Pregnancy, Parenting & Careers: Leave, Pay, and Promotion Bias

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I. Introduction

The last fifty years have seen a dramatic growth in the population of working women. Women currently constitute approximately 47% of the nation’s entire workforce. See Bureau of Labor Statistics, Women in the Labor Force: A Databook (2011 Edition), www.bls.gov/cps/wlf-intro-2011.pdf. As the number of women in the workforce has grown, so too has the importance of their salaries. Women are the primary or co-breadwinners in nearly two-thirds of families. See Heather Boushey & Ann O’Leary, The Shriver Report: A Woman’s Nation Changes Everything, www.americanprogress.org/issues/2009/10/pdf/awn/a_womans_nation. Furthermore, the number of single-parent families, most of which are headed by women, has grown exponentially. Id. at 35. The presence of pregnant women in the workforce has also increased: between 2006 and 2008, two-thirds of women who had their first child worked during pregnancy. 88% of those mothers worked into their last trimester. See U.S. Census Bureau, U.S. Dep’t of Commerce, Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008 4, 6 (2011). Concurrent with these increases, however, has been a growth in pregnancy discrimination. Of the 99,947 charges filed with the EEOC in 2011, 28.5% of them were sex-based. Of those cases, 20% involved charges of pregnancy discrimination. Moreover, that number has grown over the past decade, escalating from 4,287 in 2001 to 5,797 in 2011, an increase of 35% over just ten years. See Equal Employment Opportunity Commission, Charge Statistics, www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm. Given these realities, the Pregnancy Discrimination Act (“PDA”), 42 U.S.C. § 2000e(k), remains as relevant today as it was when it was first passed in 1978.

These materials are intended to provide practitioners with an overview of the PDA, its key provisions and the case law that courts have developed since the law’s passage in 1978. The materials also explore how the PDA interacts with the Family and Medical Leave Act (“FMLA”), 29 U.S.C. §§ 2601 et seq., and the Americans with Disabilities Act (“ADA”) as amended by the Americans with Disabilities Act Amendments Act of 2008, 42 U.S.C. §§ 12101 et seq., both of which provide additional protections.

II. The Origins, Passage, and Impact of the PDA

A. The Origins of the PDA

Congress passed the PDA in 1978. The law amended Title VII of the Civil Rights Act of 1964 (“Title VII”) by changing the definition of “sex” to explicitly include pregnancy. Title VII prohibits employers from terminating or otherwise discriminating against employees in any manner “with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color religion, sex or national origin.” 42 U.S.C. §2000e-2(a)(1). The amendment to Title VII was necessitated by a series of Supreme Court cases that held that classifications concerning pregnancy could not be considered discrimination on the basis of sex.\(^2\)

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\(^2\) Pregnant women had some success, however, pursuing cases against employers via disparate impact claims. In Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), for example, the Supreme Court
The first of these cases was *Geduldig v. Aiello*, 417 U.S. 484 (1974), in which the Court considered whether a California disability insurance program discriminated against women by failing to provide coverage for pregnant women. The insurance program in question established a scheme under which private employees could receive compensation during periods of disability, but left pregnant women experiencing normal symptoms of pregnancy out, excluding them from coverage. A pregnant woman brought suit under the Fourteenth Amendment’s Equal Protection Clause arguing that the California insurance program “invidiously discriminate[d] against [the plaintiff] and others similarly situated by not paying insurance benefits for disability that accompanies normal pregnancy and childbirth.” *Id.* At 492. The Court held that the state had not discriminated against women by excluding normal pregnancy from the state’s insurance coverage program because there was “no risk from which men are protected and women are not.” *Id.* at 497. The Court reasoned:

[W]hile it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification. Normal pregnancy is an objectively identifiable physical condition with unique characteristics. Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

*Id.*

Four years later, the Supreme Court affirmed that it did not consider classifications based on pregnancy to amount to discrimination based on sex. In *Gilbert v. General Election Co.*, 429 U.S. 125 (1976), the Court concluded that employers do not discriminate against women in violation of Title VII when they fail to cover pregnancy-related disabilities as part of their disability plans. In *Gilbert*, the defendant employer General Electric provided to its employees a disability plan that excluded from coverage disabilities arising from pregnancy. The Court held that “an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all.” *Gilbert*, 429 U.S. at 136.

considered whether an employer policy that stripped women of their seniority when they returned from maternity leave constituted a violation of Title VII. The Court held that it did, concluding that the policy had a disparate impact on women because the employer “has not merely refused to extend to women a benefit that men cannot and do not receive, but has imposed a substantial burden that men need not suffer,” and that therefore, the “facially neutral seniority system does deprive women of employment opportunities because of their sex.” *Id.* at 143. The Court went on to determine that “there was no proof of any business necessity adduced with respect to the policies in question.” *Id* at 143; *see also Mitchell v. Board of Trs.*, 599 F.2d 582, 586-87 (4th Cir. 1979) (arising before the effective date of the PDA and finding that employer’s policy of requiring employees to commit to one full year of uninterrupted service before renewing their contracts disparately impacted women).
B. Passage of the PDA

_Gilbert_ prompted Congress to clarify what it had meant by Title VII’s prohibition against discrimination “because of sex.” In the lead up to passage of the PDA, Congress held a series of hearings exploring the challenges faced by women in the workplace because of their role as child bearers. Congress found that women were regularly left with little recourse when their employers imposed forced leave of absence requirements, denied leave time during and after pregnancy, restricted the right to reinstatement after leave because of pregnancy, denied sick pay benefits for disabilities related to pregnancy or childbirth, failed to hire or terminated pregnant employees because of stereotypes about how pregnancy would affect them. Employers frequently asked women during interviews about plans to start families and rejected women’s applications after they responded in the affirmative. _See Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearing on H.R. 5055 and H.R. 6075 Before the Subcommittee on Employment Opportunities of the H. Comm. on Educ. and Labor, 95th Cong. 122 (1977))._ Further, employers who took their female employees back after their pregnancies frequently rehired them for entry-level positions and stripped them of the service, pension, and seniority credits they had previously earned. _See id; see also 123 Cong. Rec. 29,385 (1977) (statement of Sen. Williams)._ In 1978, Congress sought to address these issues through passage of the PDA. The law made clear Congress’s intention that women should be protected from discrimination on account of their role as child bearers. The amended law established that:

[T]he terms “because of sex” or “on the basis of sex,” as used 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, including receipt of benefits under fringe benefit programs, as other person not so affected but similar in their ability or inability to work.

42 U.S.C. § 2000e(k). By its simplest interpretation, the PDA establishes that women cannot be fired or rejected for a job just because they are or may become pregnant. Nor may they be demoted, denied a promotion, or discriminated against with respect to “compensation, terms, conditions, or privileges of employment,” because they are or may become pregnant. Further, employers may not force pregnant women to stop working and take pregnancy leave if they are still willing and able to work. The Senate report issued following the law’s passage stated: “Under this Act, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. 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 other benefits, as other workers who are disabled from working.” _S.Rep. No. 95-331, 95th Cong., 1st Sess. 4-5 (1977), reprinted in Legislative History of the Pregnancy Discrimination Act of 1978, 96th Cong., 2d Sess. 151, 152 (1979), at 41-42, U.S.Code Cong. & Admin.News 1978, p. 4749._
C. Impact of the PDA

In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983), the Supreme Court recognized that its prior holdings in *Gilbert* and *Geduldig* had been abrogated by Congressional action via the passage of the PDA. In that case, the Court ruled that an employer insurance plan that differentiated between female employees and spouses of male employees could not stand in light of the passage of the PDA. “The 1978 Act makes clear,” Justice Stevens wrote in the majority opinion, “that, for all Title VII purposes, discrimination based on a woman’s pregnancy is, on its face, discrimination because of her sex.” *Newport News*, 499 U.S. at 682. The Supreme Court later reiterated in *California Fed. Savings & Loan Ass’n v. Guerra*, 479 U.S. 272, 286 (1987), that the PDA reversed its previous decisions, stating: “[T]he reports, debates and hearings make abundantly clear that Congress intended the PDA to provide relief for working women and to end discrimination against pregnant workers.”

In the years since the PDA’s passage, the law has had a substantial impact on workplace practices. While courts have complicated the law through interpretation, the PDA has at the very least changed the calculus employers must make when reaching employment decisions relating to pregnant women and women of childbearing age. Below are a few examples of how:

1. Forced Leave and Mandatory Maternity Policies

The PDA ensures that private employers may no longer subject pregnant women to mandatory maternity leaves, either before or after their pregnancies absent the ability to prove that the requirement is a bona fide occupation qualification (discussed in further detail below). Prior to the PDA’s passage, the Supreme Court had overturned a school board policy that required pregnant public school teachers to take mandatory maternity leave both prior to and following the birth of their children. See *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974). The forced leave began after the first four months of pregnancy and teachers were not permitted to return until the beginning of the next regular school semester after the child reached three months old. The leave was unpaid and teachers had to get a doctor’s certificate attesting to her ability to work before being allowed to return. The Court ruled that this policy was unconstitutional, basing its decision on the Fourteenth Amendment’s Due Process Clause and the fact that the policy bore no rational relationship to any legitimate state interest. *Id.* at 639-40. The protection afforded by the Constitution’s Fourteenth Amendment, however, was not available to women working for private employers.

While some pregnant employees were able to successfully challenge mandatory leave policies via a disparate impact analysis, discussed further below, courts frequently sided with employers in such cases, upholding the discriminatory policies based on business necessity justifications, a standard that, as discussed below, is less stringent than that required under a disparate treatment analysis. See, e.g., *Langley v. State Farm Fire & Cas. Co.*, 644 F.2d 1124, 1128 (5th Cir. 1981) (upholding employer’s mandatory leave policy requiring women to take leave when their doctors suggested such leave would be advisable); *deLaurier v. San Diego Unified Sch. Dist.*, 588 F.2d 674, 678-80 (9th Cir. 1978) (no violation of Title VII where pregnant women required to take leave at the beginning of pregnancy because the school
district’s administrative and educational objectives provided an adequate business justification for the differential treatment). In particular, courts determined that where the safety of third parties was concerned, employers could pursue policies that may have a disparate impact on women.

The PDA’s passage made mandatory leave policies easier for pregnant women to defeat by establishing such policies as per se discrimination. In UAW v. Johnson Controls, Inc., 499 U.S. 187 (1991), the Supreme Court considered whether Title VII permitted an employer to pursue a policy barring all fertile women from jobs that involved actual or potential exposure to lead at levels exceeding standards set by the Occupational Safety and Health Administration. The employer argued that the intent behind the policy was to protect pregnant women, and the fetuses they may be carrying or will carry in the future, from harm. The Court, however, determined that the policy violated Title VII as amended by the PDA, holding that the “fetal-protection policy explicitly discriminates against women on the basis of sex,” because it “does not apply to the reproductive capacity of the company’s male employees in the same way as it applies to that of the females. Id. at 197, 199; see also EEOC v. Catholic Healthcare West, 530 F. Supp. 2d 1096 (C.D. Cal. 2008) (policy forcing pregnant personnel out of certain jobs violates the PDA); Peralta v. Chromium Plating & Polishing Corp., No. 1:99-CV-3996, 200 WL 346333645 (E.D.N.Y. Sept. 15, 2000) (finding PDA violation where employer refused to allow a pregnant employee to work without a doctor’s note because of concerns about the health of employee’s unborn child).

2. Seniority

The plain language of the PDA indicates that, for the purposes of “the receipt of benefits under fringe benefit programs,” employers must treat employees alike, regardless of pregnancy. 42 U.S.C. § 2000e(k). This language establishes that seniority policies “expressly based on pregnancy” amount to “facial sex discrimination.” Harriss v. Pan Am. World Airways, Inc., 649 F.2d 670, 679 (9th Cir. 1981). Employers must, therefore permit pregnant employees to accrue seniority in the same way as their peers during periods of leave due to pregnancy. This has resulted in enormous changes for women. Before the PDA, employers regularly treated leave for pregnancy differently than they did leave for other reasons, granting fewer seniority credits to those employees who took time off because of their pregnancies. In In re Southwestern Bell Tel. Co. Maternity Benefits Litig., 602 F.2d 845, 848 (8th Cir. 1979), a case brought before the enactment of the PDA, for example, female employees brought suit contending that “in granting employees on disability leave full seniority credit for the period of their absence, while granting female employees on maternity leave a maximum thirty days’ service credit, Bell deprives such female employees of the ability to compete equally with other employees for employment benefits which are based on accumulated seniority.” Id. at 848. The Eighth Circuit Court of Appeals rejected the plaintiffs’ claims noting that “[w]e cannot say that Bell’s policy of granting female employees on maternity leave up to the former maximum of thirty days or the present maximum of forty-two days seniority for the period of their absence constitutes a burden on

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3 Although this case was decided after the effective date of the PDA, the decision was based on pre-PDA considerations.
women that ‘deprives them of employment opportunities because of their different role.’” Id. at 848-49. After the PDA became effective, however, the courts reversed course on this issue.

In *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009), the Supreme Court made clear, however, that the PDA’s changes could not be applied retroactively to policies in place prior to the PDA’s passage. In that case, the Court evaluated the seniority system that AT&T relied upon to calculate pension benefits. Prior to the enactment of the PDA, AT&T relied on a policy in which employees who took disability leave received more service credit than did those employees who took personal leave because AT&T classified pregnancy leave as “personal leave.” Id. at 705. After the PDA became effective, the company changed its policy so that women on pregnancy leave would receive the same service credit as those who took leave for other temporary disabilities. Id. The plaintiffs in *Hulteen* brought suit because of AT&T’s leave practices prior to enactment of the PDA, noting that “if her total term of employment had not been decreased due to her pregnancy leave, each would be entitled to a greater pension benefit.” Id. at 706. The Court, however, disagreed, noting that “AT&T’s intent when it adopted the pregnancy leave rule (before the PDA) was to give differential treatment that, as a matter of law, as *Gilbert* held, was not gender-based discrimination.” Id. at 711-712. In reaching its decision, the Court noted that AT&T altered its behavior after Congress passed the PDA and consequently held that AT&T’s policies could not be the basis for suit. This left women who had been harmed by pre-PDA policies without recourse. But, the decision in *Hulteen* is illustrative of the difference the PDA made in women’s lives. Whereas prior to the law’s passage, women who had children would have been unable to build seniority at pace with men, leaving them at clear disadvantage, following its enactment, employers could no longer make distinctions that deprived women of the seniority they earned.

3. Termination

Under the PDA, employers may not terminate employees “because of or on the basis of pregnancy, childbirth, or related medical condition.” 42 U.S.C. § 2000e(k). It is, therefore, a per se violation of the PDA for employers to terminate women on the basis of pregnancy or stereotypes associated with it. See 29 C.F.R. § 1604.10(a) (“A written or unwritten employment policy or practice which excludes from employment … employees because of pregnancy, childbirth or related medical conditions is a prima facie violation of Title VII.”); see also *Troy v. Bay State Computer Group, Inc.*, 141 F.3d 378, 381 (1st Cir. 1998) (upholding a jury verdict for the plaintiff where the employer based its termination decision on the “stereotypical judgment that pregnant women are poor attendees” and noting that “under the law, this kind of stereotyping amounts to gender discrimination: the company could not discharge her simply for being pregnant on the speculation that she would probably be rendered unable to fulfill the requirements of the job”); *Kerzer v. Kingly Mfg.*, 156 F.3d 356 (2d Cir. 1998) (reversing district court’s grant of summary judgment and holding that there was sufficient issues of fact regarding the veracity of the employer’s explanation that plaintiff was not fired because she was pregnant but rather as part of a reduction in force, because the employer ultimately replaced the pregnant employee with another person who did substantially the same work as the pregnant employee); *Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482 (10th Cir. 1994) (plaintiff
fired in violation of PDA where there was evidence that employer departed from past practice in terminating employee without opportunity to correct performance related issues).

Pregnancy is not, however, a shield that protects pregnant women from termination regardless of performance. A woman who fails to adequately fulfill the duties of her job may be terminated at any time by her employer, provided that the employer can demonstrate that the termination was unrelated to the employee’s pregnancy. See Troy, 141 F.3d at 381 (“Bay state would not automatically be liable for gender discrimination if it had discharged Alexandra Troy for poor attendance under standards applied to other employees, even if the poor record were due to pregnancy complications…. But it would be liable if poor attendance was a pretext and the actual reason was her pregnancy.”) (emphasis in original). Courts will, however, carefully review the facts to ascertain whether the employer’s motivation for termination was actually based on factors other than the employee’s pregnancy before ruling for the employer. In Elam v. Regions Fin. Corp., 601 F.3d 873 (8th Cir. 2010), for example, the Eighth Circuit refused to find pregnancy discrimination where an employee had repeatedly violated her employer’s policies and failed to adequately fulfill the responsibilities of her job. The Court ruled in favor of the employer, noting that the plaintiff’s numerous acts of misconduct provided a “good faith basis for her discharge.” Id. at 881; see also Riddick v. MAIC, Inc., 445 Fed A’ppx 686 (4th Cir. 2011) (pregnant employee’s termination did not violate PDA because employee’s former subordinates complained that she was difficult to work with and internal emails showed that employee had performance issues prior to revelation of her pregnancy); Slater v. Energy Servs. Group Intern., Inc., 441 Fed App’x 637 (11th Cir. 2011) (employer terminated employee during pregnancy but showed non-discriminatory reasons for termination where employee expressed concerns about absences and performance before pregnancy); Maldonado v. LogLogic, Inc., 383 Fed. App’x 9 (D.C. Cir. 2010) (termination of pregnant employee not in violation of PDA because employee had lackluster sales and failed to meet employer-set targets); Doe v. First Nat’l Bank, 865 F.2d 864 (7th Cir. 1988) (employee who had an abortion was not terminated in violation of PDA, but because of her poor job performance, where she made several mistakes and failed to complete important assigned tasks before going on vacation). Employers who can show that the termination resulted from nondiscriminatory reasons may do so both before an employee goes on maternity leave and after. See, e.g., McLaughlin v. W & T Offshore, Inc., 78 Fed App’x 334 (5th Cir. 2003) (employer demonstrated that it discovered during plaintiff’s maternity leave that other employees could perform their own duties and hers with fewer errors than employee could alone).

4. Failure to Hire

Just as the PDA establishes that women can no longer be terminated on the basis of pregnancy, childbirth, or a related medical condition, so too does it make clear that employers cannot decline to hire a woman for those reasons. Employers may not, for example, refuse to hire a woman because she is of child bearing age and may, at some point in the future, become pregnant. See, e.g., Kocak v. Community Health Partners of Ohio, Inc., 400 F.3d 466 (6th Cir. 2005) (ruling against the plaintiff but declaring that a woman need not be pregnant for an employer to violate the PDA by refusing to hire someone because could or might soon be pregnant); Walsh v. National Computer Sys., Inc., 332 F.3d 1150, 1160 (8th Cir. 2003)
(upholding jury verdict for plaintiff where plaintiff was “discriminated against … because she is a woman who had been pregnant, had taken a maternity leave, and might become pregnant again”). Furthermore, employers may not refuse to hire those who are pregnant at the time they apply for a job. In Wagner v. Dillard Dep’t Stores, Inc., 17 F. App’x 141 (4th Cir. 2001), the plaintiff, who was six months pregnant at the time, applied for a job at Dillard’s department store. The interviewer was initially sufficiently impressed with the plaintiff to tell her she was hired and to get her supervisor to introduce the two. After speaking with her supervisor, however, the interviewer returned to inform the plaintiff that she could no longer offer her the job. Among other explanations for its behavior, Dillard’s asserted that the plaintiff would need to be absent for doctors’ appointments and to give birth to her baby. The store argued that “to dismiss an employee for absences or tardiness, even if they are directly the result of the employee’s pregnancy [is perfectly permissible] as long as the employer does not overlook similar absences or tardiness from non-pregnant employees.” Id. at 149. The court, however, rejected Dillard’s argument, concluding that it is contrary to the PDA’s intent for an employer to “anticipate” that a pregnant or recently pregnant woman would be “unable to fulfill” her job expectations. Id. “At best,” the court held, “Dillard’s argument amounts to a post hoc fictitious assertion that it did not hire [plaintiff] based upon the assumption that she could not or would not come to work either because of her pregnancy or in the wake of her anticipated childbirth.” Id. The court went on to declare, “we are certainly unprepared to take judicial notice of the physical abilities or limitations of women who bear children, other than to note that they would surely vary widely from individual to individual.” Id.

III. The PDA’s Basic Legal Framework

Because the PDA is based on Title VII, the basic legal framework is the same as for other sex or race discrimination cases. Plaintiffs seeking to file suit must first file their claims with the Equal Employment Opportunity Commission (“EEOC”) within 180 days of the alleged harassment (which may be extended by state laws). To prevail on a claim of pregnancy discrimination, a plaintiff must show that she was treated differently because of her pregnancy. Plaintiffs may do so under a disparate treatment or a disparate impact theory, or both. If a plaintiff prevails under either theory, she is entitled to back pay, front pay, compensatory damages, and attorneys’ fees and costs. See 42 U.S.C. §2000e-5. Where an employer acts with malice or reckless indifference, the employer may be liable for punitive damages. See EEOC v. W&O, Inc., 213 F.3d 600 (11th Cir. 2000).

A. Disparate Treatment

As with all Title VII cases, a plaintiff seeking to prove that she has suffered disparate treatment on the basis of pregnancy must produce either direct or circumstantial evidence of discrimination. Direct evidence is evidence that demonstrates “‘a specific link between the alleged discriminatory animus and the challenged [employment] decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated [the employer’s] decision,’ to take the adverse employment action.” Deneen v. Northwest Airlines, Inc., 132 F.3d 431, 435 (8th Cir. 1998) (quoting Thomas v. First Nat’l Bank of Wynne, 111 F.3d 64, 66 (8th Cir. 1997)); see also Warch v. Ohio Cas. Ins. Co., 435 F.3d 510, 520 (4th Cir. 2006)
(direct evidence “both reflect[s] directly the alleged discriminatory attitude and … bear[s] directly on the contested employment decision.” (quoting Taylor v. Virginia Union Univ., 193 F.3d 219, 232 (4th Cir. 1999) (en banc)); Venturelli v. ARC Cmty. Servs., 350 F.3d 592, 599 (7th Cir. 2003). An advantage of direct evidence over the other forms of evidence is that the presence of direct evidence precludes summary judgment in favor of the defendant ensuring that a plaintiff will get his or her day in court. See, e.g., Enslow v. Salem-Keizer Yellow Cab Co., Inc., 389 F.3d 802, 812 (9th Cir. 2004); Wexler v. White’s Fine Furniture, Inc., 317 F.3d 564, 572 (6th Cir. 2003); E.E.O.C. v. Liberal R-II School Dist., 314 F.3d 920, 923-24 (8th Cir. 2002).

The following are examples of direct evidence in pregnancy discrimination cases:

- An employer tells his employee that she is being terminated and states “hopefully this will give you some time to spend with your children.” Sheehan v. Donlan Corp., 173 F.3d 1039, 1045 (7th Cir. 1999) (holding that this comment and others constituted direct evidence sufficient to overcome a motion for summary judgment);

- An employer puts a pregnant employee on unpaid leave because she was pregnant, despite the fact that she could have fulfilled her job responsibilities without incident. See Carney v. Martin Luther Homes, Inc., 824 F.2d 643, 648 (8th Cir. 1987) (holding that such policies constitute direct evidence and stating that “the PDA was enacted to ensure that pregnant women are judged on their actual ability and willingness to work, and although the [employer] had no mandatory leave policy, its decision as to the plaintiff in effect forced her from the workplace at a time when she was willing and able to perform her job successfully. Had the officials who made the decision to place plaintiff on leave simply consulted with plaintiff’s immediate supervisors, they would have discovered that her pregnancy in no way interfered with her job performance.”)

Where no direct evidence is available, the plaintiff must prove she suffered disparate treatment by using circumstantial evidence, which courts will examine under the McDonnell Douglas framework. Under McDonnell Douglas, 411 U.S. 792, 802 (1973), a plaintiff must first establish a prima facie case of discrimination by showing that (1) she is a member of a protected group; (2) she was qualified for her position; (3) she suffered an adverse employment decision; and (4) the discharge occurred under circumstances giving rise to an inference of discrimination. See, e.g., Young v. United Parcel Service, Inc., --- F.3 ---, 2013 WL 93132 (4th Cir. 2013); Martinez-Burgos v. Guayama Corp., 656 F.3d 7 (1st Cir. 2011); Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358 (3d Cir. 2008); Quarantino v. Tiffany & Co., 71 F.3d 58 (2d Cir. 1995). Once the

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4 In cases involving the PDA, most courts require that the employer be aware of employee’s pregnancy. See Cline v. Catholic Diocese, 206 F.3d 651 (6th Cir. 2000).

5 Courts frequently word this final requirement in different ways. Other Courts have required that plaintiffs show that there was “a nexus between her pregnancy and the adverse employment decision,” see, e.g., Prebilich-Holland v. Gaylord Entertainment Co., 297 F.3d 438, 442 (6th Cir. 2002), or that another comparably qualified person continues to perform her duties, Smith v. F.W. Morse & Co., 76 F.3d 413, 421 (1st Cir. 1996).
plaintiff establishes a prima facie case, the burden of production shifts to the defendant, who must offer a “legitimate, non-discriminatory reason” for the employer’s conduct to rebut the prima facie case. *McDonnell Douglas*, 411 U.S. at 802. After the defendants offers that evidence, the burden shifts back to the plaintiff, who must prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.” *Texas Dep’t of Comm. Affairs v. Burdine*, 450 U.S. 248, 253 (1981) (citing *McDonnell Douglas*, 411 U.S. at 804).

In those cases where the plaintiff is able to prove pretext, an employer may nonetheless prevail and avoid liability by establishing that it discriminated on the basis of sex because sex was a bona fide occupational qualification (“BFOQ”). Section 703(e) of Title VII provides:

> Notwithstanding any other provision of this [title], (1) it shall not be an unlawful employment practice for an employer to hire and employ employees … where sex is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

42 U.S.C. § 2000e-2(e). To prevail via the BFOQ defense, employers must demonstrate by using objective evidence that pregnancy interferes with the woman’s ability to perform the job. 29 C.F.R. §1604.2(a). An employer must establish that the job qualification is not “so peripheral to the central mission of the employer’s business that no discrimination could be reasonably necessary to the normal operation of the particular business,” and either that “all or substantially all persons excluded would be unable to perform safely and efficiently the duties of the job involved or that it is impossible or highly impractical to deal with them on an individual basis.” *UAW v. Johnson Controls*, 499 U.S. at 215-216 (internal citations omitted).

In many cases, the issue of safety is central to a court’s assessment of whether a BFOQ applies. In the context of pregnancy discrimination, courts have considered, for example, whether airlines may impose mandatory maternity leave in order to protect the safety of passengers. In *Harriss v. Pan Am. World Airways, Inc.*, 649 F.2d 670 (9th Cir. 1980), the court determined that the mandatory maternity leave policy was justified by the BFOQ defense because the policy was reasonably necessary to avoid safety risks to passengers posed by a disabled flight attendant during an emergency. This was due in large part to the fact that protecting the safety of passengers is a central part of a flight attendant’s job. *Id.* In contrast, policies that are concerned not with guarding public safety, but rather with the safety of an unborn child may not qualify as a BFOQ. In *UAW v. Johnson Controls*, the employer argued that its jobs required employee exposure to lead and were therefore unsafe for fetuses. 499 U.S. at 202. The employer, therefore, argued that banning women from working for it constituted a BFOQ and shielded it from liability under the PDA. The Court, however, held otherwise. In dismissing the BFOQ defense, the Court reasoned that “danger to a woman herself does not justify discrimination,” nor does danger to an unborn child. *Id.* The Court further noted that the primary focus of the work has nothing to do with the safety of the fetus. *Id.; see also Carney v. Martin Luther Home, Inc.*, 824 F.2d 643 (8th Cir. 1987) (reversing district court’s grant of summary judgment for the employer based on BFOQ defense because putting a pregnant
employee on forced leave where the employee can actually perform the duties of her job is not “reasonably necessary”).

In some circumstances, employers may utilize the BFOQ defense when the “essence” of the business would be undermined without the policy in question. In *Chambers v. Omaha Girls Club, Inc.*, for example, the Eighth Circuit found a bona fide occupational qualification where a private social girls club established a “role model rule” that required staff to act as role models for the club’s members and prohibited staff from becoming pregnant out of wedlock. The Court held that the role model rule justified the plaintiff’s termination because it was central to the club’s fundamental purpose and was “reasonably necessary” for the club’s operation. 834 F. 2d 697 (8th Cir. 1987); but see *Vigars v. Valley Christian Ctr. of Dublin, Cal.*, 805 F. Supp. 802 (N.D. Cal. 1992) (refusing to grant summary judgment for employer here it was unclear whether modeling moral values was a central part of a religious school librarian’s job).

**B. Disparate impact**

Under the disparate impact theory of discrimination, an employer is liable for discrimination if it uses a facially neutral employment practice that has an unjustified adverse impact on members of a protected class. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Proof of discriminatory intent is not necessary under a disparate impact analysis. *Id.* Rather, in a disparate impact case a plaintiff is “responsible for isolating and identifying the specific employment practices that are allegedly responsible for any observed” disproportionate impact that the policy has upon a specific and protected group and must show a causal impact between the policy and the disparity. *See, e.g.*, *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (race discrimination case applying the same test in which the Court noted that “the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group.”); *Smith v. City of Jackson*, 544 U.S. 228, 241 (2005) (emphasis in original); *see also Garcia v. Woman’s Hosp. of Texas*, 97 F.3d 810 (5th Cir. 1996). Demonstrating a causal relationship will most often involve the use of statistical evidence that shows that the “challenged practice has resulted in prohibited discrimination.” *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309 (11th Cir. 1999). Gathering such statistical evidence often proves to be a roadblock to establishing a disparate impact case. *Id.* at 1314 (appellant has failed to present statistical evidence to demonstrate that this policy in practice has a disproportionate impact on pregnant employees”); *Maganuco v. Leyden Cmty. High Sch. Dist. 212*, 939 F.2d 440 (7th Cir. 1991) (plaintiff never provided statistical evidence showing that women suffered more than men or non-pregnant women who suffered a non-pregnancy related disability).

Courts frequently reject disparate impact cases brought pursuant to the PDA because of concerns that doing so would amount to giving preferential treatment to pregnant women *See, e.g.*, *Dormeyer v. Comerica Bank-Illinois*, 223 F.3d 579, 583 (7th Cir. 2000) (declaring that finding a disparate impact would amount to “subsidizing a class of workers …and the concept of disparate impact does not stretch that far in a case where the employer had strict attendance rules and plaintiff sued alleging disparate impact on pregnant women who suffer severe morning sickness). In *Stout v. Baxter Healthcare Corp.*, the Fifth Circuit labeled a plaintiff’s disparate
impact claim as an attempt to seek “preferential treatment.” 282 F.3d 856, 861 (5th Cir. 2002). The court noted that leniency when it came to the causal requirement “would be to transform the PDA into a guarantee of medical leave for pregnant employees, something we have specifically held that the PDA does not do.”  Id. In that case, the court expressly rejected an earlier Fifth Circuit case making it easier for plaintiffs to prove causality. Nonetheless, some employees have prevailed in disparate impact cases against their employers where they are able to provide such information. See, e.g., Lochren v. Suffolk County, No. 01-3925, 2008 WL 2039458 (E.D.N.Y. 2008) (plaintiffs showed that light duty policy granting light duty only to those with on the job injuries disproportionately impacted pregnant women and proving causation by showing that pregnant women were more likely to use light duty than other officers); Lehmuller v. Incorporated Village of Sag Harbor, 944 F. Supp. 1087 (E.D.N.Y. 1996) (plaintiff “has shown that the Village adopted a light-duty policy that has an adverse impact on pregnant officers and, therefore, has established a prima facie case of disparate impact discrimination”).

When an employee is able to identify a policy and prove a causal relationship between the policy and a disproportionate impact on pregnant employees, employers may defeat the claim via the business necessity defense. Establishing a business necessity defense is difficult and presents an employer with a “‘heavy burden.’” Chambers v. Omaha Girls Club, Inc., 834 F.2d 697, 701 (8th Cir. 1988) (quoting Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 815 (8th Cir. 1983)). The business necessity defense requires employers to show that their policy is based on more than just routine business considerations, but rather has “‘a manifest relationship to the employment in question.’” Othard v. Rawlinson, 433 U.S. 321 (1977) (quoting Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971)). Where a policy with a less discriminatory impact could have the same desired effect, courts will reject the employer’s offered business necessity defense. See Levin v. Delta Airlines, Inc., 730 F.2d 994 (5th Cir. 1984).

IV. Frequently Faced and Developing Legal Questions Under the PDA

Courts regularly evaluate the extent and reach of the protections afforded by the PDA. Central to those considerations are common questions about what the PDA requires in the treatment of pregnant employees, what constitutes an appropriate comparator for the purposes of evaluating whether a plaintiff has been treated the same as similarly situated peers, and precisely what Congress meant when it defined sex-based discrimination to include discrimination on the basis of pregnancy, childbirth, or related medical conditions.

A. The PDA Sets a Floor, Not a Ceiling

The PDA and the framework described above are designed to require that employers treat pregnant workers as well as they treat other employees. Courts have, therefore, repeatedly asserted that employers need not treat female employees better than their non-pregnant counterparts on account of the PDA. See Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358, 364 (3d Cir. 2008) (“The PDA does not … require preferential treatment for pregnant employees. Instead it mandates that employers treat pregnant employees the same as non-pregnant employees who are similarly situated with respect to their ability to work.”); Lang v. Star
Herald, 107 F.3d 1308, 1312 (8th Cir. 1988) (The PDA “does not create substantive rights to preferential treatment”).

States may, however, legislate improved treatment for pregnant women, at least to some extent. In California Fed. Savings & Loan Ass’n v. Guerra, the Supreme Court considered a California policy that required employers to provide female employees with unpaid pregnancy disability leave of up to four months. 479 U.S. 272, 276 (1987). The agency responsible for interpreting the law construed it to mean that it required employers to reinstate employees returning from pregnancy leave to jobs they previously held. The California Federal Savings & Loan Association filed suit arguing that the PDA “forbids an employer to treat pregnant employees any differently than other disabled employees.” The Court, however, determined otherwise, emphasizing for support the fact that Congress passed the PDA to address discrimination and to provide relief for pregnant workers. The Court also noted that Congress passed the PDA with full knowledge that state laws similar to California’s already existed and that Congress “did not consider them inconsistent with the PDA.” Id. at 287. The Court upheld the statute and famously declared that “Congress intended the PDA to be a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise.” Id. at 286 (internal quotations omitted).

The extent of that specialized treatment is limited, however, by Title VII’s prohibition against sex discrimination. The Guerra Court acknowledged as much, emphasizing that the “limited nature of the benefits [the California law] provide[d]” were appropriate because the statute was “narrowly drawn to cover only the period of actual physical disability on account of pregnancy, childbirth, or related medical conditions.” Id. at 290. Some circuits have interpreted this to mean that, save for the period of disability that follows the birth of a child, Title VII does not permit policies that treat women better than men. The Third Circuit reached this conclusion in Schafer v. Bd. of Public Educ. of the Sch. Dist. of Pittsburgh, in which the court determined that the Supreme Court’s Guerra holding does not allow “preferential treatment to employees who have recently given birth without a simultaneous showing of a continued disability related either to the pregnancy or to the delivery of the child.” 903 F.2d 243, 248 (3d Cir. 1990). The court noted that the Supreme Court “emphasized the limited nature of the benefits at issue and noted that the statute would allow benefits to ‘cover only the period of actual physical disability on account of pregnancy.’” Id. (quoting Cal. Fed., 479 U.S. at 290).

Where a state has not legislated particular treatment for pregnant women, courts have been quick to point out that the PDA does not entitle pregnant women to treatment different from that offered to their peers. Instead, the PDA simply requires equal treatment. Thus, under the PDA, “employers can treat pregnant women as badly as they treat similarly affected but non-pregnant employees.” Troup v. May Dep’t Stores, Co., 20 F.3d 734, 738 (7th Cir. 1994) (internal citations omitted). The PDA does not, therefore, guarantee family-friendly policies that permit women to take maternity leave, grant accommodations, or allow women to refuse to engage in certain job activities that they believe could jeopardize the fetus unless equivalent policies are applicable to other similarly situated employees. Thus, in Armstrong v. Flowers Hosp., 33 F.3d 1308 (11th Cir. 1994), the Eleventh Circuit rejected a pregnant nurse’s claim that her employer discriminated against her by terminating her after she refused to treat a patient with AIDS. The
nurse expressed concern about putting her fetus at risk. The court, however, took notice of the fact that all employees were subject to the same requirements, meaning that the policy has been applied in exactly the same way to pregnant and non-pregnant employees, and held that “the PDA does not require employers to extend any benefits to pregnant women that they do not already apply to other disabled employees.” *Id.* at 1317. See also Armindo v. Padlocker, 209 F.3d. 1319 (11th Cir. 2000) (firing a plaintiff who was regularly absent for pregnancy-related reasons is not discriminatory because “statements in the legislative history [‘make it clear that the PDA does not require employers to extend any benefit to pregnant women that they do not already provide to other disabled employees.’”) (internal citations omitted)); Troy v. Bay State Computer Group, Inc. 141 F.3d 378, 381 (1st Cir. 1998) (noting that “the discrimination statutes are not medical leave acts” that protect pregnant women who have poor attendance even if the poor record were due to pregnancy complications); Boyd v. Harding Acad., 88 F.3d 410 (6th Cir. 1996) (teacher fired because she had a child out of wedlock was not a PDA violation because males and non-pregnant females were also discharged under the policy); Barrash v. Bowen, 846 F.2d 927 (4th Cir. 1988) (employee who sought six month maternity leave not entitled to leave because she was not incapacitated and therefore, pursuant to the employer’s disability policy, had no right to the time off).

By the same token, employers must treat pregnant employees as well as they treat non-pregnant employees. As the EEOC notes in its guidelines on the PDA:

(1) Any fringe benefit program, or fund, or insurance program which is in effect on October 31, 1978, which does not treat women affected by pregnancy, childbirth, or related medical conditions the same as other persons not so affected but similar in their ability or inability to work, must be in compliance with the provisions of § 1604.10(b) by April 29, 1979. In order to come into compliance with the provisions of 1604.10(b), there can be no reduction of benefits or compensation which were in effect on October 31, 1978, before October 31, 1979 or the expiration of a collective bargaining agreement in effect on October 31, 1978, whichever is later.

(2) Any fringe benefit program implemented after October 31, 1978, must comply with the provisions of § 1604.10(b) upon implementation.

29 C.F.R. 1604.10(d)(1), (2). Courts have regularly found that policies that disadvantage women in this respect are unlawful in light of the PDA. See, e.g., Doe v. C.A.R.S. Prot. Plus, Inc., 527 F.3d 358 (3d Cir. 2008) (employer violated PDA where it did not provide sick days for an employee covered by the PDA who would otherwise have qualified for leave); EEOC v. Ackerman, Hood & McQueen, Inc., 956 F.2d 944 (10th Cir. 1992) (applying different leave standards to a pregnant woman than applied to other employees); EEOC v. Wooster Brush Co. Employees Relief Ass’n, 727 F.2d 566 (6th Cir. 1984) (employer held responsible for discrimination against women in provision of disability benefits).
B. Comparator Groups and Light Duty

As discussed in the section above, the PDA requires that employers treat pregnant workers and those of childbearing age the same as their “similarly situated” counterparts. The difficulty, however, is often in determining to whom pregnant workers should be compared. The question is not easily answered and courts have reached divergent conclusions. Most courts have applied the analysis employed in non-PDA related Title VII cases, requiring that the individuals used for comparison, or those that are considered “similarly situated,” have “dealt with the same supervisors, have been subject to the same standards, and engaged in the same conduct without any mitigating or distinguishing circumstances.” Elam v. Regions Fin. Corp., 601 F.3d 873 (8th Cir. 2010) (citing Hervey v. County of Koochiching, 527 F.3d 711, 720 (8th Cir. 2008)). Those courts have rejected arguments that the PDA, despite its language, alters Title VII’s traditional sex discrimination analysis to establish that pregnant women should be compared to workers solely based on their ability or inability to work. As an example of this distinction, and as described more fully below, this issue comes into play most often when employers have special policies for individuals injured on the job. If pregnant women must be similar in all respects, they would only be able to benefit from those accommodations if they are injured on the job. Under the broader view, pregnant women are similarly unable to work as those injured on the job and should be given the same accommodations regardless of whether or not they were injured on the job.

The Fourth Circuit adopted the narrower view in Young v. UPS, --- F.3d ---, 2013 WL 93123 (4th Cir. 2013). In reaching its decision, the court analyzed the two clauses of the PDA, the first making clear that pregnancy related conditions may not be treated less favorably than other medical conditions, and the second establishing that women should be treated the same as non-pregnant employees similarly situated with respect to their ability to work. The court concluded that “the second clause does not stand alone,” and that “although the second clause can be read broadly, we conclude that its placement in the definitional section of Title VII, and grounding within the confines of sex discrimination under … make clear that it does not create a distinct and independent cause of action.” Id. at *8. Other courts have followed suit. The Fifth Circuit, for example, noted in Urbano v. Continental Airlines, Inc. 138 F.3d 204, 207-208 (5th Cir. 1998), that “by defining sex discrimination under Title VII to include pregnancy, Congress intended to do no more than “re-establish principles of Title VII law as they had been understood prior to the Gilbert decision,’ and ensure that female workers would not be treated ‘differently from other employees simply because of their capacity to bear children.”” Id. (internal citations omitted).

In contrast, other courts have considered the broader question of ability to work. The Sixth and Tenth Circuits have applied this less exacting standard, at least at the prima facie stage of a plaintiff’s case. In Ensley-Gaines v. Runyon, 100 F.3d 1220 (6th Cir. 1996), for example, the Sixth Circuit determined that the comparator group under the PDA is different from that in the typical Title VII analysis in that the PDA requires comparison to those similarly situated with respect to their ability to work. Thus, “while Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment is similarly situated in all respects, the PDA requires only that the employee be similar in his or her ability or inability to
work.” Id. at 1226 (internal citations omitted); see also Tysinger v. Police Dep’t. City of Zanesville, 463 F.3d 569, 574 (6th Cir. 2006) (in “a pregnancy discrimination claim, the ‘relevant respects’ in which comparables must be similarly situated are their ‘ability or inability to work’”) (quoting Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344, 353 (6th Cir. 1998)). The Sixth Circuit, however, appears to have limited the scope of its decision in Ensley-Gaines through its ruling in Reeves v. Swift Transp. Co., Inc., 446 F.3d 637 (6th Cir. 2006). In Reeves, the court asserted that the Ensley-Gaines decision was based on reasoning applicable at the prima facie stage of an employee’s case. At the pretext phase of the McDonnell Douglas analysis, however, the Sixth Circuit determined that the Ensley-Gaines decision does not control. Id. at 641 n.1. See also EEOC v. Horizon/CMS Healthcare Corp. 220 F.3d 1184, 1193-4 (10th Cir. 2000) (pregnant women should be compared with any “non-pregnant, temporarily disabled employee” at the prima facie stage).

The import of how courts define the comparator group is particularly important when the issue is an employer’s decision to refuse a request for light duty. Many employers make a distinction between those who are injured on the job and those injured outside of their employment to determine what type of accommodations an employee should be able to access and the courts have repeatedly been asked to consider whether this is an acceptable distinction under the PDA. In Spivey v. Beverly Enters., Inc., 196 F.3d 1309 (11th Cir. 1999), a pregnant employee’s doctor imposed a lifting restriction of 25 pounds. As a nurse at a nursing home, her job required her to lift and reposition patients, assist with baths and meals, and provide general patient care. When she requested that her employer assign her to light duty, the nursing home terminated her, informing her that the policy was to excuse only those employees who suffered work-related injuries. Id. at 1311. The plaintiff sued and argued that she was similarly situated to those employees who had been injured on the job because both she and those employees were subject to lifting restrictions. The court disagreed, holding that an employer does not violate the PDA “when it offers modified duty solely to employees who are injured on the job and not employees who suffer from a non-occupational injury,” and noting that the benefit the employee sought was “not generally available to temporarily disabled workers.” Id. at 1313.

Similarly, in Young v. UPS, – F.3d –, 2013 WL 93132 (4th Cir. Jan. 9, 2013), the plaintiff was a driver for UPS who was advised to seek light duty by her doctor after she became pregnant. Though UPS had a policy of giving temporary work assignments to employees who are unable to perform their regular jobs because of on-the-job injuries, UPS denied the plaintiff’s request for light duty. The court upheld UPS’s decision, finding that UPS’s policy was “pregnancy blind.” Id. at *6; see also Urbano v. Continental Airlines, 138 F.3d 204 (5th Cir. 1998); cf Adams v. Nolan, 962 F.2d 791, 792 (8th Cir. 1992) (holding that while employer had a written policy of providing light duty assignments only to employees who are injured on the job, the employer had repeatedly granted such assignments to those injured in other ways and that, therefore, the decision to deny light duty to the plaintiff was unlawful not because light duty was granted to those on the job but because the employer treated her differently than others who needed light duty for other reasons).

In Ensley-Gaines v. Runyon, 100 F.3d 1220 (6th Cir. 1996), however, the Sixth Circuit reached the opposite conclusion. The plaintiff, Ensley-Gaines, was an employee of the U.S.
Postal Service. The U.S. postal service provided “light duty” to those injured employees whose injuries were not employment-related and “limited duty” to those who were injured on the job. Pursuant to the union agreement, the postal service was required to pay those who were injured on the job regardless of whether they were assigned alternative work during the period of their injury, while in contrast employees who were not injured on the job need not be paid if no light duty jobs were available. The postal service placed the plaintiff on light duty after her doctor ordered her not to lift items over 15 pounds and put a four hour limit on standing and sitting. Her supervisor, in compliance, simply limited her working hours to four hours a day. This left her without compensation for the other four hours in the day for which she would normally have worked and received payment. When she asked to be allowed to continue working while sitting down for the remaining four hours of the day, her supervisor declined her request. Id. at 1223. The court rejected the postal service’s scheme, stating:

There was also evidence to show that limited-duty and light-duty employees are similarly situated and differ only with respect to the fact that limited-duty employees are unable to perform their full duties because they have been injured on the job and light-duty employees are unable to perform their full duties because of a non-job-related injury or illness. While Defendant must continue to pay limited-duty employees regardless of whether they work, such a distinction pertains to the terms of employment, not to an employee’s ability or inability to work, as provided in the PDA.

Id. at 1226.

Some plaintiffs have sought to avoid this analysis entirely by arguing that policies that grant light duty to employees injured on the job but not to pregnant employees constitute direct evidence of discrimination such that the McDonnell Douglas analysis is unnecessary. In Young v. UPS, for example, the plaintiff contended that the employer’s “policy of accommodating certain employees but not pregnant workers who are otherwise allegedly similar in their ability or inability to work … runs afoul of the PDA.” 2013 WL at *7. The Fourth Circuit, however, rejected this argument in Young, holding that UPS’s policy was “at least facially a ‘neutral and legitimate business practice’” and not evidence of UPS’s discriminatory animus toward pregnant workers.” Id.

C. Is Discrimination on the Basis of Pregnancy, Childbirth or Related Medical Conditions?

The PDA only protects those who assert discrimination on the basis of pregnancy, childbirth, or related medical condition. What falls into those three categories, however, is sometimes up for debate. Courts have had to grapple with whether abortion, fertility problems, reproductive rights, or care-giving fall under the PDA’s protection.

1. Abortion and Reproductive Rights

The legislative history of the PDA suggests that it covers abortion. The House conference report states that the PDA’s basic language “covers women who chose to terminate
their pregnancies. Thus, no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion. H.R. Conf. Rep. No 95-1786 at 4 (1978), as reprinted in 95th Cong., 2d Sess. 4, 1978 U.S.C.C.A.N. 4749, 4766. The EEOC affirmed this statement via guidelines that make clear that the PDA protects women from discrimination by their employer when they have abortions. The Commission’s Questions and Answers on the PDA state that employers may not “discharge, refuse to hire, or otherwise discriminate against a woman because she has had an abortion.” 29 C.F.R. §1604, App. (EEOC Q&A on the PDA). The EEOC goes on to note that employers are required to provide “all fringe benefits other than health insurance, such as sick leave, which are provided for other medical conditions.” Id.

The Third Circuit deferred to these guidelines in Doe v. C.A.R.S. Prot. Plus, Inc, 527 F.3d 358 (3d Cir. 2008). In that case, the plaintiff terminated her pregnancy after her physician recommended that she do so. The employer laid the plaintiff off just three days later, allegedly for taking time off without providing notice. The evidence, however, suggested otherwise. Further evidence established that other employees had repeatedly been granted equivalent time off. In reaching a decision, the court considered whether the PDA even applied in the case at hand. The court ultimately determined that “the term ‘related medical condition’ includes abortion.” Doe, 527 F.3d at 364.

The Sixth Circuit has also ruled on this issue in Turic v. Holland Hospitality, Inc., 85 F.3d 1211 (6th Cir. 1996), and in fact expanded on the right, holding that a woman need not have the abortion to be covered by the law. In Turic, the employer discharged the employee after she considered having an abortion. The Court held that “the plain language of the statute, the legislative history and the EEOC guidelines clearly indicate that an employer may not discriminate against a woman employee because she has exercised her right to have an abortion.” Id. at 1214. Furthermore, although the employee in question never actually went through with the abortion, the court concluded that the distinction between those who consider having an abortion and those who have it “has no effect” when it comes to the application of the PDA. Id. Rather, “since an employer cannot take adverse employment action against a female employee for her decision to have an abortion, it follows,” the court said, “that the same employer cannot take adverse action against a female employee for merely thinking about what she has a right to do.” Id.

2. Fertility Treatment

The Courts of Appeals are split on whether women who seek fertility treatment are protected by the PDA. The Eighth Circuit has held that “because the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender neutral, it does not violate the PDA.” Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 680 (8th Cir. 1996). The court reasoned that pregnancy and childbirth are “strikingly different from infertility,” and that consequently infertile women are not protected by the PDA. Likewise, the Second Circuit has held that infertility is not covered under the PDA, noting that “because reproductive is common to both men and women, we do not read the PDA as introducing a completely new classification of prohibited discrimination based solely on reproductive
capacity.” Saks v. Franklin Covey, 316 F. Supp. 2d 337, 345 (2d Cir. 2006). In Saks, the plaintiff brought suit arguing that her employer’s failure to provide coverage for certain infertility treatments constituted a violation of the PDA. The court rejected her claims, holding that “including infertility within the PDA’s protection as a ‘related medical condition [ ]’ would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination.” Id. at 346.

The Seventh Circuit departed from the analysis employed by both the Eighth and Second Circuits. That circuit has held that infertility is not gender neutral but rather that the condition is a gender-specific “quality of childbearing capacity” and therefore covered by the PDA. Hall v. Nalco, 534 F.3d 644, 649 (7th Cir. 2008). In reaching its conclusion, the court noted that “[e]mployees terminated for taking time off to undergo IVF – just like those terminated for taking time off to give birth or receive other pregnancy-related care will always be women.” Id. at 648-649; see also Pacourek v. Inland Steel Co., 858 F. Supp. 1393 (N.D. Ill. 1994) (“As a general matter, a woman’s medical condition rendering her unable to become pregnant naturally is a medical condition related to pregnancy and childbirth for the purposes of the Pregnancy Discrimination Act. . . . If potential pregnancy is treated like pregnancy for purposes of the PDA, it follows that potential pregnancy-related medical conditions should be treated like pregnancy-related medical conditions for purposes of the PDA.”).

3. Caregiving

Women frequently find themselves the victim of stereotypical assumptions that they will be less engaged at work once they have children. While it is clear that the PDA prohibits employers from discriminating against women because of stereotypes about how they will perform when pregnant, the PDA has not been found to protect women from assumptions made about them as caregivers. In Piantanida v. Wyman Center, Inc., the Eighth Circuit considered “whether being discriminated against because of one’s status as a new parent is ‘because of or on the basis of pregnancy, childbirth, or related medical conditions,’ and therefore violates the PDA.” 116 F.3d 340, 342 (8th Cir. 1997) (quoting 42 U.S.C. §2000e(k)). The Court determined that it is not, holding that “an individual’s choice to care for a child is not a ‘medical condition’ related to childbirth or pregnancy. Rather it is a social role chosen by all new parents who make the decision to raise a child.” Id. The Court noted that while such discrimination might be “reprehensible,” it is not “based on the gender-specific biological functions of pregnancy and child-bearing, but rather is based on a gender-neutral status potentially possessible by all employees, including men and women who will never be pregnant.” Id.; cf. Piraino v. International Orientation Res., Inc., 84 F.3d 270, 274 (7th Cir. 1996) (plaintiff stated a case under the PDA because “[t]his is … not a case in which the claim relates only to an employer's refusal to hire (or reinstate) a mother with a young child, without a hint of any role that the earlier pregnancy played in the decision”) (emphasis added); Armstrong v. Flowers Hosp., 33 F.3d 1308 (11th Cir. 1994) (“the [PDA] does not … require employers to offer maternity leave …”) (quoting Troup v. May Dept Stores Co., 20 F.3d 734, 738 (7th Cir. 1994)); Kenney v. Ultradent Prods., Inc., No. 05-1851 RMB, 2007 WL 2264851 (D.N.J. Aug. 6 2007) (parenthood is not protected by the PDA); Boeser v. Sharp, No. CivA03CV00031WDMEH, 2006 WL
Such discrimination against women because of their family responsibilities may not be actionable under the PDA, but plaintiffs may nonetheless pursue such cases under state law or other theories of Title VII discrimination or state law. For example, several states prohibit discrimination based on family responsibilities. See Alaska Stat. § 18.80.200 (prohibiting discrimination based on “parenthood”); D.C. Code § 2-1402.11 (prohibiting discrimination based on family responsibilities, which is defined as “the actual or potential state of being a ‘contributor’ to the support of dependents”). Furthermore, Title VII’s prohibition against discrimination based on sex also provides some protection where the PDA does not. The EEOC provides some direction on what protections workers enjoy with respect to their caregiving responsibilities:

employment decisions that discriminate against workers with caregiving responsibilities are prohibited by Title VII if they are based on sex or another protected characteristic, regardless of whether the employer discriminates more broadly against all members of the protected class. For example, sex discrimination against working mothers is prohibited by Title VII even if the employer does not discriminate against childless women.


Under the EEOC’s Guidance, employers must refrain from stereotyping working women as less desirable because of assumptions that the “female worker will assume caretaking responsibilities or that a female worker’s caretaking responsibilities will interfere with her work performance.” Id. In *Lust v. Sealy, Inc.*, for example, a sales manager sued her employer after she was passed over for promotion. The plaintiff alleged, and the supervisor admitted, that she was qualified for the position, but not hired because the supervisor assumed she would not want to relocate her family as the new position would require. In affirming the jury’s decision, the 7th Circuit noted:

Realism requires acknowledgment that the average mother is more sensitive than the average father to the possibly disruptive effect on children of moving to another city, but the antidiscrimination laws entitle individuals to be evaluated as individuals rather than as members of groups having certain average characteristics.”

277 F. Supp. 2d 973 (W.D. Wis 2003), aff’d, 383 F.3d 580, 584 (7th Cir. 2004); see also *Walsh v. National Computer Sys., Inc.*, 332 F.3d 1150 (8th Cir. 2003) (employee awarded damages after her work was scrutinized more than other employees and she was subjected to hostility
from her supervisor upon returning from maternity leave because of employer’s prejudice against new mothers); Santiago-Ramos v. Centennial P.R. Wireless Corp, 217 F.3d 46 (1st Cir. 2000) (summary judgment overturned based on finding that evidence of discrimination based on sex existed where employer learned employee intended to have more children and he subsequently asked her how she could perform her job if she had more children, made comments about how her husband could manage without her at home caring for her children, and where a company director expressed concern that she would no longer work late after having children); Manhart v. City of Los Angeles, Dep’t of Water & Power, 435 U.S. 702, 708 (1978) (“[Title VII’s] focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a … sexual … class …. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply.”)

Title VII also prohibits employers from taking adverse employment actions against employees or applicants because of the employer’s belief that women should play a particular societal role. In Coble v. Hot Springs Sch. Dist. No. 6, 682 F.2d 721 (8th Cir. 1982), for example, the Court found for the plaintiff where the male interviewer informed a female applicant that he had chosen an unmarried, childless man over her because that applicant would be more “available” and “dedicated.” See also Back v. Hastings on Hudson Union Free Sch. Dist., 365 F.3d 107 (2d Cir. 2004) (employer violated Title VII where employer denied employee tenure after she became a mother because, as employer stated, “it was not possible for [her] to be a good mother and have this job”).

V. Overlap Between the PDA and Other Laws

A. The PDA and the Americans with Disabilities Act

The Americans with Disabilities Act (ADA) of 1990 prohibits discrimination against people with disabilities in employment, transportation, public accommodation, communications, and governmental activities. 42 U.S.C. § 12101 et seq. The ADA defines a disability as “(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.” 42 U.S.C. § 12102(2). Individuals who can demonstrate the first prong are entitled to reasonable accommodations.

In the years following the law’s enactment, a series of court decisions limited the scope and impact of the law. See Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999) (impairments that can be mitigated with corrective action are not disabilities for the purposes of the ADA); Murphy v. United Parcel Service, 527 U.S. 516 (1999) (same); Albertson’s v. Kirkingburg, 527 U.S. 555 (1999) (same); Toyota Motor Mfg., Inc. v. Williams, 534 U.S. 184 (2002) (establishing a strict standard for those seeking to establish their disabilities under the ADA so that to be substantially limited in performing a major life activity under the ADA “an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people’s daily lives”). This series of cases drastically limited the pool of individuals who could access to the law’s protections.
Pregnant women who suffered complications related to their pregnancies were no exception. District courts across the country repeatedly ruled that pregnancy does not qualify as a disability and, because they are normal symptoms of reproduction, the conditions associated with pregnancy only rise to the level of a disability in extremely rare circumstances. See Gudenkauf v. Stauffer Commc’ns, Inc., 922 F. Supp. 465, 472 (D. Kan. 1996) (“[P]regnancy is a physiological condition, but it is not a disorder. Being the natural consequence of a properly functioning reproductive system, pregnancy cannot be called an impairment.”); Willareal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 142 (S.D. Tex. 1995) (same); Tsetseranos v. Tech Prototype, Inc., 893 F. Supp. 109, 119 (D.N.H. 1995) (same); Farrell v. Time Service, Inc., 178 F. Supp. 2d 1295 (N.D. Ga. 2005) (“At most, courts have held that pregnancy may rise to the level of a disability if there are severe complications.”); Minott v. Port Authority of NY and NJ, 116 F. Supp. 2d 513 (S.D.N.Y. 2000) (“courts have held only in extremely rare circumstances that complications arising from pregnancy constitute a disability under the ADA.”).

In 2008, Congress passed the ADA Amendments Act (“ADAAA”). The Act overturned the strict interpretations of what it means to be disabled under the law. The ADAAA left in place the ADA’s definition of disability, but mandated that the definition of disability be broadly construed. See 42 U.S.C. § 12102(4) (“the definition of disability in this Act shall be construed in favor of broad coverage of individuals under this act, to the maximum extent permitted under the terms of this Act.”).

In March, 2011, the EEOC issued regulations implementing the ADAAA. See 29 C.F.R. § 1630. The regulations establish a broad construction of what it means to have a “physical or mental impairment that substantially limits one or more major life activities,” and provide an expanded list of examples that constitute major life activities whose limitation could equate to a disability. For example, a major life activity may encompass “caring for oneself, performing manual tasks … standing … lifting … bending.” 29 U.S.C. § 1630.2(i). It might also mean an impact to the operation of a major bodily function, including “digestive … bladder … circulatory … and reproductive functions.” Id. The regulations also define the meaning of impairment broadly.6 Finally, the regulations made clear that impairments that are episodic or temporary may nonetheless be considered disabilities and expressly did not set a minimum duration that an impairment’s effects must last in order to be deemed substantially limiting. 29 C.F.R. §1630.2(j); see also Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act, www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm.

This new law and regulatory framework could have a significant impact on the legal recourses available to pregnant women. Pregnant women often suffer from a host of

6 The regulations define impairment as: “(1) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more body systems, such as neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genitourinary, immune, circulatory, hemic, lymphatic, skin, and endocrine; or (2) any mental or psychological disorder, such as an intellectual disability (formerly termed ‘mental retardation’), organic brain syndrome, emotional or mental illness, and specific learning disabilities.” 29 C.F.R. § 1630.2(h).
complications associated with pregnancy – temporary physical impairments which may render them unable to fulfill their job responsibilities as they normally would. The Americans with Disabilities Act, as amended by the ADA Amendments Act, may now provide them with relief both under the ADA and potentially under the PDA.

First, based on the terms of the ADAAA and on the EEOC’s regulations regarding covered impairments and temporary impairments, more complications of pregnancy may now be considered disabilities. While the EEOC regulations continue to state that pregnancy is “not the result of a physiological disorder” and is therefore not an impairment in and of itself, the EEOC also explicitly states that “a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition.” 76 Fed. Reg. 16978, 917007 (Mar. 25, 2011) (explaining 29 C.F.R § 1630.2(h)).

Indeed, just by expanding the definition of “impairment” and “major life activity,” the ADAAA encompasses a broader swath of disabilities that courts previously would have refused to recognize. These broadened definitions likely encompass pregnancy complications that might not have qualified under pre-ADAAA precedent. For example, the appendix to the EEOC regulations suggests that a person with an impairment resulting from a lifting restriction that will last for a finite period of time would qualify as disabled. This analysis could also extend to women whose pregnancies limit their ability to lift heavy items.

That said, the EEOC did not go so far as to say that all pregnancy symptoms are temporary disabilities. It is yet to be seen whether a woman experiencing normal pregnancy symptoms, such as morning sickness, back pain, or the need to go to the bathroom more often, would be able to succeed in court on a claim that those symptoms constitute disabilities, even under the more expansive ADAAA. Employers may successfully argue that back pain is part of a normal pregnancy, and normal pregnancy is, as described by the EEOC, not considered a disability.

Second, the newly expanded ADAAA may provide pregnant women with additional recourse under the PDA. As discussed above, the PDA requires that women affected by pregnancy, childbirth, or related medical conditions be treated the same as those who are similarly situated. The ADAAA’s expansion does not change the underlying analysis, but should in theory expand the comparator groups against whom women may be judged. Whereas previously, a woman who needed light duty because of a lifting restriction might only be able to point to workers injured on the job as comparators, employers covered by the ADAAA may now be compelled to give light duty to any employees who suffer back problems not related to a work injury. Consequently, even if a pregnant woman’s lifting restrictions were not considered a “disability,” she might now be able to point to a “similarly situated” employee who was given light duty as an accommodation.

It is unclear whether this argument will be successful, as courts may decide that those protected by the ADA are not an appropriate comparator group. The Seventh Circuit did precisely this in Serednyj v. Beverly Healthcare, 656 F.3d 540 (7th Cir. 2011). In that case, a nursing home activity director became pregnant. She had previously suffered a miscarriage and
was experiencing complications from her pregnancy. Her doctor advised her to refrain from lifting heavy objects. Though she was still able to perform the essential functions of her job, her employer refused to accommodate her, stating that it had a policy of granting light duty only to those employees who suffered work related injuries or whose non-work related injuries were accommodated under the ADA. Because Ms. Serednyj was not injured on the job, and her pregnancy-related complications were not considered disabilities under the ADA, the Seventh Circuit determined that she was not similarly situated with those other individuals and not entitled to light duty. If this analysis holds sway in other districts, it is possible that the expansion of the ADA will not provide a broader comparison group. Indeed, it could even make matters worse. As the ADA covers more employees, if pregnant women cannot be compared to those covered by the ADA, pregnant women will face more difficulty establishing that they are being treated differently than their peers.

There is little guidance on how these questions will pan out going forward. There is minimal case law currently as courts have not yet had the opportunity to explore the issue in full. This area of law is developing and the impact on pregnant employees will become clearer over time as more courts reach decisions that take the ADAAA into account.

B. The PDA and the FMLA

Under the PDA, an employer must permit a pregnant employee to take leave if that employer would do the same for other similarly limited employees. The PDA does not, however, require that employers give new mothers leave if other similarly situated employees would not be entitled to it. Where that is the case, however, some employees may nonetheless be able to take maternity leave pursuant to the Family and Medical Leave Act (“FMLA”).

The FMLA is a federal law that entitles eligible employees to take up to twelve weeks of unpaid leave in order to care for a sick family member or because of her own serious health condition. 29 U.S.C. § 2601 et seq. It requires that employees returning from leave must be restored to their original jobs, or at least an equivalent one with the same pay and terms and conditions of employment. It also requires employers to maintain group health insurance coverage for employees who are on FMLA leave. 29 U.S.C. § 2614(c). The FMLA, therefore, entitles pregnant women and new parents (including foster and adoptive parents) to take time off even where their employers do not otherwise have policies in place that allow pregnant women to take leave before and after the birth of their children, or that allow new parents to access time off after the birth or adoption of a child.

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7 Courts have held that the statute is not retroactive. See, e.g., Nyrop v. Independent Sch. Dist. No. 11, 2010 WL 3023665 (8th Cir. 2010) (holding that ADA amendments are not retroactive); Becerril v. Pima County Assessor’s Office, 587 F.3d 1162, 1164 (9th Cir. 2009) (same); Thornton v. United Parcel Serv., Inc., 587 F.3d 27, 34 n.3 (1st Cir. 2009); Fredricksen v. United Parcel Serv., Co., 581 F.3d 516, 521 n. 1 (7th Cir. 2009); Lytes v. D.C. Water & Sewer Auth., 572 F.3d 936, 941 (D.C. Cir. 2009); Milholland v. Sumner County Bd. of Educ., 569 F.3d 562, 567 (6th Cir. 2009); EEOC v. Agro Distrib., LLC, 555 F.3d 462, 469-70 (5th Cir. 2009).
Under the FMLA, an eligible employee working for a covered employer who is a parent -- mother or father -- can take family and medical leave to bond with a newborn or newly adopted child. The leave must be taken within 12 months of the birth or placement of the baby or child. See 29 C.F.R. § 825.200 -.201. Parents may also take such leaves because of the placement of an adopted child, which may include time to “travel to another country to complete an adoption.” 29 C.F.R. § 825.121(a)(1)

Not everyone is eligible for the FMLA, however. FMLA coverage is limited to employers with more than 50 employees at the employee’s worksite or 50 employees within 75 miles of the worksite. 29 U.S.C. § 2611(2)(B)(ii). Furthermore, under the federal FMLA, the worker must have been employed by the same employer from whom the leave is requested for at least 12 months before the request for leave and the employee must have worked at least 1,250 hours during the 12 months prior to the request for leave (average of 24 hours per week). 29 U.S.C. § 2611(2)(A). The 12 months an employee must have been employed need not be consecutive months, but the 12 total months of previous employment must have occurred within seven years preceding the leave. 29 C.F.R. §825.110(b). Because of these limitations, a sizeable population of women -- approximately 41% -- are left without FMLA protected time off during or after their pregnancies. See National Partnership for Women and Families, A Look at the U.S. Department of Labor’s 2012 Family and Medical Leave Act Employee and Worksite Surveys, www.nationalpartnership.org/site/DocServer/DOL_FMLA_Survey_2012_Key_Findings.pdf?docID=11862.

The FMLA prohibits an employer from terminating a qualified employee in retaliation for taking up to 12 weeks of leave. See 29 U.S.C. §§ 2614(a)(1); 2615(a)(1). An employer is also prohibited from interfering with an employee’s right to take FMLA-qualifying leave, harassing an employee for taking leave, denying a valid request for leave, refusing to hire or promote an employee because she has taken or will take an FMLA-qualifying leave, retaliating against an employee for requesting a FMLA-qualifying leave, or retaliating against an employee for complaining about a violation of FMLA law. 29 U.S.C. § 2615. Where an employer violates these rules, employees may be eligible for wages, employment benefits, and other compensation denied or lost to the employee as a result of the violation that are “justified by the facts of a particular case.” 29 C.F.R. 825.400(c).

Additionally, for violations where the employer has not denied the employee any tangible amount or benefit, such as when an employer illegally refuses to grant FMLA leave, the employee can receive payment for any actual monetary loss that he or she suffers as a result of the violation. This can include, for example, the cost of providing care for the family member the employee would have cared for had leave not been denied, up to an amount equal to 12

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8 Determination of the number of employees for purposes of FMLA leave occurs at the time the employee gives notice of leave. 29 C.F.R. § 825.110(e).

9 If, however, the leave is occasioned by military service obligations to the National Guard or Reserves, employment prior to the break in service must be counted toward the 12-month and 1,250-hour requirements even if it is more than seven years prior to leave, as must the time that the employee would have worked for the employer but for mandatory military service. 29 C.F.R. § 825.110(b)(2)(i).
weeks of wages for the employee, plus interest. A successful litigant may also be able to receive: (1) liquidated damages, if the violation was willful; (2) equitable relief, including reinstatement and/or promotion; and (3) reasonable attorneys’ fees and “other costs of the action from the employer in addition to the judgment awarded by the court.”

An employee will not prevail in a suit against her employer based on violations of the FMLA if the employer can establish a good faith and legitimate reason for not reinstating the employee. See O’Connor v. PCA Family Health Plan, Inc., 200 F.3d 1349 (11th Cir. 2000); Gleklen v. Democratic Congressional Campaign Comm., Inc., 199 F.3d 1365, 1369 (D.C. Cir. 2000).

VI. Where Do We Go From Here?

The PDA established important protections for employees who are or may become pregnant, but many women still face discrimination in the workplace because of their role as child bearers. With the law approaching its 35th year, and with a changing landscape of laws that may alter court analyses, the law’s application will continue to evolve. In the years to come, pregnant women and those experiencing related medical conditions may witness an expansion of the protections that guarantee their rights. Congress is considering a number of bills that, if passed and signed into law, would build upon the protections offered by Title VII, the FMLA, and the ADA in ways that would likely impact women seeking pregnancy-related accommodations or leave. Among them are bills expanding the scope of the FMLA so that it has a broader reach and a proposal that would affirmatively establish that pregnant women have a right to reasonable accommodations when conditions caused by pregnancy so require. These include:

- The Pregnant Workers Fairness Act, which would make it unlawful for employers to refuse to grant reasonable accommodations to pregnant women who suffer limitations due to pregnancy, childbirth, or related medical conditions unless that accommodation would impose an undue hardship on the employer.

- The Family and Medical Leave Enhancement Act, which would grow the number of employees eligible for leave by amending the FMLA to cover businesses with 25 or more employees. The bill would also expand the reasons for which an employee could take leave. If passed, it would give workers the right to take leave for parental and family involvement reasons and for routine family medical needs.

- The Parental Bereavement Act, which would provide leave for employees to grieve the death of a child.

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10 A number of these bills were introduced during the last Congress. They have yet to be introduced during the current 113th Congress, but many expect that similar bills will be reintroduced.
• The Balancing Act, which is a comprehensive bill that would expand access to the FMLA by defining family member more broadly, decreasing the coverage threshold from employers with 50 employees to those with 25 or more, and allowing employees to take leave for parental involvement, family wellness purposes or to address the results of domestic violence. The bill would also guarantee six paid sick days to employees, establish a paid family and medical leave program, and expand child care programs.

• The Family Fairness Act, which would eliminate the hours worked requirement under the FMLA and expand it to include part-time workers.

While our laws are presented as objective reality, they are at the core, a body of cultural norms for our country. The changes in the laws related to the treatment of pregnancy workers over the past three decades reflects our evolving national view of this important issue, which will likely continue to evolve and be debated for many years to come.