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Marco Di Stefano

### **Young v. UPS and the Evidentiary Dilemma**

The Fourth Circuit in *Young v. UPS* and Sixth Circuit in *Ensley-Gaines v. Runyon* have split on the question of whether the Pregnancy Discrimination Act (hereinafter PDA) includes an obligation to accommodate a pregnant employee's work restrictions when an employer does so for non-pregnant workers similar in their ability or inability to work. The Sixth Circuit, in *Ensley-Gaines v. Runyon*, held that pregnant employees need not be similarly situated in all relevant respects but the PDA requires only that the employee be similar in his or her ability or inability to work.<sup>1</sup> Conversely, the Fourth Circuit held that the non-occupational source of the plaintiff's lifting restriction was sufficient to defeat any similarities between a pregnant employee and the workers that the policy granted an accommodation to. Thus, requiring a higher degree of similarity than the Sixth Circuit.<sup>2</sup>

In *Young v. UPS*, the Supreme Court has addressed the split by channeling claims brought under the PDA through the *McDonnell Douglas* burden-shifting test.<sup>3</sup> Once the plaintiff has established her prima facie case via *McDonnell Douglas* an employer has the burden of production to proffer a legitimate, nondiscriminatory reason for denying the accommodation.<sup>4</sup> Once the employer proffers a legitimate, nondiscriminatory reason, the employee must establish that the employer's reason is pretextual.<sup>5</sup>

Although the Court has addressed the split, there are many questions left open for lower courts concerning pretext and comparators. This lack of clarity will lead to subjective decision making by lower courts and inconsistent results. Because of the lack of clarity, there is a risk lower

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<sup>1</sup> *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1222 (6th Cir. 1996).

<sup>2</sup> *Young v. UPS*, 784 F.3d 192, 195 (4th Cir. 2013).

<sup>3</sup> *Young v. UPS*, 135 S.Ct 1338, 1354 (2015).

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

courts will continue to interpret the PDA in a narrow way requiring the non-pregnant comparators to be similar to the pregnant employees in all-relevant respects. Furthermore, forcing pregnant employees to prove their PDA claim through the *McDonnell Douglas* burden-shifting approach creates an evidentiary quagmire for pregnant employees that will have difficulty finding sufficiently similar comparators to prove their claims due to the high degree of similarity required by courts.

This comment argues that a new legislative solution should be implemented consistent with the Pregnant Workers Fairness Act (hereinafter the PWFA), which creates an affirmative duty to accommodate pregnant women unless the accommodation imposes an undue hardship on the employer. This resolves any ambiguity left open by the majority in *Young* because the PWFA would streamline the proof requirements for pregnant workers denied these accommodations by ensuring that a worker with a limitation arising out of pregnancy did not have to identify a non-pregnant comparator in any particular case who had already received the reasonable accommodation sought.

Part one of this comment will explain the PDA's two clauses and the congressional history that suggests lower courts should take a broad interpretation of the second clause of the PDA. Part two will summarize the Circuit split that lead to the Supreme Court granting certiorari to Peggy Young. Part three will explain the majority opinion by Justice Breyer and Justice Alito's Concurrence. Part four will summarize the subsequent decisions that have been decided since *Young v. UPS* and how they serve as an analogy for the types of risks that pregnant workers face given the Supreme Court's ambiguous standard. Part five will identify the ambiguities in the Supreme Court's decision and the problem that pregnant women will have finding evidence to prove their claims under the PDA. Part six will discuss the PWFA, which resolves the ambiguities

by alleviating the pregnant employees burden of comparing workers. Part six will also discuss the effect the Americans with Disabilities Act Amendments Act of 2008 will have on the Supreme Court's test.

## **I. Pregnancy Discrimination Act**

Both clauses of the PDA are necessary to keep employers from discriminating against their employees based on pregnancy, childbirth, or related conditions. The first clause of the PDA alters the definition of sex discrimination under Title VII of the Civil Rights Act of 1964 by making the “terms ‘because of sex’ or ‘on the basis of sex’ include . . . pregnancy, childbirth, or related medical conditions.”<sup>6</sup> The first clause is a definition without any additional substantive protections. Thus, all the first clause does is further define the protective class that may bring suit under Title VII. The second clause of the PDA provides a distinct and independent substantive standard, which employers must satisfy. This clause states that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”<sup>7</sup> This second clause of the PDA requires an employer to treat pregnant employees the same as other employees with limitations similar to those of the pregnant employee.<sup>8</sup> The employer need only provide a pregnant employee with an accommodation if said accommodation is granted to another “similarly situated” employee.<sup>9</sup> In other words, the second prong of the PDA does not grant pregnant employees a most favored nation status by requiring all pregnant employees be treated more favorably than all other employees because they are

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<sup>6</sup> 42 USCS § 2000e

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

pregnant.<sup>10</sup> The second clause of the PDA thus requires formal equality between pregnant and non-pregnant worker.

The PDA's legislative history suggests that congress intended to provide broad protection to women on the basis of pregnancy through the PDA's legislative history. For example, Representative Augustus Hawking introduced the act on the floor of the House, emphasizing that the purpose of the act was to broadly ban discrimination on the basis of pregnancy.<sup>11</sup> Hawkins acknowledged that "because many of the disadvantages imposed on women are predicated upon their capacity to become pregnant, genuine equality in the American labor force is no more than an illusion as long as employers remain free to make pregnancy the basis of the unfavorable treatment of working women."<sup>12</sup> Testimony in the Senate echoes Representative Hawking's contention that legislators intended that the PDA be broadly interpreted. For example, a Senate report supporting the bill stated, "[t]he assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace."<sup>13</sup>

In July of 2014, the Equal Employment Opportunity Commission (hereinafter "EEOC") issued guidelines proving that courts should read the second clause of the PDA broadly. The PDA provided that "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations (e.g., a policy of providing light duty

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<sup>10</sup> Effland Matthew, *Disability Accommodation under the ADA* (January 24, 2015) <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/rule18.pdf>.

<sup>11</sup> 124 Cong. Rec. 21435 (1978), Legis. Hist. at 167-168.

<sup>12</sup> *Id.*

<sup>13</sup> S. Rep. No. 95-331, p. 3 (1977).

only to workers injured on the job).”<sup>14</sup> The EEOC guidelines further provided an example of disparate treatment that would violate the PDA:

An employer has a policy or practice of providing light duty, subject to availability, for any employee who cannot perform one or more job duties for up to 90 days due to injury, illness, or a condition that would be a disability under the ADA. An employee requests a light duty assignment for a 20-pound lifting restriction related to her pregnancy. The employer denies the light duty request.<sup>15</sup>

The EEOC further added “an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job injuries.”<sup>16</sup> Thus, evidence from both the PDA’s legislative history and the subsequent EEOC guidelines show that courts should interpret the second clause of the PDA broadly to achieve its legislative goals of eradicating pregnancy discrimination. However, not all courts interpret the PDA broadly for fear that a broad interpretation would give pregnant employees a privileged status over non-pregnant employees.<sup>17</sup> The contrasting interpretation of the circuits has led to a circuit split as will be discussed in the sections below.

## **II. Circuit Split**

### **a. Fourth Circuit interpretation of the PDA**

In *Young v. UPS* the U.S. Court of Appeals for the Fourth Circuit inquired whether the PDA required employers to provide light duty accommodation for pregnant employees when they provide such accommodations for non-pregnant employees. The plaintiff, Peggy Young was a part time driver for UPS. She became pregnant in 2006 and was given lifting restrictions by her doctor.<sup>18</sup> Young was advised that she “should not lift more than twenty pounds during the first

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<sup>14</sup> 2 EEOC Compliance Manual §626-I(A)(5), p. 626:0009 (July 2014).

<sup>15</sup> 2 EEOC Compliance Manual §626-I(A)(5), p. 626:0013, Example 10.

<sup>16</sup> 2 EEOC Compliance Manual §626-I(A)(5), p. 626:0028.

<sup>17</sup> *McQuiston v. City of Clinton*, 872 N.W.2d 817, 824 (Iowa 2015) (“the Court found nothing from the history and background of the Act to suggest Congress intended for the PDA to alter the approach of the law or to impose a ‘new legislative mandate’ to require more favorable treatment for pregnant employees.”) (quoting H.R. Rep. No. 95-948, at 3-4 (1978))

<sup>18</sup> *Young v. UPS*, 784 F.3d 192, 195 (4th Cir. 2013).

twenty weeks of her pregnancy or more than ten pounds thereafter.”<sup>19</sup> Drivers from UPS, however, are required to lift parcels weighing up to seventy pounds or more.<sup>20</sup> UPS had a policy where the company would accommodate lifting restrictions.<sup>21</sup> For an employee to be granted an accommodation under the policy, however, she would need to qualify for temporary alternative work assignment.<sup>22</sup> The policy made temporary alternative work assignments available to employees that suffered on-the-job injuries, suffered from permanent disability or have lost his or her Department of Transportation (hereinafter DOT) certification because of a medical examination.<sup>23</sup> Because Young’s pregnancy fit into none of the categories listed in UPS’s policy, UPS prohibited her from working while under the work restrictions.<sup>24</sup>

In July 2007, Young filed a pregnancy discrimination charge with the EEOC.<sup>25</sup> After receiving a right to sue letter,<sup>26</sup> she brought an individual disparate treatment claim against UPS in federal district court alleging a violation of the PDA.<sup>27</sup> The district court granted summary judgment in favor of UPS because Ms. Young could not show intentional discrimination via direct evidence and she could not satisfy her burden under *McDonnell Douglas* test.<sup>28</sup> She subsequently appealed the decision to the Fourth Circuit.

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<sup>19</sup> *Id.*

<sup>20</sup> *Young*, 784 F.3d at 196.

<sup>21</sup> *Young*, 784 F.3d at 195.

<sup>22</sup> *Id.*

<sup>23</sup> *Young*, F.3d at 196.

<sup>24</sup> *Id.*

<sup>25</sup> *Young*, 784 F.3d at 197.

<sup>26</sup> *Karstens v. International Gamco, Inc.*, 939 F.Supp. 1430 (D.Neb. 1996) (“Timely filing a charge of discrimination with the EEOC is a prerequisite to the later commencement of a civil action in federal court. The purpose of filing the charge is to provide the EEOC with an opportunity to investigate and attempt to resolve the controversy through conciliation before permitting the aggrieved party to pursue a lawsuit. To exhaust her remedies, not only must a Title VII plaintiff timely file her charges with the EEOC, but she must also receive a “right to sue” letter from the EEOC.”)

<sup>27</sup> *Young*, 784 F.3d at 97.

<sup>28</sup> *Id.*

The Fourth Circuit disagreed with Young’s interpretation of “similar in their ability or inability to work” clause of the PDA.<sup>29</sup> The non-occupational source of Young’s lifting restriction was sufficient to defeat any similarities between her and the workers that the policy granted an accommodation to.<sup>30</sup> The Fourth Circuit refused to require UPS to accommodate pregnant workers because such a requirement would result in preferential treatment for pregnant workers.<sup>31</sup> According to the Fourth Circuit, giving pregnant workers such an accommodation would not be fair to workers that were injured in the workplace.<sup>32</sup> The policy that UPS had in place would exclude many workers injured off the job.<sup>33</sup> If UPS was required to provide pregnant workers with accommodations, then these pregnant workers would receive access to the accommodation while non-pregnant employees with off-the-job physical limitations would not.<sup>34</sup> The Fourth Circuit concluded that the PDA merely requires that employers implement neutral, pregnancy-blind policies and that UPS does not need to provide preferential access to light duty work for pregnant employees with non-occupational pregnancy restrictions where it would not do the same for non-pregnant employees with non-occupational injuries.<sup>35</sup> The Fifth, Seventh and Eleventh Circuits largely agreed with the Fourth Circuit, though no circuit has gone so far as to hold that employers accommodating other employees need not accommodate pregnant workers.<sup>36</sup>

#### **b. Sixth Circuit Interpretation of the PDA**

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<sup>29</sup> *Young*, 784 F.3d at 205.

<sup>30</sup> *Young*, 784 F.3d at 203.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> See *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-49 (7th Cir. 2011); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641 (6th Cir. 2006); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312-13 (11th Cir. 1999); *Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204, 207-08 (5th Cir. 1998) (“By defining sex discrimination under Title VII to include pregnancy, Congress intended to do no more than ‘re-establish principles of Title VII law as they had been understood prior to the Gilbert decision,’ and ensure that female workers would not be treated ‘differently from other employees simply because of their capacity to bear children.’”).



In *Ensley-Gaines v. Runyon*, the Sixth Circuit Court of Appeals addressed the same question regarding the second clause of the PDA that the Fourth Circuit Court addressed. The plaintiff in *Ensley-Gaines* was a mail handler working full time.<sup>37</sup> There was a collective bargaining agreement<sup>38</sup> between the Postal Service and the National Postal Mail handlers Union. Under this agreement, workers who were temporarily unable to work may submit written requests for alternative assignments.<sup>39</sup> The Postal Service's plan distinguishes between limited duty and light duty. Limited duty is available to those workers injured on the job, while light duty is available to employees whom have sustained injuries that are not employment related.<sup>40</sup> On July 3, 1991, the plaintiff requested temporary light duty status under the agreement because of the medical limitations her doctor imposed on her due to her pregnancy, which include a fifteen pound lifting limitation and a four hour limit on standing and sitting.<sup>41</sup> She was not permitted to sit while working after four hours of working while standing.<sup>42</sup> She like, Peggy Young, filed a pregnancy discrimination charge with the EEOC.<sup>43</sup> After receiving a right-to-sue letter, she brought an individual disparate treatment claim against UPS in federal district court alleging a violation of the PDA.<sup>44</sup>

The Sixth Circuit found that the “the burden under PDA differed from other Title VII cases in that plaintiff need not show that those receiving favorable treatment were similar in all respects,

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<sup>37</sup> *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1222 (6th Cir. 1996).

<sup>38</sup> Collective Bargaining, Legal Dictionary, <http://legaldictionary.net/collective-bargaining/> (“Collective bargaining is the negotiation process that takes place between an employer and a group of employees when certain issues arise. The employees rely on a union member to represent them during the bargaining process, and the negotiations often relate to regulating such issues as working conditions, employee safety, training, wages, and layoffs. When an agreement is reached, the resulting ‘collective bargaining agreement,’ or ‘CBA,’ becomes the contract governing employment issues.”)

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

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Einsley-Gaines*, 100 F.3d at 1223.

<sup>43</sup> *Einsley-Gaines*, 100 F.3d at 1221.

<sup>44</sup> *Id.*

but merely in their ability or inability to work.”<sup>45</sup> The Sixth Circuit rejected a rule from *Mitchell v. Toledo Hospital*, which stated that

... the individual with whom the pregnant employee seeks to compare her treatment must have dealt with the same supervisor, have been subject to the same standards and engaged in the same conduct without such differentiating circumstances that would distinguish their conduct or the employer’s treatment of them of it.<sup>46</sup>

The Sixth Circuit further found that the Plaintiff successfully demonstrated that the contention that they were unequally situated was pretextual.<sup>47</sup> The defendant had articulated a facially legitimate reason for its treatment of the plaintiff, namely that any disparate treatment arose from the distinction between limited-duty employees and light-duty employees.<sup>48</sup> She presented evidence that “limited-duty and light-duty employees are similarly situated and differ only with respect to the fact that limited-duty employees are unable to perform their full duties because they have been injured on the job and light-duty employees are unable to perform their full duties because of a non-job-related injury or illness”.<sup>49</sup> While the employer must continue to pay limited-duty employees regardless of whether they work, this distinction is inconsequential to the court because the distinction pertains to the terms of employment, not to an employee's ability or inability to work, as provided in the PDA. The sixth circuit, thus, did not require that plaintiff be similar to the comparators in all-relevant respects but only similar in their ability or inability to work. As such, the Sixth Circuit has adopted a much broader interpretation of the second prong of the PDA when compared to the Fourth Circuit.<sup>50</sup> The Eight and Tenth Circuits agreed with the Sixth Circuit by holding that with regard to the similarly situated analysis, a pregnant employee should be

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

<sup>46</sup> *Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992).

<sup>47</sup> *Id.* at 1226.

<sup>48</sup> *Ensley-Gaines*, 100 F.3d at 1224-25.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

compared to any other employee who has a similar ability or inability to perform the job, including those who become temporarily disabled due to a workplace injury incurred while on the job.<sup>51</sup>

### **III. Supreme Court's Resolution of this Circuit Split**

#### **a. How the Supreme Court Majority Split the Baby**

The Supreme Court's opinion focused on interpreting the second clause of the PDA because that was the focal point of the dispute between the Fourth and Sixth Circuits, as well as the focal point of the disagreement of the parties.<sup>52</sup> Peggy Young argued that the clause "requires an employer to provide the same accommodation to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have similar effect on ability to work."<sup>53</sup> The Court rejected this argument because the PDA would then grant pregnant women a "most favored employee" status.<sup>54</sup> This means that if the employer provided an employee with an accommodation, then the employer must give such an accommodation to all pregnant employees.<sup>55</sup> According to the Court, such an interpretation would not allow for the appropriate balancing of the distinguishing factors of employee's jobs such as the employer's need for certain employee's to keep working, and the employee's age.<sup>56</sup> The language in the statute does not require employers to treat pregnant employees the same as any other person.

UPS argued that the PDA's second clause merely clarifies the first clause by defining sex discrimination to include pregnancy discrimination, and does not impose any additional

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<sup>51</sup> See *Adams v. Nolan*, 962 F.2d 791, 794 (8th Cir. 1992) (holding that the plaintiff demonstrated that some officers with off the job injuries or conditions other than pregnancy in fact were given light duty assignments to accommodate their condition); see also *EEOC v. Ackerman, Hood & McQueen, Inc.*, 956 F.2d 944, 948 (10th Cir. 1992) (holding that the "clear language of the PDA requires the court to compare treatment between pregnant persons and 'other persons not so affected but similar in their ability or inability to work'").

<sup>52</sup> *Young v. UPS*, 135 S.Ct. 1338, 1348 (2015).

<sup>53</sup> *Young*, 135 S.Ct. at 1349.

<sup>54</sup> *Young*, 135 S.Ct. at 1362.

<sup>55</sup> *Young*, 135 S.Ct. at 1349-59.

<sup>56</sup> *Young*, 135 S.Ct. at 1349-50.

requirements on employers.<sup>57</sup> The Court rejected UPS's argument because such a reading would render the second clause of the statute superfluous.<sup>58</sup> Such a reading is superfluous because the first clause of the PDA already expressly amends Title VII definitional provision to clarify that pregnancy discrimination counts as sex discrimination.<sup>59</sup> To accept such an interpretation would be inconsistent with the legislative intent to overrule *General Electric Co. v. Gilbert*.<sup>60</sup> The Supreme Court in *Gilbert* held that employers could treat pregnancy differently from other illnesses or disabilities as long as it did so on a neutral basis.<sup>61</sup> Both clauses are needed to overturn *Gilbert* because the first clause of the PDA reflected congressional disapproval of the decision and the second clause demonstrated how discrimination against pregnancy is to be remedied. Thus, to read the second clause in such a way that would render it meaningless would defeat such a legislative intent.<sup>62</sup>

The majority instead held that a plaintiff alleging that the denial of an accommodation constituted disparate treatment under the PDA's second clause may establish a prima facie case of pregnancy discrimination either through direct or circumstantial evidence. A plaintiff may establish a prima facie case of pregnancy through "direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic. . . ." If a plaintiff does not have direct evidence of pregnancy discrimination, then the plaintiff may establish a prima facie case through circumstantial evidence, as in *McDonnell Douglas*, that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her and that the employer

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<sup>57</sup> *Young*, 135 S.Ct. at 1352.

<sup>58</sup> *Id.*

<sup>59</sup> *Young*, 135 S.Ct. at 1352.

<sup>60</sup> *Young*, 135 S.Ct. at 1353.

<sup>61</sup> *General Electric Co. v. Gilbert*, 429 U. S. 125 (1976).

<sup>62</sup> See *California Federal Savings & Loan Ass'n v. Guera*, 479 U.S. 272, 274 (1987) ("[second clause] was intended to illustrate how discrimination against pregnancy is to be remedied; the meaning of the first clause is not limited by the specific language in the second clause").

did accommodate others “similar in their ability or inability to work.”<sup>63</sup> The employer may then seek to justify its different treatment of pregnant employees by relying on legitimate, non-discriminatory reason for refusing to accommodate a pregnant employee.<sup>64</sup> What is a legitimate non-discriminatory reason? The majority in *Young* states that the reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to their current accommodation plan.<sup>65</sup>

If an employer offers an apparently legitimate non-discriminatory reason for its actions, the plaintiff may in turn show that the employer’s proffered reasons are in fact pretextual.<sup>66</sup> A plaintiff may survive a summary judgment motion and reach a jury on this issue by providing sufficient evidence that the employer’s policies impose a significant burden on pregnant employees and that the employer’s legitimate non-discriminatory reasons are not sufficiently strong to justify the burden.<sup>67</sup> The majority further stated that the plaintiff could create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of non-pregnant employees while at the same time failing to accommodate a large percentage of pregnant employees.<sup>68</sup>

#### **b. Justice Alito’s Answer the Unanswered Questions About Pretext?**

Justice Alito authored the concurring opinion where he tried to elaborate on the ambiguities left unresolved in the majority’s new test. He grappled with the question of to whom must the pregnant employees be compared in determining whether they have been given the equal treatment that the PDA requires.<sup>69</sup> According to Justice Alito, pregnant employees must be compared to

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<sup>63</sup> *Young*, 135 S.Ct at 1354.

<sup>64</sup> *Young*, 135 S.Ct. at 1341.

<sup>65</sup> *Young*, 135 S.Ct. at 1338.

<sup>66</sup> *Young*, 135 S.Ct. at 1342-43.

<sup>67</sup> *Young*, 135 S.Ct. at 1354.

<sup>68</sup> *Id.*

<sup>69</sup> *Young*, 135 S.Ct at 1357-58.

workers “performing the same or very similar jobs.”<sup>70</sup> Another question that this raises is that when comparing pregnant and non-pregnant employees in similar jobs, “which characteristics of the pregnant and non-pregnant employees must be taken into account.”<sup>71</sup> Justice Alito answered this question by referencing “other employees who are similar in their ability or inability to work.” The phrase “similar in their ability or inability to work” simply means “similar *in relation* to the ability or inability to work.”<sup>72</sup> Under such an interpretation, pregnant and non-pregnant workers are not similar in relation to their ability or inability to work if the reasons for their inability to work are different.<sup>73</sup> Pregnant and non-pregnant employees thus, are not similar in the relevant sense if the employer has a neutral business reasons for treating them differently.<sup>74</sup>

What is such a neutral business reason? Justice Alito echoes the majority opinion in declaring what the reason cannot be that accommodating is more expensive or less convenient.<sup>75</sup> Furthermore, he gives two further illustrations by applying his variation of the test to Young’s claim.<sup>76</sup> The respondent, UPS, had a neutral business reason for accommodating non-pregnant employees when it was required to do so by the ADA.<sup>77</sup> UPS also had a neutral business reason for accommodating the non-pregnant workers off the job.<sup>78</sup> If these employees were not accommodated, then UPS would have had to provide them with workers compensation benefits.<sup>79</sup> However, there are no neutral business reasons for accommodating workers that lost their DOT certification.<sup>80</sup> These workers could have lost their certification based on medical injuries or

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<sup>70</sup> *Id.*

<sup>71</sup> *Young*, 135 S.Ct at 1359.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Young*, 135 S.Ct at 1359.

<sup>75</sup> *Id.*

<sup>76</sup> *Young*, 135 S.Ct at 1360.

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

<sup>78</sup> *Id.*

<sup>79</sup> *Young*, 135 S.Ct at 1360.

<sup>80</sup> *Id.*

limitations incurred off the job.<sup>81</sup> Pregnant employees too have medical limitations incurred off the job.<sup>82</sup> Pregnancy stands in the way of pregnant employees and their work just like the loss of a DOT certification stands in the way of non-pregnant employees.<sup>83</sup> Yet these non-pregnant drivers are given light duty work assignments that are compatible with their limitations and pregnant employees are not.<sup>84</sup>

### III. Lower Court PDA Decisions After Young

#### a. Antonich v. United States Bank Nat'l Ass'n

In *Antonich v. United States Bank Nat'l Ass'n*, a Minnesota District Court also considered a claim brought under the PDA and applied the Supreme Court's burden-shifting framework from *Young*. The plaintiff, Antonich, worked as a bank teller for U.S. Bank.<sup>85</sup> She took an eight-week parenting leave of absence in April 2011 after the birth of her first child.<sup>86</sup> After the parenting leave, she resigned to complete an associate's degree and was rehired at another branch in August of 2012.<sup>87</sup> U.S. Bank maintains certain check and cashing policies for checks.<sup>88</sup> Defendant trained Antonich in these procedures when she was first hired.<sup>89</sup> Any mistakes in these procedures would jeopardize her employment at U.S. Bank.<sup>90</sup> Antonich became pregnant with her second child while working at the U.S. Bank and informed both her immediate manager and the branch manager that she would be taking a parenting leave, which would have begun on May 27, 2013.<sup>91</sup> While working

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Young*, 135 S.Ct at 1360.

<sup>85</sup> *Antonich v. United States Bank Nat'l Ass'n*, 2015 U.S. Dist. LEXIS 106565, \*1-2 (D. Minn. Aug. 13, 2015).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Antonich*, 2015 U.S. Dist. LEXIS 106565 at \*3.

<sup>89</sup> *Id.* at \*4.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at \*27.

on February 2013, she processed a fraudulent check causing U.S. Bank substantial losses.<sup>92</sup> In processing the fraudulent checks, she failed to follow the policies.<sup>93</sup> U.S. Bank terminated Antonich's employment on May 24, 2013 and Antonich was not rehired for another position.<sup>94</sup> Plaintiff asserted claims under Title VII, as amended by the pregnancy discrimination act for her termination. The court ultimately granted defendant's motion for summary judgment.<sup>95</sup>

The district court concluded that the employee has the burden "to prove that the compared employees were similar in all relevant respects."<sup>96</sup> The plaintiff could not demonstrate pretext because there were no other employees who were identified as having committed a policy violation resulting in a loss of more than \$1,000 or more who were still employed with US Bank.<sup>97</sup> There were employees who incurred more than a \$1,000 loss but the cause of the loss was a teller variation and not a policy violation.<sup>98</sup> Also, there were tellers that created a risk of loss of more than \$1,000 but there was no actual loss incurred by the bank so those employees remained employed.<sup>99</sup>

#### **b. Emmanuel v. Cushman & Wakefield, Inc.**

In *Emmanuel v. Cushman & Wakefield, Inc.*, the plaintiff, Emmanuel Cushman filed a PDA claim in the Southern District of New York. Emmanuel worked for Cushman as a receptionist.<sup>100</sup> Nancy Lara was the senior property manager for Cushman.<sup>101</sup> Charlene Coger was a supervisor and managed the receptionists.<sup>102</sup> Lara would consult Coger before taking any disciplinary action

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<sup>92</sup> *Id* at \*5-6.

<sup>93</sup> *Id* at \*9.

<sup>94</sup> *Id* at \*11.

<sup>95</sup> *Id* at \*16.

<sup>96</sup> *Id* at \*45.

<sup>97</sup> *Id* at \*46.

<sup>98</sup> *Id* at \*46-48.

<sup>99</sup> *Id* at \*48.

<sup>100</sup> *Emmanuel v. Cushman & Wakefield, Inc.*, 2015 U.S. Dist. LEXIS 113280, \*1 (S.D.N.Y. Aug. 26, 2015).

<sup>101</sup> *Id* at \*1-3.

<sup>102</sup> *Id* at \*3.



against the receptionist.<sup>103</sup> Cogger did not have any individual authority to either hire, fire, adjust employee grievances or issue a written discipline.<sup>104</sup> On October 2011, Emanuel informed Cogger that she was pregnant.<sup>105</sup> Cogger asked Emanuel if she would terminate her pregnancy and Emmanuel responded that she did not intend to.<sup>106</sup> Cogger responded to her comment “watch your back or watch yourself in here.”<sup>107</sup> On March of 2012, an unidentified scholastic employee reported that Emanuel was sleeping on the couch in a reception area during business hours.<sup>108</sup> The employee reported to Cogger whom reported to Lara.<sup>109</sup> Lara then terminated Emanuel’s employment with Cushman.<sup>110</sup>

Emanuel asserted claims under Title VII, as amended by the PDA for her termination.<sup>111</sup> The court ultimately granted defendant’s motion for summary judgment.<sup>112</sup> Because there was no evidence that Cogger consulted with Lara or otherwise played a role in connection with the specific decision to terminate Emmanuel's employment, the evidence suggesting that Cogger was biased against pregnant employees does not indicate that Emmanuel's pregnancy was a motivating factor in Lara's decision to terminate her employment.<sup>113</sup> Furthermore, Cogger’s failure to discipline two other non-pregnant employees for sleeping in the reception area is not probative of pretext because Cogger was not involved in the decision to terminate Emmanuel's employment.<sup>114</sup> The comparators

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<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> *Id.* at \*4.

<sup>106</sup> *Id.* at \*4

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at \*6.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at \*7.

<sup>111</sup> *Id.* at \*1.

<sup>112</sup> *Id.* at \*28-29.

<sup>113</sup> *Id.* at \*16-17

<sup>114</sup> *Id.* at \*19

were not similarly situated because the decision maker that fired Emmanuel was not the same decision maker that treated the two other non-pregnant employees more favorably.<sup>115</sup>

## V. Problems with the Supreme Court's Resolution

### a. Unanswered Questions

The Supreme Court's use of the *McDonnell Douglas* burden-shifting test left many questions unanswered. For example, what justifications for denying pregnant women accommodations will constitute "legitimate, non-discriminatory reasons"? An employer's obligations under the PDA are unclear in that the only guidance that the Supreme Court gave to what a legitimate non-discriminatory reason is what it cannot be, i.e. more expensive or less convenient for the employer.<sup>116</sup> If the majority provided an affirmative, non-exhaustive list of things that could constitute such a reason that would provide more guidance to lower courts in addressing this ambiguity.

Furthermore, the ultimate decision of liability will turn on whether a fact finder places greater value on the burden on pregnant workers or on the employer's justification for not accommodating the employee.<sup>117</sup> What evidence suffices for an employee to show that the employer's justification is not sufficiently strong? The majority originally stated that plaintiffs like Peggy Young could prove that the employer's reasons for not accommodating pregnant employees were not sufficiently strong by providing evidence that employers had multiple policies accommodated certain non-pregnant workers.<sup>118</sup> However, the Court then goes on to state it will not consider whether UPS's reasons for not accommodating Peggy Young are sufficiently strong

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

<sup>116</sup> *Id.* at 1342.

<sup>117</sup> *Id.* at 1343.

<sup>118</sup> *Id.* at 1354.

and will remand the decision to the lower court to decide.<sup>119</sup> This directly contradicts the majority's earlier statement about the way plaintiffs like Peggy Young could prove their employer's reasons were not sufficiently strong by saying they are not addressing this question. Furthermore, lower courts will be confused in applying this part of the test because they will not know how much weight to give to the court's suggestion regarding how plaintiffs could show the employer's reasons for not accommodating pregnant employees were not sufficiently strong,

Lastly, the majority does not clearly provide guidance as to what constitutes a significant burden. The opinion simply states that “[t]he plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a *large* percentage of non-pregnant workers while failing to accommodate a *large* number of pregnant workers.”<sup>120</sup> The court did not fully explain what constitutes a large percentage and left the lower court discretion to make its own subjective interpretations as to what constitutes a large percentage. Such an ambiguous standard does not provide any guidance to lower courts and will lead to inconsistency by lower courts in determining whether the percentage is large enough to tip the scales in the pregnant employees favor. Although relying on statistical disparities is not the only way that the plaintiff can establish a genuine question of material fact about the employer's proffered reason for denying her requested accommodation<sup>121</sup>, lower courts will rely on the Supreme Courts ambiguous standard where plaintiff's try to establish their claims by relying on statistical disparities.

#### **b. Justice Alito Furthers the Comparator Ambiguity**

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<sup>119</sup> *Id* at 1356.

<sup>120</sup> *Young*, 135 S.Ct at 1354.

<sup>121</sup> *Allen-Brown v. District of Columbia*, 2016 U.S. Dist. LEXIS 42840, \*37-38 (D.D.C. Mar. 31, 2016) (“ . . . Allen-Brown does not make such an argument or rely on statistical disparities to support her claim of pretext. Instead, Allen-Brown relies on "traditional" evidence to establish a genuine question of material fact about the District's proffered reason for denying her requested accommodation—that is, whether the reason offered by the MPD is the real reason for the denial or simply a pretext for discriminatory intent.”)

Justice Alito’s concurring opinion does not answer the question left open by the majority regarding comparators but rather furthers the confusion. Justice Alito does not really define what generally neutral business reason. It is not similar to what the ADA defines as an “undue hardship” because he asserts how different the language in the PDA’s second clause is from other anti-discrimination provisions. Justice Alito gives a negative definition of genuine neutral business reason in defining what it cannot be, i.e. too expensive and less convenient. He also only provides a limited number of illustrations by applying his standard to Young’s case. The concurrence’s new “genuine neutral business reason” standard invites judicial subjectivity on the part of lower courts just like the majority did and provides just as little guidance as the majority.

Justice Alito’s concurring opinion exploits the ambiguities in the majority’s opinion and made it harder for pregnant employees to find proof of comparators. His interpretation as to what the relevant comparators has allowed employers to avoid addressing the ongoing and pervasive problem of pregnancy discrimination because he has broadened the category of characteristics employers may take into account. An employer may find dissimilarity on the basis of traits other than ability to work so long as there is a neutral business reason for considering those traits. Thus, Justice Alito’s interpretation of the second clause of the PDA give employers more latitude for avoiding compliance with the PDA than necessary by allowing employers to discriminate based on pregnancy so long as they had a genuine neutral business reason for doing so.

### **c. The Evidentiary Conundrum**

The *Young* decision also creates an evidentiary conundrum because direct evidence of discrimination can be difficult to obtain. Direct evidence is evidence that is so one sided that no inference from the jury is required.<sup>122</sup> Essentially, this means that the employer admitted to acting

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<sup>122</sup> See, e.g., *Thomas v. NFL Players Ass’n*, 131 F.3d at 205 (citing the Fifth, Tenth, and Eleventh Circuits as taking “direct evidence” to mean non-inferential).

with discriminatory intent.<sup>123</sup> Because direct evidence is scarce, most women will need to prove their case via the *McDonnell Douglas* burden-shifting analysis. Pregnant workers are expected to produce enough evidence to prove their prima-facie case but must do so in circumstances where there is often no official policy or where the employer has obscured the policy for purposes of avoiding liability.

The comparator may enter the analysis at the prima facie case stage or to show pretext by establishing that the employer did not apply its non-discriminatory reason in a sex-blind manner.<sup>124</sup> *Antonich v. United States* demonstrates the difficulty that employees face in finding sufficient evidence of comparators to show pretext. Courts will be less likely to grant summary judgment in favor of employees in cases where the employee, although unable to show pretext, has sufficiently strong circumstantial evidence of discrimination that might lead a jury to find that the employment decision was motivated, at least in part, by discrimination.<sup>125</sup> In *Antonich*, the court established that a plaintiff had the burden to show that “U.S. Bank treated her differently than other non-pregnant employees.”<sup>126</sup> A plaintiff must show that “the compared employees were similarly situated in all relevant respects.”<sup>127</sup> Pregnant workers in the accommodation context will face similar hardships in finding sufficiently similar comparators to pregnant employees in the termination context if lower courts interpret the second clause of the PDA to require the non-pregnant comparators to be similar in all relevant respects. Given the ambiguities in both the majority’s and the concurrence’s pretext analysis that remains a possibility that is all too stark for pregnant employees.

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<sup>123</sup> *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 421 (1st Cir. 1996).

<sup>124</sup> See generally Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 59 Ala. L. Rev. 191 (2009).

<sup>125</sup> *Smith*, 76 F.3d at \*22.

<sup>126</sup> *Antonich*, 2015 U.S. Dist. LEXIS 106565 at \*45.

<sup>127</sup> *Id.*

The reason why Antonich’s claim failed was due to the court’s narrow interpretation of similarly situated.<sup>128</sup> The majority required that similarly situated employees, or “comparators,” deal “with the same supervisor, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.”<sup>129</sup> To be suggestive of pretext, evidence of the alleged misconduct of other employees must be of “comparable seriousness.”<sup>130</sup> However, pregnant employees face a Herculean challenge to find evidence of non-pregnant workers that committed an offense of comparable seriousness that were treated more favorably. Antonich, like other pregnant employees in her position, failed to meet this evidentiary burden because it requires such a high degree of similarity.<sup>131</sup> Antonich failed in discovery to elicit the requisite information due to a failed interrogatory that included too many higher-level employees in the field of comparators.<sup>132</sup>

*Emmanuel v. Cushman & Wakefield, Inc.* also demonstrates the difficulty that workers in general face, let alone pregnant workers, to find sufficient evidence to establish that their employer’s rationale is merely pretextual. Even though *Emmanuel* is a termination case, a plaintiff that brings an accommodation claim under the PDA will face similar hardships in establishing that the person that failed to grant them an accommodation was the actual decision maker. The plaintiff, in *Emanuel*, did not establish that the same decision maker that discriminatorily fired her was the same decision maker that failed to discipline the other two non-pregnant employees that also fell asleep in the reception area.<sup>133</sup> Because the plaintiff did not establish that the same decision maker

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<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.* at \*48 (“Plaintiff, however, chose to frame her interrogatories using the disjunctive ‘or,’ asking for employees who either cashed a fraudulent check or violated bank policy in a similar fashion.”)

<sup>133</sup> *Id.* at \*16.

disciplined her that disciplined the two other employees, then she could not show pretext.<sup>134</sup> It is commonplace that there are many levels of management and the employee may be dealing with several managers all of whom have varying degree of power over her.<sup>135</sup> For this reason a decision to fire or failure to accommodate may come from a number of managers and it is difficult to prove which one actually terminated the plaintiff or denied her the accommodation. It is similarly difficult to prove that the person that made the employment decisions possessed the authority to make determinations about the pregnant employee's employment or had influence over the formal decision maker.

Even though both *Antonich* and *Emmanuel* are about termination and not accommodation they serve as a good analogy of the types of hardships that pregnant workers have in establishing their pregnancy discrimination claims. Both in the termination context and the accommodation context pregnant employees can establish pretext by finding sufficiently similar comparators. Because justice Alito in his concurrence has broadened the characteristic that employers may take into account and has added that employers may find dissimilarity on the basis of traits other than ability to work, pregnant workers will have just as hard a time find sufficiently similar non-pregnant employees. Requiring pregnant employees to find other workers that nearly identical to them is a nearly impossible standard for them to meet due to their condition. The circuits will likely continue to have differing interpretations of the degree of similarity between pregnant and non-pregnant employees because of the Supreme Court's lack of clarity in *Young*. Providing pregnant workers with accommodations would impose such a de minimis burden on employers

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<sup>134</sup> *Antonich v. United States Bank Nat'l Ass'n*, 2015 U.S. Dist. LEXIS 106565 at \*20

<sup>135</sup> *Id.*

that pregnant workers should not be required to have to identify non-pregnant comparators, as was the case in *Young*.<sup>136</sup>

## **VI. Pregnant Workers Fairness Act: A Statutory Solution to The Young Evidentiary Quagmire**

### **a. Understanding the Statute**

The Pregnant Workers Fairness Act (hereinafter the PWFA) was a bill that had been introduced in Congress three times but now has bipartisan support. When it was initially introduced in 2012, the PWFA (which has not yet passed) was drafted to respond to the improper narrowing and misreading of the PDA by some lower courts.<sup>137</sup> Under the previous PDA scheme, pregnant workers had no clear path to accommodation and employers had no clear understanding of their responsibilities. It is time for a new statutory solution to the ambiguities created by both the PDA and the Supreme Court's decision in *Young v. UPS*. The PWFA uses the same language as the Americans with Disabilities Act (ADA), and twenty-five years of ADA court decisions give clear guidance to lower courts as to what the law is.<sup>138</sup> Employers know just what to expect, and, most importantly, pregnant women know they will be protected.

This bill would answer questions left open by the Supreme Court by setting out a simple, easy-to-apply legal standard that provides clarity to employers and employees. The new statute would prohibit employers from failing to provide a reasonable accommodation for limitations that

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<sup>136</sup> See Sarah Cypinski, *Note: Pregnant Laborers Should Expect Better: The Broken Pregnancy Discrimination Standard and How the Pregnant Workers Fairness Act Can Repair It*, 76 U. Pitt. L. Rev. 303 (“As part of Title VII, the PWFA would impose a minimal burden on employers. It applies only to employers with over fifteen employees and requires plaintiffs to file an EEOC charge before pursuing further action.”).

<sup>137</sup> See, e.g., Letter from Hon. Jerrold Nadler to House of Representatives Colleagues (May 2, 2013) (“Congress passed the Pregnancy Discrimination Act of 1978 in order to end discrimination against pregnant workers. But thirty five years later, women still risk being forced out of the workplace if and when they become pregnant.”); 158 Cong. Rec. H2459 (daily ed. May 9, 2012) (statement of Rep. 38 Nadler) (“Case law shows that courts are uncertain, even confused, about the scope of the law, requiring Congress to set the record straight.”); Letter from Sen. Robert P. Casey, Jr. and Sen. Jeanne Shaheen to Senate Colleagues (May 8, 2013) (“Congress made a commitment to end discrimination against pregnant workers over 30 years ago. Unfortunately, too many women are still being forced to choose between healthy pregnancies and keeping their jobs.”)

<sup>138</sup> *Dickinson v. Univ. of N.C.*, 91 F. Supp. 3d 755, 764 (M.D.N.C. 2015) (“The ADA was originally enacted on July 26, 1990. Americans with Disabilities Act of 1990.”)



arise out of pregnancy, childbirth, or any other related medical conditions.<sup>139</sup> The PWFA requires employers to make the same sorts of accommodations for pregnancy, childbirth and related medical conditions that the ADA requires employers make for disabilities.<sup>140</sup> Under the ADA, “reasonable accommodations may include job restructuring, part-time or modified work schedules, reassignment to a vacant position, [ . . . ] and other similar accommodations. . . .”<sup>141</sup> Thus, such accommodations would probably be required of employers under the PWFA because the PWFA is modeled after the ADA and it is required under the ADA.

The exception would be an accommodation that causes an undue hardship for the employer. An undue hardship under the PWFA is similar to what it would be under the ADA.<sup>142</sup> “Undue hardship”, according to the ADA, is defined as “significant difficulty or expense incurred by a covered entity” with respect to the provision of an accommodation.<sup>143</sup> It will probably not be the case that providing a pregnant worker with an accommodation will be an undue hardship for the employer because pregnant women represent such a small minority in the workforce.<sup>144</sup> Only about 5% of women in the workforce are pregnant in any given year not all of which will need accommodations.<sup>145</sup>

The PWFA would provide further protections than the PDA by making it illegal to avoid making accommodations by refusing employment opportunities to pregnant women.<sup>146</sup>

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<sup>139</sup> Pregnancy Workers Fairness Act of 2015, H.R. 2654, 114th Cong. § 2(1) (2015).

<sup>140</sup> Pregnancy Workers Fairness Act of 2015, H.R. 2654, 114th Cong. § 2(5).

<sup>141</sup> *Gonzalez-Rodriguez v. Potter*, 605 F. Supp. 2d 349, 369 (D.P.R. 2009)

<sup>142</sup> Pregnancy Workers Fairness Act of 2015, H.R. 2654, 114th Cong. § 2(1).

<sup>143</sup> Americans With Disabilities Act Of 1990, 1990 Enacted S. 933, 101 Enacted S. 933, 104 Stat. 327, 331, 101 P.L. 336, 1990 Enacted S. 933, 101 Enacted S. 933

<sup>144</sup> Amy Tannenbaum, *Five Fast Facts about Pregnancy in the Workplace* (October 31, 2015, 10:00 A.M.), <http://www.nwlc.org/our-blog/five-fast-facts-about-pregnancy-workplace>.

<sup>145</sup> *Id.*

<sup>146</sup> Pregnancy Workers Fairness Act of 2015, H.R. 2654, 114th Cong. § 2(3).

Furthermore, an employer cannot force a pregnant woman to take leave under any leave law or policy if there are other reasonable accommodations that are at the employer's disposal.<sup>147</sup>

The PWFA is such a common sense solution that fifteen states, the District of Columbia and four cities have passed laws requiring some employers to provide reasonable accommodations.<sup>148</sup> The evidence from the states and the cities that have state statutes with similar provisions to the PWFA is that the clarity that such laws provide helps to reduce lawsuits and helps these pregnant women receive the accommodation in a speedier manner than was available under the PDA.<sup>149</sup> The broad support for accommodating pregnant workers is reflected also in the United States Senate whereby all one hundred members of the Senate voted in favor of a budget amendment that supported requiring employers to provide reasonable and temporary accommodations to pregnant workers if such accommodations are not an undue burden on the business entity.<sup>150</sup>

#### **b. How the Pregnant Workers Fairness Act Resolve The Young Evidentiary Dilemma?**

With a statute like the PWFA in place, pregnant employees will not need to undergo the nearly impossible task of discovering direct evidence of discrimination in the form of an admission.<sup>151</sup> Furthermore, pregnant workers will not need to go through the arduous *McDonnell Douglas* burden-shifting analysis in order to prove their cause of action through circumstantial evidence.<sup>152</sup> Under the PWFA, pregnant workers would not need to go through the laborious task

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<sup>147</sup> Pregnancy Workers Fairness Act of 2015, H.R. 2654, 114th Cong. § 2(4).

<sup>148</sup> *The Pregnant Workers Fairness Act Fact Sheet*, National Partnership for Women and Families (October 26, 2015 10:00 A.M.), <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/fact-sheet-pwfa.pdf>.

<sup>149</sup> *Id.*

<sup>150</sup> Budget Blog, (October 26, 2015 10:00 A.M.), <http://www.budget.senate.gov/democratic/public/index.cfm/2015/3/casey-pregnant-workers-amendment>

<sup>151</sup> Czipinski, *Supra* at 318.

<sup>152</sup> *Id.*

of discovering sufficient comparators that are similarly situated to prove their cause of action.<sup>153</sup> Plaintiffs like Peggy Young would be benefited by the PWFA because there is no need for plaintiffs like her to find adequate comparators to show pretext.<sup>154</sup>

Because the PWFA requires employers to make the same sorts of accommodations for pregnancy, childbirth and related medical conditions that the ADA requires employers make for disabilities, the employers will have ample case law to help them put in place lawful policies. The legal analysis under the new legislation would be much simpler than the PDA where a pregnant worker's rights can turn on a determination of whether an employer accommodates a large percentage of non-pregnant workers while failing to accommodate a large number of pregnant workers.<sup>155</sup> Under the PWFA, if you are pregnant, you get an accommodation.<sup>156</sup> There are no unsurmountable burdens placed against the pregnant employees under the PWFA. Under the PWFA, pregnant employees are not required to compare workers or decide what counts as discrimination.<sup>157</sup> There are no new or confusing terms to trip up the courts.<sup>158</sup> Most importantly, there are no lengthy, expensive litigation for pregnant employees that cannot afford to go through the trials and tribulations of the judicial process.<sup>159</sup> The PWFA creates an affirmative duty to accommodate pregnant women unless the accommodation imposes an undue hardship on the employer.<sup>160</sup> The clarity of such a rule would answer all the questions left unanswered by the Supreme Court regarding comparators by eliminating them from the discussion all together.<sup>161</sup>

### **c. Americans with Disabilities Act Expansion**

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<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Young*, 135 S.Ct at 1354.

<sup>156</sup> Pregnancy Workers Fairness Act of 2015, H.R. 2654, 114th Cong. § 2(1) (2015).

<sup>157</sup> *Id.*

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

There is proposed expansion to the ADA. As the majority has noted, those recent changes to the ADA may diminish the practical impact of the *Young* decision.<sup>162</sup> The Americans with Disabilities Act Amendments Act of 2008 and subsequent EEOC interpretations have joined forces to expand the ADA's coverage to some temporary disabilities, even when related to healthy pregnancies (which are not considered disabilities under the ADA), the accommodation obligation of the ADA would render the PDA framework mute.<sup>163</sup> The expanded definition make Peggy Young's claim covered not only by the PDA but also the ADA.<sup>164</sup> This will ensure that pregnant employees get the requisite protection they need because the recent expansion of the law requires employers to treat impairments caused by pregnancy, even temporary ones, the same as impairments caused by other conditions.<sup>165</sup>

## VII. Conclusion

The Supreme Court's Decision in *Young v. UPS* was an important step toward resolving a dispute between the Fourth and Sixth Circuits regarding the meaning of the second prong of the PDA by reaffirming the *McDonnell Douglas* burden-shifting test as the primary method pregnant workers with only circumstantial evidence of discrimination could seek recourse under the statute. However, the Supreme Court's resolution of the dispute between the Fourth and Sixth Circuit provided more questions than answers and did not give any guidance to the lower courts regarding how many comparators were necessary to show a comparator that is similarly situated to the pregnant worker and to what degree must they be similar. The Pregnant Worker Fairness Act

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<sup>162</sup> ADA AMENDMENTS ACT OF 2008, 110 P.L. 325, 122 Stat. 3553, 110 P.L. 325, 2008 Enacted S. 3406, 110 Enacted S. 3406

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

resolves all of the loopholes left by the Supreme Court in its decision by dropping the impossible hurdle of finding sufficient comparators of similarly situated workers.