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Joanna L. Grossman

Making Sure Pregnancy Works: Accommodation Claims After *Young v. United Parcel Service, Inc.*

Joanna Grossman & Gillian Thomas***

The Supreme Court's 2015 ruling in Young v. United Parcel Service, Inc. *outlined a new analytical framework for Pregnancy Discrimination Act (PDA) claims that challenge employers' failure to "accommodate" pregnant workers. That framework was intended to lessen the evidentiary burden on plaintiff-employees in showing that others "similar in their ability or inability to work" were accommodated and to increase the burden on defendant-employers in justifying such differential treatment. In the five years since* Young, *however, lower courts have been inconsistent in their application of this mandate. In this Article, we survey the precedent that set the stage for* Young, *the decision's new approach to accommodation claims under the PDA, and the mixed precedent that has followed. We identify for practitioners the flawed reasoning in negative post-*Young *rulings and emphasize arguments that best fulfill the letter and spirit of* Young*'s expansive approach to the PDA.*

INTRODUCTION

In March 2015, the Supreme Court issued an opinion in *Young v. United Parcel Service, Inc.*,[1] its first foray into the jurisprudential debate concerning the scope of pregnant workers' entitlement to "accommodation" under the Pregnancy Discrimination Act (PDA).[2] When and under what circumstances are workers entitled to a workplace accommodation necessi-

* Ellen K. Solender Endowed Chair in Women and Law & Professor of Law, SMU Dedman School of Law.
** Senior Staff Attorney, American Civil Liberties Union Women's Rights Project.
[1] 575 U.S. 206 (2015).
[2] 42 U.S.C. § 2000e(k) (2018).

tated by the physical effects of pregnancy? This might not seem like a hard question, but by the time the Court considered it, federal courts had been grappling with it for nearly two decades. They puzzled over the meaning of the second of the PDA's two clauses, which provides for pregnant workers to be treated the "same" as others "similar in their ability or inability to work"—that is, a comparative right of accommodation. If pregnant workers are entitled to accommodations made available to comparably disabled workers, who, then, is comparable?

Could an employer, for example, maintain a policy that granted "light duty" assignments only for employees who were temporarily disabled by on-the-job injuries, even though no pregnant woman would qualify for an accommodation under such a policy? Before *Young*, courts in these cases almost always sided with employers and against pregnant workers.[3] These rulings almost uniformly endorsed employers' refusals to make the temporary job modifications pregnant workers needed to continue working, even where they did so for other workers with temporary impairments, even when the accommodations were minor and costless and the resulting harm to the pregnant worker was precisely the sort that Congress intended to outlaw in enacting the PDA–namely, loss of her job, either temporarily or permanently, solely because of her unique role in the reproductive process.[4] When the Supreme Court agreed to review Peggy Young's case, advocates for pregnant workers hoped that the Court would halt this disturbing trend and broadly interpret which workers are "similar" to pregnant employees "in their ability or inability to work," the PDA's touchstone for mandating equal treatment.

Young (mostly) delivered. While the Court refused the invitation to deem any accommodation policy preferencing non-pregnant workers a per se violation of the PDA, the Court did announce a new burden-shifting framework for assessing accommodation claims that promised more exacting scrutiny of employers' reasons for disadvantaging pregnancy. It did so by considerably lightening the prima facie burden on plaintiffs to raise an inference of discrimination and by increasing the quantum of proof employers must present to justify their disadvantaging the pregnant worker. With this momentous step forward, the Court endorsed an approach to pregnancy's temporary impairments that presumed the feasibility of the requested accommodation, where an employer already accommodated at least some other groups of workers.

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[3] *See, e.g.*, Reeves v. Swift Transp. Co., 446 F.3d 637, 640, 643 (6th Cir. 2006) (upholding policy reserving accommodations for employees with occupational injuries); Spivey v. Beverly Enterprises, Inc., 196 F.3d 1309, 1312, 1314 (11th Cir. 1999) (same); Urbano v. Continental Airlines, Inc., 138 F.3d 204, 206, 208 (5th Cir. 1998) (same).

[4] For a comprehensive analysis of the pre-*Young* accommodation cases, *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 (2009); *see also* Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567 (2010); Deborah L. Brake & Joanna L. Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67 (2014).

In this Article, we explore the fate of pregnancy accommodation claims after *Young*. In the more than five years since the Court ruled in that case, courts have delivered several noteworthy victories to PDA plaintiffs. Most encouragingly, some courts have applied the "comparator" analysis liberally—in some instances finding the mere existence of a policy favoring nonpregnant workers sufficient to create an inference of discrimination even without evidence of specific individuals who benefited from that policy—and a few have dispensed with the comparator analysis altogether where the record contains traditional evidence of pretext, such as shifting reasons for the employer's accommodation denial. Relatedly, some courts have shown greater willingness to find an employer's express hostility to accommodating pregnancy to constitute direct evidence, obviating the need for employing *Young*'s burden-shifting analysis. Finally, where courts have properly conducted the comparator analysis as laid out in *Young*, they have applied an appropriately low bar as to the number and type of comparators the PDA plaintiff must present in order to satisfy the prima facie showing of discrimination, thereby shifting the burden to the employer to explain why it could not similarly accommodate the plaintiff.

Alarmingly, however, far too many courts have imposed new burdens not approved by *Young*, demanding a degree of "similarity" that the Court did not—both with respect to the comparators' impairments and the type of accommodations sought—that has doomed plaintiffs' claims, even at the pleading stage. Moreover, one of the three post-*Young* appellate rulings to have engaged in comprehensive analysis of a plaintiff's accommodation claim dispensed with *Young*'s analytical framework altogether, to the detriment of the plaintiff. Finally, plaintiffs have not taken full advantage of the disparate impact framework in challenging employer accommodation schemes. Such claims have untapped potential that can avoid altogether the risk of flawed comparator analysis under the disparate treatment theory.

I. THE PDA AND ITS PRE-*YOUNG* APPLICATIONS

Modern pregnancy discrimination law makes no sense without historical context. This section will explore its origins—and the discriminatory landscape that led to its development. Most critically, the comparative right of accommodation that bedeviled courts before *Young*, and that continues to stymie many, arose from the distinct context in which the PDA was passed.

Congress enacted the PDA in 1978 to right one of the Supreme Court's most famously egregious wrongs—its ruling, in 1976's *General Electric Company v. Gilbert*,[5] that an employer's temporary disability benefit plan excluding pregnant workers from coverage did not violate Title VII's ban on discrimination "because of" sex.[6] The PDA provides:

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[5] 429 U.S. 125 (1976).

[6] *Id.* at 125. Among the bases for the Court's ruling was its conclusion that because not *all* female employees became pregnant, the disadvantage to pregnancy was not discrimination "be-

> The terms "because of sex" or "on the basis of sex" [in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and 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. . . .[7]

The PDA was a direct rebuke to *Gilbert* in two respects.[8] First, the PDA's first clause amended Title VII's "definitions" section to make explicit that "sex" includes "pregnancy, childbirth, and related medical conditions" and, thus, that sex discrimination includes pregnancy discrimination.[9] Second, the PDA's next clause goes further, expressly directing that pregnant workers "be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work."[10]

As reflected by the policy at issue in *Gilbert*, the PDA was passed at an historical moment when employers had begun enacting benefit schemes to assure that employees experiencing temporary disability would not face the extreme sanction of job or income loss. As Deborah Widiss explains, "[e]mployer support for medical conditions that do not stem from work—and thus for which employers bear no direct responsibility—became common" in the period leading up to *Gilbert*, a development that started with the provision of employer-based health insurance and grew to encompass "a variety of fringe benefits that shelter employees from income loss otherwise experienced when medical conditions make it impossible to work."[11] Pregnancy's casting as a *sui generis* condition ineligible for such coverage—and the attendant serious economic consequences it imposed on pregnant workers recovering from childbirth or otherwise unable to work during pregnancy—was a chief concern of the PDA's drafters.[12] The Campaign to End

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cause of sex." *Id.* at 135. The Supreme Court had applied similar reasoning to interpret the Equal Protection Clause two years earlier with respect to a California disability benefits scheme, holding that pregnancy-based classifications did not merit the heightened scrutiny applied to sex-based classifications. *See* Geduldig v. Aiello, 417 U.S. 484, 496–97 (1974).

[7] 42 U.S.C. § 2000e(k) (2018).

[8] *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 677–78 (1983) (observing that Congress's "unambiguous[ ]" intent in enacting the PDA was to correct "both the holding and the reasoning of the Court in the *Gilbert* decision").

[9] 42 U.S.C. § 2000e(k) (2018).

[10] *Id.*

[11] 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, 985–86 (2013); *see also* Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as It Approaches Full Term*, 52 IDAHO L. REV. 825, 826 (2016) ("[W]orkers across the country were benefitting from a rising tide of benefits, while pregnancy was being routinely omitted from comprehensive benefit plans, and pregnant workers found themselves singled out for adverse treatment. . . .").

[12] *See, e.g.*, S. Rep. No. 95-331, at 3, 4 (1977) ("Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and

Discrimination Against Pregnant Workers was organized immediately after the *Gilbert* ruling came down and led to passage of the PDA two years later. The legal feminists who ran this campaign and advocated for passage of the PDA viewed *Gilbert* as a serious affront to women's fight for equality, one that would "legitimate a broad swath of employment discrimination against women."[13] Prior to the law's passage, a wide array of employer policies expressly disadvantaged pregnant employees by forcing them off the job due to paternalistic stereotypes about their abilities or the primacy of their roles at home and by penalizing them during those absences.[14] Courts were uneven in finding such policies to violate Title VII's ban on sex discrimination or the Equal Protection Clause.[15]

Although the PDA put an end to rulings that expressly exempted pregnant workers from Title VII's sex discrimination protections, passage of the Americans with Disabilities Act (ADA) in 1990 marked a new development that again left pregnant workers behind. The ADA provides that individuals with a "disability" who are "otherwise qualified" have the right to reasonable accommodations that do not impose an undue hardship on the employer, without regard to how employees with comparable impairments are treated.[16] A disability is defined as "a physical or mental impairment that substantially limits one or more major life activities."[17] Pregnancy and childbirth can have this effect, but early on courts and the EEOC determined that normal pregnancy did not constitute an "impairment" under the ADA.[18] This gap between pregnant workers and others needing on-the-job accom-

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other benefits, as other workers who are disabled from working"; the bill's purpose is to combat "the assumption that women will become pregnant and leave the labor market . . . at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace"); H.R. Rep. No. 95-948, at 4 (1978) ("The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.").

[13] Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 468–73 (2011) (discussing the history surrounding the congressional override of *Gilbert*).

[14] On this history, see Grossman, *supra* note 4, at 595–98.

[15] *See, e.g.*, Nashville Gas Co. v. Satty, 434 U.S. 136 (1977) (forcing pregnant workers to take leave without pay and erased pregnant workers' accrued seniority during such leave); Turner v. Dept. of Employment Security, 423 U.S. 44 (1975) (prohibiting pregnant women from collecting unemployment compensation from twelve weeks prior to due date or six weeks after giving birth because they were irrebuttably presumed unable to work); Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 634–35 (1974) (forcing pregnant teachers to take unpaid leave five months before they were due to give birth, with no guarantee of re-employment); EEOC v. Chrysler Corp., 683 F.2d 146, 147 (6th Cir. 1982) (requiring pregnant women to take leave in the fifth month of pregnancy); Clanton v. Orleans Parish Sch. Bd., 649 F.2d 1084, 1086–87 (5th Cir. 1981) (placing teachers on leave in the end of the sixth month of their pregnancy); Condit v. United Air Lines, Inc., 631 F.2d 1136, 1137 (4th Cir. 1980) (requiring that flight attendants "shall, upon knowledge of pregnancy, discontinue flying").

[16] Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(5)(A) (2018).

[17] *Id.* at § 12102(2)(A).

[18] *See* 29 C.F.R. pt. 1630 app. § 1630.2(h), (j) (2019); *see also* Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 553 (7th Cir. 2011) (abrogated by Young v. United Parcel Service, Inc., 575 U.S. 206 (2015)) (collecting cases where the court has refused to acknowledge pregnancy as a physical impairment).

modation was exacerbated by passage in 2008 of the Americans with Disabilities Act Amendments Act (ADAAA), which restored a broad interpretation of the ADA after a series of narrowing rulings by the Supreme Court.[19] The ADAAA was designed to expand protection for short-term disabilities, including those that manifest in ways very similar to pregnancy—e.g., a twenty-pound lifting restriction—yet, the EEOC continues to take the position that the physical limitations of normal pregnancy are not covered and need not be accommodated under the ADA.[20]

Beginning in the mid-1990s, federal courts began grappling with PDA claims by workers whose pregnancies impeded their ability to work at full capacity. Not surprisingly, such claims typically were brought by women working in physically strenuous or otherwise risky jobs—such as those requiring exposure to toxic chemicals, overtime or nighttime schedules inconsistent with fetal health, or potential for physical altercations—whose ability to keep working safely depended on some modification of job duties.[21] But even "normal" pregnancies could trigger the need for some accommodation: morning sickness, for instance, might impede a pregnant worker's punctuality, or her physician might direct she take certain precautions to avoid complications, such as drinking more water to avoid urinary tract infections or taking additional breaks to interrupt prolonged standing, which can compromise fetal growth.[22]

Denial of such accommodations leaves pregnant workers in a dire catch-22: ignore their health provider's directives and keep working without any accommodation, or stop working altogether. For most workers in the

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[19] These decisions included Sutton v. United States Air Lines, Inc., 527 U.S. 471 (1999) (holding that a worker who can correct for or mitigate an impairment is not "disabled" within the meaning of the ADA and therefore not entitled to its protections), and Toyota Motor Mfg., Kentucky, Inc. v. Williams, 534 U.S. 184 (2002) (narrowing the definition of a "major life activity" that must be affected in order to gain coverage under the ADA to those performed on a daily basis).

[20] *See* 29 C.F.R. pt. 1630 app. § 1630.2(h) (2019) (failing to include pregnancy as an impairment in the ADA). For detailed discussion of the changes, *see* Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 460–66 (2012) (addressing the expanded scope of the ADA). *See also* Widiss, *supra* note 11, at 964–65 (2013).

[21] On the typical conflicts between pregnancy and work and the historical approach to understanding those conflicts, see Grossman, *supra* note 4, at 578–84.

[22] *See generally* Wendy Chavkin, *Walking a Tightrope: Pregnancy, Parenting, and Work*, *in* DOUBLE EXPOSURE: WOMEN'S HEALTH HAZARDS ON THE JOB AND AT HOME 196, 200 (Wendy Chavkin ed., 1984); Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 3–8 (1995) (discussing scientific research about the maternal and fetal hazards in the workplace); Jeannette A. Paul et al., *Work Load and Musculoskeletal Complaints During Pregnancy*, 20 SCANDINAVIAN J. WORK, ENV'T & HEALTH 153, 156–57 (1994) (noting the effect of the hormone relaxin on joint stability during pregnancy); J. A. Nicholls & D. W. Grieve, *Performance of Physical Tasks in Pregnancy*, 35 ERGONOMICS 301, 301, 304 (1992) (finding that pregnant women had more difficulty performing thirty-two of forty-six ordinary tasks); Karen J. Kruger, *Pregnancy & Policing: Are They Compatible? Pushing the Legal Limits on Behalf of Equal Employment Opportunities*, 22 WIS. WOMEN'S L.J. 61, 70–71 (2007) (describing the impact of pregnancy-related physical changes on police officer's job duties); Grossman, *supra* note 4 (comprehensively describing and categorizing potential conflicts between pregnancy and work).

latter category, this predicament results in outright job loss due to absenteeism given that the only federal job protection mandate for workers who are absent due to pregnancy is the Family and Medical Leave Act (FMLA), which lasts just twelve weeks and thus is likely to expire long before the pregnant employee gives birth.[23] And even if the pregnant worker is lucky enough to enjoy an alternative source of job protection during such absence from the job—for instance, under a collective bargaining agreement—such leave is typically unpaid. Coupled with the time needed to recover after giving birth, then, a worker forced to leave work due to lack of accommodation faces months of income loss.

In the years before *Young*, courts typically evaluated such claims according to the three-part burden-shifting framework established by the Supreme Court in *McDonnell Douglas v. Green*.[24] Under that standard, where a plaintiff did not have the benefit of direct evidence of discriminatory animus and needed to rely on circumstantial evidence, she could raise an inference of discrimination by making out a prima facie case that: (1) she belonged to a protected group; (2) she was qualified for the job in question; (3) she suffered an adverse employment action; and (4) the adverse action occurred under circumstances suggestive of bias.[25] The burden of production then shifted to the employer to articulate a "legitimate, non-discriminatory reason" for the adverse action.[26] The plaintiff's ultimate burden, then, was to put forward sufficient evidence that that reason was a pretext for discrimination.[27]

But many courts refused to find that employers' denials of accommodations established viable PDA claims, even where it was undisputed that, but for the plaintiff's pregnancy, she would not have faced adverse action. Most commonly, such courts concluded that the pregnant worker failed to cite circumstances suggestive of discrimination by identifying anyone "similar in their ability or inability to work" who had been treated more favorably,[28] or,

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[23] Approximately two-thirds of the U.S. labor force works for an employer covered by the FMLA, but only a little more than half also meet the service and hours requirements necessary to be eligible for leave themselves. *See* U.S. DEP'T OF LABOR, WAGE & HOUR DIV., FAMILIES AND EMPLOYERS IN A CHANGING ECONOMY, https://www.dol.gov/whd/fmla/survey/summary.htm [https://perma.cc/PY4C-65DM] (reporting on research findings of the Commission on Leave, established when the FMLA was passed in 1993).

[24] 411 U.S. 792 (1973).

[25] *Id.* at 802.

[26] *Id.* at 802–03.

[27] *Id.* at 804–05.

[28] As Judge Posner memorably characterized the PDA's terms in Troupe v. May Department Stores, 20 F.3d 734, 738 (7th Cir. 1994), "Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees." Accordingly, the court upheld summary judgment against the plaintiff, Ms. Troupe, who was fired for excessive tardiness due to pregnancy symptoms, but Judge Posner explained that the outcome would have been different if there were a "Mr. Troupe" who was "as tardy as [plaintiff] was" and "about to take a protracted sick leave" comparable to plaintiff's anticipated maternity leave, but was not fired. *Id.* at 737-78. *See also* Stout v. Baxter Healthcare Corp., 282 F.3d 856, 859-60 (5th Cir. 2002) (affirming summary judgment for employer because plaintiff fired for absenteeism during probationary period while recovering from miscarriage could not show any other probationary employee treated more favorably); Dormeyer v. Comerica Bank-Illinois, 223 F.3d 579, 583

where an employer demonstrably had accommodated other employees, that those favored individuals were sufficiently "similar" to warrant the pregnant worker being treated "the same."[29] These rulings largely concluded that if the employer's reason for accommodating non-pregnant individuals could be characterized as "gender-neutral" or "pregnancy-blind"—such as under a scheme allowing workers with occupational injuries to work "light duty" assignments—the PDA claim would fail. Indeed, given that such policies disadvantaged *all* non-pregnant workers with "off-the-job" injuries and illnesses, not just pregnancy, these courts often characterized the pregnant plaintiff seeking accommodation as impermissibly asking for "special treatment." Some courts even found that the plaintiff could not make out the prima facie case's second requirement of being "qualified" for the job in question—a kind of circular reasoning that, by virtue of needing accommodation in the first place, the pregnant employee was not "qualified" to work without accommodation.[30]

By 2014 then, the scope of the PDA's second clause had become muddied with respect to women's right to "accommodation" of their pregnancy-

(7th Cir. 2000) (citing *Troupe,* upholding summary judgment against bank teller fired for morning sickness-related tardiness and absenteeism; she "was fired because of her absenteeism, not because of her pregnancy"); Garcia v. Women's Hosp. of Texas, 143 F.3d 227, 231 (5th Cir. 1998) (Garcia II) (holding that the plaintiff nurse with lifting restriction failed to make out a prima facie case for facial or pretextual disparate treatment, because she could not show she was treated differently than anyone else who could not satisfy employer's lifting requirement); Armstrong v. Flowers Hosp., Inc., 33 F.3d 1308, 1314 (11th Cir. 1994) (finding pregnant nurse could not satisfy prima facie case based on employer's refusal to excuse her from treating HIV-positive patient, where employer's policy of requiring nurses to treat all patients had "been applied in exactly the same way to pregnant and non-pregnant employees"). *Cf.* Byrd v. Lakeshore Hosp., 30 F.3d 1380, 1383 (11th Cir. 1994) (reversing summary judgment for employer where plaintiff's pregnancy-related absences fell within allotted time permissible under generally-applicable sick leave policy).

[29] *Compare* Ensley-Gaines v. Runyon, 100 F. 3d 1220, 1226 (6th Cir. 1996) (reversing summary judgment for employer, finding favorable treatment of employees with on-the-job injuries sufficient to satisfy fourth prong of prima facie case) *with* Serednyj v. Beverly Healthcare, LLC, 656 F. 3d 540, 547, 552 (7th Cir. 2011) (affirming summary judgment where policy accommodated only workers injured on the job or workers qualifying for accommodation under the ADA; plaintiff could not make out fourth prong); Reeves v. Swift Transp. Co., 446 F. 3d 637, 640, 643 (6th Cir. 2006) (affirming summary judgment; reserving accommodations for employees with occupational injuries showed no intent to discriminate); Spivey v. Beverly Enterprises, Inc., 196 F. 3d 1309, 1312, 1314 (11th Cir. 1999) (affirming summary judgment where on-the-job injuries accommodated; plaintiff neither was "qualified" nor could show she was treated less well than co-workers with impairments incurred off-the-job); Urbano v. Continental Airlines, Inc., 138 F. 3d 204, 206, 208 (5th Cir. 1998) (same); Guarino v. Potter, No. 03-31139, 2004 WL 1448154, *2–3 (5th Cir. June 28, 2004) (holding that the defendant's motion for summary judgment was properly granted because plaintiff postal worker, who challenged her exclusion from the employer's "limited duty" policy afforded to workers with occupational injuries, failed to establish a prima facie case of discrimination); Horton v. American Railcar Industries, Inc., 214 F. Supp. 2d 921, 923, 931–32 (E.D. Ark. 2002) (holding that although the plaintiff proved that she was pregnant and denied a light duty work assignment, she failed the other two elements of a prima facie case under the PDA).

[30] *See, e.g., Spivey,* 196 F.3d at 1312 (deeming the plaintiff unqualified to work as a nurse's assistant because of the lifting restriction for which she sought an accommodation); *Urbano,* 138 F.3d at 206 (same, as to airline ticketing sales agent).

related medical needs. On the one hand, the Supreme Court had generously interpreted the PDA to permit pregnancy-related disability to be accommodated even if other types of temporary disability were not.[31] But on the other, lower federal courts had permitted employers effectively to do the opposite by upholding accommodation policies that left pregnant workers behind those with comparable disabilities.[32] Recognizing the "lower-court uncertainty about interpretation of the [PDA]" in the accommodations context, the Supreme Court granted certiorari in *Young v. United Parcel Service, Inc.*[33] All of the cases cited by the Court as giving rise to this "uncertainty" concerned employer policies that, in whole or in part, granted more favorable treatment to workers needing accommodations due to on-the-job injuries than to workers needing accommodation because of pregnancy.[34] So, too, did the *Young* case itself.[35]

II. *YOUNG V. UNITED PARCEL SERVICE, INC.* AND THE NEW BURDEN-SHIFTING FRAMEWORK FOR PDA ACCOMMODATION CASES

The Supreme Court in *Young* emphatically rejected the appellate trend of reflexively approving employer refusals to accommodate pregnancy. By putting forward an alternative burden-shifting framework—including a relaxed prima facie threshold for plaintiffs and an enhanced evidentiary requirement for employers—the Court flipped the inquiry in PDA accommodation cases. Rather than demand that pregnant workers justify why they deserved the same accommodations as non-pregnant peers, *Young* asked the employer to answer a simple question: why *didn't* they?

The Supreme Court's ruling in *Young* arose out of a lawsuit filed by Peggy Young, a delivery driver for United Parcel Service (UPS).[36] Although her pregnancy was uncomplicated, and although the packages she delivered usually were small and light, her health provider directed her to avoid the few occasions when her job required heavy lifting. But UPS refused to permit her to continue working unless she could lift the amount in her job description.[37] Young requested a light duty assignment, which UPS made available by formal policy to three large groups of employees—those injured on the job, those eligible for an accommodation under the ADA, and those

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

[32] *See supra* notes 19–30 and accompanying text.

[33] 575 U.S. at 218.

[34] *Id.* (collecting cases).

[35] *See* Young v. United Parcel Serv., Inc., 707 F.3d 437 (4th Cir. 2013), *opinion amended and superseded*, 784 F.3d 192 (4th Cir. 2015) (denying light duty to pregnant delivery driver with lifting restriction, while granting it to workers with occupational injuries, as well as those entitled to accommodation under the Americans with Disabilities Act and those whose commercial drivers' licenses had been revoked).

[36] *Young*, 575 U.S. at 211.

[37] *Id.*

who had lost their commercial driver's license due to illness, injury, or even non-medical reasons, like a DUI conviction.[38] Notwithstanding the widespread availability of light duty assignments, Young's request was denied, forcing her to leave her job until after she gave birth and lose her health insurance.[39]

Young's case revolved around the proper interpretation of the PDA's second clause, which gives pregnant women the right to be treated the same as others who are "similar in their ability or inability to work," but "not so affected" by pregnancy.[40] Early on in the life of the PDA, the Supreme Court held that the statute imposes a "floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[41] In effect, this means that employers can offer (or states can require employers to offer) accommodations that correspond to the actual disabilities of pregnancy, childbirth, or related medical conditions even if similar accommodations are not offered to those temporarily disabled from another cause. But where is the floor? That was the question raised by Young's lawsuit. Young argued that UPS's willingness to accommodate so many other workers, but not pregnant women, violated the PDA.[42]

UPS argued that it was free to deny accommodations to pregnant workers as long as it did not do so because of the pregnancy per se.[43] Young argued that she was entitled to any accommodation that her employer provided (or would have provided) to another worker with similar limitations from another cause.[44] The Supreme Court rejected both interpretations of the second clause offered by the parties. At core, it decided, this was a dispute over the proper comparison group under a statute that expressly requires comparisons between pregnant and non-pregnant workers. Justice Breyer, writing for the majority, rejected Young's argument that she was entitled to "most favored nation" status—that is, that irrespective of how many non-pregnant workers might receive accommodations, pregnant workers should receive that same "favored" status, as opposed to joining the ranks of the "disfavored."[45] He deemed this interpretation too broad. But he deemed UPS's interpretation too narrow and inconsistent with the text and

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[38] *Id.*

[39] *Id.*

[40] 42 U.S.C. § 2000e(k) (2018).

[41] California Fed. Sav. & Loan Ass'n v. Guerra, 479 U.S. 272, 285 (1987) (upholding California law requiring employers to provide up to four months unpaid leave for pregnancy-or childbirth-related disability against preemption challenge).

[42] *Young*, 575 U.S. at 211-12.

[43] *Id.* at 1349. The Fourth Circuit adopted this approach in Young's case. *See* Young v. United Parcel Serv., Inc., 707 F.3d 437, 446–47 (4th Cir. 2013), *opinion amended and superseded*, 784 F.3d 192 (4th Cir. 2015).

[44] *Young*, 575 U.S. at 220.

[45] *Id.* at 222.

history of PDA, which made clear that employers cannot maintain a policy that broadly provides benefits but denies them to pregnant women.[46]

The majority in *Young* crafted an entirely new approach to the second clause of the PDA that, in its view, "minimizes the problems [of the parties' interpretations], responds directly to *Gilbert*, and is consistent with long-standing interpretations of Title VII."[47] This approach incorporates the *McDonnell-Douglas* test, which is used to smoke out evidence of unadmitted, but intentional discrimination by employers.[48] Under so-called pretext analysis, a plaintiff must first satisfy the prima facie case by showing she was treated differently from someone similarly situated but outside the protected class.[49] Before Young's case reached the Supreme Court, this was a roadblock. The district court held that she failed to make out a prima facie case because none of the proposed comparators were "similarly situated," which the court interpreted to mean in need of light duty but also ineligible under the company's policy.[50] The policy, oddly, was offered in its own defense—Young was not similarly situated to anyone covered by the policy because she was not covered by the policy.

The Supreme Court corrected this circularity by putting forward a modified prima facie case applicable to PDA failure-to-accommodate claims. Now, a plaintiff can raise an inference of discrimination that shifts the evidentiary burden to the employer 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.'"[51] Moreover, the justices gave pointers to lower courts in interpreting this new standard. The prima facie case, the majority wrote, is neither "onerous" nor "burdensome."[52] It is "'not intended to be an inflexible rule.'"[53] Moreover, it does not require the plaintiff to "show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways."[54] These caveats pointedly distance *Young* from the negative appellate and district court decisions that precede it. Those rulings overwhelmingly had deferred to employers'

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[46] *Id.* at 221-22.

[47] *Id.* at 228.

[48] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[49] *Young*, 575 U.S. at 206.

[50] Young v. United Parcel Serv., Inc., No. DKC 08-3586, 2011 WL 665321, *13–14 (D. Md. Feb. 14, 2011).

[51] *Young*, 575 U.S. at 229. Among the modified prima facie case's benefits is the elimination of the *McDonnell Douglas* test's second prong—*i.e.*, the plaintiff was "qualified"—which some pre-*Young* courts had found could not be satisfied by a pregnant worker needing accommodation. *See, e.g.*, *Spivey*, 196 F.3d at 1312; *Urbano*, 138 F.3d at 206. Research has revealed just one post-*Young* case in which an employer sought to re-insert the "qualified" component into the prima facie test, but that effort was summarily rejected by the court. *See* Townsend v. Town of Brusly, No. 3:18-554-SDD-EWD, 2019 WL 5866584, at *7 (M.D. La. Nov. 8, 2019)

[52] *Young*, 575 U.S. at 228.

[53] *Id.*

[54] *Id.* at 228.

distinctions among employees in awarding the benefit of accommodation, notwithstanding the PDA's demand that pregnant workers be entitled to such benefits, too.[55]

This relatively simple course correction would have changed the outcome in many past accommodation cases, but the Supreme Court did not stop there, going on to tweak other aspects of the proof structure so as to enhance employers' obligation to justify refusals to accommodate pregnancy. Just as under the *McDonnell Douglas* framework, after establishment of a prima facie case, the burden of production shifts to the employer, who must articulate a legitimate, nondiscriminatory reason for its differential treatment—but unlike other cases, the *Young* decision provides that for a PDA claim, "consistent with the Act's basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates."[56] Indeed, the Court observed of its precedent rebuked by Congress, the "employer in *Gilbert* could in all likelihood have made such a claim," and many restrictive, unfair policies could be justified in those exact terms.[57]

Rather, *Young* directs that if the employer articulates a legitimate, nondiscriminatory reason for denying accommodation to the plaintiff, the plaintiff still has the opportunity to reach a jury by "providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not *sufficiently strong* to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination."[58] By way of example, the Court suggests that such inference could be drawn when an "employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[59]

This language of benefits and burdens expands on traditional pretext analysis by forcing employers to reveal why they chose to exclude pregnant women from an otherwise available accommodation. "[W]hy," asks the Court, "when the employer accommodated so many, could it not accommodate pregnant women as well?"[60]

III. The Post-*Young* Landscape

In the five years since *Young*, courts considering PDA accommodation claims have largely stopped reflexively approving employers' stated justifica-

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[55] *See supra* note 29.
[56] *Young*, 575 U.S. at 208.
[57] *Id.*
[58] *Id.* (emphasis added).
[59] *Id.*
[60] *Id.* at 231.

tions for excluding pregnant workers from the accommodations extended to other categories of employees.[61] Indeed, several decisions have conformed to *Young* in their liberal reading of the burden, at the prima facie stage, of identifying others "similar in their ability or inability to work" whom the employer favored.[62] And the *Young* accommodation analysis also has been found to apply with equal force to claims brought by breastfeeding employees denied the ability to pump at work.[63]

But while the *Young*–modified prima facie analysis has resulted in more plaintiff-friendly rulings, courts continue to impose burdens on PDA plaintiffs not intended by *Young*. Especially concerning is the degree to which so many courts continue not only to scrutinize comparator evidence, but also to demand a level of specificity that is not warranted by *Young* and is, in fact, contrary to its directives. This trend has resulted in plaintiffs' claims foundering even at the initial pleading stage, when the employee does not yet have the benefit of discovery—thereby insulating employers from having to justify the disfavored treatment of the pregnant worker, as *Young* clearly intended.

Finally, virtually no post-*Young* courts have engaged in the ultimate pretext analysis envisioned by the Supreme Court—that is, can the employer put forward a "sufficiently strong" reason for denying accommodation that justifies the extreme burden on the pregnant worker imposed by that denial? Rather, research reveals only a single instance in which a court has examined whether an employer's rationale for favoring the plaintiff's comparators is "sufficiently strong."[64] In sum, according to a troubling recent report by the advocacy group A Better Balance, more than two-thirds of relevant court rulings after the *Young* decision have resulted in adverse rulings against pregnant workers, including those denied accommodations.[65]

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[61] *But see* Durham v. Rural/Metro Corp., No. 4:16-cv-01604, 2018 WL 4896346 (N.D. Ala. Oct. 9, 2018), *rev'd*, 955 F.3d 1279 (11th Cir. 2020); Adduci v. Federal Express Corp., 298 F. Supp. 3d 1153, 1162-63 (W.D. Tenn. 2018) (after acknowledging employees with work-related injuries had access to distinct modified duty program, finding plaintiff package handler with lifting restriction could not satisfy prima facie case because she could not identify specific employees with lifting restrictions who had benefited from that policy); Vidovic v. City of Tampa, No: 8:16-cv-714-T-17AAS, 2017 WL 10294807, at *19 (M.D. Fla. Oct. 12, 2017) (dismissing PDA claim over denial of light duty because plaintiff could not show the schedule she sought had been granted to any other firefighter on light duty for non-job-related injury or illness; court assumed without discussion that plaintiff not entitled to schedule afforded firefighters on light duty due to occupational injury or illness). *Cf.* Jones v. Brennan, No. 16-CV-49-CVE-FHM, 2017 WL 5586373, at *5-6 & n.8 (N.D. Okla. Nov. 20, 2017) (granting summary judgment because plaintiff received some accommodation and therefore could not satisfy prima facie case, but approving two-tiered modified duty scheme under which workers with occupational injuries enjoyed wider range of potential accommodations than those with impairments not incurred on the job).

[62] See cases discussed at Section III.A, *infra*.

[63] *See, e.g.*, Hicks v. City of Tuscaloosa, 870 F.3d 1253 (11th Cir. 2017).

[64] *See* Legg v. Ulster Cty., 820 F.3d 67, 74 (2d Cir. 2016).

[65] DINA BAKST, ELIZABETH GEDMARK, & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE: IT IS TIME FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf [https://perma.cc/76XW-BZBF].

In this Section, we explain why such rulings are erroneous under *Young* and argue for courts to adopt an approach that focuses on the totality of the evidence—which may provide direct evidence or otherwise obviate the need for comparator evidence altogether. In the alternative, courts should adhere to *Young*'s liberal prima facie analysis by finding that employer *policies* that extend accommodations to non-pregnant workers but not to pregnant workers raise an inference of discrimination, rather than demand specific examples of *individuals who have benefited* from those policies, and then proceed to the ultimate, "sufficiently strong" pretext analysis. This approach appropriately focuses the inquiry on the employer's decision to favor nonpregnant workers—i.e., why *couldn't* it accommodate the pregnant worker, too?—rather than on whether the plaintiff has shown she was sufficiently *dis*favored to trigger the PDA's protection.

*A. Positive Post-*Young *Precedent: Comparators Are Only Part of the Picture*

As summarized in Part I, above, employers often provide "light duty" assignments to workers with occupational injuries—usually as a means to minimize their liability for workers' compensation benefits—and, prior to *Young*, such policies generally were approved as consistent with the PDA. That trend generally has ended since *Young*; indeed, the mere *existence* of such a policy has been found sufficient to satisfy the fourth prong of the prima facie case, i.e., that "the employer did accommodate others 'similar in their ability or inability to work.'"[66]

In several respects, the Second Circuit's opinion in *Legg v. Ulster County* is a model of post-*Young* analysis.[67] *Legg* concerned Anne Marie Legg, a veteran corrections officer in the Ulster County Jail in upstate New

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[66] *See Durham*, 955 F.3d at 1286-87 (policy of automatically giving light duty to EMTs injured on the job while denying it to pregnant workers satisfied fourth prong of prima facie case); Legg, 820 F.3d at 74 (citing *Young*, finding policy of accommodating jail guards injured on the job but not pregnant guards could support finding of intent if inadequately justified); Elease S., Complainant, EEOC DOC 0120140731, 2017 WL 6941010, at *5 (Dec. 27, 2017) (finding that a pregnant mail carrier at risk of miscarriage satisfied fourth prong of prima facie case where she presented evidence that her employer had a policy of accommodating letter carriers who had been injured on the job; "The existence of such a distinction, work-related versus nonwork-related injury, does not absolve the [employer] of liability under the *Young* framework."). The U.S. Department of Labor's (DOL) regulation prohibiting pregnancy discrimination by federal contractors similarly approves denial-of accommodation claims based on disparate policies without evidence that specific individuals benefited from that policy, if such differential treatment cannot be sufficiently justified. U.S. Dep't of Labor, 41 C.F.R. § 60-20.5(c)(ii) (2020) (a federal contractor discriminates on the basis of pregnancy if it "provides, or is required by its policy . . . to provide, [accommodations] to other employees whose abilities or inabilities to perform their job duties are similarly affected" but does not provide the same to pregnant workers and "the denial of accommodations imposes a significant burden on employees affected by pregnancy, childbirth, or related medical conditions and the contractor's asserted reasons for denying accommodations to such employees do not justify that burden") (emphasis added).

[67] 820 F.3d 67 (2d Cir. 2016).

York. After her pregnancy was diagnosed as high risk in 2008, she sought temporary reassignment to a "light duty" job that would not put her in direct contact with inmates.[68] The jail denied her request in reliance on a policy that reserved such jobs for guards with occupational injuries or illnesses.[69] Unable to absorb the financial cost of taking a leave of absence, Legg disregarded her doctor's directives and continued working. When she was seven months pregnant, she came upon an inmate fight and was bumped by one of the men as he ran past her. Distressed by this near-miss with physical harm, Legg took a leave of absence for the remainder of her pregnancy.[70]

At trial, roughly a year before *Young*, the district court granted the County's motion for directed verdict at the close of Legg's evidence.[71] It found that because the County applied the light duty policy in a neutral fashion, reserving such jobs for officers with on-the-job injuries did not run afoul of the PDA.[72] The Second Circuit, ruling after *Young* was issued, reversed.

The court began by finding that the existence of the light duty policy itself satisfied the fourth prong of the prima facie case, because "[t]hese facts are enough, if left unexplained, for a reasonable jury to conclude that it is more likely than not that the policy was motivated by a discriminatory intent."[73] After accepting the County's stated reason for its disparate treatment—namely, New York's workers' compensation law that required municipalities to pay full salaries to employees with occupational injuries—it further found that Legg had provided sufficient evidence of pretext to warrant a trial.

First, the court noted that the County had provided shifting reasons for denying Legg a light duty job, variously citing an interest in encouraging employees to save their sick time to cover absences caused by conditions other than occupational injuries, concern for Legg's safety and the safety of her fetus, and cost.[74] These inconsistencies, it found, would permit a jury to

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[68] *Legg*, 820 F.3d at 71, 76.
[69] *Id.*
[70] *Id.*
[71] *Id.*
[72] *Id.*
[73] *Id.* at 74. This conclusion is entirely consistent with *Young*, which contemplated that an employer's policy would be the touchstone for the comparison inquiry—that is, how would it treat the plaintiff if her impairment stemmed not from pregnancy, but from some other condition? – rather than head counting among the pregnant worker's colleagues to identify specific individuals who had benefited from that policy. *See Young*, 575 U.S. at 210 ("[T]he [Pregnancy Discrimination] Act requires courts to consider the extent to which *an employer's policy* treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work.") (emphasis added); *id.* ("Ultimately the court must determine whether the nature of *the employer's policy* and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination.") (emphasis added); *see also* cases cited at n.66, *infra*.
[74] *Legg*, 820 F.3d at 75.

conclude that the County's "current explanation," the workers' compensation law, was pretextual.[75]

Second, the court engaged in the balancing of interests directed by *Young* and determined that compliance with the workers' compensation law was not a "sufficiently strong" reason to justify the extreme burden the limited light duty policy imposed. For one thing, the court observed, "nothing in the [workers' compensation] statute [demanding accommodation of workers with occupational injuries] prevented [the County] from offering the same accommodations to pregnant employees."[76] The court held that the County's cost justification did not pass muster, at least before Legg and her attorneys had had the opportunity to cross examine the County's witnesses, given that "*Young* expressly cautioned . . . that cost alone is generally not a legitimate basis for refusing to accommodate pregnant employees on the same basis as those similar in their ability or inability to work."[77]

The court contrasted these flimsy reasons with the "burden" to Legg of being denied light duty, and found a sufficient jury question as to pretext: "A reasonable jury could conclude that the defendants imposed a significant burden on pregnant employees because, like UPS [in *Young*], the County categorically denied light duty accommodations to pregnant women."[78] For all of these reasons, the court concluded, a jury should hear Legg's claim.[79]

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[75] *Id.* *Young* had made explicit that such alternative methods for raising an inference of discrimination and proving pretext remain viable alternatives to comparator evidence. *See Young*, 575 U.S. at 230 (leaving undisturbed the "longstanding rule that a plaintiff can use circumstantial proof" of an employer's discriminatory animus).

[76] *Legg*, 820 F.3d at 77.

[77] *Id.* (citing *Young*, 575 U.S. at 229); *accord Townsend*, 2019 WL 5866584, at *9.

[78] *Legg*, 820 F.3d at 75. The court wisely rejected the County's insistence that Legg's disadvantage should be measured as against the treatment afforded *all* correctional officers. *Id.* at 76. ("The defendants perplexingly suggest that these figures show that pregnant employees were not significantly burdened because 'only one of 176 [correctional officers] were affected by this policy.' But under *Young*, the focus is on how many pregnant employees were denied accommodations in relation to the total number of pregnant employees, not how many were denied accommodations in relation to *all* employees, pregnant or not.") (citation omitted). The court further refused to credit the County's contention that its accommodation denial did not impose a "significant burden" on Legg because she continued to perform her correctional officer duties for several more months–recognizing that where a pregnant worker decides to work without accommodation because she cannot afford to stop working altogether, the burden of the accommodation denial is not magically vitiated. *Id.* Indeed, the court recognized that having to stay on the job in contravention of her health provider's directive was itself a "significant burden." *Id.* ("[W]e think that when an accommodation policy excludes pregnant employees from coverage and thereby places them at risk of violent confrontations, a reasonable jury could find that the denial itself is evidence of a significant burden.").

[79] In August 2016, a jury rejected Legg's disparate treatment claim. (The court reserved for its determination the disparate impact claim; as discussed further *infra* at Part III.D., it later issued judgment for the County. Legg v. Ulster County, 1:09-CV-550 (FJS/RFT), 2017 WL 3207754 (N.D.N.Y. July 27, 2017), *appeal pending*, No. 17-2861 (2d Cir.).) While the reason or reasons for a jury's decision never can be fully known, it must be noted that the instructions the *Legg* jury received significantly bungled the *Young* liability standard by grafting a comparator requirement onto the "significant burden" analysis: Legg had to show, the court directed, that "the light-duty policy places a significant burden on pregnant women as opposed to all other employees who are similar in their ability or inability to work and were not granted

The Eleventh Circuit's recent ruling in *Durham v. Rural/Metro Corporation* similarly confirmed that *Young*'s "new, modified" prima facie standard sets a low bar for plaintiffs.[80] Michelle Durham, an Alabama Emergency Medical Technician ("EMT") whose doctor told her not to lift more than 50 pounds for the duration of her pregnancy, requested an accommodation because she was regularly required to lift one hundred pounds. Although the company had a policy of providing "light duty" work to EMTs injured on the job and also of attempting to place EMTs with disabling physical limitations incurred off the job in alternative positions, it refused to reassign Durham. Instead, it forced her onto unpaid leave, several months before her due date.

The district court granted summary judgment to Rural/Metro, based on an egregious misreading of *Young*.[81] Among other errors, it relied on pre-*Young* precedent to conclude that EMTs with on-the-job injuries were *per se* not "similar in the ability or inability to work" to pregnant EMTs for purposes of PDA comparison.[82] The Eleventh Circuit reversed, and its opinion offers some of the broadest language to date in applying *Young*'s prima facie test. After finding that Durham had satisfied the first three prima facie elements, it reiterated that, by the PDA's express terms, the "single criterion" for evaluating comparators in a failure-to-accommodate case—in contrast to the "more general" comparator analysis in other Title VII disparate treatment claims requiring a comparator who is "similarly situated"—is "one's ability to do the job."[83] Under that standard, the court explained, the appropriate universe of comparators for Durham would be anyone unable to satisfy the lifting requirements of an EMT.[84]

The court then concluded that Durham had put forward sufficient evidence that Rural/Metro had accommodated such individuals, including four nonpregnant EMTs who received light-duty assignments because of lifting restrictions. Moreover, the company had a policy that "left open the possibility that [the company] accommodated some of those disabled off the job, including those with resulting lifting restrictions."[85] This conclusion is perhaps the most significant of all, given that Durham had not identified specific individuals who benefited from this policy—but the policy alone was deemed sufficient to show others "were accommodated." On these grounds, the court ruled that Durham had satisfied the fourth prong of the post-*Young* prima facie test.[86] It vacated the grant of summary judgment and re-

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a light-duty accommodation." Legg v. Ulster Cty., No. 1:09-CV-550 (FJS/RFT) (N.D.N.Y. Aug. 30, 2016), Jury Instructions, ECF No. 185, at 10.

[80] 955 F.3d 1279, 1285 (11th Cir. 2020) (*per curiam*).

[81] Durham v. Rural/Metro Corp., No. 4:16-cv-01604-ACA, 2018 WL 4896346 (N.D. Ala. Oct. 9, 2018).

[82] *Id.* at *3-4. .

[83] 955 F.3d at 1286 (quoting Lewis v. City of Union City, Ga., 918 F.3d 1213, 1228 n.14 (11th Cir. 2019) (en banc)).

[84] 955 F.3d at 1286.

[85] *Id.* (citing *Legg*, 820 F.3d at 74).

[86] 955 F.3d at 1286-87.

manded the case for consideration of whether Rural/Metro's denial of Durham's request for accommodation was pretextual.[87]

A promising handful of district court rulings have, like *Legg* and *Durham*, applied appropriately expansive standards in deciding what circumstances raise sufficient inference of discrimination to survive motions to dismiss or motions for summary judgment.

In the first instance, it is worth noting that other courts have joined *Legg* in holding that traditional circumstantial evidence—such as hostile statements by decisionmakers or an employer's failure to comply with its own policies—remains equally probative as comparator evidence in raising an inference of discrimination. Indeed, several district courts have issued rulings for plaintiffs under such circumstances, at both the motion to dismiss and summary judgment stages, even where the record contained *no* comparator evidence.[88] As the District Court for the District of Columbia explained

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[87] *Id.* at 1287. A concurring opinion by Judge Danny Boggs, sitting by designation from the Sixth Circuit, agreed with the majority's conclusions about the prima facie standard, but proposed an improperly cabined pretext analysis. He argued that even though EMTs with on-the-job injuries were sufficiently "similar" to Durham for purposes of the prima facie test, Rural/Metro should be able to invoke its uniform application of such a policy – that is, to show that Durham was not treated any differently from EMTs with *off*-the-job injures – to defeat pretext. *Id.* at 1289 (Boggs, J., concurring). Such a standard, however, would merely move from the prima facie stage to the pretext stage the sort of per se approval of employer policies favoring workers with on-the-job injuries that *Young* rejected.

[88] *See, e.g.*, *Durham*, 955 F.3d at 1287 (observing that "one way" to show pretext is by showing that the accommodation denial imposes a heavy burden on the pregnant worker and cannot be justified); Bonner-Gibson v. Genesis Eng'g Grp., No. 3:18-cv-298, 2019 WL 3818872, at *9–10 (M.D. Tenn. Aug. 14, 2019) (citing *Young*, denying summary judgment on PDA claim where engineer, fired for pregnancy-related absences, put forward circumstantial evidence that (1) supervisor expressed hostility to pregnancy doubt about plaintiff's job commitment; (2) supervisor created artificial deadlines that set plaintiff up to fail; and (3) HR director misrepresented to management Plaintiff's willingness to return to work post-childbirth; noting that, although plaintiff also put forward comparator evidence, "[i]t is unclear to the court why such a showing would be strictly necessary in a case, such as this one, where the [causation] requirement can be met with other evidence." (quoting Huffman v. Speedway LLC, 21 F. Supp. 3d 872, 877 (E.D. Mich. 2014)); Brown v. Aria Health, No. 17-1827, 2019 WL 1745653, at *8 (E.D. Pa. Apr. 17, 2019) (denying employer's motion for summary judgment where emergency room nurse presented evidence that available positions existed that would not have exposed her to hazards, and further, that she was only offered 30-day leave as accommodation where employer had policy of granting longer leaves); Boyne v. Town & Country Pediatrics & Family Med., No. 3:15-CV-1455 (MPS), 2017 WL 507212, at *4 (D. Conn. Feb. 7, 2017) (denying motion to dismiss where plaintiff, a medical assistant, alleged her employer repeatedly failed to accommodate her need to be excused from bending and lifting, refused to permit her to work at all because it did not want to "risk it," made hostile statements about other employee pregnancies, filled plaintiff's position while she was on leave, and ultimately terminated her); Allen-Brown v. District of Columbia, 174 F. Supp. 3d 463, 480 (D.D.C. 2016) (denying employer's motion for summary judgment on patrol officer's PDA claim for failure to accommodate lactation); *see also* Everett v. Grady Memorial Hosp. Corp., 703 Fed. Appx. 938, 948 (11th Cir. 2017) (upholding summary judgment in favor of defendant in denying hospital employee's light duty request, but noting that pretext can be shown without comparator evidence, where a plaintiff can "'demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence'") (citation omitted); Lawson v. City of Pleasant Grove, No. 2:14-cv-536-JEO, 2016 WL 2338560, at *11 (N.D. Ala. Feb. 16, 2016) (and cases cited therein) (finding plaintiff

in *Allen-Brown v. D.C.*,[89] when considering the PDA claim brought by a patrol officer whose need to pump on the job was not accommodated,

> [U]nlike in the typical Title VII case, [a plaintiff alleging a PDA failure-to-accommodate claim can create a triable question of fact on pretext] in one of two ways. She can produce "traditional" evidence that the reason given by the MPD was a pretext for discrimination—that is, evidence that the MPD is "making up or lying about the underlying facts," that its proffered reasons "have changed over time," or the like. Or, following *Young*, she could produce "evidence that [the MPD's] policies impose a significant burden on pregnant workers, and that [its] 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden . . . — give rise to an inference of intentional discrimination." *Young*, 135 S.Ct. at 1354.[90]

The *Allen-Brown* court went on to conclude that the plaintiff had put forward sufficient "traditional" evidence to create a triable question of pretext,[91] based on the employer's inconsistent explanation for denying her accommodation, its conflicting descriptions of its own policies, and inconclusive evidence as to who made the decision to deny the requested accommodation.[92]

Where it has been necessary for courts to rely on comparator evidence in assessing failure-to-accommodate claims, a number of them have followed *Young*'s directives, imposing a low burden of production on plaintiffs. When presented with motions to dismiss, these courts have found it sufficient where a plaintiff alleged (a) she was denied accommodation and (b) the employer accommodated non-pregnant employees, even without naming or

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police officer denied light duty had insufficient non-comparator evidence, such as evidence of bias by supervisors, to create question of fact for trial, but approving such alternative route to proving pretext).

[89] 174 F. Supp. 3d 463 (D.D.C. 2016).

[90] *Id.* at 475 (internal citations omitted).

[91] The court assumed, without engaging in full discussion, that Allen-Brown had satisfied the prima facie test. *Id.* at 474.

[92] *Id.* at 475. Relatedly, courts have recognized that *Young* did not disturb the rule that direct evidence of discrimination obviates the need for the burden-shifting framework altogether. *See, e.g.*, *Townsend*, 2019 WL 5866584, at *5 (finding that employer town mayor's statement to pregnant police officer that "if she wanted to keep her job, she should not stay pregnant" was "alone . . . sufficient to constitute direct evidence of discrimination"); Thomas v. Fla. Parishes Juvenile Justice Comm'n, No. 18-2921, 2019 WL 118011, at *6 (E.D. La. Jan. 7, 2019) (denying employer's motion for summary judgment where it had refused plaintiff juvenile detention officer's request to be excused from a physical fitness test; accepting as direct evidence of intent to discriminate the affidavit of an agent of defendant who admitted he would "let other non-pregnant employees with physical limitations be excused from the [test] with an appropriate doctor's note"); *see also* Martin v. Winn-Dixie, Inc. 132 F. Supp. 3d 794, 818 (M.D. La. 2015) (supervisor statement that plaintiff "couldn't do [her job duties] and be pregnant" was direct evidence of discrimination).

otherwise identifying those individuals.[93] Where motions for summary judgment are at issue, such courts have applied a low bar to the "similarity" in the "ability or inability to work" test. These rulings have found employees with work-related injuries or illnesses,[94] employees with non-work-related injuries (including a back injury from a bar fight),[95] and employees with disabilities covered under the ADA[96] to be proper comparators for pregnant workers.[97] In these more permissive cases, courts have also found a relatively low number of comparators to suffice.[98]

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[93] *See, e.g.*, Taylor v. C&B Piping, Inc., No. 2:14-cv-1828-MHH, 2017 WL 1047573, at *4 (N.D. Ala. Mar. 20, 2017) (denying an employer's motion to dismiss PDA claim of accounting clerk with lifting restriction denied accommodation, even though she did not plead "when [the employer] provided other alleged accommodations, how the requests were made, what medical conditions or impairments required them, the identity of [the plaintiff's] comparators, how they were similarly situated, or how they were treated more favorably").

[94] *See Durham*, 955 F.3d at 1286; *Legg*, 820 F.3d at 74; Bray v. Town of Wake Forest, No. 5:14-CV-276, 2015 WL 1534515, at *6 (E.D.N.C. Apr. 6, 2015); *Elease S.*, 2017 WL 6941010, at *5.

[95] *See Townsend*, 2019 WL 5866584, at *8 (denying summary judgment where defendant police department had given clerical work to officer recovering from shoulder surgery and "light duty tasks" to another officer recovering from eye surgery); *Martin*, 132 F. Supp. 3d at 820–21; *Allen-Brown*, 174 F. Supp. 3d at 477 (denying summary judgment on police officer's claim for failure to accommodate need to express breast milk, crediting evidence that eleven officers with non-occupational injuries or illnesses were granted temporary reassignment she had sought); *see also Hicks*, 870 F.3d at 1261 (upholding jury verdict that lactating officer was constructively discharged when denied desk job so that she would not have to wear a constricting bulletproof vest, where evidence was that an undefined number of non-lactating officers with unspecified "temporary injuries" had been afforded desk jobs).

[96] *See, e.g.*, *Durham*, 955 F.3d at 1286; Gonzales v. Marriott Int'l, Inc., 142 F. Supp. 3d 961, 978 (C.D. Cal. 2015). *But see* LaCount v. South Lewis SH Opco, No. 16-CV-545-CVE-TLW, 2017 WL 1826696, at *5 (N.D. Okla. May 5, 2017), *reconsid. denied*, 2017 WL 2821814 (June 29, 2017) (asserting that employees needing accommodation due to ADA-qualifying disabilities were not appropriate comparators). Practitioners are advised to remind courts that the justices in *Young* had the opportunity to declare ADA-qualifying co-workers to be *per se* incomparable for purposes of PDA accommodation claims and did not do so. Moreover, the DOL regulation governing accommodation by federal contractor expressly recognizes that a non-pregnant individual accommodated pursuant to a separate statutory scheme is an appropriate comparator to a pregnant worker. 41 C.F.R. § 60-20.5(c)(ii) (2020) (a federal contractor discriminates on the basis of pregnancy if it "provides, or is required . . . *by other relevant laws* to provide, [accommodations] to other employees whose abilities or inabilities to perform their job duties are similarly affected" but does not provide the same to pregnant workers, and does not adequately justify the differential treatment). "

[97] In a recent decision denying summary judgment, the Middle District of Louisiana also refused to credit an employer's justifying its refusal to grant light duty to a pregnant police officer while accommodating an Assistant Chief recovering from eye surgery by reference to the Assistant Chief's "professional experience" while arguing that the plaintiff was a "relatively novice" officer who had received written warnings and exhausted her leave time: "[T]he issue under the PDA is not a comparator's difference in professional experience, disciplinary record, or available leave time. The sole basis for comparison under *Young* is the similarity in the physical restrictions of the employee and the need for similar accommodations." *Townsend*, 2019 WL 5866584, at *8.

[98] *Durham*, 955 F.3d at 1286 (holding that evidence that four non-pregnant coworkers with lifting restrictions were accommodated satisfied fourth prong of pregnant EMT's prima facie case); *Townsend*, 2019 WL 5866584 at *8 (two comparators sufficient to create inference of pretext and warrant trial); *Bray*, 2015 WL 1534515 at *6 (two comparators sufficient to state claim for pregnancy discrimination and survive motion to dismiss); *Martin*, 132 F. Supp. 3d at 820-21 (finding two male comparators sufficiently "similar" to create question of fact as to

*B. Negative Post-*Young *Precedent: Unduly Strict Comparator Standards*

There are worrisome examples, however, of courts misapprehending *Young*'s liberal pleading and proof standards for plaintiffs. A key stumbling block appears to be the perception that a plaintiff must go beyond identifying *policies* that favor non-pregnant workers and identify specific *individuals* who benefited from such policies.[99] Demanding proof of actual comparators tethers a pregnant worker's ability to obtain accommodations to such idiosyncratic factors as the size of the employer's workforce, and whether and to what extent other employees have needed job modifications; an employer lucky enough not to have had many, or any, prior requests for accommodations has a ready-made defense to PDA claims. Even worse, this focus on specific individuals has been applied by some courts at the initial pleading stage, before the plaintiff has had the benefit of discovery.[100] Such stringency, in addition to contravening *Young* specifically, violates the well-settled general precedent that the complaint need not plead sufficient facts to meet the prima facie case, but rather need only set forth a plausible claim for relief.[101]

In addition to requiring individual comparators, as opposed to policies that favor certain employees, courts applying overly strict standards for comparators have gone even further to demand a similar *source* of impairment,[102]

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pretext because they "held the same job over roughly the same time period, at suburban Winn–Dixie stores, located within the same cultural and economic area"); *cf.* Huffman v. Speedway LLC, 621 Fed. Appx. 792 (6th Cir. 2015) (assuming without discussing that single co-worker with knee injury who was accommodated could satisfy comparator requirement, but granting summary judgment because insufficient admissible evidence that such accommodation actually occurred).

[99] *See, e.g.*, *Adduci*, 298 F. Supp. 3d at 1162-63; *Vidovic*, 2017 WL 10294807, at *19; *LaCount*, 2017 WL 1826696, at *5 (granting motion to dismiss because plaintiff certified nursing assistant with lifting restriction "alleges that defendant accommodated workers with conditions other than pregnancy, but she does not explain what physical or mental impairments the employees had or how the employees were accommodated").

[100] *See* Swanger-Metcalfe v. Bowhead Integrated Support Servs., LLC, No. 1:17-cv-2000, 2019 WL 1493342, at *8 (M.D. Pa. 2019) (dismissing claim because the plaintiff "failed to identify any similarly situated individuals outside of her class who were accommodated" and gave "no factual details as to how other employees . . . were so accommodated"); Dudhi v. Temple Health Oaks Lung Center, No. 18-3514, 2019 WL 426145, at *6 (E.D. Pa. 2019) (granting employer's motion to dismiss because plaintiff who sought breastfeeding accommodation could not point to another employee who received the accommodation she sought); Waite v. Board of Trustees of University of Alabama, No. 2:16-cv-01244-JEO, 2018 WL 5776265, at *13 (N.D. Ala. 2018) (granting defendant's motion to dismiss in part because plaintiff "conspicuously admits" she cannot point to a similarly situated comparator); Wadley v. Kiddie Academy Int'l, Inc., No. 17-05745, 2018 WL 3035785, at *4 (E.D. Pa. 2018) (granting employer's motion to dismiss because plaintiff could not identify a non-pregnant coworker who was accommodated with light duty and extra breaks); *LaCount*, 2017 WL 1826696, at *5.

[101] *See* Swierkiwicz v. Sorema N.A., 534 U.S. 506, 512 (2002); *see also* Pueblo of Jemez v. United States, 790 F.3d 1143, 1172 (10th Cir. 2015) ("'The 12(b)(6) standard does not require that [the] Plaintiff establish a prima facie case in [the] complaint,' but rather requires only that the Plaintiff allege enough factual allegations in the complaint to 'set forth a plausible claim.'").

[102] *See, e.g.*, Washington v. Donahoe, No. CV-13-2444, 2016 WL 9455309, at *5 (D. Ariz. Mar. 31, 2016), *aff'd*, 692 F. App'x 486 (9th Cir. 2017) (finding comparators who were granted time off for non-medical reasons not "similar").

a similar *type* of impairment,[103] and the same supervisor or work location.[104] But this approach skews toward the pre-Young cases' rigid comparator standards that the Court rejected when it adopted its modified prima facie and pretext stndards. In finding that pregnant workers could be sufficiently "similar" to UPS employees injured on the job and those protected by the ADA—irrespective of the nature of their impairments—as well as to those who were unable to drive due to the non-medical reason of having been convicted of a DUI, Young affirmed that the ability or inability to work is what makes a comparator.[105]

C. The Fifth Circuit Becomes an Outlier

In addition to *Legg* and *Durham*, one other post-*Young* appellate ruling has applied the *Young* standard, but with a puzzling and detrimental outcome. The court troublingly inserted an "essential job functions" analysis not approved by the Supreme Court, essentially replicating the circular logic of the pre-*Young* courts that refused to find a plaintiff needing accommodation to be "qualified."

In *Luke v. CPlace SNF LLC*,[106] Eryon Luke was a certified nursing assistant (CNA) whose health provider imposed a lifting restriction during her pregnancy. Luke sought "light duty" but was denied by her employer, who instead forced her to take unpaid leave; when her statutorily protected time

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[103] *See, e.g.*, Luke v. CPlace Forest Park SNF, L.L.C., 747 Fed. App'x 978 (5th Cir. 2019) (*per curiam*), *cert. denied*, —- S. Ct. —-, 2019 WL 5686490 (Nov. 4, 2019) (affirming summary judgment in favor of employer against certified nursing assistant with lifting restriction because, even though she showed that other workers received assistance with lifting, "none of the workers who allegedly received these accommodations were, like [plaintiff], under a doctor's orders not to engage in heavy lifting"); Jackson v. J.R. Simplot Co., 666 Fed. App'x, 739 743 (10th Cir. 2016) (employees needing light duty due to lifting restrictions not comparable to pregnant employee needing limited exposure to chemicals); *Adduci*, 298 F. Supp. 3d at 1161 (granting summary judgment to employer because even though plaintiff submitted a spreadsheet identifying 261 identifying co-workers who received accommodations, the spreadsheet did not show if any of them had a lifting restriction, as plaintiff did). *See also LaCount*, 2017 WL 1826696, at *5 (granting motion to dismiss because plaintiff certified nursing assistant with lifting restriction "alleges that defendant accommodated workers with conditions other than pregnancy, but she does not explain what physical or mental impairments the employees had or how the employees were accommodated").

[104] *See, e.g.*, *Washington*, 2016 WL 9455309 at *5; *Lawson*, 2016 WL 2338560 at *10 n.6.

[105] Courts also have refused to consider as comparators pregnant workers whose pregnancies distinguished them from the plaintiff—such as by needing different accommodations, or needing no accommodations at all. *See* Mercer v. Gov't of the Virgin Islands Dep't of Educ., No. 2014-50, 2016 WL 5844467, at *11 (D.V.I. Sept. 30, 2016); *Luke*, 2016 WL 4247592, at *3; *Lawson*, 2016 WL 2338560, at *9–10; Frederick v. New Hampshire, No. 14-cv-403-SM, 2016 WL 4382692, at *9–10 (D.N.H. Aug. 16, 2016) (motion to dismiss granted where breastfeeding plaintiff pointed only to other lactating employees granted accommodations). *But see* Martin v. Winn-Dixie Louisiana, Inc., 132 F. Supp. 3d 794, 819 (M.D. La. 2015) (favorable treatment of a pregnant coworker probative evidence of pretext); Gonzales v. Marriott Int'l, Inc., 142 F. Supp. 3d 961, 978 (C.D. Cal. 2015) (evidence that other workers, including other lactating employees, were provided accommodations, was sufficient to establish prima facie case).

[106] 747 Fed. App'x 978 (5th Cir. 2019) (*per curiam*), *cert. denied*, —- S. Ct. —-, 2019 WL 5686490 (Nov. 4, 2019).

off expired, she was fired. On appeal to the Fifth Circuit, Luke contended that her employer not only had mechanical lifts available for CNAs to use in aiding patients, but also that it had a policy of directing CNAs to seek assistance from one another when doing any heavy lifting, even without any physical restrictions. The district court, in addition to refusing to consider such accommodations due to Luke's supposed failure to have specifically requested them,[107] concluded that Luke's evidence that her employer had a *practice* of providing lifting assistance to those who needed it (and that she herself previously had been provided such assistance)[108] was insufficient to satisfy the fourth prong of the prima facie case. Accordingly, it granted summary judgment to the employer.

On appeal, the Fifth Circuit affirmed, but it did so on entirely different grounds than the district court. After assuming Luke had presented a sufficient prima facie case—thus squandering the opportunity to provide guidance to lower courts in conducting the post-*Young* comparator analysis—the panel accepted the employer's stated reason for *terminating* Luke, namely, that she could not "perform an essential aspect of her job."[109] Putting aside the fact that neither the PDA nor *Young* includes an "essential functions" inquiry, such reasoning works an end run around the *Young* framework for assessing accommodation denials, in the same way that pre-*Young* cases might find a pregnant worker could not satisfy her prima facie burden because she was "unqualified"; the employer's refusal to accommodate Eryon Luke's lifting restriction is rendered irrelevant because, in needing help with lifting, she was, it seems, deserving of discharge. The employer's failure to address Luke's need while having at least a practice of allowing other CNAs to receive assistance with lifting thereby remains insulated from inquiry—precisely the opposite result intended by *Young*. Indeed, *Luke* creates a per-

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[107] In the court's view, the fact that Luke may have used a particular term in lodging her request for accommodation—specifically, "light duty," which the court itself never defined but appeared to view as a desk job or other assignment that did not require any lifting at all—precluded her from presenting any evidence that her employer had such accommodations at its disposal. *Luke*, 2016 WL 4247592 at *3 ("It is self-evident that where, as here, Plaintiff sought a specific accommodation, her PDA claim is limited to Defendant's denial thereof."). Such a crabbed view of the employer's obligation to identify a "sufficiently strong" reason for accommodation denial—as in, "we did not have the specific accommodation she requested, so we did not inquire further as to whether another type of accommodation might have been equally satisfactory"—falls far short of the revised conception of the employee's and employer's burdens laid out in *Young*, let alone ignores that employers routinely must engage in such an interactive process in accommodating ADA-qualifying disabilities.

[108] It is well-settled that an employer's differential treatment of a plaintiff before and after she becomes pregnant can reflect pregnancy-based animus; unlike most other protected characteristics, one's status as pregnant is eminently "mutable" and thus the condition's onset can trigger new, disparate treatment. *See, e.g.*, Martin v. Cannon Bus. Solutions, Inc., No. 11-cv-2565-WJM-KMT, 2013 U.S. Dist. LEXIS 129008, at *25–26 (D. Colo. 2013) (high-performing plaintiff began receiving reprimands shortly after announcing pregnancy); Hunter v. Mobis Ala., LLC, 559 F. Supp. 2d 1247, at 1257–58 (M.D. Ala. 2008) (employer began enforcing attendance policy only after plaintiff became pregnant); Calabro v. Westchester BMW, Inc., 398 F. Supp. 2d 281, 293 (S.D.N.Y. 2005) (employer accommodated plaintiff before pregnancy, but not after).

[109] *Luke*, 747 Fed. App'x at 979.

verse incentive for employers to refuse to accommodate the pregnant worker because her inability to perform all job functions without accommodation is acceptable grounds for her firing her outright, irrespective of how the employer treats others "similar in their ability or inability to work."

D. Disparate Impact: A Way Out of the Comparator Conundrum

Plainly, PDA failure-to-accommodate disparate treatment claims remain extremely challenging for plaintiffs after *Young*. Far too many courts still erroneously demand a high threshold showing of who is "similar" to a pregnant worker, rather than examine whether the employer's rationale for favoring those comparators is "sufficiently strong."

The disparate impact framework therefore offers untapped potential for PDA litigants challenging failures to accommodate.[110] Such claims would demand that employers justify as a "business necessity" a neutral policy—such as one that limits modified duty to workers with on-the-job injuries and ADA-accommodating disabilities—that, by definition, "fall[s] more harshly on" pregnant workers by excluding them altogether.[111]

Disparate impact claims under the PDA have enjoyed a checkered history, to be sure. Immediately following the statute's passage, there was reason to hope that such claims offered a fruitful path in challenging policies maintained by employers that plainly never contemplated a pregnant worker's presence on the job, or if they did, did not care to remedy such policies' exclusionary effect.[112] But far too often, disparate impact was viewed by courts as an end run around the PDA's "equal treatment" mandate.[113]

But in the in the context of pregnancy accommodation specifically, the theory has been underutilized; even conservative courts have acknowledged its potential.[114] Indeed, at oral argument in *Young*, Justice Breyer wryly ob-

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[110] *See generally* Reva B. Siegel, Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination, 59 WM. & MARY L. REV. 969 (2018) (arguing that *Young* embraces disparate treatment and disparate impact frameworks for pregnancy accommodation claims).

[111] Teamsters v. United States, 421 U.S. 324, 335-36 n.15 ("[Disparate impact claims] involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity.").

[112] *See, e.g.*, Abraham v. Graphic Arts Int'l Union, 660 F.2d 811, 819 (D.C. 1981) (employer's 10-day maximum leave policy imposed disparate impact on pregnant workers; "Oncoming motherhood was virtually tantamount to dismissal. . . . In short, the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age—an impact no male would ever encounter."). *See also* 29 C.F.R. § 1604.10(c) (2020) ("Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity.").

[113] *See generally* Grossman & Thomas, *supra* note 4, at 41–49.

[114] *See, e.g.* Reeves v. Swift Transp. Co., 446 F.3d 637, 641-42 (6th Cir. 2006); Garcia v. Woman's Hospital of Texas (Garcia I), 97 F.3d 810 (5th Cir. 1996); *see also* Germain v. County of Suffolk, No. 07-cv-2523 (ADS) (ARL), 2009 WL1514513, at *4 (E.D.N.Y., May 29, 2009) (denying summary judgment to employer because County Park Police department's

served that disparate impact would have been a "beautiful vehicle" for Peggy Young to challenge UPS's accommodation policy—one that would have offered her an "easy way to win."[115]

Advocates soon will have an important indication of whether that assessment was accurate or overly optimistic. The first post-*Young* appellate ruling on a disparate impact challenge to an accommodation denial is imminent from the Second Circuit, in its second go-round in *Legg*. Following that court's 2016 remand for trial on the plaintiff correctional officer's challenge to the employer county's policy of reserving light duty for correctional officers injured on the job, a jury ruled in favor of the county on the disparate treatment claim, while the court ruled in favor of the county on the disparate impact claim.[116]

The court began by recognizing that, under Ulster County, New York's policy reserving light duty job assignments to correctional officers with occupational injuries, pregnant officers would be denied such accommodations 100 percent of the time.[117] Yet the court ruled that that uncontroverted fact was insufficient to make out a prima facie claim of disparate impact on pregnancy because, it contended, the plaintiff could not show causation—namely, that most or all pregnant correctional officers would, in fact, require light duty in order to continue working.[118] The court relied on the fact that two other pregnant officers had worked until their seventh month and then taken sick leave; rather than draw the common sense conclusion that the unavailability of light duty necessitated such leaves, the court instead penalized the plaintiff for not expressly showing that "these women were capable of performing light duty assignments but made the choice to take accrued leave because they knew they would not be provided an accommodation."[119]

While one hopes that the Second Circuit concludes that the wholesale unavailability of light duty in the physically taxing and dangerous job of correctional officer poses a prima facie case of disparate impact—thereby shifting the burden to the employer to show that excluding pregnant workers from the light duty scheme is a "business necessity"—the district court's ruling nevertheless offers a cautionary tale to practitioners: even if pregnancy limitations in a particular job would appear obvious, introduce evidence con-

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policy of limiting modified duty assignments to officers with occupational injuries posed a *per se* disparate impact; "[A]lthough the pregnant officer and the non-pregnant officer are similarly situated in their inability to perform full-duty, the distinction the Park Department's policy draws between occupational and non-occupational injuries necessarily excludes pregnant women from light-duty. Under the circumstances, the Plaintiff has established a prima facie case that the Park Department's light-duty policy has a disparate impact on pregnant women.").

[115] Oral Argument at 5:45, Young v. United Parcel Serv., Inc., 575 U.S. 206 (2015).

[116] *Legg*, 2017 WL 3207754, at *10.

[117] *Id.*, at *6.

[118] *Id.*, at *9. *See also Garcia I*, 97 F.3d at 813 (pregnant nurse unable to meet hospital's 150 pound lifting requirement could make out prima facie case of disparate impact if she could show that "pregnant women as a group would be subject to this medical restriction"; "If all or substantially all pregnant women would be advised by their obstetrician not to lift 150 pounds, then they would certainly be disproportionately affected by this supposedly mandatory job requirement for [nurses] at the Hospital.").

[119] *Id.*

firming them. Such evidence need not consist solely of statistical evidence from the workplace at issue, given women's gross underrepresentation in fields such as law enforcement; rather, either through an expert or through introduction of scientific literature of which the court may take judicial notice, ease the court's conclusion that failure to provide accommodations to pregnant workers is equivalent to failing to accommodate pregnancy, full stop.[120]

Conclusion: The Way Forward?

What these cases tell us is that courts are still using the prima facie case as a roadblock to pregnancy accommodation disparate treatment claims, even though the *Young* court took pains to remove that barrier. Research has revealed that *Legg* is the lone federal court opinion handed down in the more than four years since *Young* to have conducted the "sufficiently strong" analysis with respect to the employer's stated reason for denying accommodation; notably, that ruling went in favor of the plaintiff.[121] There is reason to hope that future cases will come out the same way. The reality is that many employers fail to accommodate pregnancy less by overt design than by oversight—that is, because the world of work is so structured around men, potential conflicts between job duties and pregnancy rarely are even contemplated. An employer unprepared to deal with the need for pregnancy accommodation in the first instance also will be on the back foot in mustering evidence justifying its refusal to meet that need.

Accordingly, practitioners must devote significant effort to educating the courts about the context in which the Supreme Court issued its ruling in *Young*, emphasizing its intention to reverse the negative trend among appellate courts, to impose a minimal prima facie burden in the disparate treatment context, and to demand that an employer have a ""sufficiently strong" reason"" for making it impossible for a pregnant worker to continue working within her medically recommended restrictions.

Most notably, in addition to resisting calls for specific comparators—let alone those with impairments or accommodation needs that are nearly identical to the plaintiff's, an "onerous" burden plainly not envisioned by *Young*—advocates should remind courts of the preexisting obligation to accommodate workers under the ADA. *Young* had the chance to say such individuals are facially "dissimilar" to pregnant workers and it did not take it. As the Second Circuit in *Legg* noted in refusing to accept that the employer's statu-

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[120] *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 331 (1977) (in assessing alleged sex-based disparate impact of state correctional board's height and weight thresholds for prison guards, approving reliance on national demographic information rather than applicant pool data where such thresholds likely deterred female applicants; "The plaintiffs in a case such as this are not required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement's grossly discriminatory impact.").

[121] *Legg*, 820 F.3d at 74.

tory obligation to accommodate employees with occupational injuries sufficiently justified disparate treatment of pregnant workers, a statutorily-mandated as to one group of employees does nothing to limit the employer's ability to extend that benefit to others.

To the extent that the employer argues that the comparators are insufficiently "similar," that analysis must be made at the pretext stage, not the prima facie stage. Advocates should remind courts that the burden on the employer is high, as *Young* eliminated the ability to rely on mere cost or convenience in excluding pregnant workers. They further should encourage courts to engage in not just a quantitative analysis of the employer's conduct—that is, simply a raw comparison of the numbers of non-pregnant workers who were favored as compared to the employee—but also, a qualitative analysis: an employer's reflexive "no" to an accommodation request, without any efforts to identify workable alternatives, should not suffice to carry its "sufficiently strong" burden. Although no court has yet incorporated an "interactive process" requirement on pregnancy accommodation cases, remind courts that employers have been engaging in such dialogue pursuant to the ADA for three decades; why did they utterly fail to do so when the time came to accommodate pregnancy?

The lesson in the post-*Young* cases is that, despite greater doctrinal protections, employers will continue to force pregnant women to work on an uneven field, and courts will sometimes let them do it. It is even more important than ever, then, for plaintiffs to develop all available theories in litigation under the PDA, including the underused tool of disparate impact theory.

Perhaps a final lesson of the post-*Young* cases may be that litigation successes are limited by the nature of the PDA itself. At its best, the PDA promises only a comparative right of accommodation. Even if courts gave the PDA its full due, which they remain reluctant to do despite *Young*, pregnant workers would still have to choose between work and reproduction too often. Accordingly, advocates have pushed hard for legislation to address the PDA's limits. Thirty states and several localities already have enacted pregnancy discrimination laws that are more protective of employees in terms of mandating accommodations.[122] On the federal level, the Pregnant Workers Fairness Act (PWFA), which first was introduced in Congress nearly a decade ago, would guarantee women the right to reasonable accommodation (akin to the rights of disabled workers under the ADA) when the short-term physical effects of pregnancy interfere with work in a way that can be accommodated without posing an undue hardship on the employer.[123] The legislation is styled as a bill to "eliminate discrimination and promote women's

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[122] *See* Chris Marr, *Tennessee Enacts Pregnant Worker Accommodation Law*, BLOOMBERG LAW (June 23, 2020), https://news.bloomberglaw.com/daily-labor-report/tennessee-enacts-pregnant-worker-accommodations-law [https://perma.cc/QGN3-MFTB].

[123] H.R. 2694, 116th Cong. (2019). *See also* American Civil Liberties Union: Congress Should Pass the Pregnant Workers Fairness Act (2019), https://www.aclu.org/sites/default/files/field_document/pwfa_-fact_sheet-july_2019.pdf [https://perma.cc/34KD-68NN].

health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job is limited by pregnancy, childbirth, or a related medical condition."[124] As we saw under the ADA, a right of reasonable accommodation is not immune from judicial undermining, but the PWFA would provide more protections to pregnant workers than does current law. The PWFA has been introduced for several years running, but its chances for passage are the best they ever have been, having secured for the first time the endorsement of the U.S. Chamber of Commerce, big business's most powerful congressional lobbyist.[125] In January 2020, the bill advanced out of committee; the next step is consideration for the full House of Representatives.[126]

In the meantime, courts should analyze PDA accommodation claims according to the modified burden-shifting standard set forth in *Young*. By presuming that pregnant workers are entitled to equal treatment, and by demanding skepticism when employers argue otherwise, that standard reaffirms the PDA's mandate—in letter and in spirit.

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[124] *Id.*

[125] Alex Gangitano, *Pro-Business Lobby Endorses Bill to Protect Pregnant Workers*, THE HILL (Jan. 14, 2020), https://thehill.com/business-a-lobbying/business-a-lobbying/478204-pro-business-lobby-endorses-bill-to-protect-pregnant-workers [https://perma.cc/UHL7-ST36].

[126] *Id.*