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REPAIR IT

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PREGNANT LABORERS SHOULD EXPECT BETTER: THE BROKEN PREGNANCY DISCRIMINATION STANDARD AND HOW THE PREGNANT WORKERS FAIRNESS ACT CAN REPAIR IT

Sarah Czipinski*

I. INTRODUCTION

Heather Wiseman was a sales floor associate at Wal-Mart Stores, Inc. (“Wal-Mart”).¹ Ms. Wiseman required a simple, reasonable accommodation to continue working throughout her pregnancy: She needed to carry water with her.² Ms. Wiseman suffered from gestational urinary and bladder infections and had to stay hydrated to combat these afflictions.³ But during Ms. Wiseman’s pregnancy, Wal-Mart changed its policy regarding water bottles so that only cashiers were permitted to carry water.⁴ Armed with a doctor’s note, Ms. Wiseman requested to carry water with her while she worked, but this request was denied.⁵ Eventually, Ms. Wiseman was moved to the fitting room area, where she again had no access to water.⁶ Concerned for her health, Ms. Wiseman decided to carry a water bottle in spite of this new policy.⁷ Unfortunately, she was then fired for insubordination.⁸

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¹ *Wiseman v. Wal-Mart Stores, Inc.*, No. 08-1244-EFM, 2009 WL 1617669, at *1 (D. Kan. June 9, 2009) (granting defendant’s motion to dismiss plaintiff’s claims).

² *Id.*

³ *Id.*

⁴ *Id.* at *1.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

Ms. Wiseman decided to sue Wal-Mart for pregnancy discrimination under existing federal law.⁹ She was denied relief.¹⁰

This Note argues that current protections for pregnant workers are insufficient, and these inadequacies can be remedied by enacting the Pregnant Workers Fairness Act (the “PWFA”),¹¹ which has been introduced in the 113th session of Congress. Part II of this Note discusses the current standard for determining pregnancy discrimination as it stands under the Pregnancy Discrimination Act of 1978 (the “PDA”)¹² and other existing federal law. Part III explains this current standard’s unfairness, providing both a legal analysis of current law and a description of cases that have failed because of this unyielding standard. Part IV breaks down the PWFA’s new standard, describes how the failed cases would have prevailed if governed by the PWFA, and discusses strategies for passing the PWFA. Part V considers recent developments in federal pregnancy discrimination law before concluding.

II. THE CURRENT FEDERAL PREGNANCY DISCRIMINATION STANDARD

Under present federal law, there are a myriad of protections in place for pregnant workers, though they all have substantial gaps. Together, the PDA,¹³ the Americans with Disabilities Act of 1990 (the “ADA”)¹⁴ with its subsequent amendment, the Americans with Disabilities Act Amendments Act of 2008 (the “ADAAA”),¹⁵ and the Family and Medical Leave Act of 1993 (the “FMLA”)¹⁶

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at *3.

¹¹ Pregnant Workers Fairness Act, S. 942, 113th Cong. (2013) [hereinafter S. 942], available at <http://www.gpo.gov/fdsys/pkg/BILLS-113s942is/pdf/BILLS-113s942is.pdf>; Pregnant Workers Fairness Act, H.R. 1975, 113th Cong. (2013) [hereinafter H.R. 1975], available at <http://www.gpo.gov/fdsys/pkg/BILLS-113hr1975ih/pdf/BILLS-113hr1975ih.pdf>.

¹² 42 U.S.C. § 2000e(k) (2012).

¹³ *Id.*

¹⁴ 42 U.S.C. §§ 12101–12213 (2012).

¹⁵ Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 [hereinafter ADA Amendments] (codified in scattered sections of 42 U.S.C. §§ 12102–12213 (2012)).

¹⁶ 29 U.S.C. §§ 2601–2654 (2012).

provide the current structure of pregnancy discrimination law. Yet these four pieces of legislation leave pregnant employees with severely inadequate protection and a legal standard that is nearly impossible to meet.

A. The Pregnancy Discrimination Act of 1978

The only federal law in place solely concerning pregnancy discrimination is the PDA.¹⁷ On its face, the PDA makes it illegal for employers to discriminate against workers based on pregnancy, childbirth, or related medical conditions.¹⁸ The PDA accomplished this by altering the definition of sex discrimination under Title VII of the Civil Rights Act of 1964 such that the “terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.”¹⁹

The PDA also directs, in pertinent part, that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”²⁰ This “comparative accommodation” provision requires employers to treat pregnant workers identically to employees with limitations similar to those of the pregnant employee. The PDA does not provide affirmative accommodations for pregnant workers.²¹ Therefore, employers need only allow pregnant employees to carry water, for instance, if it similarly accommodates other temporarily disabled employees. This stipulation was inserted to alleviate employers’ worries about providing pregnant workers more benefits than nonpregnant workers.²²

Because the PDA is part of Title VII,²³ a plaintiff seeking relief thereunder must meet the standards for any Title VII violation. The plaintiff must, therefore, establish a *prima facie* case of discrimination “either through direct evidence, statistical proof, or the test established by the [United States] Supreme Court in

¹⁷ 42 U.S.C. § 2000e(k).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Jeannette Cox, *Pregnancy As “Disability” and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 469–70 (2012).

²² D’Andra Millsap, Comment, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411, 1417 (1996).

²³ 42 U.S.C. § 2000e(k).

[*McDonnell Douglas Corp. v. Green*].²⁴ Direct evidence requires the plaintiff to show discriminatory intent behind her employer's actions.²⁵ This can be a difficult burden to meet,²⁶ so indirect evidence of discrimination can be shown with the *McDonnell Douglas* test. This test requires that a plaintiff show a *prima facie* case of discrimination such that: "(1) she is a member of a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the job in question; and (4) the circumstances give rise to an inference of discrimination."²⁷ Once the plaintiff meets these criteria, the burden shifts to the employer, which must show "some legitimate, nondiscriminatory reason" for its action.²⁸ If the employer cannot meet this burden, the plaintiff is entitled to relief.

The PDA, however, significantly alters the fourth prong of the *McDonnell Douglas* analysis. "[T]he second clause [of the PDA] . . . mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated with respect to their ability or inability to work."²⁹ The fourth *McDonnell Douglas* prong under the PDA thus requires a pregnant employee to demonstrate that "others similarly situated were more favorably treated."³⁰ A pregnant worker must, therefore, identify another employee with similar limitations who her employer has treated more favorably than herself.

²⁴ *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1224 (6th Cir. 1996) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

²⁵ *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 256 (1981).

²⁶ *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711 (1983).

²⁷ Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 *YALE J.L. & FEMINISM* 15, 34 (2009).

²⁸ *Id.*; *McDonnell Douglas*, 411 U.S. at 802.

²⁹ *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 204–05 (1991) (citing *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 297 (1987) (White, J., dissenting)); *see Dulina v. Hometown Nursing & Rehab. Ctr.*, No. 3:09-CV-0458, 2010 WL 6490009 (M.D. Pa. Dec. 21, 2010), *report and recommendation adopted*, 2011 WL 1376242 (M.D. Pa. Apr. 12, 2011) ("The evidence most often used to establish this element is that of disparate treatment, whereby a plaintiff shows that she was treated less favorably than similarly situated employees who are not in plaintiff's protected class.").

³⁰ *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998).

B. *Other Sources of Federal Protection: The ADA, ADAAA, and FMLA*

Two other sources of federal law provide limited protection for pregnant workers: the ADA³¹ as amended by the ADAAA³² and the FMLA.³³ The ADA did not protect pregnant workers as originally enacted in 1990.³⁴ The purpose of the ADA is to combat discrimination against disabled individuals, both inside and outside the workplace.³⁵ It does so by requiring employers to provide reasonable accommodations to disabled individuals so long as the accommodation would not impose undue hardship on the employer.³⁶ The Equal Employment Opportunity Commission (the “EEOC”) describes a reasonable accommodation as one that “seems reasonable on its face, *i.e.*, ordinarily or in the run of cases’ . . . ‘feasible’ or ‘plausible.’”³⁷ A reasonable accommodation must not impart undue hardship on the employer.³⁸ This includes reasonable accommodations that are “unduly extensive, substantial, or disruptive, or those that would fundamentally alter the nature or operation of the business.”³⁹

The ADA excludes pregnant workers in its explanation of a qualifying disability. It defines a disability as “a physical or mental impairment that substantially limits one or more major life activities of such individual,” a history of such an impairment, or where one is perceived as having such an impairment.⁴⁰ The United States Supreme Court construed this congressional definition narrowly in a way that potentially excludes individuals afflicted with “diabetes, epilepsy,

³¹ 42 U.S.C. §§ 12101–12213.

³² ADA Amendments, *supra* note 15.

³³ 29 U.S.C. §§ 2601–2654.

³⁴ 42 U.S.C. §§ 12101–12102.

³⁵ *Id.* § 12101(b).

³⁶ *Id.* § 12112 (b)(5)(a).

³⁷ Equal Emp’t Opportunity Comm’n, *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities*, EEOC.GOV (Oct. 22, 2002), <http://www.eeoc.gov/policy/docs/accommodation.html#types> [hereinafter EEOC Enforcement Guidance] (citing *US Airways, Inc. v. Barnett*, 535 U.S. 391, 401–03 (2002)).

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ 42 U.S.C. § 12102(1)(A).

cancer, muscular dystrophy, and artificial limbs.”⁴¹ Federal courts have taken the Court’s lead and “[w]ith near unanimity” have held that “pregnancy is not a ‘disability’ under the ADA.”⁴²

Enacted in 2008, the ADAAA was meant to change this perspective.⁴³ It expanded the definition of “disability” to overcome the Court’s overly narrow definition.⁴⁴ The EEOC, however, still does not consider pregnancy a “disability” under the ADAAA, but particular impairments that result from pregnancy “may be considered a disability if they substantially limit a major life activity.”⁴⁵ Despite this expansion, the ADAAA does not cover conditions arising from the average pregnancy.⁴⁶ For a pregnancy condition to be covered under the ADAAA, it must not be part of a clinically standard pregnancy.⁴⁷ In other words, the ADAAA only covers complications arising from an abnormal pregnancy and does not cover complications arising from a “normal pregnancy.”⁴⁸

The FMLA extends limited protection to pregnant workers.⁴⁹ This broad piece of legislation was designed “to entitle employees to take reasonable leave for medical reasons,” one of which is childbirth.⁵⁰ Its primary purpose, however, was not to protect pregnant women from employment discrimination. Instead, it aimed

⁴¹ Kevin Barry, Emily Benfer & Chai Feldblum, *Comparison of the ADA (as construed by the courts) and the ADA, As Amended*, GEORGETOWN FED. LEGISLATION & ADMIN. CLINIC, <http://www.law.georgetown.edu/archiveada/documents/ComparisonofADAandADAAA.pdf> (last visited Jan. 22, 2013).

⁴² *Wenzlaff v. NationsBank*, 940 F. Supp. 889, 890 (D. Md. 1996).

⁴³ ADA Amendments, *supra* note 15. The ADAAA is an amendment to the already existing ADA. In this note, I refer to the ADAAA as a piece of legislation separate from the ADA only to highlight the changes it made to the existing law. The ADAAA and ADA are, however, one in the same.

⁴⁴ Equal Emp’t Opportunity Comm’n, *Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, EEOC.GOV, http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm (last visited Jan. 27, 2015).

⁴⁵ *Id.*

⁴⁶ Nat’l Women’s Law Ctr., *Fact Sheet: The Pregnancy Discrimination Act and the Amended Americans with Disabilities Act: Working Together to Protect Pregnant Workers*, NAT’L WOMEN’S LAW CTR. (Aug. 2013), http://www.nwlc.org/sites/default/files/pdfs/pda_adaaa_preg_workers_fact_sheet.pdf [hereinafter NWLC ADAAA Fact Sheet].

⁴⁷ *Spees v. James Marine, Inc.*, 617 F.3d 380, 397 (6th Cir. 2010).

⁴⁸ *Id.*

⁴⁹ 29 U.S.C. §§ 2601–2654.

⁵⁰ *Id.* § 2601(b)(2).

“to promote the stability and economic security of families” by providing families twelve weeks of unpaid leave.⁵¹ The FMLA allows an employer to compel a pregnant employee to take her FMLA leave as soon as she cannot meet the strict guidelines of her job, even if it is the employer’s inflexible rules that create the issue.⁵² The FMLA does not provide for accommodation of pregnant employees. It only offers job protection when pregnant women must take leave because of their pregnancies or childbirth.

III. THE CURRENT FEDERAL STANDARD’S UNFAIRNESS

The EEOC and state and local Fair Employment Practices Agencies reported 5,797 pregnancy discrimination charges in 2011, but only 2.2 percent of these claims were successful.⁵³ Why are so many claims of pregnancy discrimination doomed to fail? Why was this Ms. Wiseman’s fate⁵⁴ and the fate of many other pregnant employees? The extraordinarily high hurdles necessary for a pregnant employee to prove her case elucidate this quandary.

A. *Near-Impossible Legal Hurdles*

The PDA’s “comparative accommodation” provision mandating that employers treat their pregnant workers no worse than their other “similarly situated” employees serves as the main legal roadblock for pregnant employees.⁵⁵ Under this system, pregnant women are considered identical to others “similar to [themselves] in all respects but for the protected characteristic.”⁵⁶ By the PDA’s definition, employers are not acting in a discriminatory manner so long as they “treat nonpregnant employees the same as pregnant employees.”⁵⁷

⁵¹ *Id.* § 2601(b)(1).

⁵² *Harvender v. Norton Co.*, No. 96-CV-653, 1997 WL 793085, at *1 (N.D.N.Y. Dec. 15, 1997); *see also Cox*, *supra* note 21, at 466–70; Grossman & Thomas, *supra* note 27, at 28; 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, 1005–06 (2013).

⁵³ Equal Emp’t Opportunity Comm’n, *Pregnancy Discrimination Charges EEOC & FEPAs Combined: FY 1997–FY 2011*, EEOC.GOV (Dec. 3, 2013), <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm>.

⁵⁴ *Wiseman v. Wal-Mart Stores, Inc.*, No. 08-1244-EFM, 2009 WL 1617669 (D. Kan. July 21, 2009).

⁵⁵ 42 U.S.C. § 2000e(k).

⁵⁶ Suzanne B. Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728, 731 (2011).

⁵⁷ *Serednyj v. Beverly Healthcare, L.L.C.*, 656 F.3d 540, 548 (7th Cir. 2011).

It can be extraordinarily difficult for pregnant employees to find another employee with a similar limitation for which the employer provided accommodation.⁵⁸ This arduous task is compounded by federal court interpretations of the interaction of the ADA and PDA. Courts have viewed ADA accommodations as inappropriate comparators for PDA suits.⁵⁹ If a pregnant worker cannot identify an appropriate, similarly situated employee, the pregnant worker's claim will fail through no fault of her own.⁶⁰

The PDA also does not require employers to take any affirmative action to help pregnant women continue to work.⁶¹ Theoretically, the ADAAA should have corrected this issue by expanding the definition of "disability" to include temporary impairments resulting from pregnancy.⁶² Courts, however, have not been receptive to this new, inclusive definition, going so far as to continue to rely on outdated case law to determine whether pregnancy-related complications constitute a disability.⁶³

Courts have erroneously interpreted the ADAAA in recent pregnancy discrimination cases. Even after acknowledging that the ADAAA was intended to overturn the Court's interpretation of "disability,"⁶⁴ the United States District Court for the Eastern District of New York returned to pre-ADAAA case law to determine that pregnancy-related complications are generally not within the scope of the ADA.⁶⁵ Similarly, the United States District Court for the Middle District of

⁵⁸ Goldberg, *supra* note 56, at 735.

⁵⁹ Young v. United Parcel Serv., Inc., 707 F.3d 437, 450 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 2898 (July 1, 2014); Widiss, *supra* note 52, at 1008–09.

⁶⁰ For further discussion of the PDA, see Grossman & Thomas, *supra* note 27; Millsap, *supra* note 22; see also Maryn Oyoung, *Until Men Bear Children, Women Must Not Bear the Costs of Reproductive Capacity: Accommodating Pregnancy in the Workplace to Achieve Equal Employment Opportunities*, 44 MCGEORGE L. REV. 515 (2013); Widiss, *supra* note 52; Goldberg, *supra* note 56.

⁶¹ See, e.g., Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (holding that the PDA does not "require employers to offer maternity leave or take other steps to make it easier for pregnant women to work"); see also Grossman & Thomas, *supra* note 27, at 18; Millsap, *supra* note 22, at 1437.

⁶² See ADA Amendments Act of 2008 (ADAAA), Pub. L. No. 110-325, 122 Stat. 3553 (codified in scattered sections of 42 U.S.C. §§ 12102–12213 (2012)).

⁶³ See Selkow v. 7-Eleven, Inc., No. 8:11-cv-456-T-33, 2012 WL 2054872, at *14 (M.D. Fla. June 7, 2012); Sam-Sekur v. Whitmore Grp., Ltd., No. 11-cv-4938, 2012 WL 2244325, at *7–8 (E.D.N.Y. June 15, 2012); Widiss, *supra* note 52, at 1009.

⁶⁴ *Sam-Sekur*, 2012 WL 2244325, at *6.

⁶⁵ *Id.* at *7–8 (citing Leahy v. Gap, Inc., No. 07-2008, 2008 U.S. Dist. LEXIS 58812, *14 (E.D.N.Y. July 29, 2008)); Conley v. United Parcel Serv., 88 F. Supp. 2d 16, 19 (E.D.N.Y. 2000); LaCoparra v.

Florida relied on case law prior to 2009 to determine if a pregnant worker had a valid disability.⁶⁶ This court did not even acknowledge the changes in disability law.⁶⁷

Even if properly interpreted, the ADAAA is primarily concerned with complications arising from an “abnormal” pregnancy.⁶⁸ Women who work with hazardous chemicals that are not safe at any time during pregnancy⁶⁹ or who must comply with a common lifting limit⁷⁰ would not merit accommodation under the ADAAA. The National Women’s Law Project notes that if an employer accommodates a temporary disability under the ADAAA, such as a lifting limitation due to a back injury, they would be required to extend that accommodation to a pregnant employee under the PDA.⁷¹ However, this still leaves pregnant worker victims to the “similarly situated” trap. If they cannot identify another employee with a similar limitation who received accommodation, they cannot prevail on their pregnancy discrimination claim. Moreover, as previously mentioned, other courts found that ADA accommodations are not appropriate comparators under the PDA.⁷² Despite its expanded definition of disability, the ADAAA does little to combat pregnancy discrimination in the work place.⁷³

The FMLA does not provide for any on-the-job accommodations. Rather, it guarantees unpaid leave and preserves the employee’s job upon their return to work.⁷⁴ However, these guarantees can actually result in a pregnant worker losing

Pergament Home Ctrs., Inc., 982 F. Supp. 213, 228 (S.D.N.Y. 1997); Tsetseranos v. Tech Prototype Inc., 893 F. Supp. 109, 119 (D. N.H. 1995).

⁶⁶ See *Selkow*, 2012 WL 2054872, at *14 (citing *Walsh v. Food Supply, Inc.*, No. 96-677-CIV-ORL-18, 1997 WL 401594 (M.D. Fla. Mar. 19, 1997)); *Farrell v. Time Serv., Inc.*, 178 F. Supp. 2d 1295, 1298 (N.D. Ga. 2001); *Wenzlaff v. NationsBank*, 940 F. Supp. 889, 890 (D. Md. 1996).

⁶⁷ *Selkow*, 2012 WL 2054872, at *14.

⁶⁸ NWLC ADAAA Fact Sheet, *supra* note 46, at 1–2.

⁶⁹ *Harvender v. Norton Co.*, No. 96-CV-653, 1997 WL 793085, at *1 (N.D.N.Y. Dec. 15, 1997).

⁷⁰ *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 450 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 2898 (July 1, 2014).

⁷¹ NWLC ADAAA Fact Sheet, *supra* note 46, at 2.

⁷² *Young*, 707 F.3d at 450.

⁷³ For further discussion of the impact of the ADA and ADAAA on pregnancy discrimination, see Cox, *supra* note 21; Amanda G. Wachuta, *The ADA Gets Even More Complicated: Analyzing Pregnancy with Complications As A Disability*, 52 DRAKE L. REV. 471 (2004).

⁷⁴ 29 U.S.C. §§ 2601–2654.

her job. If an employee needs accommodations early enough in her pregnancy, her employer may force her to take FMLA leave. She may then run out of her FMLA leave before she even gives birth.⁷⁵ This would sacrifice her guarantee of a job, as her employer-compelled leave would run far past the permitted twelve-week leave provided under the FMLA.⁷⁶

By providing only unpaid leave, the most economically disadvantaged pregnant women also become the most vulnerable. Women occupy nearly two-thirds of minimum wage positions,⁷⁷ and 82 percent of women work until the last month of their pregnancy.⁷⁸ These workers are the least able to take unpaid leave when they could be working and earning income for their families. By not providing accommodations and instead forcing women to leave their jobs, the FMLA only continues to disadvantage pregnant employees.⁷⁹

B. Recent Pregnancy Discrimination Cases

In 2012, women made up 47 percent of the workforce,⁸⁰ and most women will be pregnant while working at some point in their careers.⁸¹ These women are significant drivers of the economy; most families depend on that income.⁸² They work longer into their pregnancies than their predecessors. Only 35 percent of first-time mothers worked until their last month of pregnancy in the early 1960s; this

⁷⁵ *Harvender v. Norton Co.*, No. 96-CV-653, 1997 WL 793085, at *1 (N.D.N.Y. Dec. 15, 1997).

⁷⁶ *See id.*

⁷⁷ Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, BLS.GOV (Feb. 26, 2013), <http://www.bls.gov/cps/minwage2012tbls.htm>.

⁷⁸ United States Dep't of Commerce, Economics & Statistics Admin., *Maternity Leave and Employment Patterns of First-Time Mothers 1961–2008*, CENSUS.GOV (Oct. 2011), <http://www.census.gov/prod/2011pubs/p70-128.pdf>; *see also* Widiss, *supra* note 52, at 971.

⁷⁹ For further discussion of the impact of the FMLA on pregnancy discrimination, *see* Cox, *supra* note 21.

⁸⁰ United States Dep't of Labor, Women's Bureau, *Civilian Labor Force by Sex, 1970–2012*, DOL.GOV (last visited Jan. 25, 2013), http://www.dol.gov/wb/stats/Civilian_labor_force_sex_70_12_txt.htm [hereinafter U.S. Dep't of Labor]; *see also* Widiss, *supra* note 52, at 970.

⁸¹ A Better Balance: The Work & Family Legal Center et al., *Why We Need the Pregnant Workers Fairness Act: Stories of Real Women*, A BETTER BALANCE: THE WORK & FAMILY LEGAL CENTER, http://www.abetterbalance.org/web/images/stories/Documents/fairness/Why_We_Need_the_Pregnant_Workers_Fairness_Act_-_Stories_of_Real_Women-2.pdf (last visited Nov. 10, 2014) [hereinafter A Better Balance].

⁸² Widiss, *supra* note 52, at 970–71.

number more than doubled in forty years.⁸³ These women—who comprise a significant portion of the workforce—are those most in need of increased workplace protection during their pregnancies. The stories of Ms. Wiseman⁸⁴ and Ms. Young⁸⁵ are indicative of how the average pregnant woman struggles when confronted with discrimination in the workplace and how the current pregnancy discrimination standard fails them.

1. *Wiseman v. Wal-Mart Stores, Inc.*

Ms. Wiseman's situation, as discussed in Part I, is a prime example of the unfairness of the current pregnancy discrimination standard. Ms. Wiseman alleged a violation of Title VII under the PDA and a violation of the FMLA. She argued that her termination for insubordination was pretextual and that she was actually fired because of her pregnancy.⁸⁶ The United States District Court for the District of Kansas dismissed Ms. Wiseman's FMLA claim on technical grounds,⁸⁷ but her PDA claim did not survive summary judgment because of the current legal structure.⁸⁸

To determine whether Ms. Wiseman established a *prima facie* case of pregnancy discrimination, the court first invoked the *McDonnell Douglas* test.⁸⁹ Ms. Wiseman easily met the first three prongs of the test⁹⁰ but failed at the final prong because she could not produce an appropriate comparator who was allowed

⁸³ U.S. Dep't of Labor, *supra* note 80; Widiss, *supra* note 52, at 970–71.

⁸⁴ *See supra* Part I.

⁸⁵ *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 450 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 2898 (July 1, 2014); Widiss, *supra* note 52, at 1008–09.

⁸⁶ *Wiseman v. Wal-Mart Stores, Inc.*, No. 08-1244, 2009 WL 1617669 (D. Kan. June 9, 2009).

⁸⁷ *Id.*

While the Court believes it would be appropriate to allow Plaintiff to amend her Complaint to address the hours of service making her eligible for FMLA coverage, the Court concludes it is futile to grant her yet another opportunity to amend to allege that she took part in a statutorily protected activity, or that her employer took adverse action interfering with her right to take eligible FMLA leave.

Id. at *3.

⁸⁸ *Wiseman*, 2009 WL 1617669.

⁸⁹ *Id.* at *4–5.

⁹⁰ *See supra* Part II.A.

to carry a water bottle on the sales floor.⁹¹ Moreover, because Wal-Mart offered a legitimate, nondiscriminatory reason for Ms. Wiseman's termination, the court placed the burden on her to provide direct evidence of discrimination and to show that discriminatory intent motivated Wal-Mart's action.⁹² As Ms. Wiseman's argument was also based on the need for accommodation under the PDA, this claim failed and Ms. Wiseman was denied all relief.⁹³

2. *Young v. United Parcel Service, Inc.*

Peggy Young suffered a similar injustice during her work at United Postal Service, Inc. ("UPS").⁹⁴ UPS employed Ms. Young as a driver, the essential functions of which required her "to '[l]ift, lower, push, pull, leverage and manipulate . . . packages weighing up to [seventy] pounds,' and to '[a]ssist in moving packages weighing up to [one hundred fifty] pounds.'"⁹⁵ The employees' collective bargaining agreement permitted temporary work assignments for on-the-job injuries.⁹⁶ UPS provided light duty work to employees covered under the collective bargaining agreement who were disabled for purposes of the ADA.⁹⁷

Ms. Young underwent two unsuccessful rounds of *in vitro* fertilization and took a FMLA leave of absence to undergo a third.⁹⁸ She became pregnant and extended her leave. Ms. Young provided UPS with a doctor's note indicating that she could not lift more than twenty pounds.⁹⁹ UPS informed Ms. Young that she would not be able to return to work so long as her twenty-pound restriction remained. While on her now-employer-mandated leave, Ms. Young's FMLA leave expired. She went on an extended leave of absence with no pay and subsequently lost her medical coverage. Ms. Young gave birth and returned to work for UPS.¹⁰⁰

⁹¹ *Wiseman*, 2009 WL 1617669, at *6–7.

⁹² *Id.* at *8.

⁹³ *Id.* at *9–10.

⁹⁴ *Young v. United Parcel Serv., Inc.*, 707 F.3d 437 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 2898 (2014).

⁹⁵ *Id.* at 439.

⁹⁶ *Id.*

⁹⁷ *Id.* at 439–40.

⁹⁸ *Id.* at 440–41.

⁹⁹ *Id.* at 440.

¹⁰⁰ *Id.* at 442.

Ms. Young brought PDA and ADA claims against her employer, but she did not prevail under either theory.¹⁰¹ The court quickly dismissed her ADA claim as improper because she was not appropriately disabled.¹⁰² The court summarized Ms. Young's PDA argument as such: "UPS policy limiting light duty work to some employees . . . but not to pregnant workers like Young violates the PDA's command to treat pregnant employees the same 'as other persons not so affected but similar in their ability or inability to work.'"¹⁰³

First, the court determined whether Ms. Young presented direct evidence of discrimination; second, the court examined her PDA claims under the *McDonnell Douglas* test.¹⁰⁴ Under the first approach, the court concluded that the PDA does not provide for a "distinct and independent cause of action" for pregnant women.¹⁰⁵ So long as the employer treated pregnant and nonpregnant employees alike, as UPS did, there is not pregnancy discrimination.¹⁰⁶ Ms. Young's claim failed the second approach, the *McDonnell Douglas* test, because she did not present an appropriate comparator under the fourth prong.¹⁰⁷ Despite the fact that UPS routinely and easily provided the reasonable accommodation of light duty work to other similarly limited employees,¹⁰⁸ the court found that Ms. Young did not experience pregnancy discrimination under the current law.¹⁰⁹ The United States Supreme Court granted Ms. Young's petition for *certiorari*¹¹⁰ and scheduled oral arguments for December 3, 2014.¹¹¹

¹⁰¹ *Id.* at 439, 451.

¹⁰² *Id.* at 445. "Because Young points to no more than the objective fact of her pregnancy, and offers no evidence tending to show that Martin subjectively believed Young to be disabled, Young cannot adduce evidence to raise a factual issue on her 'regarded as' claim." *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 446.

¹⁰⁵ *Id.* at 447.

¹⁰⁶ *Id.* at 449.

¹⁰⁷ *Id.* at 449–50.

¹⁰⁸ *Id.* at 439–40.

¹⁰⁹ *Id.* at 451.

¹¹⁰ *Certiorari Order List for 573 U.S.*, SUPREME COURT OF THE UNITED STATES, at 2 (July 1, 2014), http://www.supremecourt.gov/orders/courtorders/070114zr_eeam.pdf.

¹¹¹ *Monthly Argument Calendar for the Session Beginning December 1, 2014*, SUPREME COURT OF THE UNITED STATES (Sept. 4, 2014), http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalDec2014.pdf. For further discussion of these developments, see *infra* Part V.A.

IV. THE PREGNANT WORKERS FAIRNESS ACT

The full title of the PWFA provides that it is “[a] bill [t]o eliminate discrimination and promote women’s health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition.”¹¹² It has two identical versions in the 113th Congress: S. 942 and H.R. 1975, both of which were introduced on May 14, 2013.¹¹³

As of the writing of this Note, the Senate version is sponsored by Senator Robert “Bob” Casey Jr. (D-PA) and has thirty-two cosponsors, all Democrats except for one Independent.¹¹⁴ The House version is sponsored by Representative Jerrold Nadler (D-NY) with one hundred forty cosponsors, all Democrats.¹¹⁵ At the writing of this Note, both bills are referred to their respective committees.¹¹⁶ The Senate bill is in the Health, Education, Labor, and Pensions Committee,¹¹⁷ while the House bill is in four separate committees: the Education and the Workforce Committee; the Workforce Protections Subcommittee Committee; the House Administration Committee; the Oversight and Government Reform Committee; and the Judiciary Committee, the Constitution and Civil Justice Subcommittee.¹¹⁸ GovTrack.us currently predicts that both versions of the PWFA have a 1 percent chance of being enacted.¹¹⁹ The Senate version has an 11 percent chance of getting past the committee;¹²⁰ the House version has a 2 percent chance.¹²¹

¹¹² S. 942, *supra* note 11; H.R. 1975, *supra* note 11.

¹¹³ Given that the text of the bills is identical, I will speak of the bill in the singular throughout this Note. I will, however, continue to cite to both versions of the bill so that these provisions are easily referenced.

¹¹⁴ GovTrack, *S. 942: Pregnant Workers Fairness Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/s942#overview> (last visited Nov. 10, 2014) [hereinafter GovTrack: S. 942].

¹¹⁵ GovTrack, *H.R. 1975: Pregnant Workers Fairness Act*, GOVTRACK.US, <https://www.govtrack.us/congress/bills/113/hr1975> (last visited Jan. 25, 2014) [hereinafter GovTrack: H.R. 1975].

¹¹⁶ GovTrack: S. 942, *supra* note 114; GovTrack: H.R. 1975, *supra* note 115.

¹¹⁷ GovTrack: S. 942, *supra* note 114.

¹¹⁸ GovTrack: H.R. 1975, *supra* note 115.

¹¹⁹ *Id.*

¹²⁰ GovTrack: S. 942, *supra* note 114.

¹²¹ GovTrack: H.R. 1975, *supra* note 115.

A. Understanding the PWFA

The PWFA provides a new, affirmative cause of action for pregnant employees, in stark contrast to the PDA.¹²² The PWFA makes it “unlawful” for employers to engage in a variety of practices¹²³ and contains its own remedies and enforcements.¹²⁴

Employers must make “reasonable accommodations” for limitations arising from pregnancy, childbirth, or any other related condition.¹²⁵ For guidance on what accommodations are reasonable, the bill directs the reader to the ADA.¹²⁶ Like the ADA, these accommodations are required only so long as undue hardship is not imposed upon the employer.¹²⁷ No employee is required to accept an accommodation¹²⁸ or take leave if another reasonable accommodation can be provided.¹²⁹ The PWFA also extends new protections to pregnant job applicants.¹³⁰ It makes it illegal for employers to deny employment to a pregnant applicant or to force an applicant to accept an accommodation.¹³¹

The PWFA significantly alters the legal framework governing pregnancy discrimination. As previously mentioned, the PWFA provides affirmative protection for pregnant workers, unlike the PDA, which simply makes it illegal to discriminate against pregnant workers in the context of Title VII. As the PWFA’s substantive portions were modeled after the ADA,¹³² the same legal structure in

¹²² *Id.*

¹²³ S. 942, *supra* note 11; H.R. 1975, *supra* note 11.

¹²⁴ S. 942, *supra* note 11, § 2; H.R. 1975, *supra* note 11, § 2.

¹²⁵ S. 942, *supra* note 11, § 2(1); H.R. 1975, *supra* note 11, § 2(1).

¹²⁶ S. 942, *supra* note 11, § 5(5); H.R. 1975, *supra* note 11, § 5(5).

¹²⁷ S. 942, *supra* note 11, § 2(1); H.R. 1975, *supra* note 11, § 2(1).

¹²⁸ S. 942, *supra* note 11, § 2(3); H.R. 1975, *supra* note 11, § 2(3).

¹²⁹ S. 942, *supra* note 11, § 2(4); H.R. 1975, *supra* note 11, § 2(4).

¹³⁰ S. 942, *supra* note 11, § 3(a); H.R. 1975, *supra* note 11 § 3(a).

¹³¹ S. 942, *supra* note 11, § 3(a); H.R. 1975, *supra* note 11, § 3(a).

¹³² Joanna L. Grossman, *The Pregnant Workers’ Fairness Act: Accommodating the Needs of Pregnant Working Women*, VERDICT: LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA (Mar. 9, 2014), <http://verdict.justia.com/2012/05/11/the-pregnant-workers-fairness-act>.

place for disabled workers would be present for pregnant workers.¹³³ Under the PWFA, a pregnant worker would not have to undergo the laborious and near-impossible task of identifying another similarly situated employee. They need only allege that their employer did not provide reasonable accommodations as mandated. If an employee prevails under the PWFA, she would receive monetary damages.¹³⁴

As part of Title VII,¹³⁵ the PWFA would impose a minimal burden on employers. It applies only to employers with over fifteen employees¹³⁶ and requires plaintiffs to file an EEOC charge before pursuing further action.¹³⁷ Because it is modeled after the ADA, moreover, employer implementation would be smooth, given that the same employers that would be subject to the PWFA must also comply with the ADA.

The PWFA closes all the loopholes in the federal pregnancy discrimination framework. It drops the near-impossible legal hurdle of finding a similarly situated employee,¹³⁸ allows pregnant employees to recover simply by virtue of not being reasonably accommodated, and does not allow employers to force pregnant workers to take a leave of absence.

B. Recent Pregnancy Discrimination Cases as Resolved under the PWFA

Under the PWFA, both Ms. Wiseman and Ms. Young¹³⁹ would have had successful pregnancy discrimination claims, because their employers would have been required to provide reasonable accommodations.

¹³³ Nat'l Women's Law Ctr., *Fact Sheet: The Pregnant Workers Fairness Act: Making Room for Pregnancy on the Job*, NAT'L WOMEN'S LAW CTR. 2 (Mar. 3, 2014), http://www.nwlc.org/sites/default/files/pdfs/pregnantworkersfairnessfactsheet_w_senate_bill_number.pdf.

¹³⁴ S. 942, *supra* note 11, § 3(a); H.R. 1975, *supra* note 11, § 3(a). Both cite 42 U.S.C. § 1981(a), which, under Title VII, provides a monetary right to recovery for violations.

¹³⁵ S. 942, *supra* note 11, § 2(2–3); H.R. 1975, *supra* note 11, § 2(2–3). The PWFA also covers government employers under the Congressional Accountability Act of 1995, 3 U.S.C. § 5, and the Government Employee Rights Act of 1991. S. 942, *supra* note 11, § 3(b–d); H.R. 1975 § 3(b–d).

¹³⁶ S. 942, *supra* note 11, § 3(a)(1); H.R. 1975, *supra* note 11, § 3(a)(1). Both cite Title VII, which, under 42 U.S.C. § 2000e(b), defines an employer as having at least fifteen employees.

¹³⁷ Grossman, *supra* note 132.

¹³⁸ *See supra* Part II.A.

¹³⁹ *See supra* Parts I, III.B.1.

The ADA provides all the guidance necessary to understand what a reasonable accommodation would have been for Ms. Wiseman¹⁴⁰ under the PWFA.¹⁴¹ Allowing her to carry water on the floor is “reasonable on its face” and would not be “unduly extensive” or “disruptive” to Wal-Mart’s business.¹⁴² Allowing Ms. Wiseman to carry water with her would not have required a substantial alteration of Ms. Wiseman’s job duties or the operations of Wal-Mart. If the PWFA had been in effect, Ms. Wiseman would have been able to carry water, maintain her health throughout her pregnancy, and keep her job.

On its face, Ms. Young’s case appears to be a more difficult exercise.¹⁴³ Would it be an undue burden on UPS to restrict her lifting ability, as this was one of her essential job duties? And would this be an “ordinary” accommodation?¹⁴⁴ Because UPS already accommodated disabled employees under the ADA with light duty assignments,¹⁴⁵ this analysis is actually quite simple. As the PWFA is modeled after the ADA, a reasonable accommodation under one Act would be reasonable under the other. If the PWFA had been in effect during Ms. Young’s pregnancy, UPS would have had to put her on a light duty assignment as long as her lifting limit was related to her pregnancy, childbirth, or a resulting medical condition. Notably, it would have been unlawful for UPS to place Ms. Young on FMLA leave against her will so long as a reasonable accommodation was available. Working throughout her pregnancy like this would have allowed for Ms. Young to keep her health insurance. The PWFA would have easily alleviated Ms. Young’s avoidable employment woes.

C. *How to Pass the PWFA: An Unlikely Alliance*

Despite the overwhelming benefits to pregnant workers, the PWFA seems doomed to fail.¹⁴⁶ As the PWFA has only Democratic or Independent congresspersons sponsoring it,¹⁴⁷ and similar bills have generally been enacted in

¹⁴⁰ See *supra* Parts I, III.B.1.

¹⁴¹ S. 942, *supra* note 11, § 5(5); H.R. 1975, *supra* note 11, § 5(5); see *supra* Part II.B.

¹⁴² EEOC Enforcement Guidance, *supra* note 37, at 3; see *supra* Part II.B.

¹⁴³ See *supra* Part III.B.2.

¹⁴⁴ See EEOC Enforcement Guidance, *supra* note 37.

¹⁴⁵ *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 437–40 (4th Cir. 2013), *cert. granted*, 134 S. Ct. 2898 (U.S. 2014).

¹⁴⁶ GovTrack: S. 942, *supra* note 114; GovTrack: H.R. 1975, *supra* note 115.

¹⁴⁷ S. 942, *supra* note 11; H.R. 1975, *supra* note 11.

traditionally liberal states,¹⁴⁸ the PWFA is seen as a liberal Democrat issue. In an increasingly divided and polarized Congress in which Democrats and Republicans are loathe to even be perceived as cooperative,¹⁴⁹ it seems a futile effort to get any legislation passed except that which is the most essential or blatantly bipartisan. Yet there is an unlikely coalition on both the left and right that would support a bill extending protections to pregnant women: pro-life and pro-choice advocates.

Many traditionally liberal or pro-choice groups (typically both) are vocal advocates of the PWFA,¹⁵⁰ including the American Civil Liberties Union,¹⁵¹ the California Women's Law Center,¹⁵² Equal Rights Advocates,¹⁵³ Legal Momentum,¹⁵⁴ the National Partnership for Women and Families,¹⁵⁵ and the National Women's Law Center.¹⁵⁶ These groups and other PWFA advocates see

¹⁴⁸ Alaska, California, Connecticut, Hawaii, Illinois, Louisiana, and Texas all have state pregnancy discrimination laws. Equal Rights Advocates, *Why Federal Law Should Require the Reasonable Accommodation of Pregnant Employees*, EQUAL RIGHTS ADVOCATES (Mar. 14, 2014), <http://www.equalrights.org/wp-content/uploads/2013/02/Expecting-A-Baby-Not-A-Lay-Off-Why-Federal-Law-Should-Require-the-Reasonable-Accommodation-of-Pregnant-Workers.pdf>. California, Connecticut, Hawaii, and Illinois all decisively voted for Barack Obama in the 2012 Presidential election. *2012 Presidential Election Results*, WASH. POST (Mar. 14, 2014), <http://www.washingtonpost.com/wp-srv/special/politics/election-map-2012/president/>.

¹⁴⁹ See Chris Cillizza, *How Congress became the most polarized and unproductive it's ever been*, WASH. POST (Feb. 3, 2014), <http://www.washingtonpost.com/blogs/the-fix/wp/2014/02/03/how-congress-became-the-most-polarized-and-unproductive-its-ever-been/>; see also Jennifer Steinhauer, *The Formerly Routine Is Now the Tendentious*, N.Y. TIMES, Mar. 24, 2012, <http://www.nytimes.com/2012/03/24/us/politics/in-polarized-congress-routines-are-now-tendentious.html>.

¹⁵⁰ See A Better Balance, *supra* note 81, at 1.

¹⁵¹ *Abortion*, AM. CIVIL LIBERTIES UNION, <https://www.aclu.org/reproductive-freedom/abortion> (last visited Mar. 14, 2014).

¹⁵² *Support Legislation*, CAL. WOMEN'S LAW CTR., <http://cwlc.org/action/support-legislation> (last visited Mar. 14, 2014).

¹⁵³ *ERA Board of Directors*, AM. EQUAL RIGHTS ADVOCATES, <http://www.equalrights.org/about-era/board-of-directors/> (last visited Mar. 14, 2014).

¹⁵⁴ *Sexuality and Family Rights*, LEGAL MOMENTUM, <http://www.legalmomentum.org/sexuality-and-family-rights> (last visited Mar. 14, 2014).

¹⁵⁵ *Abortion*, NAT'L P'SHIP FOR WOMEN & FAMILIES, <http://www.nationalpartnership.org/issues/repro/abortion.html> (last visited Mar. 14, 2014).

¹⁵⁶ *Abortion*, NAT'L WOMEN'S LAW CTR., <http://www.nwlc.org/our-issues/health-care-%2526-reproductive-rights/abortion> (last visited Mar. 14, 2014).

the current dismal pregnancy discrimination standard as a women's issue.¹⁵⁷ Women bear children and must, consequently, bear the austere price of pregnancy in the workplace. Equality in society and the workplace can only be assured when women have a level playing field where their pregnancies are not impairing them.

The gathering of liberal groups is consistent with the perception that the PWFA is a liberal issue. To my knowledge, no traditional conservative group has come out in support of the PWFA. The closest support has come from LifeNews.com, which recognized widespread pregnancy discrimination as an issue¹⁵⁸ and bemoaned the devaluing of motherhood in society.¹⁵⁹

The PWFA would help combat this ill. Pregnancy would not imperil a woman's job, and the PWFA would ease her pregnancy-related difficulties in the workplace. More importantly to many conservative groups like LifeNews.com, the PWFA significantly decreases the need for abortion: If pregnant workers are less likely to incur costs because of their pregnancy, there may be less incentive to seek an abortion.

Now these two battling groups must be brought together. While they are plainly opposed on the core focus of their abortion battle, the passage of the PWFA would provide both sides a victory. Granting rights for pregnant workers is not a politicized issue with Democrats and Republicans on conflicting sides. This is an issue of women's and human rights. Leaders of these divergent groups need to realize that their interests align in protecting pregnant workers. They must set aside their differences. They must rise above their ongoing battle and collaborate to pass an important piece of legislation that would improve the lives of every pregnant employee in the country.

¹⁵⁷ A Better Balance, *supra* note 81; *The Pregnant Workers Fairness Act: Making Room for Pregnancy on the Job*, NAT'L WOMEN'S LAW CTR. (Dec. 3, 2013, 6:38 PM), http://www.nwlc.org/sites/default/files/pdfs/pregnantworkersfairnessfactsheet_w_senate_bill_number.pdf.

¹⁵⁸ Christina Martin, *Pro-Abortion Pregnancy Discrimination Rises in the Workplace*, LIFENEWS.COM (Apr. 5, 2012, 12:41 PM), <http://www.lifenews.com/2012/04/05/pro-abortion-pregnancy-discrimination-rises-in-the-workplace/>. LifeNews.com is "an independent news agency devoted to reporting news that affects the pro-life community." *About Us*, LIFENEWS.COM, <http://www.lifenews.com/about> (last visited Jan. 27, 2015).

¹⁵⁹ Martin, *supra* note 158.

V. CONCLUDING REMARKS

A. Recent Developments

The summer of 2014 brought a resurgence of pregnancy discrimination awareness. First, the United States Supreme Court granted *certiorari* in Ms. Young's case against UPS on July 1.¹⁶⁰ As of the writing of this Note, oral arguments have been scheduled for December 3, 2014.¹⁶¹ In Ms. Young's petition, she questions "[w]hether, and in what circumstances, an employer that provides work accommodations to nonpregnant employees with work limitations must provide work accommodations to pregnant employees who are 'similar in their ability or inability to work'" under the PDA.¹⁶²

Numerous organizations have filed *amicus* briefs in support of Ms. Young's position, including Members of Congress.¹⁶³ The drafters and cosponsors of the PWFA authored the Members of Congress brief.¹⁶⁴ The brief argues that current judicial constructions of the PDA are against Congress's intent and that employers cannot "narrow the class of potential comparators by considering the source or legal categorization of the inability to work."¹⁶⁵

Only two weeks later, the EEOC released new guidelines regarding the interpretation of federal pregnancy law.¹⁶⁶ These guidelines—the first such update since 1983—do not alter the existing law. They only provide a roadmap for

¹⁶⁰ *Young v. United Parcel Serv., Inc.*, 134 S. Ct. 2898 (2014).

¹⁶¹ *2013 Term Court Orders, Miscellaneous Order*, SUPREME COURT OF THE UNITED STATES (Sept. 4, 2014), http://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalDec2014.pdf.

¹⁶² Brief of Petitioner at i, *Young v. United Postal Service*, 707 F.3d 437 (4th Cir. 2013), *appeal docketed*, No. 12-1226 (U.S. July 1, 2014), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/12-1226_pet.pdf.

¹⁶³ American Bar Association, *Young v. United Parcel Service, Inc. Docket*, A.B.A., http://www.americanbar.org/publications/preview_home/12-1226.html (last visited Sept. 17, 2014).

¹⁶⁴ Brief for Members of Congress as Amici Curiae Supporting Petitioner at 4, *Young*, 707 F.3d 437, *appeal docketed*, No. 12-1226 (U.S. July 1, 2014), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/12-1226_pet_amcu_moc.authcheckdam.pdf.

¹⁶⁵ *Id.* at 3.

¹⁶⁶ Equal Emp't Opportunity Comm'n, *EEOC Issues Updated Enforcement Guidance on Pregnancy Discrimination and Related Issues*, EEOC.GOV (July 14, 2014), <http://www.eeoc.gov/eeoc/newsroom/release/7-14-14.cfm>.

employers attempting to navigate the ill-defined legal landscape of pregnancy accommodations.

Even if the Court decides in Ms. Young's favor and expands the category of comparative accommodations, pregnant workers would still not have a right to affirmative workplace protections. They would merely have a broader spectrum of similarly situated workers with whom to compare themselves. The only true protection for pregnant workers can come from the PWFA.

The pro-life/pro-choice coalition still waits in the wings. Twenty-three pro-life organizations also filed an *amicus* brief in support of Ms. Young. They argue that proper enforcement of the PDA can help "reduce pressure on women in the workforce to have an abortion."¹⁶⁷ Lawmakers should reach out to this coalition, regardless of the Court's decision in *Young*.

B. Conclusion

Pregnant employees have little recourse for discrimination in the workplace. With near-impossible legal hurdles to overcome, it is the rare and lucky plaintiff who can prevail on a case of pregnancy discrimination. Congress can easily change this dismal standard by passing the PWFA, and lawmakers have an unlikely coalition waiting in the wings: pro-life and pro-choice groups. Advocates on both sides of the abortion battle would benefit by increasing protections for pregnant workers.

The PWFA would change the current legal standard for pregnant employees for the better. It must be passed in order to bring pregnant workers into the fold and provide them with full employment protection. Ms. Wiseman and every other pregnant worker should have access to simple workplace accommodations—for instance, the ability to carry a bottle of water at work—without sacrificing their health for their job. The PWFA would make this a reality.

¹⁶⁷ Brief for 23 Pro-Life Organizations and the Judicial Education Project as Amici Curiae Supporting Petitioner at 1, *Young*, 707 F.3d 437, *appeal docketed*, No. 12-1226 (U.S. July 1, 2014), *available at* http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/12-1226_pet_amcu_23.authcheckdam.pdf.