenty weeks of her pregnancy, and no more than ten pounds for the rest of her pregnancy.<sup>77</sup> UPS

---

71 *Young*, 135 S. Ct. at 1345; *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 506–07 (1993); *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

72 *See, e.g., Troupe v. May Dep’t Stores*, 20 F.3d 734, 738 (7th Cir. 1994) (describing the need for a “hypothetical Mr. Troupe” as a comparator); *see also Williams et al., supra* note 12, at 102.

73 *E.g., Price v. UTI*, No. 4:110CV01427 CAS, 2013 WL 798014, at \*2 (E.D. Mo. Mar. 5, 2013) (citing *Wierman v. Casey’s Gen. Stores*, 638 F.3d 984, 993 (8th Cir. 2011)); *see also Williams et al., supra* note 12, at 108.

74 *See Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 449–50 (4th Cir. 2013) (characterizing the fourth step of the *McDonnell Douglas-Burdine-Hicks* prima facie case as a requirement to produce a comparator), *vacated*, 135 S. Ct. 1338; *see generally Goldberg, Discrimination by Comparison, supra* note 17.

75 *Young*, 135 S. Ct. at 1353–55.

76 *Id.* at 1344.

77 *Id.*

informed Young that she could not work with those restrictions and denied her a light-duty accommodation, so she stayed home without pay, eventually losing her employer-provided medical coverage.<sup>78</sup> She filed a discrimination charge with the EEOC in 2007, and filed suit against UPS in 2008.<sup>79</sup>

At the time, UPS's policies required it to provide light-duty accommodations like the one sought by Young under only three circumstances: (1) when an employee became injured on the job; (2) when an employee was disabled under the ADA; and (3) when an employee lost her driving certification.<sup>80</sup> Therefore, UPS argued, it had not discriminated against Young based on her pregnancy, but rather had treated her like all other workers who, like Young, did not fall into any of the three neutral categories that would entitle a worker to an accommodation.<sup>81</sup> The district court granted summary judgment to UPS,<sup>82</sup> and the Fourth Circuit affirmed.<sup>83</sup>

As the Supreme Court observed, the dispute between Young and UPS centered on the interpretation of the second clause of the PDA, which provides 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*.”<sup>84</sup> UPS's policy treated pregnant workers less favorably than some similarly situated non-pregnant workers, but on the basis of criteria that the Court deemed “facially neutral.”<sup>85</sup> The Court noted that it was not apparent from the “same treatment” language of the second clause of the PDA what, exactly, a court (or, presumably, an employer) was to do in that situation: Did the second clause require “courts [to] compare

---

78 *Id.*

79 *Young v. United Parcel Serv., Inc.*, No. DKC 08-2586, 2011 WL 665321, at \*6 (D. Md. Feb. 14, 2011).

80 *Young*, 135 S. Ct. at 1344. UPS voluntarily changed this policy effective January 1, 2015, while the *Young* case was pending before the Supreme Court. Brigid Schulte, *With Supreme Court Case Pending, UPS Reverses Policy on Pregnant Workers*, WASH. POST (Oct. 29, 2014), <http://www.washingtonpost.com/blogs/she-the-people/wp/2014/10/29/with-supreme-court-case-pending-ups-reverses-policy-on-pregnant-workers> [<http://perma.cc/XVQ3-MM4E>].

81 *Young*, 135 S. Ct. at 1344.

82 *Young*, 2011 WL 665321, at \*22.

83 *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 451 (4th Cir. 2013).

84 *Young*, 135 S. Ct. at 1348 (quoting 42 U.S.C. § 2000e(k) (2012)) (emphasis in original quotation).

85 *Id.* at 1349.

workers *only* in respect to the work limitations that they suffer?”<sup>86</sup> Or might “courts, when deciding who the relevant ‘other persons’ are, . . . consider other similarities and differences as well?”<sup>87</sup>

The parties in *Young* adopted “almost polar opposite” positions on these questions, and the Court rejected them both.<sup>88</sup> *Young* argued that the second clause of the PDA required employers to provide the same accommodations to pregnant workers with impairments that they extended to some workers with impairments unrelated to pregnancy, even if other similarly impaired, non-pregnant workers would not be accommodated.<sup>89</sup> The Court found that *Young*’s approach would unwarrantedly “grant pregnant workers a ‘most-favored-nation’ status,” requiring employers to accommodate pregnant workers any time they provided even “one or two workers with an accommodation.”<sup>90</sup> The Court noted that the second clause of the PDA stated pregnant workers should be treated the same as “other persons,” but not “*any* other persons,” and that the statute does not “specify *which* other persons Congress had in mind.”<sup>91</sup> And the Court reinforced the principle that “disparate-treatment law normally permits an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual reason for doing so.”<sup>92</sup>

UPS contended that the second clause of the PDA simply defined pregnancy discrimination as a form of sex discrimination, and therefore required courts to “compare the accommodations an employer provides to pregnant women with the accommodations it provides to others *within* a facially neutral category (such as those with off-the-job injuries)

---

86 *Id.* at 1348–49.

87 *Id.*

88 *Id.* at 1349.

89 *Young*, 135 S. Ct. at 1349.

90 *Id.*

91 *Id.* at 1350.

92 *Id.* The Court also declined to defer to the government on the grounds that the EEOC’s 2014 pregnancy discrimination guidance—which expressed the interpretation promoted by *Young*—had been enacted only after the Court granted certiorari in *Young*, and was “inconsistent with positions the Government ha[d] long advocated.” *Id.* at 1352.

to determine whether the employer has violated Title VII.”<sup>93</sup> But the Court found that it was the first clause of the PDA that established pregnancy discrimination to be a form of sex discrimination, and so UPS’s reading was incorrect because it would render the second clause superfluous.<sup>94</sup> In addition, the Court stated that UPS’s interpretation would undermine the express intent of Congress when it enacted the PDA because it would not overturn the *Gilbert* decision in full.<sup>95</sup>

The Court then presented its own interpretation of the second clause of the PDA. First, the Court emphasized that “an individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework.”<sup>96</sup> The Court further explained that a pregnancy discrimination plaintiff can establish a prima facie case “by showing . . . that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others ‘similar in their ability or inability to work.’”<sup>97</sup> Then, the employer may respond with a “legitimate, nondiscriminatory” explanation for denying the accommodation.<sup>98</sup>

The Court stated that a plaintiff can carry her burden to rebut the employer’s explanation and raise an inference of intentional discrimination by showing that “the employer’s policies impose a significant burden on pregnant workers” that the proffered nondiscriminatory reason does not justify.<sup>99</sup> It further explained that a pregnancy discrimination plaintiff may seek to prove that an employer policy places a “significant burden” on pregnant workers “by providing evidence that the employer accommodates a large percentage of nonpregnant

---

93 *Id.* at 1349.

94 *Young*, 135 S. Ct. at 1352.

95 *Id.* at 1353. The Court also noted that it had previously found that the second clause had a different meaning than the first in *California Federal Savings and Loan Association v. Guerra*, when the Court stated that the second clause “was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied.” *Id.* (quoting *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 284 (1987)).

96 *Id.*

97 *Id.* at 1354.

98 *Id.*

99 *Young*, 135 S. Ct. at 1354.



workers while failing to accommodate a large percentage of pregnant workers.”<sup>100</sup> And the Court emphasized that “a plaintiff may rebut an employer’s proffered justifications by showing how a policy operates in practice.”<sup>101</sup> The Court then vacated the Fourth Circuit’s opinion and remanded the case.<sup>102</sup>

The Supreme Court’s “significant burden” approach carved a middle path between the parties’ dueling interpretations of the second clause of the PDA. The Court confirmed, however, that the second clause has independent meaning and force, and that it requires employers to treat pregnant workers the same as other workers in many cases. This holding underscores the significant role that comparisons between pregnant and non-pregnant workers will play in future PDA cases. It remains to be seen how the *Young* rule will be applied in practice, or how high of a hurdle plaintiffs will have to clear to prove that a “substantial burden” exists. But it is apparent even now that future pregnancy discrimination plaintiffs’ cases will likely hinge on comparisons between pregnant workers and non-pregnant workers with similar impairments.

#### **D. The ADAAA: Clarifying the ADA**

##### **1. The ADA’s Expanded Definition of Disability**

The ADA, enacted in 1990 and amended in 2008, prohibits discrimination on the basis of disability.<sup>103</sup> In addition, and unlike the PDA, the ADA requires employers to reasonably accommodate employees with disabilities unless the accommodations would constitute an “undue hardship.”<sup>104</sup> Until recently, however, courts construed the ADA narrowly, under instructions from the Supreme Court that “disability” should “be interpreted . . . to create a demanding standard for qualifying as disabled.”<sup>105</sup> Then, in 2008, Congress repudiated this cramped interpretation of the ADA with the ADAAA.<sup>106</sup> The “Findings and Purposes”

---

100 *Id.*

101 *Id.* at 1355.

102 *Id.* at 1355–56.

103 42 U.S.C. §§ 12111–12117 (2012).

104 42 U.S.C. § 12112(b)(5)(A) (2012). *See* Grossman & Thomas, *supra* note 4, at 33–34 (explaining that the PDA does not create affirmative rights).

105 *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

106 *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, §§ 2(a)–(b), 122 Stat. 3553 (codified as

section of the Act expresses Congress' intent to reject Supreme Court precedents that had sharply limited the availability of ADA protections.<sup>107</sup>

The ADAAA dramatically expanded the ADA, broadening its definition of "disability" and expressly extending its protections to previously excluded conditions.<sup>108</sup> Before the ADAAA, the Supreme Court interpreted the ADA's definition of disability so narrowly that the statute only helped the subset of Americans who are so severely disabled that they are generally unable to work.<sup>109</sup> The amended ADA expanded the definition of "disability" to mean: "(A) a physical or mental impairment that substantially limits one or more major life activities . . . ; (B) a record of such impairment; or (C) being regarded as having such an impairment . . . ." <sup>110</sup> The statute's non-exclusive list of "major life activities" now includes "performing manual tasks" and "sleeping, walking, standing, lifting, [and] bending."<sup>111</sup> The statute also clarifies that a disability need not last longer than six months to qualify for ADA coverage.<sup>112</sup> These changes led courts to apply the ADA to temporary conditions like back and ankle injuries,<sup>113</sup> which would not have been covered by the pre-amendment ADA because they were either too temporary or too minor.<sup>114</sup>

---

amended in scattered sections of 42 U.S.C. §§ 12111–12117).

107 *Id.*

108 29 C.F.R. § 1630.1(c)(4) (2011) ("The purpose of the ADAAA is to make it easier for people with disabilities to obtain protection under the ADA. . . . [T]he definition of 'disability' . . . shall be construed broadly in favor of expansive coverage to the maximum extent permitted by the terms of the ADA.")

109 Ruth Colker, *The Mythic 43 Million Americans with Disabilities*, 49 WM. & MARY L. REV. 1, 10 (2007).

110 42 U.S.C. §§ 12102(1)(A)–(C) (2012).

111 42 U.S.C. § 12102(2)(A) (2012).

112 29 C.F.R. § 1630.2(j)(1)(ix) (2012) ("The effects of an impairment lasting or expecting to last fewer than six months can be substantially limiting within the meaning of this section.")

113 *See, e.g.*, *Cohen v. CHLN, Inc.*, No. 10-00514, 2011 WL 2713737, at \*7–8 (E.D. Pa. July 13, 2011) (back injury); *Fleck v. WILMAC Corp.*, No. 10-05562, 2011 WL 1899198, at \*1, \*6 (E.D. Pa. May 19, 2011) (ankle injury). Notably, not every court has embraced the ADA's loosened standard so vigorously. *See, e.g.*, *Peoples v. Langley/Empire Candle Co.*, No. 11-2469-CM-JPO, 2012 WL 171340 (D. Kan. Jan. 20, 2012) (relying on pre-ADAAA cases to hold recovery from hernia repair surgery was not an ADA-covered disability).

114 *E.g.*, *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 203 (2002) (holding that a worker's chronic carpal tunnel syndrome was not sufficiently disabling to receive ADA coverage); *see also Williams et al., supra* note 12, at 130–35 (collecting cases).

## 2. The ADA and Pregnancy

Scholars have long debated the relationship between pregnancy and disability,<sup>115</sup> and the ADAAA has reinvigorated that discussion.<sup>116</sup> Given the widened scope of the amended ADA, some scholars argue that pregnancy itself should now be covered by the ADA.<sup>117</sup> After all, many of the “major life activities” referenced in the amended ADA are also activities that pregnant women may find difficult, such as “sleeping, walking, standing, lifting, [and] bending.”<sup>118</sup> In particular, Professor Jeanette Cox has compellingly argued that the amended ADA should cover pregnancy itself, and not just some pregnancy-related impairments.<sup>119</sup> She contends that because the ADA now covers similarly temporary and low-stigma conditions, and because the “social model” of disability suggests that pregnancy, like traditional disabilities, creates social and economic disadvantages for pregnant workers, pregnancy now properly fits within the ADA.<sup>120</sup>

Still, the weight of authority is against the view that pregnancy qualifies as a disability.<sup>121</sup> Historically and in recent cases, courts have held that pregnancy cannot be a disability since

---

115 See, e.g., Jennifer Gottschalk, *Accommodating Pregnancy on the Job*, 45 U. KAN. L. REV. 241 (1996) (concluding that reinterpretation of Title VII, not the ADA, is the best way to secure workplace accommodations for pregnant employees); Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225, 250 (1998) (arguing that incorporating pregnancy into the ADA would promote stereotypes about pregnant workers); Colette G. Matzzie, Note, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the ADA*, 82 GEO. L.J. 193, 194–98 (Nov. 1993) (arguing that the ADA should be understood to cover pregnancy); D’Andra Millsap, Comment, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411, 1450 (1995–1996) (arguing that the ADA cannot accommodate pregnancy and so Congress should amend the PDA).

116 See, e.g., Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA’s Pregnancy Exclusion*, 27 WIS. J.L. GENDER & SOC’Y 1 (2012); Cox, *supra* note 12; Anastasia Latsos, *ADA Reform and Stork Parking: A Glimmer of Hope for the Pregnant*, 32 WOMEN’S RTS. L. REP. 193 (2011). In addition, for an in-depth analysis of the ADAAA and its relationship to pregnancy discrimination claims, see Williams et al., *supra* note 12.

117 Cox, *supra* note 12, at 449–50.

118 See Calloway, *supra* note 35; see also Williams et al., *supra* note 12, at 142–48 (appendix entitled “Some Pregnancy Conditions That Commonly Give Rise to the Need for Workplace Accommodations”).

119 Cox, *supra* note 12, at 451–52.

120 Cox, *supra* note 12, at 451–52. Notably, the Congress that enacted the PDA may have shared Professor Cox’s view that pregnancy should be considered a disability. See *infra* notes 185–190 and accompanying text.

121 See *supra* note 21 and accompanying text.

it is “the natural consequence of a properly functioning reproductive system”<sup>122</sup> and is “often a voluntarily undertaken and desired condition.”<sup>123</sup> Moreover, after the enactment of the ADAAA, the EEOC promulgated guidance stating that “conditions, such as pregnancy, that are not the result of a physiological disorder are . . . not impairments” under the ADA.<sup>124</sup> And some scholars have worried that tying pregnancy to disability will promote certain negative stereotypes about pregnant workers.<sup>125</sup> The ongoing insistence of courts, the EEOC, and some scholars that pregnancy is categorically different from disability makes it unlikely that the pregnancy-as-disability approach will take hold.

Although the EEOC has expressly stated that pregnancy itself should not be considered a disability under the amended ADA, the agency has also asserted that pregnancy-related impairments might rise to the level of the disabilities covered under the newly amended ADA.<sup>126</sup> Three recent decisions and an EEOC settlement, all of which arose under the amended ADA, recognized this line of reasoning.<sup>127</sup> In *Price v. UTI*, Jennifer Price, who suffered from pregnancy-related complications, alleged that her employer discriminated against her based on her pregnancy in violation of Title VII and violated the ADA by

---

122 *Gudenkauf v. Stauffer Commc'ns, Inc.*, 922 F. Supp. 465, 473 (D. Kan. 1996).

123 *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976); *see also Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 553 (7th Cir. 2011) (collecting cases holding that “absent unusual circumstances, [pregnancy] is not a physical impairment”).

124 29 C.F.R. app. § 1630.2(h) (2011).

125 *E.g.*, Greenberg, *supra* note 115, at 250. As I will argue below, to the extent that this threat of stereotyping pregnant workers exists, the problem has now been inverted: unless pregnant workers are able to use ADA-covered workers as comparators, they will find it nearly impossible to establish PDA claims, and thus risk segregation and stereotyping as an unemployable class. *See infra* Part III.B.

126 2015 EEOC ENFORCEMENT GUIDANCE, *supra* note 10, at II.A; *see also Williams et al.*, *supra* note 12, at 113–17 (collecting cases and examples, and terming this approach to pregnancy discrimination claims the “impairment theory”).

127 *See Price v. UTI*, No. 4:110CV01427 CAS, 2013 WL 798014, at \*3 (E.D. Mo. Mar. 5, 2013) (denying summary judgment to employer where a plaintiff impaired by pregnancy-related complications had brought claims under both Title VII and the ADA); *Nayak v. St. Vincent Hosp. & Health Care Ctr., Inc.*, No. 1:12-cv-0817-RLY-MJD, 2013 WL 121838, at \*3 (S.D. Ind. Jan. 9, 2013) (denying summary judgment to employer regarding plaintiff’s pregnancy-related ADA claim); *Alexander v. Trilogy Health Servs., LLC*, No. 1:11-cv-295, 2012 WL 5268701, at \*9, \*12 (S.D. Ohio Oct. 23, 2012) (denying summary judgment to employer on plaintiff’s PDA claim and granting summary judgment to plaintiff on her ADA claim, which was based on pregnancy-related hypertension); *see also Williams et al.*, *supra* note 12, at 131–33 (discussing the *Price* and *Nayak* cases, as well as others that apply the ADAAA). Because the ADAAA is not retroactive, there are still relatively few pregnancy-related cases to which the amended ADA could apply.

failing to accommodate her impairments.<sup>128</sup> The court denied the employer's motion for summary judgment on both claims,<sup>129</sup> stating that, under the amended ADA, "a 'physical impairment' includes any physiological disorder or condition that affects the reproductive systems, which can be . . . related to pregnancy."<sup>130</sup> Similarly, in *Nayak v. St. Vincent Hospital*, Seema Nayak's ADA claim based on pregnancy-related bed rest and post-partum complications survived summary judgment.<sup>131</sup> And in *Alexander v. Trilogy Health Services*, the court actually granted partial summary judgment for plaintiff Tasha Alexander, who experienced pregnancy-related disability discrimination in violation of the ADA based on her preeclampsia.<sup>132</sup> Finally, the EEOC recently won a large settlement in an action alleging both pregnancy and disability discrimination against an employer who refused to accommodate a pregnant worker suffering from severe nausea.<sup>133</sup>

Even though a few district courts and the EEOC have embraced the notion that the ADA may cover pregnancy-related ailments, other courts have declined to do so.<sup>134</sup> In *Selkow v. 7-Eleven*, for example, a court held that Katie Selkow's lifting restrictions due to "pregnancy-related back pains" did not "substantially limit[] [her] in performing a major life activity," rendering her ineligible for ADA coverage.<sup>135</sup> This decision was arguably incorrect, given that the EEOC has identified lifting as a "major life activity" under the ADA,<sup>136</sup> and that other courts have held that even minor lifting restrictions may qualify

---

128 *Price*, 2013 WL 798014, at \*1.

129 *Id.* at \*2–3.

130 *Id.* at \*3.

131 *Nayak*, 2013 WL 121838, at \*3.

132 *Alexander*, 2012 WL 5268701, at \*11–12.

133 Press Release, EEOC, EDSI to Pay \$70,000 to Settle EEOC Pregnancy & Disability Discrimination Suit (Apr. 15, 2013), <http://www.eeoc.gov/eeoc/newsroom/release/4-15-13.cfm> [<http://perma.cc/NHN3-V6X9>].

134 Although EEOC guidance is due "great deference" by courts, it is not binding, and courts routinely disregard it. *See, e.g., Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1351–52 (2015); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 140–41 (1976).

135 *Selkow v. 7-Eleven, Inc.*, No. 8:11-cv-456-T-33EAJ, 2012 WL 2054872, at \*15 (M.D. Fla. June 7, 2012).

136 29 C.F.R. § 1630.2(i)(1)(i) (2011).

for coverage under the amended ADA.<sup>137</sup> Still, the *Selkow* opinion, and others like it,<sup>138</sup> arise in the context of courts' longstanding practice of refusing to provide ADA relief for pregnancy-related ailments except in "extremely rare cases."<sup>139</sup> Although some courts appear to have accepted Congress's invitation to construe the ADA's coverage broadly, decisions like *Nayak* and *Alexander* might also be rationalized as such "rare cases" because both concerned particularly severe, and possibly life-threatening, impairments.<sup>140</sup> Courts may continue to refuse to extend ADA coverage to less medically severe impairments when they arise from pregnancy, perpetuating what Professor Joan C. Williams and her co-authors have termed the "pregnancy-contamination doctrine."<sup>141</sup> Thus, it may be that some courts will be more receptive to the use of ADA-covered comparators in PDA cases than to the argument that a pregnancy-related impairment is, itself, a disability entitled to reasonable accommodation under the ADA.

---

137 *E.g.*, *D'Entremont v. Atlas Health Care Linen Servs. Co.*, No. 1:12-CV-00070 (LEK/RFT), 2013 WL 998040, at \*7 (N.D.N.Y. Mar. 13, 2013) (denying employer's motion to dismiss where plaintiff suffered severe back pain); *Coffman v. Robert J. Young Co.*, No. 3:10-1052, 2011 WL 2174465, at \*7 (M.D. Tenn. June 1, 2011) (denying employer's motion to dismiss where the plaintiff had suffered a non-work-related injury that left her with a ten-pound lifting restriction).

138 *E.g.*, *Sam-Sekur v. Whitmore Grp., Ltd.*, No. 11-cv-4938(JFB)(GRB), 2012 WL 2244325, at \*7 (E.D.N.Y. June 15, 2012) (holding plaintiff's post-pregnancy illnesses, including multiple infections and chronic cholecystitis, were too temporary to be "substantially limiting" under the amended ADA).

139 *See Froehlich v. Holiday Org. Inc.*, No. 11 CV 2977(DRH)(WDW), 2012 WL 4483006, at \* 6 (E.D.N.Y. Sept. 27, 2012) (citation omitted).

140 The *Price* court did not specify the nature of the plaintiff's ailments, stating only that she experienced "pregnancy-related complications" that abated after she gave birth. *Price v. UTI*, No. 4:110CV01427 CAS, 2013 WL 798014, at \*1 (E.D. Mo. Mar. 5, 2013).

141 Williams et al., *supra* note 12, at 111. I further note that, even outside the pregnancy context, courts are divided as to the extent that more minor impairments will receive coverage under the amended ADA. Compare *Cohen v. CHLN, Inc.*, No. 10-00514, 2011 WL 2713737, at \*11 (E.D. Pa. July 13, 2011) (denying summary judgment to employer based on non-pregnant plaintiff's ADA claim stemming from a back injury), and *Coffman*, 2011 WL 2174465, at \*7 (denying employer's motion to dismiss where plaintiff had a ten-pound lifting restriction), with *Koller v. Riley Riper Hollin & Colagreco*, 850 F. Supp. 2d. 502, 513–14 (E.D. Pa. 2012) (granting summary judgment to employer and holding that plaintiff's many weeks of recovery and rehabilitation from torn ACL was too minor and transitory to be covered by even the amended ADA), and *Farina v. Branford Bd. of Educ.*, No. 3:09-CV-49(JCH), 2010 WL 3829160, at \*11 (D. Conn. Sept. 23, 2010) (granting summary judgment to employer on grounds that plaintiff's fifteen-pound lifting restriction did not "substantially limit[]" a major life activity under the amended ADA).

## II. Comparing Pregnancy and Disability Under Law

The ADA's expanded definition of "disability" should enable many pregnant workers who are denied accommodations to point to similarly impaired employees with ADA accommodations as comparators who were treated better.<sup>142</sup> Given courts' traditional reluctance to view pregnancy-related impairments as disabilities, as well as the Supreme Court's emphasis in *Young* on the centrality of the *McDonnell Douglas* framework to proving pregnancy discrimination claims, this expansion of the pool of comparators available to PDA claimants may prove to be critical. Still, no court to date has permitted a pregnancy discrimination claim to proceed on this theory. Moreover, some scholars, and some pre-*Young* and pre-ADAAA cases, have suggested that comparisons between pregnant workers and ADA-covered employees should not be permitted.

But, as scholars like Deborah A. Widiss have noted, if ADA-covered employees cannot serve as comparators for PDA plaintiffs, then, ironically, the expansion of the ADA's definition of "disability" would gut the PDA.<sup>143</sup> This rule would shrink the pool of comparators for PDA plaintiffs to almost no one, making it virtually impossible for plaintiffs to identify a "large percentage" of non-pregnant, impaired workers who were treated better because those workers would be covered by the ADA, and therefore unavailable.<sup>144</sup> Moreover, pregnant workers might become the only temporarily impaired workers *not* entitled to accommodations in the workplace. This result would run counter to the courts' repeated command to treat pregnant workers like other employees, and it cannot be the result Congress envisioned.

In this Part, I draw on case law and the legislative history of the PDA to show that employees receiving ADA-mandated accommodations are appropriate comparators for PDA plaintiffs.

### A. Support From Mr. Troupe: ADA Comparators and PDA Precedent

Since the ADAAA was enacted, no court has squarely addressed whether PDA plaintiffs

---

142 I am not the first person to make this point. *See, e.g.*, Brief of ACLU et al. as Amici Curiae Supporting Petitioner at 26–30, *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4th Cir. 2013) (No. 11-2078); Emily Martin, Vice President and General Counsel of the National Women's Law Center, Written Testimony to the EEOC (Feb. 2012); Widiss, *supra* note 12; Williams et al., *supra* note 12, at 119–23.

143 *See* Widiss, *supra* note 12, at 1024–25.

144 *See* *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1388, 1354 (2015); Widiss, *supra* note 12, at 1024–25.

may point to ADA-covered workers as comparators. Some earlier cases, however, suggest that these comparisons might be inappropriate,<sup>145</sup> and a few scholars have contended that those cases established a rule that PDA plaintiffs may not use ADA-accommodated employees as comparators.<sup>146</sup> But even these pre-ADAAA, pre-*Young* cases—including the now-vacated Fourth Circuit opinion in *Young*—did not expressly state that ADA comparators were *never* available to PDA plaintiffs. Moreover, most other pre-ADAAA cases suggest that these comparisons are entirely appropriate.

### 1. Cases that Cast Doubt on the Comparison

Scholars who suggest that PDA plaintiffs may be barred from using ADA comparators cite two cases: *Serednyj v. Beverly Healthcare* from the Seventh Circuit and the Fourth Circuit's now-vacated opinion in *Young*.<sup>147</sup>

Victoria Serednyj was fired from her job at a nursing home after pregnancy complications limited her ability to lift and move heavy objects, and she brought discrimination claims under the ADA and the PDA.<sup>148</sup> Although her complications were severe enough to require two weeks of bed rest, her employer asserted that she was not disabled under the pre-amendment ADA.<sup>149</sup> The court agreed, and it further found that the employer's policy of offering accommodations only to employees who were either injured on the job or covered by the ADA was pregnancy-neutral, and thus not direct evidence of pregnancy discrimination.<sup>150</sup> Moreover, because she could not point to a non-pregnant comparator who had received better treatment, Serednyj could not establish a *prima facie* case under the *McDonnell Douglas* framework.<sup>151</sup> So, her PDA claim failed.<sup>152</sup>

---

145 See *supra* note 125; see also *Young v. United Parcel Serv., Inc.*, No. DKC 08-2586, 2011 WL 665321 (D. Md. Feb. 14, 2011), *aff'd*, 707 F.3d 437 (4th Cir. 2013), *vacated*, 135 S. Ct. 1338; *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 553 (7th Cir. 2011).

146 See Brake & Grossman, *supra* note 25, at 95; Cox, *supra* note 12, at 469–71.

147 See Brake & Grossman, *supra* note 25, at 95; Cox, *supra* note 12, at 469–71.

148 *Serednyj*, 656 F.3d at 546–47, 552.

149 *Id.* at 546, 556.

150 *Id.* at 548–49.

151 *Id.* at 552.

152 *Id.*



The court did not, however, discuss whether employees who have ADA-covered disabilities could ever serve as comparators for pregnant women with similar impairments. This is most likely because the pre-amendment ADA did not reach most non-work-related injuries.<sup>153</sup> Thus, although *Serednyj* might be read to imply a bar on comparing disabled and pregnant employees, it did not expressly hold that one existed.

Similarly, even before it was vacated by the Supreme Court, the Fourth Circuit opinion in *Young* did not hold that ADA-covered employees could never serve as comparators for PDA plaintiffs. The court stated that “a pregnant worker subject to a temporary lifting restriction is not similar in her ‘ability or inability to work’ to an employee disabled within the meaning of the ADA.”<sup>154</sup> But the court went on to reason that a ruling for Ms. Young would require UPS to treat a pregnant worker better than it would treat, for example, an employee with a temporary lifting restriction who had “injured his back while picking up his infant child,” or “whose lifting limitation arose from her off-the-job work as a volunteer firefighter.”<sup>155</sup> These hypotheticals make it plain that the Fourth Circuit did not announce a rule that would prevent comparisons between PDA plaintiffs and individuals with temporary disabilities under the *amended* ADA, because the fictional comparators with back injuries had precisely the types of disabilities that the ADAAA was enacted to protect.<sup>156</sup> Perhaps that is why the court, surely aware of the newly enacted ADAAA, stopped short of announcing a categorical bar on the use of ADA comparators in PDA cases.

## 2. Cases that Support the Comparison

Even if some pre-ADAAA cases cast doubt on the ADA comparator question, most suggest that these comparisons are appropriate. In *Ensley-Gaines v. Runyon*, the Sixth Circuit expressly held that PDA plaintiffs may point to workers covered by a federal disability statute as comparators. In addition, the reasoning of many other cases, including *In re Carnegie Associates* from the Third Circuit and *Troupe v. May Department Stores* from the Seventh Circuit, provides indirect support for the availability of ADA comparators for PDA plaintiffs.

---

153 See Colker, *The Mythic 43 Million with Disabilities*, *supra* note 109.

154 *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 450 (4th Cir. 2013).

155 *Id.* at 448.

156 See *supra* notes 108–114 and accompanying text.

In *Ensley-Gaines*, a Postal Service worker brought a pregnancy discrimination lawsuit after being denied a temporary light duty assignment.<sup>157</sup> The Postal Service argued that it did not have to provide Ms. Ensley-Gaines full accommodations because she was not covered by the Federal Employee Compensation Act (“FECA”), a federal statute requiring covered employers to compensate employees with employment-related injuries, regardless of their ability or inability to work.<sup>158</sup> The Postal Service further claimed that employees accommodated under the FECA were not appropriate comparators in the Title VII case.<sup>159</sup> But the Sixth Circuit disagreed, holding that FECA-covered employees were perfectly proper comparators, as they, too, were limited in their ability to work and had received better treatment than Ms. Ensley-Gaines.<sup>160</sup> Therefore, Ms. Ensley-Gaines had established a prima facie case of intentional discrimination under the *McDonnell Douglas* framework. The court took no issue with the fact that FECA was a federal statute mandating protections for covered employees.

The Third Circuit’s decision in *In re Carnegie Center Associates* lends further support to the argument that ADA- and PDA-covered employees can be compared.<sup>161</sup> In that case, Deborah Rhett’s secretarial position was eliminated as part of a reduction in force that took place during her unpaid maternity leave.<sup>162</sup> Her employer argued that the PDA did not prevent the company from terminating her employment during her maternity leave.<sup>163</sup> The court agreed with the employer, noting that the PDA required employers to treat pregnant women “in the same fashion as any other temporarily disabled employee.”<sup>164</sup> The court then “point[ed] out” that the ADA did not bar employers from discharging employees away from work due to temporary disabilities as part a reduction in force.<sup>165</sup> Given that the ADA would not have required the employer to save Ms. Rhett’s job, the court reasoned,

---

157 *Ensley-Gaines v. Runyon*, 100 F.3d 1222, 1224 (6th Cir. 1996).

158 *Id.* at 1222–23.

159 *Id.*

160 *Id.* at 1226.

161 *See In re Carnegie Ctr. Assocs.*, 129 F.3d 290 (3d Cir. 1997).

162 *Id.* at 293.

163 *Id.* at 295.

164 129 F.3d at 297.

165 *Id.*

it was also lawful under the PDA to discharge her.<sup>166</sup> The PDA, after all, is about equal treatment—not special treatment.<sup>167</sup>

Thus, the court not only implied that comparisons between pregnant and disabled workers were proper, but actually relied on such a comparison in its holding. A corollary to this reasoning is that if the ADA *had* required the employer to save Ms. Rhett's job, the PDA would have imported that same employment protection.

Perhaps no single pregnancy discrimination case better explains the PDA's equal treatment rule than Judge Posner's opinion in *Troupe v. May Department Stores*.<sup>168</sup> Kimberly Troupe was a saleswoman at a Chicago Lord & Taylor department store when she became pregnant.<sup>169</sup> After Ms. Troupe's unusually severe morning sickness caused her to be late to work on a regular basis, her employer terminated her.<sup>170</sup> The employer explained that she was fired in part for tardiness and in part because Lord & Taylor assumed she would not return to work after having her baby.<sup>171</sup> In denying relief to Ms. Troupe under Title VII, Judge Posner explained that the PDA did not require employers to treat pregnant workers any better than they treated non-pregnant but similarly impaired employees.<sup>172</sup> He then famously offered the example of a "hypothetical Mr. Troupe," who was "as tardy as Ms. Troupe was, also because of health problems, and who [was] about to take a protracted sick leave growing out of those problems."<sup>173</sup> If the law did not require Lord & Taylor to retain Mr. Troupe, the court reasoned, then the PDA would not require anything more for Ms. Troupe.<sup>174</sup>

---

166 *Id.*

167 *See id.* ("[T]he PDA is a shield against discrimination, not a sword in the hands of a pregnant employee.").

168 20 F.3d 734, 734 (7th Cir. 1994).

169 *Id.* at 735.

170 *Id.* at 736.

171 *Id.* As Williams et al. note, the assumption that Troupe would not return to work after giving birth might today be treated as evidence of bias sufficient to support the conclusion that she was fired because of her sex. Williams et al., *supra* note 12, at 140.

172 20 F.3d at 738.

173 *Id.*

174 *Id.*

Although “Mr. Troupe” probably would not have been covered by the restrictive, pre-amendment ADA, it is difficult to imagine that his ailments would not fall under the amended ADA. Under the logic of *Troupe*, then, if Mr. Troupe would be accommodated under the ADA, then accommodating Ms. Troupe’s morning sickness would constitute the equal treatment the PDA requires.

Cases like *Troupe* exemplify the pre-*Young* PDA case law because they rely on the idea that the PDA requires employers to treat pregnant workers the same way they treat non-pregnant employees, and no better.<sup>175</sup> And the Supreme Court reinforced this principle in *Young* when it rejected the notion that the PDA granted pregnant workers a “most-favored-nation” status.<sup>176</sup>

But the reasoning of these cases also suggests that just as pregnant workers may not be treated *better* than their non-pregnant colleagues, they surely may not be treated *worse*.<sup>177</sup> To prohibit comparisons between pregnant and ADA-covered workers, however, would be to treat pregnant workers worse. This approach would shrink the pool of available comparators to the vanishing point, thwarting pregnant workers’ ability to identify a “large percentage” of comparable non-pregnant workers with accommodations, and leaving them the only temporarily impaired workers who are not accommodated.<sup>178</sup> This result would undermine the equal-treatment rule emphasized in *Troupe*, *In re Carnegie Associates*, and even *Young*, as well as the very purpose of the PDA.

## B. Back to *Gilbert*: Support From Congress and Legislative History

Congress enacted the Pregnancy Discrimination Act to repudiate the *Gilbert* decision and to clarify that pregnancy discrimination violated Title VII.<sup>179</sup> But Congress also

---

175 See *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285 (1987) (“Congress intended the PDA to be ‘a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.’”); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1313–14 (11th Cir. 1999); *Urbano v. United Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998). See also *supra* note 65 and accompanying text for a discussion of the PDA’s equal treatment goals.

176 *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1388, 1349 (2015).

177 See *supra* note 175.

178 See *Young*, 135 S. Ct. at 1354; see also Widiss, *supra* note 12, at 1024–25.

179 See *supra* notes 53–57 and accompanying text.

explicitly recognized the relationship between pregnancy and disability,<sup>180</sup> effectively designating non-pregnant workers with impairments as the appropriate comparison group for pregnant workers.<sup>181</sup> The *Gilbert* decision itself concerned an employer's refusal to provide disability benefits to pregnant women,<sup>182</sup> and the legislative history of the PDA is rife with language comparing pregnant and disabled workers.<sup>183</sup> Moreover, Congress was plain in its intent that pregnant workers should be compared with—and treated no worse than—their disabled colleagues.<sup>184</sup>

As the legislative history of the PDA indicates, comparisons between pregnant and disabled workers were top of mind for Congress: the word “disability” appears throughout the official legislative history, and it is frequently used to describe pregnancy itself.<sup>185</sup> For example, while discussing *Gilbert*, Senator Williams criticized GE's disability plan for “provid[ing] protection in the event of virtually every conceivable disability but one.”<sup>186</sup> Likewise, Representative Hawkins characterized the PDA as legislation addressing “pregnancy disability.”<sup>187</sup> Unlike today's courts, the Congress that enacted the PDA did not believe that pregnancy and disability were such starkly different conditions.

In addition, the congressional record makes plain that Congress wanted pregnant workers to be compared to other workers based on the “actual effects of [pregnancy] on their ability to work.”<sup>188</sup> As the Senate Report states, the PDA requires employers to allow pregnant women to work “on the same conditions as other employees” and to be “accorded the same rights, leave privileges and other benefits, as other workers who are disabled from

---

180 See *infra* notes 185–190 and accompanying text.

181 Brief of Law Professors and Women's Rights Organizations as Amici Curiae Supporting Petitioner at 6, *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4th Cir. 2013) (No. 12-1226) [hereinafter Brief of *Young* Amici].

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

183 See *infra* notes 185–190 and accompanying text.

184 See *infra* notes 185–190 and accompanying text.

185 See LEGISLATIVE HISTORY OF THE PDA, *supra* note 54.

186 S. REP. NO. 54-748, at 2 (remarks of Sen. Williams); see also *id.* at 7 (remarks of Sen. Brooke) (criticizing the Supreme Court for rejecting EEOC guidance that “pregnancy-related disabilities had to be treated the same as any other temporary disability for all job-related purposes”).

187 LEGISLATIVE HISTORY OF THE PDA, *supra* note 54, at 11 (remarks of Congressman Hawkins).

188 LEGISLATIVE HISTORY OF THE PDA, *supra* note 54, at 41.

working.”<sup>189</sup> Likewise, the House Report clarifies that, through the PDA, Congress sought to ensure that pregnant workers would receive all of “the same benefits as those provided other disabled workers.”<sup>190</sup>

One might argue that the later enactment of the ADA changes how courts should understand the relationship between pregnancy and disability. For instance, it may be that because the ADA does not require proof of discriminatory intent in the same ways as Title VII, the comparisons Congress contemplated are no longer appropriate. Since many employers only accommodate non-pregnant disabled employees because the ADA requires them to do so, withholding accommodations from pregnant workers does not necessarily indicate animus toward them. The Fourth Circuit suggested as much in *Young*, when it effectively required pregnant workers to prove animus beyond the obvious disparate treatment of pregnancy-related impairments.<sup>191</sup>

This understanding of the relationship between the PDA and the ADA is contrary to basic principles of statutory interpretation and to the plain intent of Congress. First, as Professor Widiss points out, it is a “longstanding principle of statutory interpretation that Congress is presumed to enact new legislation with a background knowledge of existing legislation.”<sup>192</sup> Congress was certainly aware of the PDA’s “same treatment” requirement when it enacted the ADA in 1990. But to distinguish disabled workers from pregnant workers because Congress enacted the ADA would constitute a “repeal by implication” of the PDA, which is “highly disfavored.”<sup>193</sup> There is no evidence that Congress intended the ADA to alter the PDA.

Moreover, although the ADA did not exist in 1978, there is no indication that Congress intended PDA protections to be conditioned on the source of the disability protections employers provided. Rather, Congress asked courts to focus on the similarity of pregnant

---

189 LEGISLATIVE HISTORY OF THE PDA, *supra* note 54, at 41.

190 LEGISLATIVE HISTORY OF THE PDA, *supra* note 54, at 151.

191 See Brief of *Young* Amici, *supra* note 181, at 14. The brief notes that the Fourth Circuit’s decision in *Young* affirmed the reasoning of the District Court, which had expressly stated that Ms. Young had failed to demonstrate “animus directed *specifically* at pregnant women.” *Id.* at 14–15; see also *Young v. United Parcel Serv., Inc.*, No. DKC 08-2586, 2011 WL 665321, at \*14 (D. Md. Feb. 14, 2011).

192 Widiss, *supra* note 12, at 53.

193 Widiss, *supra* note 12, at 54. As discussed above, a perverse consequence of the this approach would be to shrink the protections of the PDA into virtual nonexistence. See *supra* Part II.

workers to other workers with respect to their ability to work.<sup>194</sup> The later enactment of the ADA should not alter Congress' command that employers should provide equal benefits to pregnant and temporarily disabled workers.

### III. Theorizing Pregnancy: Comparators, Intersectionality, and Solidarity

Comparing workers with pregnancy-related impairments to workers with other impairments finds strong support in theoretical approaches to antidiscrimination law that highlight the dangers of reinforcing identity differences in the workplace. First, intersectionality theory reveals that current law fails to protect pregnant workers because it sees pregnancy discrimination as a matter of pure sex discrimination.<sup>195</sup> To address the problem more fully, courts must recognize that pregnancy discrimination implicates not only sex discrimination, but also discrimination based on ability. For that reason, comparisons between pregnant and non-pregnant workers with impairments are actually essential to redressing the problem of pregnancy discrimination.

Second, a newer theoretical approach that aims to “disrupt”<sup>196</sup> the processes by which certain groups are regarded as, and treated as, different in the workplace also illuminates the importance of the availability of ADA comparators to PDA plaintiffs. This approach suggests that antidiscrimination law should be used to target workplace structures and policies that operate to single out certain groups for differential treatment, and in so doing make their prohibited characteristics more salient than they should be, creating divisions among coworkers and leading to segregation and stereotyping. Under this view, if the law treats pregnant workers differently than it treats similarly-impaired non-pregnant workers, it invites precisely the kinds of stereotyping and segregation of pregnant women that the PDA was enacted to prevent.

---

194 LEGISLATIVE HISTORY OF THE PDA, *supra* note 54, at 150.

195 Kimberlé Crenshaw first introduced the concept of intersectionality in 1989. *See* Crenshaw, *Demarginalizing the Intersection*, *supra* note 28. At nearly the same time, Angela Harris addressed similar ideas through the lens of anti-essentialism. *See* Harris, *Race and Essentialism*, *supra* note 9.

196 This term comes from Vicki Schultz, *Antidiscrimination Law as Disruption: The Emergence of a New Paradigm for Understanding and Addressing Discrimination* (Apr. 2010) (unpublished manuscript) (on file with author) [hereinafter Schultz, *Antidiscrimination Law as Disruption*].

### A. Intersectionality Theory

Kimberlé Crenshaw introduced the concept of intersectionality in 1989,<sup>197</sup> and Angela Harris addressed the same set of issues in 1990.<sup>198</sup> Both argued that antidiscrimination law failed to account for the specific harms that black women face, instead focusing on the dominant experiences of sexism and racism: those of white women and black men.<sup>199</sup> They explained that black women experience the compound harm of racism and sexism, which is greater than—and different from—the sum of its parts.<sup>200</sup> Because antidiscrimination law did not account for this unique and complex form of discrimination, Professor Crenshaw argued, courts failed to understand or remedy discrimination against black women.<sup>201</sup> Professor Harris likewise cautioned against the use of the falsely universal category of “woman,” and argued that instead we should embrace the idea of “multiple consciousness”: the notion that women, as a group and as individuals, may have many identities.<sup>202</sup> Both theorists argued for an understanding of identity groups as coalitions of different kinds of people with different life experience.<sup>203</sup>

Although intersectionality theory was developed in the context of considering the situation of women of color, and of black women in particular, scholars have applied the concept of intersectionality to many other areas of law, including disability and human rights.<sup>204</sup> I have been unable, however, to locate any scholarship applying intersectionality

---

197 Crenshaw, *Demarginalizing the Intersection*, *supra* note 28.

198 Harris, *Race and Essentialism*, *supra* note 9. Although Professor Harris did not use the term “intersectionality” until later (see, e.g., Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL L. REV. 741, 767 (1994) [hereinafter Harris, *The Jurisprudence of Reconstruction*]), *Race and Essentialism* embodied the concept by exposing the unique issues faced by people who belong to multiple identity groups.

199 Harris, *The Jurisprudence of Reconstruction*, *supra* note 198, at 151.

200 Harris, *The Jurisprudence of Reconstruction*, *supra* note 198, at 140 (“Because the intersectional experience is greater than the sum of racism and sexism, any analysis that does not take intersectionality into account cannot sufficiently address the particular manner in which Black women are subordinated.”).

201 Harris, *The Jurisprudence of Reconstruction*, *supra* note 198, at 140.

202 Harris, *Race and Essentialism*, *supra* note 9, at 608.

203 Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1299 (1991) [hereinafter Crenshaw, *Mapping the Margins*].

204 See, e.g., Lisa A. Crooms, “To Establish My Legitimate Name Inside the Consciousness of Strangers”: *Critical Race Praxis, Progressive Women-of-Color Theorizing, and Human Rights*, 46 HOW. L.J. 229, 243–44 (2003); Rangita de Silva de Alwis, *Mining the Intersections: Advancing the Rights of Women and Children with*



theory to pregnancy discrimination. This omission in the literature is surprising because, as I will illustrate below, pregnancy is best understood as an experience that lies at the intersection of sex and disability. And just as courts have overlooked the complex harms caused by the interaction of race and sex that intersectionality theorists described, so too have courts ignored the complex harms caused at the intersection of sex and disability that many pregnant workers experience.<sup>205</sup>

Pregnancy discrimination can also implicate other identities, and race and class in particular. Historically, black women, unlike white women, were expected to continue working during and after pregnancy and marriage—and they often had no choice but to do so.<sup>206</sup> Indeed, in the late nineteenth and early twentieth centuries, poor black women experienced markedly lower fertility rates and higher rates of stillbirth, in part because of the backbreaking labor of sharecropping and other manual work.<sup>207</sup> Racial inequalities with respect to pregnancy continue today, as indicated by cases like *Flores*, in which the plaintiff, who was pregnant and Hispanic, was treated worse than coworkers who were pregnant and white.<sup>208</sup> And class, too, comes into play in many pregnancy discrimination cases, as the problem disproportionately burdens women in low-wage occupations.<sup>209</sup> Although I focus specifically on the intersection of sex and disability in this Article, that focus does not diminish the importance of these other historical and intersectional aspects of pregnancy discrimination.

### 1. The Intersectional Nature of Pregnancy

Pregnancy discrimination is plainly a form of sex discrimination. But the location of the PDA in Title VII should not prevent courts from recognizing that pregnant workers

---

*Disabilities Within an Integrated Web of Human Rights*, 18 PAC. RIM. L. & POL'Y J. 293, 294–95 (2009); Ribet, *supra* note 34, at 185. Crenshaw also noted that the concept of intersectionality “can and should be expanded” to include other factors. Crenshaw, *Mapping the Margins*, *supra* note 203, at 1244 n.9.

205 The location of the PDA in Title VII doubtless contributes substantially to courts’ disregard of the disability-related aspects of pregnancy. Still, as I will discuss in Section III.A.1 *infra*, the question addressed in this paper—the propriety of ADA-PDA comparisons—offers courts the chance to recognize the intersectional nature of pregnancy without requiring Congress to change the law.

206 Courtni E. Molnar, “Has the Millennium Yet Dawned?”: *A History of Attitudes Toward Pregnant Workers in America*, 12 MICH. J. GENDER & L. 163, 168–69, 178 (2005).

207 *Id.*

208 *Flores v. Home Depot, Inc.*, No. CIV.A. 01-6908, 2003 WL 1793388, at \*1 (D. Kan. June 9, 2009).

209 ERA REPORT, *supra* note 5, at 22; see also Schlichtmann, *supra* note 46.

also face problems that women workers, as a group, do not.<sup>210</sup> For example, most pregnant women experience physical difficulties that do not affect women as a general population.<sup>211</sup> In addition, pregnant workers face biases and stereotypes that do not affect non-pregnant women workers.<sup>212</sup> Throughout the 19th and 20th centuries, pregnant women were considered unfit for work, or even to be seen in public.<sup>213</sup> At the same time, however, pregnancy and motherhood were viewed as a woman's "natural role"—or at least that of a white, upper-class woman—and so pregnant women forced out of their jobs were unable to collect unemployment compensation.<sup>214</sup> Today, studies show that pregnant women are viewed as "less committed to their jobs, less dependable, and less authoritative, but warmer, more emotional, and more irrational" than non-pregnant women.<sup>215</sup> Thus, despite the PDA, biases and negative attitudes toward pregnant workers continue to persist.<sup>216</sup>

Pregnancy is also related to disability because it can cause impairments that make it difficult for pregnant workers to do their jobs in the same ways that other disabled workers

---

210 Of course, pregnancy discrimination is not the only form of sex discrimination that affects only a discrete subclass of women. For another example, see *Phillips v. Martin Marietta Corporation*, 400 U.S. 542, 544 (1971), in which the Court held that an employer's policy of not accepting job applications from women with young children violated Title VII's prohibition on sex discrimination.

211 See Calloway, *supra* note 35.

212 See Gayle Tzemach Lemmon, *The Pregnancy Penalty: How Working Women Pay for Having Kids*, ATLANTIC (Dec. 13, 2012), <http://www.theatlantic.com/sexes/archive/2012/12/the-pregnancy-penalty-how-working-women-pay-for-having-kids/266239/> [<http://perma.cc/X5UB-5EPA>] (citing recent studies revealing negative attitudes toward pregnant women in the workplace); Molnar, *supra* note 205 (historical views); Williams et al., *supra* note 12, at 103. See also LEGISLATIVE HISTORY OF THE PDA, *supra* note 54, at 154 ("As testimony received by this committee demonstrates, the assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs.").

213 Molnar, *supra* note 206, at 171 ("Policies requiring mandatory leaves of absence during pregnancy were an outgrowth of the Victorian view that it was obscene for a pregnant woman to be seen in public.").

214 Molnar, *supra* note 206, at 172.

215 Lemmon, *supra* note 212.

216 Studies also indicate that these negative attitudes extend past pregnancy, to women with children as well. See, e.g., Joan C. Williams & Amy J.C. Cuddy, *Will Working Mothers Take Your Company to Court?*, HARV. BUS. REV., Sept. 2012, at 95, 96; Francois-Cerrah, *supra* note 1. In addition, American society remains sharply conflicted as to whether it is "good" for mothers of children to work at all. WANG, PARKER & TAYLOR, *supra* note 51 (reporting that while 67% of respondents believed working women have made it easier for families to earn enough money, 74% believed that the increased number of working women makes it harder for parents to raise children).

sometimes have difficulties. It is not necessary to consider pregnancy to be a disability to recognize the truth of this point. There are numerous similarities between pregnant workers and the broadened class of workers now included under the amended ADA. A diabetic employee may need to take periodic breaks to adjust his insulin levels, just as a pregnant worker may need breaks to sit, stand, or use the bathroom.<sup>217</sup> An employee with a temporary back injury may, like a pregnant worker, have a short-term doctor-ordered restriction on lifting, sitting, standing, or climbing.<sup>218</sup> And, like a pregnant woman, an employee with sleep apnea may have difficulty sleeping that interferes with his ability to work.<sup>219</sup> Pregnant workers who experience disabilities are entirely “similar in their ability or inability to work”<sup>220</sup> to many disabled workers, as Congress has recognized.<sup>221</sup>

Furthermore, even if pregnancy itself is not an ADA disability, many employers view pregnant workers as too disabled to work and treat them that way. In 2001, for example, new recruits to the District of Columbia Fire & EMS Department received letters warning that if they suffered from any “medical disability” that adversely affected their ability to do the job, they would not be hired.<sup>222</sup> The “medical disabilities” listed that would preclude employment included broken bones, infections, and pregnancy.<sup>223</sup> This example, though perhaps extreme, is but one of many instances of employers assuming pregnant workers would be unable to fulfill their job duties simply by virtue of being pregnant.<sup>224</sup>

---

217 See Cox, *supra* note 12, at 472 (explaining that “[t]he ADA now includes virtually all persons diagnosed with diabetes”).

218 See Mills v. Temple Univ., 869 F. Supp. 2d 609, 617, 622, 625 (E.D. Pa. 2012) (denying summary judgment to employer on grounds that non-pregnant plaintiff, whose back problems led to restrictions on “bending, lifting, filing, pushing or pulling and weight bearing activity,” might qualify as disabled under the amended ADA).

219 See Johnson v. Farmers Ins. Exch., No. CIV-11-963-C, 2012 WL 95387, at \*1–2 (W.D. Okla. Jan. 12, 2012) (denying employer’s motion to dismiss on the grounds that it was possible the amended ADA would encompass sleep apnea).

220 42 U.S.C. § 2000e(k) (2012).

221 See *supra* notes 189–194 and accompanying text.

222 Dana Page, *D.C.F.D.: An Equal Opportunity Employer—As Long as You Are Not Pregnant*, 24 WOMEN’S RTS. L. REP. 9, 11 (2002).

223 *Id.*

224 Another example is found in *Troupe*: the employer based its firing of Ms. Troupe in part on the assumption that she would not return to work after having her baby. *Troupe v. May Dep’t Stores*, 20 F.3d 734, 736 (7th Cir. 1994).

## 2. Gaps in the Law and ADA Comparators

An analysis of pregnancy discrimination helps to explain why courts have so often interpreted the PDA in ways that fail to protect pregnant workers.<sup>225</sup> Perhaps the clearest instance of these legal gaps is the issue of comparators, discussed at length in the sections above. Pregnancy discrimination claimants usually have only a small number of available comparators—non-pregnant workers who are similarly impaired and who received better treatment—and courts have frequently made that pool even smaller by, for example, imposing the requirement that comparators have “off the job” injuries.<sup>226</sup> It may be that courts sharply limit the pool of PDA comparators, and thus the relief available to PDA plaintiffs, because they fail to recognize the intersectional aspects of pregnancy that overlap with disability.

Unlike the courts, Congress seems to have understood the intersectional nature of pregnancy. This is implicit in the history and structure of the PDA, which was enacted in direct response to the exclusion of pregnant workers from an employer’s *disability benefits* plan.<sup>227</sup> The inclusion of the comparative “same treatment” language in the PDA’s text further suggests that Congress understood pregnancy to implicate issues of both sex and disability.

Thus, although the PDA is located in Title VII, courts, like Congress, are free to recognize the aspects of pregnancy discrimination that differentiate it from pure sex discrimination. Courts should view pregnancy discrimination as the product of the unique interaction between stereotypes about women, stereotypes about pregnancy, and the reality that pregnancy can sometimes cause impairments. When ailments associated with pregnancy interfere with work, pregnant workers become like ADA-covered temporarily disabled employees. The Supreme Court’s suggestion in *Young* that impaired, non-pregnant employees who received accommodations under UPS’s policies—including ADA-accommodated employees—might be proper comparators for a pregnancy discrimination plaintiff acknowledges this point.<sup>228</sup> Moreover, the intersectional nature

---

225 Crenshaw’s critique of feminist theorists also finds parallels in the pregnancy discrimination context, particularly with respect to the longstanding “equal treatment”/“special treatment debate.” See *supra* note 65. But neither of these approaches adequately addresses the intersectional nature of pregnancy as a question of both sex *and* disability.

226 *E.g.*, *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548–49 (7th Cir. 2011).

227 See *supra* note 54 and accompanying text.

228 See *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015) (noting that *Young* contended

of pregnancy indicates that the availability of ADA comparators is essential to insuring that the experience of pregnant workers is fully accounted for, and to acknowledging the coalitional nature of this identity. Only by appreciating the fundamental overlap between pregnancy discrimination and disability discrimination can courts ensure that the purposes of the PDA are fulfilled.

## B. Disruption Theory

In the last several years, a new approach to antidiscrimination law has emerged that decries the reification of identity categories in even broader terms than does intersectionality theory.<sup>229</sup> In the words of Professor Vicki Schultz, this approach identifies the purpose of antidiscrimination law as “not simply to protect *preexisting* groups, but rather to police against practices that actually tend to *divide people into dichotomous* groups and to *create . . . differences* between those groups.”<sup>230</sup> These difference-creating processes are harmful because they lead to the very stereotyping and segregation that Congress sought to eliminate through Title VII, and impede the development of solidarity across group boundaries.<sup>231</sup> Professor Schultz has theorized and championed this emerging approach, labeling it “disruption” theory to capture the idea that antidiscrimination law should disrupt the processes that create difference in the workplace.<sup>232</sup> Professor Schultz and others call for a legal approach that targets difference-creating workplace practices as appropriate sites for Title VII intervention, and aspires to replace them with mechanisms and incentives for people to identify with each other across “difference.”<sup>233</sup>

---

that she could show that UPS failed to accommodate pregnant workers even though it accommodated “most nonpregnant employees with lifting limitations”).

229 See, e.g., RICHARD THOMPSON FORD, RACIAL CULTURE 25–28 (2004); Vicki Schultz, *Telling Stories About Women and Work*, 103 HARV. L. REV. 1749 (1990); Noah Zatz, *Beyond the Zero-Sum Game: Toward Title VII Protection for Intergroup Solidarity*, 77 IND. L.J. 63, 114 (2002); Schultz, Antidiscrimination Law as Disruption, *supra* note 196.

230 Schultz, Antidiscrimination Law as Disruption, *supra* note 196, at 2.

231 See, e.g., Zatz, *Beyond the Zero-Sum Game*, *supra* note 229, at 123–24 (arguing Title VII should protect cross-group solidarity in the workplace).

232 See Schultz, Antidiscrimination Law as Disruption, *supra* note 196.

233 Another example of this approach can be found in the work of Noah Zatz. E.g., Zatz, *Beyond the Zero-Sum Game*, *supra* note 229. Professor Zatz argues that Title VII should be interpreted to provide more robust protections for cross-race and cross-sex alliances. See *supra* note 229, at 69. Current interpretations of Title VII, he says, create a “zero-sum game” that pits different groups against one another in the workplace and denies the possibility of simultaneous discrimination against members of different groups. See *supra* note 229, at 69.

## 1. Disrupting Pregnancy Discrimination

Applying disruption theory to the problem of pregnancy discrimination makes it clear that a failure to recognize the similarities between pregnant and ADA-covered workers may create precisely the types of divisions that lead to stereotyping and discrimination. Whether pregnancy qualifies as a disability at a metaphysical level is irrelevant; what matters is whether pregnancy-related impairments interfere with a pregnant woman's job performance any more than similar impairments interfere with the work of non-pregnant, disabled workers. If a pregnant woman's ability to work is the same as that of a similarly impaired non-pregnant colleague, to treat her any differently is the essence of discrimination.<sup>234</sup>

Notably, under disruption theory, a policy that favored pregnant workers with impairments over other impaired workers—such as the “most-favored-nation” approach rejected by the Supreme Court in *Young*—would also undermine antidiscrimination goals. Disruption theory calls for a focus on uniting employees across boundaries, including sex and disability: there is no reason why pregnant workers with impairments should be treated *better* than non-pregnant workers with similar impairments, but neither should they be treated worse.<sup>235</sup> To treat either group unequally incites the disfavored group to resentment, impeding the development of affinity across boundaries. Moreover, emphasizing that both groups experience temporary ailments that affect their ability to work finds support in Justice Brennan's dissent in *Gilbert*, which Congress codified through the PDA,<sup>236</sup> and remains true to the underlying spirit of Title VII and antidiscrimination law generally.<sup>237</sup> Instead of differentiating people based on the source of their impairments, the law should encourage pregnant and disabled workers to recognize their fundamental similarities and to stand in solidarity with each other as colleagues who are entitled to the same respect and protections.

---

234 This view again echoes the equal treatment view articulated by the PDA itself. *See supra* note 65 and accompanying text.

235 In this way, this emerging approach echoes many of the well-established PDA cases emphasizing equal treatment. *See infra* Part II.A.2.

236 *See* LEGISLATIVE HISTORY OF THE PDA, *supra* note 54 and accompanying text. *See also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 160 (1975) (Brennan, J., dissenting) (citing Title VII's purpose of creating equal employment opportunity).

237 For example, in enacting a Title VII exception for “bona fide occupational qualifications,” or BFOQ, Congress acknowledged that a worker's ability to actually do her job is paramount. *See UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 195–96 (1991) (discussing the BFOQ exception).

## 2. Disruption and ADA Comparators

Thus, like intersectionality theory, disruption theory counsels for the use of ADA comparators in PDA cases. If courts were to find that ADA comparators were barred in PDA cases, pregnant workers would rapidly become the only employees who could be fired for impairments akin to temporary disabilities.<sup>238</sup> Pregnant workers would be marked as “different” and less able than their colleagues, even those with similar work limitations, because of the different treatment they would receive at work. Over time, as more and more pregnant women were forced out of their jobs, a new equilibrium would develop that reinforced stereotypes about pregnant women as less dependable, less committed to working, and more focused on home and family life.<sup>239</sup>

Ultimately, this exodus of pregnant workers would effectively segregate pregnant workers out of certain occupations. As Professor Schultz has argued, the greater the degree of job segregation found within a workplace, the more particular jobs become identified with the predominant group and the stereotypes and expectations that accompany that group.<sup>240</sup> If certain roles or workplaces become more inhospitable to pregnant workers, this will only solidify the idea that pregnant women simply do not *do* that particular job.<sup>241</sup>

Under disruption theory, the availability of ADA comparators is also important to encourage pregnant and disabled workers to express solidarity with each other.<sup>242</sup> When pregnant workers receive accommodations for minor illnesses experienced during their pregnancies, there will be less room for resentment and backlash if others who

---

238 While some of these impairments may themselves become recognized as disabilities under the ADA, it is equally plausible that this will not happen, given courts’ traditional reluctance to view pregnancy-related impairments as disabilities. *See supra* note 141 and accompanying text.

239 *See supra* Part III.A.1. It is also possible that this segregation could affect workers who are mothers as well, since they face similar stereotypes about their competency and dedication. *See Williams & Cuddy, supra* note 216 (citing study finding that women who were mothers were judged to be less competent and less likely to be hired than their colleagues). Thus, comparing pregnancy to other conditions that require minor accommodations may have the beneficial effect of reducing stereotyping not only about pregnant workers, but also about all women with children.

240 Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683, 1760 (1998).

241 The amicus brief by law professors and women’s rights organizations in *Young* argued that Congress, too, understood pregnancy discrimination as a problem rooted in stereotypes, which formed the basis of its “same treatment” requirement. Brief of *Young* Amici, *supra* note 181, at 15–16.

242 *Cf. Zatz, supra* note 229, at 123–24 (arguing Title VII should promote cross-group solidarity).

experience similar illnesses—or may do so someday—know that they, too, will receive the accommodations necessary to keep their jobs. Thus, in this context, encouraging employers to provide the same treatment to both pregnant and non-pregnant workers who have minor or temporary disabilities can help undermine the “zero-sum game” that creates inter-group competition and hostility,<sup>243</sup> and encourage pregnant and non-pregnant disabled workers to recognize themselves in each other.<sup>244</sup>

## CONCLUSION

The Supreme Court’s decision in *Young* highlights the inherently comparative nature of pregnancy discrimination claims. But pregnancy discrimination plaintiffs have struggled to produce acceptable comparator evidence because courts often require that the proffered comparator be a plaintiff’s “near twin,”<sup>245</sup> and because, sometimes, a comparator simply cannot be found.<sup>246</sup> Under the most demanding view of comparator evidence and in cases where there is no suitable comparator, the ADA-PDA comparisons I have argued for in this Article may not, as a practical matter, be available.

*Young*, however, suggests that the strictest approach to comparator evidence is incorrect. In *Young*, the Supreme Court signaled that courts should accept a broader range of evidence in PDA cases: instead of focusing on narrow distinctions between employees, the Court emphasized the importance of considering employer policies as a whole, as well as the practical effects those policies have on workers.<sup>247</sup> As the Court noted, “it is hardly anomalous . . . that a plaintiff may rebut an employer’s proffered justifications by showing how a policy operates in practice.”<sup>248</sup> And although the Court did not decide the issue, the *Young* opinion strongly suggests that comparisons between pregnant employees

---

243 Zatz, *supra* note 229, at 69.

244 Some feminists have not yet taken the step of recognizing women’s kinship with their disabled colleagues. For example, as Matzzie points out, women’s organizations did not participate at all in the EEOC’s rulemaking proceedings for the 1990 ADA. Matzzie, *supra* note 115, at 195. Perhaps if they had, pregnancy would receive better protection today.

245 Williams et al., *supra* note 12, at 102.

246 See Widiss, *supra* note 12, at 1017.

247 *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354–55 (2015).

248 *Id.* at 1355.



and employees covered by the ADA—or who had lost their driving certifications, or who became injured at work—would be appropriate.<sup>249</sup>

Courts applying *Young* should embrace this more expansive approach to the types of evidence that can support a pregnancy discrimination claim. For instance, it may not be necessary for a comparator to be a plaintiff’s “near twin” in every case, especially when employer policies and other circumstantial evidence also support the necessary inference of intentional discrimination. Moreover, as some scholars have suggested, it may be enough for a plaintiff to point to a “hypothetical” comparator by showing that a non-pregnant worker with a similar impairment would be entitled to reasonable accommodations under the ADA or another provision.<sup>250</sup> And a less stringent view of comparator evidence would also heed the lessons of both intersectionality theory and disruption theory by ensuring that the law accounts for the multifaceted nature of pregnancy and by disrupting the processes through which pregnant workers are marked as different from their colleagues. Finally, this broader approach may prove to be essential: Congress enacted the PDA to promote equal opportunity for pregnant women in the workforce; but as *Young* reminds us, the only route to parity may be by comparison.

---

249 *Id.* at 1354–55.

250 See Widiss, *supra* note 12, at 1025; Williams et al., *supra* note 12, at 122–23 (discussing Widiss’s argument and terming it the “‘de jure’ comparator theory”).

COLUMBIA  
JOURNAL *of*  
GENDER & LAW

Issue 30.2

*The spacious home of today's feminist movement.*

The *Columbia Journal of Gender and Law (CJGL)* is published by students at Columbia University School of Law. Please direct general correspondence to the following addresses:

*Columbia Journal of Gender and Law*  
Columbia University School of Law  
435 West 116th Street  
New York, NY 10027

Email: [jrnngen@law.columbia.edu](mailto:jrnngen@law.columbia.edu)

**Subscriptions:** Subscriptions are \$65 per volume for institutions, \$50 per volume for public interest organizations, \$40 per volume for individuals, and \$20 per volume for current students. For international subscribers, please add \$10. Individual issues may be purchased for \$20, subject to availability.

Email: [jrnngen@law.columbia.edu](mailto:jrnngen@law.columbia.edu)

**Submissions:** *CJGL* welcomes unsolicited submissions of articles, book reviews, essays, comments, and letters. Please note that due to the volume of materials received, submissions to *CJGL* will not be returned to the author.

Email: [columbia.jgl.submissions@gmail.com](mailto:columbia.jgl.submissions@gmail.com)

Copyright © 2016 by the *Columbia Journal of Gender and Law*.

The *Columbia Journal of Gender and Law (CJGL)* is an interdisciplinary journal designed to address the interplay between gender and sexuality law, and its effects at the personal, community, national, and international levels. The articles we publish reflect an expansive view of gender and sexuality law—embracing issues related to feminism and gender and sexuality studies that cut across all races, ethnicities, classes, sexual orientations, gender identities, and cultures. *CJGL* also publishes articles that merge and blend disciplines—revealing the connections between law and philosophy, psychology, history, religion, political science, literature, and sociology.

*CJGL* operates by consensus and welcomes all law students at Columbia Law School to apply, regardless of status as a first-year law student, JSD student, or LLM student. All editors and staff members are involved in *CJGL*'s decision-making process with respect to selection and editing of articles. Members work in teams and follow articles from acceptance to publication.

In fostering dialogue, debate, and awareness about gender-related issues, our goal is to advance feminist scholarship and gender and sexuality studies at Columbia Law School. We strive to break through traditional legal and academic confines, and serve as both a community and an outlet for interested students, faculty members, and practitioners.

*CJGL* publishes issues in both the fall and spring semesters. The size of our issues depends upon the number of articles our members vote to accept. We traditionally publish two issues per volume.

The editors and staff members of *CJGL* are grateful for your support. We look forward to your continued readership and welcome your contributions and responses.

# ADVISORY

**Jessica Bulman-Pozen**

Associate Professor of Law  
Columbia University School of Law

**Elizabeth F. Emens**

Isidor and Seville Sulzbacher Professor of Law  
Columbia University School of Law

**Katherine M. Franke**

Isidor and Seville Sulzbacher Professor of Law  
Director, Center for Gender and Sexuality Law  
Columbia University School of Law

# BOARD

## **The Honorable Ruth Bader Ginsburg**

United States Supreme Court

## **Suzanne B. Goldberg**

Executive Vice President for University Life  
Herbert and Doris Wechsler Clinical Professor of Law  
Director, Center for Gender and Sexuality Law  
Columbia University School of Law

## **Jamal Greene**

Vice Dean and Professor of Law  
Columbia University School of Law

## **Scott E. Kessler**

Bureau Chief Domestic Violence Bureau  
Queens County District Attorney's Office  
Lecturer in Law, Columbia University School of Law

# SENIOR EDITORIAL BOARD

## **Editor-in-Chief**

Sarah Mac Dougall

## **Executive Editor**

Kate Gadsden

## **Executive Managing Editor**

Jacqueline Y. Ma

## **Business and Administrative Editor**

Avni Mehta

## **Submissions Editors**

Nicole Taykhman • Scott Yakaitis

## **Notes Editors**

Abigail Shaw • Anne Simons

# EDITORS

## **Article Editors**

Kent T. Hiebel • Andrea M. Kozak  
Cynthia Luo • Alice Wang

## **Production Editors**

Sydney Gaylin • Deandré Harris  
Sandra Huerta • Rachael E. Siegel

## **Copyright and Online Editor**

Lanna Lan

# EDITORS

**Symposium Editor**  
Anya C. Olsen

# STAFF MEMBERS

Rushant Badani • Francisco Berretta

Issac Brooks • Young Choi • John Christian

Francesca Cocuzza • Alexandra Farmer

Alex Finkelstein • Madeline K. Hopper

Courtney Irons • Alexis M. Johnson • Vishakha Joshi

Spencer Kelly • Joseph F. Lawless

Emi B. Lawson • Alice Li • Joanne Liu

Hannah Lutz • Juliette Miller • Sophie Moskop

Payal Nanavati • Lauren Nickoloff • Harry Parmenter

Miriam Perechocky • Elizabeth Pericak • Laura D. Pond

Zachary Schrieber • Justin Sedor • Alexia Syrmos

Clare Tilton • Vita Vivek • Caroline Voldstad

Regina Wang • Roger Yang