

NOTES

“IS THAT STILL GOING ON?” CONTINUING DIFFICULTIES FOR THE PREGNANT WORKER & OPPORTUNITIES FOR COUNTERING DISCRIMINATION

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NOTES

“IS THAT STILL GOING ON?”¹ CONTINUING DIFFICULTIES FOR THE PREGNANT WORKER & OPPORTUNITIES FOR COUNTERING DISCRIMINATION

Julie Daw*

INTRODUCTION

More than forty years after Congress passed the Pregnancy Discrimination Act (“PDA” or “the Act”) as an amendment to Title VII,² pregnant people³ continue to encounter discrimination in the workplace. Workers who become pregnant may be

¹ A tongue-in-cheek remark by the author’s mother on the topic of pregnancy discrimination at work.

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² 42 U.S.C. § 2000e(k) amended Title VII to clarify that “because of sex” and “on the basis of sex” includes “because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions.”

³ Where possible, this Note uses inclusive language so as to not erase the experiences of transgender and non-binary people who can become pregnant. Given that the language of pregnancy discrimination statutes and caselaw are still largely grounded in the gender binary, at times the impacted group is referred to more narrowly as “pregnant women.” For more on the importance of including LGBTQ people in considerations of reproductive justice, see *Queering Reproductive Justice: A Toolkit*, NAT’L LGBTQ TASK FORCE (Mar. 2017), <https://www.thetaskforce.org/wp-content/uploads/2017/03/Queering-Reproductive-Justice-A-Toolkit-FINAL.pdf> [<https://perma.cc/HLW9-Y3GP>].

fired outright, or they may face conditions that force them to quit.⁴ Management is generally hostile to workers' efforts to organize in the workplace,⁵ and worker power to speak up against unfair treatment has reached historic lows.⁶ Pregnancy discrimination complaints filed with the Equal Employment Opportunity Commission (EEOC) have increased each year for the past two decades, signaling that the problem of pregnancy discrimination persists.⁷ And yet, evidence from workplace surveys and the press suggests that many incidences of pregnancy discrimination go unreported.⁸ Pregnancy discrimination harms workers by impacting their ability to earn wages, advance in the workplace, and secure healthcare for themselves and their families.⁹

At a time when worker power to influence the terms and conditions of employment is severely diminished,¹⁰ the labor movement can utilize its expertise creatively to empower pregnant workers to claim their rights under the PDA. This empowerment continues the tradition of worker-powered movements yielding workplace protections, like wage and hour laws, health and safety standards, and anti-discrimination laws, to benefit American workers across many sectors and industries.¹¹ The PDA itself was a product of a wide coalition of interest groups, including organized labor.¹² Continued efforts to spread awareness of the Act's

⁴ *Pregnancy and Parenting Discrimination*, ACLU, <https://www.aclu.org/issues/womens-rights/pregnancy-and-parenting-discrimination> [<https://perma.cc/T7ES-5U3V>].

⁵ Gordon Lafer & Lola Loustaunau, *Fear at Work: An Inside Account of How Employers Threaten, Intimidate, and Harass Workers to Stop Them from Exercising Their Right to Collective Bargaining*, ECON. POL'Y INST. (July 23, 2020), <https://www.epi.org/202305> [<https://perma.cc/SE59-KYTU>].

⁶ Anna Stansbury & Lawrence H. Summers, *The Declining Worker Power Hypothesis: An Explanation for the Recent Evolution of the American Economy* (Nat'l Bureau of Econ. Rsch., Working Paper No. 27193, 2020), https://www.nber.org/system/files/working_papers/w27193/w27193.pdf [<https://perma.cc/PQ7Z-FDAS>].

⁷ Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America's Biggest Companies*, N.Y. TIMES (Feb. 8, 2019), <https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html> [<https://perma.cc/6HAV-SPJY>].

⁸ *Id.*

⁹ *Id.*

¹⁰ Stansbury & Summers, *supra* note 6.

¹¹ Kitroeff & Silver-Greenberg, *supra* note 7.

¹² *Id.*

protections and to empower workers to feel confident in their ability to vindicate their rights can increase the Act’s general effectiveness.

In a 2019 investigation, the *New York Times* concluded that “[m]any of the country’s largest and most prestigious companies still systematically sideline pregnant women. They pass them over for promotions and raises. They fire them when they complain.”¹³ Discrimination can have a compounding effect, where workers who already face difficult circumstances are more likely to encounter pregnancy discrimination. Workers in low-wage jobs, for instance, are more likely to face pregnancy discrimination and in more blatant forms than missed promotions or accolades.¹⁴ Similarly, Black women are more likely to encounter pregnancy discrimination at work.¹⁵ Black women are also more likely to face complications in their pregnancies.¹⁶ The consequences of losing a job and the insurance that comes with it are even more significant for these workers’ financial stability and health.¹⁷

Many pregnant workers—close to 250,000 every year—are refused necessary accommodations and are forced to continue working in unsafe conditions or quit.¹⁸ Hacheler Cyrille, for example, was pregnant with her second child in 2019 when she encountered unsafe working conditions in her job at JFK Airport in New York.¹⁹ When she requested accommodations during her pregnancy, Cyrille was reassigned from her position as a wheelchair attendant to a new position as a “bag runner”—

¹³ *Id.*

¹⁴ DINA BAKST ET AL., LONG OVERDUE: IT IS TIME FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT 5 (2019), <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf> [<https://perma.cc/3AY5-Z3LX>].

¹⁵ *By the Numbers: Women Continue to Face Pregnancy Discrimination in the Workplace*, DATA BRIEF (Nat’l P’ship for Women & Fams.), Oct. 2016, at 3, <https://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/by-the-numbers-women-continue-to-face-pregnancy-discrimination-in-the-workplace.pdf> [<https://perma.cc/6LQA-J5ZS>] [hereinafter *By the Numbers*].

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Nora Ellmann & Jocelyn Frye, *Efforts to Combat Pregnancy Discrimination*, CTR. FOR AM. PROGRESS (Nov. 2, 2018, 5:00 AM), <https://www.americanprogress.org/issues/women/news/2018/11/02/460353/efforts-combat-pregnancy-discrimination> [<https://perma.cc/3A7S-QR22>].

¹⁹ *Woman Claims to Have Been Discriminated Against While Working at JFK Airport*, NEWS12 THE BRONX (Oct. 1, 2019, 5:44 PM), <https://bronx.news12.com/woman-claims-to-have-been-discriminated-against-while-working-at-jfk-airport-41127175> [<https://perma.cc/R94K-5JM9>] [hereinafter *Woman Discriminated Against*].

without any training.²⁰ The job required her to place luggage onto a moving belt, and one day, Cyrille lost her balance, fell onto the belt, and hit her head.²¹ Her employer, a contractor hired by the airport, had denied her earlier requests to use a chair while working.²² After Cyrille's ordeal, her coworkers rallied in protest with the support of the union local 32BJ Service Employees International Union (SEIU).²³ The union supported the campaign organized and led by Cyrille's coworkers and pointed to the incident as one example of the frequent workplace violations experienced by workers at the airport.²⁴ This kind of public activism, objecting to discriminatory treatment and unsafe working conditions and calling for better employer practices, is the exact type of advocacy that compels workers to form unions in the first place. Hacheler's coworkers had engaged in concerted activity for "mutual aid and protection";²⁵ they sought to end the unsafe, discriminatory practices their employer subjected to their pregnant coworkers.

Michelle Durham was 22 and pregnant with her first child in 2015 when she encountered problems with her employer.²⁶ Michelle was six months into a new career as a paramedic and was excited about her prospects in a tough but rewarding field.²⁷ When she became pregnant, she asked for a temporary reassignment to a desk job.²⁸ Her employer refused her request, stating that they reserve these desk jobs only for paramedics injured on the job.²⁹ Michelle was forced to quit and does not see

²⁰ Naeisha Rose, *32BJ Joins JFK Workers as They Rally Around Pregnant Co-Worker Injured on the Job*, LAB. PRESS (Oct. 2, 2019), <http://laborpress.org/32bj-joins-jfk-workers-as-they-rally-around-pregnant-co-worker-injured-on-the-job/> [<https://perma.cc/KRZ7-38LZ>].

²¹ *Woman Discriminated Against*, *supra* note 19.

²² Rose, *supra* note 20.

²³ *Id.*

²⁴ *Id.*

²⁵ "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other *concerted activities* for the purpose of collective bargaining or other *mutual aid or protection*." 29 U.S.C. § 157 (emphasis added) (commonly referred to as Section 7 of the National Labor Relations Act (NLRA)).

²⁶ Sari Aviv, *Fighting for Overdue Protections for Pregnant Workers*, CBS NEWS (Jan. 12, 2020, 10:09 AM), <https://www.cbsnews.com/news/fighting-for-overdue-protections-for-pregnant-workers-pregnant-workers-fairness-act/> [<https://perma.cc/P6T2-5VU5>].

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

herself returning to her position as a paramedic, proclaiming, “I couldn’t have the EMT job and my son”³⁰

These are just two recent examples of discrimination experienced by pregnant workers. The Pregnancy Discrimination Act is not a panacea for pregnant workers, but it does offer a path for many workers to seek accommodations that allow them to remain at work and continue earning money.³¹ Given the limited financial safety net for many working families in the United States, expectant parents often need to continue working for as long as possible leading up to the birth of their child.³²

In the United States, women worked long before any federal laws provided protections for pregnancy in the workplace.³³ Therefore, the several decades since the passage of the PDA provide only a small part of the larger picture when put into context. This Note asserts several key reasons why the PDA is often minimally enforced. Many workers remain unaware of the protections offered by the Act, or they are fearful of speaking up against discrimination and thus do not assert their rights in the workplace. Workers who do ask for accommodations or speak out against discriminatory treatment are refused such accommodations or otherwise face retaliation. This underlines the need for advocacy across workplaces in the United States, union and nonunion, to raise awareness of the Act’s protections. The solutions proposed by this Note are not exclusively legal. Rather, this Note recognizes the history of union advocacy for workplace fairness for pregnant workers and points to opportunities for the PDA’s enforcement by raising workers’ awareness of the Act and empowering them to take action against unlawful discrimination.

Many statutory worker protections, including the PDA, rely on “bottom-up” enforcement, meaning that individual employees must bring suit themselves when

³⁰ *Id.*

³¹ For a discussion of the protections offered by the PDA, see *infra* Part II.

³² See generally NAT’L WOMEN’S L. CTR. & A BETTER BALANCE, IT SHOULDN’T BE A HEAVY LIFT: FAIR TREATMENT FOR PREGNANT WORKERS (2013), https://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf [<https://perma.cc/BR8F-NQ9K>] (discussing the need for many pregnant workers to continue earning a paycheck throughout their pregnancies).

³³ See MICHELLE D. DEARDORFF & JAMES G. DAHL, PREGNANCY DISCRIMINATION AND THE AMERICAN WORKER 4 (2016) (“Of course, women have always worked—rural women, immigrant women, women who were enslaved, women who brought wage labor into the home—even before they entered the formal labor market. Pregnancy has been a reality for them; except for the very economically privileged, work does not cease because a woman is pregnant.”).

they face illegal actions from employers.³⁴ If workers are unsure of their rights, enforcement will necessarily be lacking.³⁵ Organized labor has traditionally been at the forefront of advocating for better treatment of workers, and pregnancy discrimination is no exception.³⁶ Part I of this Note focuses on the development and content of the PDA. It explores how the fight for gender equality at work led to the amendment of Title VII and the courts' current understanding of pregnancy discrimination. Part II focuses on the problems of enforcing the PDA, including the enforcement structure of the Act and the complications of its retaliation framework. This Note then reasons that organized labor is a key ally for all pregnant workers, even those in nonunion workplaces. Drawing on the history of the labor movement in the United States, Part III points to recent examples of unions working with unorganized workers claim their rights and investigates opportunities for using a model of collaboration, advocacy, and solidarity across workplaces and industries to enforce the PDA better.

I. UNDERSTANDING THE DEVELOPMENT AND CONTENT OF THE PDA

Congress created protections for employees through Title VII of the Civil Rights Act of 1964.³⁷ Among those protections were prohibitions against employers from making decisions “because of sex.”³⁸ While it might seem obvious to modern readers that pregnancy is closely related to sex, advocates fought in the courts and Congress in the years following the passage of Title VII to firmly establish that “because of sex” incorporates pregnancy.³⁹ It was only after the passage of the PDA

³⁴ Charlotte S. Alexander & Arthi Prasad, *Bottom-Up Workplace Law Enforcement: An Empirical Analysis*, 89 IND. L.J. 1069, 1069 (2014).

³⁵ See generally Charlotte S. Alexander, *Workplace Information-Forcing: Constitutionality and Effectiveness*, 53 AM. BUS. L.J. 487 (2016) (explaining the centrality of information to the in workplace law enforcement).

³⁶ *Our Labor History Timeline*, AFL-CIO, <https://aflcio.org/about-us/history> [<https://perma.cc/F2VN-FC65>]; see also Kitroeff & Silver-Greenberg, *supra* note 7.

³⁷ 42 U.S.C. §§ 2000e–2000e-17 (2018).

³⁸ 42 U.S.C. § 2000e-2 (2018).

³⁹ See P. DANIEL WILLIAMS, *THE PREGNANCY DISCRIMINATION ACT: A GUIDE FOR PLAINTIFF EMPLOYMENT LAWYERS* 3 (2011) (“Many regarded it as obvious that pregnancy was inherently related to sex, but there was much litigation and controversy in the 1970s about whether Title VII permitted employers to discriminate on the basis of pregnancy.”).

in 1978, as an amendment to Title VII, that the Supreme Court accepted that employers could not discriminate on the basis of pregnancy.⁴⁰

A. Precedent Before the PDA

Two Supreme Court decisions in particular, *Geduldig v. Aiello*⁴¹ and *General Electric v. Gilbert*,⁴² underlined the need to amend Title VII and clarify that employers cannot discriminate against pregnant employees.⁴³ In both cases, the Court failed to recognize pregnancy discrimination as sex discrimination.⁴⁴

1. *Geduldig v. Aiello*

Geduldig was a constitutional challenge grounded in the Equal Protection Clause of the 14th Amendment. The case took issue with a disability insurance regime in California that extended its coverage to many temporary disabilities but did not include pregnancy.⁴⁵ The Court found no “invidious discrimination”⁴⁶ in the plan’s exclusion of pregnancy.⁴⁷ Instead, the Court focused on the State’s contention that including pregnancy in the disability plan would be “extraordinarily expensive” and concluded that requiring the inclusion of pregnancy would compromise the entire benefits system.⁴⁸ At the core of the Court’s analysis was its understanding of whom the disability plan excluded. Because women were among those covered for other temporary disabilities, the Court did not recognize that the exclusion of pregnancy was on the basis of sex.⁴⁹

⁴⁰ 42 U.S.C. § 2000e(k) (2018).

⁴¹ *Geduldig v. Aiello*, 417 U.S. 484 (1974).

⁴² *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

⁴³ Katherine Shaw, “*Similar in Their Ability or Inability to Work*”: *Young v. UPS and the Meaning of Pregnancy Discrimination*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 205, 208–10 (Melissa Murray, Katherine Shaw & Reva B. Siegel eds., 2019).

⁴⁴ *Geduldig*, 417 U.S. at 484.

⁴⁵ Shaw, *supra* note 43, at 208.

⁴⁶ *Geduldig*, 417 U.S. at 484.

⁴⁷ Initially, even temporary disabilities arising from abnormal pregnancies were not covered by the state. This part of the plaintiffs’ challenge was mooted by a state court holding that the disability plan statute only prohibited the payment of benefits for normal pregnancies. *See id.* at 489–92.

⁴⁸ *Id.* at 493–94.

⁴⁹ *Id.* at 494–95 (“[California] has not chosen to insure all such risks . . . [A] State ‘may take one step at a time, addressing itself to the problem which seems the most acute to the legislative mind.’”).

2. *General Electric v. Gilbert*

A few years later, in 1976, the Court considered *Gilbert*, a Title VII challenge brought by a group of women working at General Electric.⁵⁰ The Court relied on the *Geduldig* analysis: even though *Geduldig* was an Equal Protection claim (not based in Title VII), the Court noted the similarity between the challenged disability insurance plans.⁵¹ The Court also remarked on the helpfulness of Equal Protection Clause jurisprudence in defining discrimination prohibited under Title VII.⁵²

The *Gilbert* plaintiffs' claim centered on the company's disability benefits system that provided temporary disability benefits covering nearly every imaginable temporary disability except for pregnancy.⁵³ For example, coverage included cosmetic surgery as well as injuries resulting from "the commission of a crime or . . . a fight."⁵⁴ After trying and failing to achieve coverage for pregnancy through their grievance process, the plaintiffs' union, the International Union of Electrical Workers (IUE), filed a Title VII sex discrimination claim on their behalf.⁵⁵ At that time, union leaders were increasingly acknowledging the harmful impacts of pregnancy discrimination on their members.⁵⁶ This change was, in part, due to the increasing overlap of feminist lawyers and labor unionists, which contributed to a progressive atmosphere.⁵⁷ Beginning in the 1960s and continuing into the 1970s, female union members would meet to discuss "women's issues" like maternity leave and sexual harassment at conferences, seminars, and classes.⁵⁸ These conversations framed issues like sexual harassment and pregnancy discrimination as social ills rather than personal problems.⁵⁹ The IUE had attempted to win maternity leave for

⁵⁰ *Gilbert*, 429 U.S. 125; Shaw, *supra* note 43, at 209.

⁵¹ *Gilbert*, 429 U.S. at 133–34; WILLIAMS, *supra* note 39, at 27.

⁵² *Gilbert*, 429 U.S. at 136–37; WILLIAMS, *supra* note 39, at 27.

⁵³ *Gilbert*, 429 U.S. at 128–29; WILLIAMS, *supra* note 39, at 27.

⁵⁴ WILLIAMS, *supra* note 39, at 27 (citing *Gilbert*, 429 U.S. at 151).

⁵⁵ Deborah Dinner, *Strange Bedfellows at Work: Neomaternalism in the Making of Sex Discrimination Law*, 91 WASH. U.L. REV. 453, 474 (2014).

⁵⁶ *Id.* at 472.

⁵⁷ *Id.* at 472 n.77.

⁵⁸ Linda Housch Kwanza Collins, "To Hell with You, Charlie": *The UAW Has a Long History of Confronting Sexual Harassment*, 1 LAB. RSCH. REV. 71, 73–74 (1993).

⁵⁹ *Id.*; see also DOROTHY SUE COBBLE, *THE OTHER WOMEN'S MOVEMENT: WORKPLACE JUSTICE AND SOCIAL RIGHTS IN MODERN AMERICA* 127 (2005).

its members in contracts since 1955, and the union was eager to gain protections against pregnancy discrimination.⁶⁰

The union’s challenge in *Gilbert*, however, was unsuccessful. In both *Geduldig* and *Gilbert*, the Court distinguished “pregnant women and nonpregnant persons”⁶¹ in order to find no discrimination on the basis of sex in the disability insurance programs. The *Gilbert* Court observed that there was “no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.”⁶²

While this distinction is difficult for the modern reader to understand, it sparked a strong response from advocacy groups, unions, and legislators, culminating in the passage of the Pregnancy Discrimination Act. The PDA directly addressed this false distinction between “pregnant women and nonpregnant persons” by clarifying that pregnancy discrimination was “because of sex.”⁶³ The Act also responded to the idea that employers could discriminate because of cost concerns, which was present in both *Geduldig* and *Gilbert*.⁶⁴

B. *Expanding Title VII Protections: Coalition Efforts*

The Court’s failure to recognize pregnancy discrimination made it clear that for Title VII to accomplish its goals, it would need an amendment explicitly including pregnancy and its related medical conditions in the definition of sex discrimination. Responses to *Geduldig* and *Gilbert* led to a coalition that included both feminist and anti-abortion groups.⁶⁵ Feminists were inspired to push for pregnancy protections so that women would not have to choose between the right to have children and full employment opportunities without discrimination. Anti-abortion organizations hoped that pregnancy protections in the workplace would encourage more women to continue with their pregnancies and forgo abortion.⁶⁶

⁶⁰ Dinner, *supra* note 55, at 472–73.

⁶¹ *Geduldig*, 417 U.S. at 496 n.20.

⁶² Shaw, *supra* note 43, at 209 (citing *Gilbert*, 429 U.S. at 138).

⁶³ 42 U.S.C. § 2000e(k) (2018).

⁶⁴ See *infra* note 100 (explaining, through the Court’s discussion in *Young*, that increased costs are not a legitimate reason to refuse a requested accommodation).

⁶⁵ Shaw, *supra* note 43, at 211.

⁶⁶ *Id.*

The impact of this coalition is evident in remarks from PDA sponsor Senator Harrison Williams, who described the Courts' treatment of pregnancy discrimination as both a "disappointment to working women[,] . . . a serious setback to women's rights," and "a serious threat to the security of the family unit."⁶⁷ In this way, the push for the PDA echoed the historical tension present in the fight for women's rights in the workplace. Advocates struggled between battling sex discrimination and dealing with perceptions that women are the "weaker sex" in need of special protections (and concerns that women would be "protected" out of the best jobs).⁶⁸ More specifically, the efforts to pass the PDA required advocates for women's economic independence to partner with groups focused on a more conservative, "traditional"⁶⁹ view of women's roles.⁷⁰

While the Court's decision in *Gilbert* certainly triggered more attention for the need to amend Title VII, the *Gilbert* case itself was the result of feminist activism within unions. The treatment of pregnant workers was a key issue for feminists within the labor movement beginning in the post-World War II era.⁷¹ In 1975, the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), the federation of most of the nation's unions, included the treatment of pregnant workers in its goals for collective bargaining.⁷² As discussed above, the union, IUE, supported the *Gilbert* plaintiffs.⁷³ Since 1971, the legal department at IUE has pursued a strategy to include pregnancy as a temporary disability for workplace discrimination protection purposes.⁷⁴ The union's newsletter provided example language drawn from an EEOC ruling that prohibited the exclusion of pregnancy from disability coverage for members who wished to file grievances based on pregnancy discrimination.⁷⁵ In protest of excluding pregnancy from sickness benefit

⁶⁷ *Id.* at 210 (citing remarks from Senator Harrison Williams).

⁶⁸ See DEARDORFF & DAHL, *supra* note 33, at 18–21.

⁶⁹ For a discussion about why traditional gender roles are not historically accurate, see *id.* at 14–15 ("The work of women has always been essential for the survival and economic viability of families, even prior to the advent of formalized wage labor.").

⁷⁰ Shaw, *supra* note 43, at 211.

⁷¹ COBBLE, *supra* note 59, at 127.

⁷² *Id.* at 216 n.47.

⁷³ Dinner, *supra* note 55, at 453.

⁷⁴ *Id.* at 473.

⁷⁵ *Id.*

coverage, more than 300 women members of IUE requested to file pregnancy discrimination claims.⁷⁶

The *Gilbert* case was a culmination of years of union advocacy around pregnancy discrimination, and this activism did not end with the Court’s disappointing holding. Instead, it strengthened resolve among feminists in the labor movement. Women from other unions, such as the Communications Workers of America (CWA), the United Electrical Workers (UE), and the Amalgamated Clothing Workers of America (ACWA) joined with IUE to form a coalition with other social activist organizations, including the National Organization for Women (NOW) and the National Association for the Advancement of Colored People (NAACP), to pass the PDA.⁷⁷ Like the feminist movement more broadly, women in the labor movement also debated and struggled with ideas around equal treatment and gender differences as these concepts intertwine with pregnancy discrimination.⁷⁸

As a result of this advocacy over many years, the Pregnancy Discrimination Act was passed in 1978, amending Title VII.⁷⁹ The amendment added Section 701(k):

The terms “because of sex” or “on the basis of sex” include, but are not limited to, because or on the basis of pregnancy, childbirth, or related medical conditions; 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 persons not so affected but similar in their ability or inability to work, and nothing in Section 703(h) of this Title shall be interpreted to permit otherwise.⁸⁰

Three key cases have since shaped the PDA’s application. A discussion of these cases below outlines the current state of federal pregnancy jurisprudence.

⁷⁶ *Id.*

⁷⁷ COBBLE, *supra* note 59, at 217.

⁷⁸ *Id.* at 217–18.

⁷⁹ WILLIAMS, *supra* note 39, at 3.

⁸⁰ 42 U.S.C. § 2000e(k) (2018).

C. *The Court's Application of the PDA: Understanding the Protections Offered*

Three central cases help to illuminate the extent of the PDA's protections for pregnant workers. They illustrate what employer practices can be challenged under the PDA and address the Act's compatibility with state pregnancy discrimination laws. *Newport News Shipbuilding and Dry Dock Co. v. EEOC* involved unfair treatment by the employer when they excluded their male employees' female spouses from insurance coverage for pregnancy-related hospitalizations.⁸¹ In *California Federal Savings and Loan Ass'n v. Guerra*, employers argued that a state law that offered stronger protections than the PDA was itself violative of Title VII.⁸² And, most recently, *Young v. UPS* provides the clearest understanding of what the courts will recognize as pregnancy discrimination when employees seek accommodations to continue working during pregnancy.⁸³

1. *Newport News Shipbuilding and Dry Dock Co. v. EEOC*

First, *Newport News Shipbuilding and Dry Dock Co. v. EEOC* made clear that employers must "treat pregnancy-related disabilities as equivalent to non-pregnancy-related disabilities."⁸⁴ The case arose from an employer's challenge of EEOC implementation guidelines for the PDA.⁸⁵ The employer's insurance plan offered pregnancy hospitalization benefits for female employees but did not offer the same benefits for the female spouses of male employees.⁸⁶ The Court found that excluding pregnancy coverage from an otherwise comprehensive plan was clear discrimination.⁸⁷ Offering protections to married male employees that were less comprehensive than the coverage offered to married female employees was discrimination "because of sex" and thus a violation of the PDA.⁸⁸ The Court explained that the *Gilbert* understanding of discrimination was incorrect under the PDA: "Congress has unequivocally rejected [*Gilbert's*] reasoning" through the PDA;

⁸¹ *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

⁸² *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987).

⁸³ *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015).

⁸⁴ DEARDORFF & DAHL, *supra* note 33, at 29.

⁸⁵ *Newport News*, 462 U.S. 669.

⁸⁶ *Id.* at 671.

⁸⁷ *Id.* at 682–84.

⁸⁸ *Id.* at 676.

“it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.”⁸⁹ This case was a clear application of the PDA’s refutation of *Gilbert*.

2. *California Federal Savings and Loan Ass’n v. Guerra*

Next, in *California Federal Savings and Loan Ass’n v. Guerra*, the Court clarified that the PDA was a floor, not a ceiling, for employers’ protections of pregnant workers.⁹⁰ Specifically, a California employment law did not violate Title VII by outlining minimum benefits for pregnant people greater than those required by the PDA; it did not require “preferential” treatment for pregnancy.⁹¹ Rebuffing the petitioner’s argument, the *Guerra* Court emphasized the “legislative history and historical context”⁹² in understanding the PDA’s purpose:

Congress intended the PDA to provide relief for working women and to end discrimination against pregnant workers. In contrast to the thorough account of discrimination against pregnant workers, the legislative history is devoid of any discussion of preferential treatment of pregnancy, beyond acknowledgements of the existence of state statutes providing for such preferential treatment.⁹³

The *Guerra* Court signaled to the states that they were free to provide protections beyond those created by the PDA. Many states have created their own pregnancy discrimination statutes and regulations in the years since *Guerra*; thirty have pregnancy accommodation laws that provide an additional layer of discrimination protections for pregnant workers.⁹⁴

3. *Young v. UPS*

Most recently, the Court gave a better indication of what constitutes a prima facie pregnancy discrimination claim in *Young v. UPS*. Peggy Young challenged her

⁸⁹ WILLIAMS, *supra* note 39, at 46–47 (citing *Newport News*, 462 U.S. at 684).

⁹⁰ Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 285 (1987).

⁹¹ DEARDORFF & DAHL, *supra* note 33, at 29–31.

⁹² *Guerra*, 479 U.S. at 284.

⁹³ *Id.* at 285–86.

⁹⁴ Chris Marr, *Tennessee Enacts Pregnant-Worker Accommodations Law*, BLOOMBERG L. (June 23, 2020, 3:15 PM), <https://news.bloomberglaw.com/daily-labor-report/tennessee-enacts-pregnant-worker-accommodations-law> [<https://perma.cc/J82F-9S6E>].

employer's policies after being denied accommodation to continue working while pregnant.⁹⁵ In particular, Young alleged that UPS violated the PDA by providing accommodations to other workers "similar in their . . . inability to work."⁹⁶ The Court agreed, but its holding did not amount to a "sweeping rule" to require that pregnant workers automatically receive the same accommodations given to any other worker without regard to the source of disability.⁹⁷

Instead, to establish a prima facie case of pregnancy discrimination based on denial of an accommodation, a plaintiff must show 1) they belong to the protected class (pregnant people), 2) they asked their employer for an accommodation, 3) the employer did not accommodate them, and 4) the employer did accommodate others "similar in their ability or inability to work."⁹⁸ This follows the *McDonnell Douglas* framework.⁹⁹ As in *McDonnell Douglas*, the employer may offer a "legitimate, nondiscriminatory reason" as to why the accommodation was denied.¹⁰⁰ Increased expense or inconvenience will not typically constitute a legitimate, nondiscriminatory reason.¹⁰¹ As in *Guerra*, the *Young* Court relied on the PDA's "basic objective" and determined that the employer's proffered reason for denying accommodations would be inconsistent with the goal of providing support for pregnant workers.¹⁰² The Court observed, "[a]fter all, the employer in *Gilbert* could in all likelihood have made just such a claim."¹⁰³ If the employer presents a

⁹⁵ *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 211 (2015).

⁹⁶ *Id.*

⁹⁷ Shaw, *supra* note 43, at 207–08. One piece of proposed legislation, the Pregnant Workers Fairness Act, advances a theory of pregnancy accommodation that tracks with the Americans with Disabilities (ADA) framework. This act "would require employers to provide reasonable accommodations to employees for pregnancy, childbirth, and related medical conditions, unless such accommodation would cause an undue hardship for the employer." BAKST ET AL., *supra* note 14, at 6–7.

⁹⁸ *Young*, 575 U.S. at 228–29; *see also* Shaw, *supra* note 43, at 218.

⁹⁹ *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (explaining how plaintiffs can show individual disparate impact in violation of Title VII).

¹⁰⁰ *Young*, 575 U.S. at 229.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

legitimate, nondiscriminatory reason, then the plaintiff can rebut by showing that the reason is pretextual—this would create an inference of intentional discrimination.¹⁰⁴

To summarize, *Young v. UPS* outlines how plaintiffs can establish that they were denied pregnancy accommodations in violation of the PDA.¹⁰⁵ The case is also helpful for understanding the limits of the PDA’s protection: as outlined below, it does not require employers to always provide requested accommodations to pregnant employees.¹⁰⁶

In addition to the PDA, pregnant people can seek legal support and protections from the amended Americans with Disabilities Act (ADA)¹⁰⁷ as well as various state and local laws that offer additional support. Many state laws are broader than the PDA, explicitly requiring reasonable accommodations for pregnant workers regardless of how other disabilities are accommodated (and so there is no need to show comparators, often a challenging aspect for such claims).¹⁰⁸ Following *Young v. UPS*, efforts have emerged to replace the *Young* framework with a reasonable accommodations ADA-style approach. The approach would require an employer to provide reasonable accommodations for pregnant workers unless they can show it would cause an undue burden.¹⁰⁹ The Pregnant Workers Fairness Act (PWFA) passed the U.S. House of Representatives in September 2020, allowing the possibility for a stronger federal framework to protect pregnant workers in the future.¹¹⁰ At present, however, the *Young* Court’s holding defines the limits of what protections pregnant workers can expect from the PDA.

¹⁰⁴ *Id.* at 229–30. The Court also discusses how a plaintiff could create an issue of material fact by showing that many nonpregnant workers are accommodated while many pregnant workers are not accommodated (as *Young* claimed was the case with UPS). *Id.* This in turn would “give rise to an inference of intentional discrimination.” *Id.*

¹⁰⁵ See Shaw, *supra* note 43, at 219, for a discussion on the relative success of plaintiffs bringing pregnancy discrimination claims following *Young*.

¹⁰⁶ JODY FEDER, THE PREGNANCY DISCRIMINATION ACT AND THE SUPREME COURT: A LEGAL ANALYSIS OF *YOUNG V. UNITED PARCEL SERVICE* 5 (2015).

¹⁰⁷ Shaw, *supra* note 43, at 220 (explaining that the ADA was amended in 2008 to expand the definition of “disability” such that temporary limitations due to pregnancy can be covered).

¹⁰⁸ *Id.*

¹⁰⁹ BAKST ET AL., *supra* note 14, at 6.

¹¹⁰ Nancy Gunzenhauser Popper & Anastasia A. Regne, *House Passes Pregnant Workers Fairness Act*, NAT’L L. REV. (Oct. 7, 2020), <https://www.natlawreview.com/article/house-passes-pregnant-workers-fairness-act> [<https://perma.cc/JYT7-JAM8>].

D. Summary of Pregnant Workers' Rights under the PDA

Before exploring why pregnant workers continue to face unlawful discrimination, this section will establish what workers can demand in the workplace by briefly summarizing prohibited employment practices under the PDA. The PDA applies to employers with fifteen or more employees engaged in interstate commerce.¹¹¹

Employers cannot force employees to take leave when they are pregnant and instead must consider each employee's "individual work capabilities."¹¹² If an employer offers accommodations to other workers similarly impacted in their working capabilities, they cannot exclude pregnant workers from such accommodations without providing a legitimate, nondiscriminatory reason.¹¹³ An increased cost, or inconvenience for the employer, is usually not enough to establish a legitimate, nondiscriminatory reason for refusing to accommodate a pregnant worker.¹¹⁴ An employer who permits an employee to take leave for surgery and return to work with full benefits and seniority, but does not extend a similar leave to a pregnant employee, may violate the PDA.¹¹⁵ Employers cannot refuse to hire or promote an individual based on pregnancy or "because of stereotyped notions of what work is proper for a pregnant woman to do or not to do."¹¹⁶

Employees must exhaust "administrative prerequisites" before bringing a claim under the PDA,¹¹⁷ but workers should not feel that they can only enforce their rights by filing a suit.¹¹⁸ One of the impacts of *Young v. UPS* is that workers have a clear

¹¹¹ WILLIAMS, *supra* note 39, at 4. Title VII prohibits private employers with 15 or more employees and employment agencies from discriminating on the basis of sex (including pregnancy) in all aspects of an employment relationship. See *Civil Rights Requirements-E. Federal Employment Discrimination Laws*, HHS.GOV: CIVIL RIGHTS (July 26, 2013), <https://www.hhs.gov/civil-rights/for-individuals/special-topics/needly-families/federal-employment-discrimination%20laws/index.html> [<https://perma.cc/4BPU-S8Y7>].

¹¹² SACHI BARREIRO, *YOUR RIGHTS IN THE WORKPLACE* 113 (Sachi Barreiro ed., 11th ed. 2018).

¹¹³ See *supra* Section I.C.

¹¹⁴ See *id.*

¹¹⁵ See BARREIRO, *supra* note 112, at 112–13.

¹¹⁶ *Id.* at 113.

¹¹⁷ WILLIAMS, *supra* note 39, at 4.

¹¹⁸ Advocates of the PWFA identify the time and cost associated with pursuing a PDA claim as one of the main problems with the PDA as defined by the Court in *Young*. See, e.g., BAKST ET AL., *supra* note 14, at 6 ("[M]any pregnant women need accommodations immediately and cannot afford—both in terms of their health and finances—to litigate a case for multiple years.").

precedent to point to when asking for pregnancy accommodations; attorneys and other advocates can assist workers in making demands and receiving accommodations without having to resort to litigation.¹¹⁹ Peggy Young’s attorney, Sharon Fast Gustafson, counsels potential clients to raise the *Young* precedent with employers by saying, “I don’t know if you’re aware of this *Young v. UPS* case, but it’s pretty clear now that if you’re making accommodations for other people with similar needs, you need to make them for pregnancy too.”¹²⁰

II. WORKERS’ LACK OF KNOWLEDGE OF THE PDA WEAKENS ITS ENFORCEMENT

Pregnancy discrimination claims filed with the EEOC are trending upward.¹²¹ Workers continue to face unlawful discrimination, and yet such discrimination is often not met with legal action.¹²² Employers continue to discriminate against pregnant workers with impunity in many situations.¹²³ Pregnant workers face a tough choice because, even if they are aware of their rights under Title VII and the PDA, speaking up against discrimination always comes with the risk of retaliation.¹²⁴ In the current economic climate, many workers are in precarious situations where they simply cannot afford to stop working.¹²⁵

¹¹⁹ Shaw, *supra* note 43, at 219–20.

¹²⁰ *Id.*

¹²¹ DEARDORFF & DAHL, *supra* note 33, at 162.

¹²² See *supra* Introduction.

¹²³ See *id.*

¹²⁴ Retaliation is, of course, unlawful under Title VII, but enforcing this is challenging in its own unique way. For a discussion of the limited definition of actionable retaliation under Title VII, see Matthew W. Green Jr., *What’s So Reasonable About Reasonableness? Rejecting a Case Law-Centered Approach to Title VII’s Reasonable Belief Doctrine*, 62 U. KAN. L. REV. 759 (2014).

¹²⁵ See, e.g., Annie Nova, *A \$1,000 Emergency Would Push Many Americans into Debt*, CNBC (Jan. 1, 2019, 10:23 AM), <https://www.cnbc.com/2019/01/23/most-americans-dont-have-the-savings-to-cover-a-1000-emergency.html> [<https://perma.cc/R45J-YFZ3>]; see also Ann Carrns, *Even in Strong Economy, Most Families Don’t Have Enough Emergency Savings*, N.Y. TIMES (Oct. 25, 2019), <https://www.nytimes.com/2019/10/25/your-money/emergency-savings.html> [<https://perma.cc/3QSL-D53R>].

A. *The Enforcement Framework*

Even if workers are willing and able to speak up against mistreatment, a central challenge to stopping pregnancy discrimination in workplaces across the United States is Title VII's enforcement mechanism. As an amendment to Title VII, the PDA has a "bottom up" or "rights-claiming" model for enforcement.¹²⁶ This means that it mainly takes individual workers recognizing violations of their rights and stepping forward to file formal complaints with the government for enforcement of the law.¹²⁷

As an amendment to Title VII, the PDA is enforced primarily through private rights of action; even cases prosecuted by the EEOC typically arise from complaints filed by workers.¹²⁸ This model appeals to notions of a worker-led structure; theoretically it empowers the workers best positioned to understand workplace problems to raise issues and seek solutions.¹²⁹ The workers experiencing discrimination must serve as "private attorneys general" to enforce the law.¹³⁰ However, an effective bottom up enforcement model depends on two assumptions: "(1) that workers have the substantive and procedural legal knowledge to identify violations of their rights and access the proper enforcement procedures, and (2) that workers have sufficient incentives to file suit or make agency complaints."¹³¹ Title VII can also be understood as a rights-claiming statute, where workers must "name, blame, and claim" to move from an experience of discrimination to a remedy at law.¹³² To achieve justice, an individual must recognize a harm to themselves (name), attribute that harm to someone else (blame), express the harm to those responsible, and seek a remedy (claim).¹³³ Workers must "translate" their

¹²⁶ See Alexander & Prasad, *supra* note 34, at 1070; Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 861 (2008).

¹²⁷ Alexander & Prasad, *supra* note 34, at 1070.

¹²⁸ *Id.*

¹²⁹ *Id.* at 1071.

¹³⁰ Brake & Grossman, *supra* note 126, at 861–62 (citing *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 415 (1975)).

¹³¹ Alexander & Prasad, *supra* note 34, at 1072.

¹³² Brake & Grossman, *supra* note 126, at 862.

¹³³ *Id.*

experiences of workplace discrimination into a legal claim through this process.¹³⁴ The rights-claiming model dampens enforcement activities.¹³⁵

The rights-claiming or bottom up enforcement mechanisms fail most dramatically in offering protections for the most vulnerable workers.¹³⁶ “These workers include women, those with less education, nonunionized workers, and undocumented workers, all of whom hold relatively disempowered positions both in the workplace and in society as a whole.”¹³⁷ In a 2008 study of low-wage, frontline workers, researchers found that more than 75% of those surveyed “did not know where to file a government complaint” about workplace violations.¹³⁸ Women overall were less likely to have an accurate understanding of their legal rights, as were undocumented workers.¹³⁹ Surveyed workers included cashiers, parking lot attendants, and dishwashers; frontline positions that offer low wages and where violations of workplace rights are “prevalent.”¹⁴⁰ The survey determined that workers who are likely to face violations are still unlikely to enforce their rights due to a lack of knowledge.¹⁴¹ Other sources have similarly concluded that many workers do not know about their statutorily protected rights in the workplace.¹⁴²

B. *Real Fear of Retaliation*

Retaliation is also a major hurdle for enforcing anti-discrimination laws like the PDA. Even if workers can get past the common sentiment that complaints will not result in any real change,¹⁴³ the retaliation framework for Title VII is both narrow and retroactive. Workers who can successfully bring a retaliation claim—a challenging process as described below—will have already suffered adverse

¹³⁴ *Id.* at 863.

¹³⁵ *Id.* at 862–63 (citing Laura Beth Nielsen & Robert L. Nelson, *Rights Realized? An Empirical Analysis of Employment Discrimination Litigation as a Claiming System*, 2005 WIS. L. REV. 663, 665 (2005)).

¹³⁶ Alexander & Prasad, *supra* note 34, at 1071.

¹³⁷ *Id.* at 1071–72.

¹³⁸ *Id.* at 1072.

¹³⁹ *Id.*

¹⁴⁰ *Id.* at 1073.

¹⁴¹ *Id.*

¹⁴² David Weil, “Broken Windows,” *Vulnerable Workers, and the Future of Worker Representation*, 10 FORUM (SPECIAL ISSUE) 1, 5 n.6 (2012).

¹⁴³ *Id.* at 6.

employment actions and related economic and social problems.¹⁴⁴ Simply put, a worker who is fired or harassed for speaking up against discrimination can only achieve a remedy after the fact.

Title VII's anti-retaliation provision provides:

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.¹⁴⁵

Courts have interpreted this provision so that workers are only protected when they speak out against behavior they *reasonably believe* to be prohibited under Title VII.¹⁴⁶ However, the “reasonable belief” doctrine is not as straightforward as it sounds. In applying the doctrine, courts have required plaintiffs complaining of retaliation to understand the intricacies of Title VII jurisprudence. “Reasonableness” is determined based on existing caselaw in a given jurisdiction and “Employees are given no leeway to be wrong about judicial interpretations of Title VII. . . . [E]mployees have been required to understand circuit splits and how the particular court hearing the plaintiff’s claim has interpreted Title VII.”¹⁴⁷

Considering these challenges in the enforcement and retaliation frameworks under Title VII, it is not surprising that many instances of pregnancy discrimination go unreported and unchallenged. There are calls to update workplace protections to address these challenges, the federal Pregnant Workers Fairness Act being just one example.¹⁴⁸ However, given the uncertainty of such updates in federal legislation, advocates of workplace justice should consider working within the current framework to combat pregnancy discrimination. Unions can support efforts to raise workers’ awareness of their rights under the PDA and stand in solidarity with workers who speak out against unfair treatment in all workplaces, including those without union representation. Such efforts have met some success already and are

¹⁴⁴ Alexander & Prasad, *supra* note 34, at 1104.

¹⁴⁵ 42 U.S.C. § 2000e-3(a).

¹⁴⁶ Green, *supra* note 124, at 760–63.

¹⁴⁷ *Id.* at 761–62.

¹⁴⁸ See, e.g., BAKST ET AL., *supra* note 14.

keeping in line with a long tradition in organized labor, not limited to the labor movement’s push for the PDA in the 1970s.¹⁴⁹

III. OPPORTUNITIES FOR BETTER ENFORCEMENT OF THE PDA THROUGH COLLABORATIVE ADVOCACY ACROSS UNION AND NONUNION WORKPLACES

The history of the PDA includes efforts by unions to achieve protections from discrimination for workers in every workplace, both union and nonunion.¹⁵⁰ While a collective bargaining agreement with a particular employer might ensure a contract for a given workplace enshrine workers’ rights, federal statutory rights are applicable across the board. Organizing around pregnancy discrimination fits into a pattern of union support for economic justice issues. “Labor’s early history was marked by broad-based organizing for broadly-applicable goals . . . with every race, sex, and skill subsumed in struggles for employment and community justice.”¹⁵¹ Moreover, the recent past is full of examples of union advocacy for broad-based economic justice initiatives. These examples include United Auto Workers (UAW) initiatives to prevent sexual harassment at work;¹⁵² SEIU efforts to raise the minimum wage to \$15 an hour,¹⁵³ and “bargaining for the common good,” a theory of contract bargaining that considers community needs within contract demands.¹⁵⁴ In light of this history, it follows that unions’ support of fair working conditions for pregnant workers can help to improve awareness and enforcement of the PDA.

Representation by a union is a proven method for better enforcement of workplace protections,¹⁵⁵ but the majority of workers in the United States are not

¹⁴⁹ See *infra* Part III.

¹⁵⁰ See discussion *supra* Sections I.A.2, I.B.

¹⁵¹ Michael M. Oswalt, *Alt-Bargaining*, 82 LAW & CONTEMP. PROBS. 89, 93 (2019).

¹⁵² Collins, *supra* note 58.

¹⁵³ Alina Selyukh, ‘Gives Me Hope’: How Low-Paid Workers Rose Up Against Stagnant Wages, NPR (Feb. 26, 2020, 4:07 PM), <https://www.npr.org/2020/02/26/808113169/gives-me-hope-how-low-paid-workers-rose-up-against-stagnant-wages> [<https://perma.cc/JWN9-D2BW>].

¹⁵⁴ *About Us*, BARGAINING FOR THE COMMON GOOD, <https://www.bargainingforthecommongood.org/about/> [<https://perma.cc/P6Q7-BR4B>] [hereinafter BARGAINING FOR THE COMMON GOOD].

¹⁵⁵ See Weil, *supra* note 142, at 13 (“There is now over two decades of evidence that shows that workers are more likely to exercise rights given the presence of a collective workplace actor, particularly a labor union.”).

represented by a union.¹⁵⁶ As discussed in Parts II and III above, workers in low-wage jobs are the most impacted by pregnancy discrimination. Additionally, their employers are often hostile towards unionization.¹⁵⁷ How, then, can advocates for fair workplaces help bolster the enforcement of the PDA? Supporting pregnant workers, particularly those in low-wage jobs, requires creative thinking and solidarity across industries. Examples from the recent past, including the development of the PDA, responses to sexual harassment, and the Fight for \$15, give a hopeful outlook for better enforcement of the Act by collaboration between unions and community groups focused on economic justice.

A. *Feminists and Labor Working Together*

The development of the PDA was very much a coalition effort, with many groups coming together to lobby for federal protections against pregnancy discrimination.¹⁵⁸ Feminist activists within the labor movement were a key part of that effort, reflecting an understanding of the power of organized labor to influence the American economy in ways that improve conditions for all workers, not just those in union workplaces.¹⁵⁹

Likewise, unions bolstered feminist responses to sexual harassment in the workplace and worked to frame the issue as “a *social issue* rather than a private pain.”¹⁶⁰ Activists with the UAW joined a taskforce at the University of Michigan to address sexual harassment in the late 1970s, around the same time as the fight for the PDA was underway.¹⁶¹ Labor historian Joyce Kornbluh, a co-chair of the taskforce, described the UAW’s involvement in the issue of sexual harassment as historic

¹⁵⁶ In 2020, 10.8% of workers in the United States were union members. Press Release, U.S. Bureau of Lab. Stat., Union Members Summary (Jan. 22, 2021). In the public sector, membership was much higher at 34.8% of workers. *Id.* Overall, men have a slightly higher union membership rate (11%) than women (10.5%). *Id.*

¹⁵⁷ Walmart, for example, is the largest private employer in the United States. Steven Greenhouse, *How Walmart Persuades Its Workers Not to Unionize*, ATLANTIC (June 8, 2015), <https://www.theatlantic.com/business/archive/2015/06/how-walmart-convinces-its-employees-not-to-unionize/395051/> [<https://perma.cc/8FH8-86KW>]. It has fought aggressively to keep unions out of its stores. *Id.*

¹⁵⁸ For more on the history of the PDA, see *supra* Part I.

¹⁵⁹ Dinner, *supra* note 55, at 472–73.

¹⁶⁰ Collins, *supra* note 58, at 74 (internal quotations omitted) (quoting co-chair of the joint UAW-Michigan taskforce on sexual harassment, Joyce Kornbluh). The article also discusses how many women were “motivated to join the union to be protected from sexual harassment—more than to improve their wages or working conditions.” *Id.*

¹⁶¹ *Id.*

“because it [was] the first time a bridge was built between feminists and unions and other institutions on the issue.”¹⁶² The taskforce drafted legislation to make harassment in the workplace illegal, amplified the stories of women who came forward about their own experiences of harassment, and held public statewide hearings to gather information on the issue.¹⁶³ To further boost the issue into the public consciousness, they organized the first statewide conference on sexual harassment in 1979.¹⁶⁴

The UAW activists succeeded in changing their own union’s policies to include “specific steps to stop harassment and empower women workers to take action.”¹⁶⁵ This policy change came several years *before* the Supreme Court interpreted Title VII to prohibit sexual harassment as a form of sex discrimination.¹⁶⁶ In partnership with academics and other feminists, the UAW’s advocacy helped shape the national conversation around sexual harassment and expand the public’s understanding of what constitutes discrimination on the basis of sex.¹⁶⁷ This is a clear example of union advocacy around a gendered issue resulting in increased awareness. Further, by securing union commitments to amend its own policies to stop sexual harassment at work, the feminists within the UAW contributed to a national trend that recognized sexual harassment as discrimination and as a workplace issue.

The UAW activists’ model for raising consciousness about sexual harassment at work is a strong example for PDA advocates. In particular, holding public hearings and amplifying the stories of workers experiencing discrimination are advocacy strategies that are applicable to the PDA enforcement issue. Already, media coverage often accompanies union attention to instances of pregnancy discrimination. Hacheler Cyrille’s ordeal, when she suffered injuries as a result of her employer’s refusal to accommodate her pregnancy, was highlighted by 32BJ SEIU and likely received more news coverage as a result.¹⁶⁸ The union helped Cyrille’s coworkers to

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See id.*

¹⁶⁸ *See supra* Introduction.

rally in her support, and to communicate their message about unsafe working conditions for pregnant workers to the public.¹⁶⁹

B. Current Trends that can be Utilized to Support Better PDA Enforcement

Like sexual harassment, pregnancy discrimination should be framed as a “social issue rather than a private pain”¹⁷⁰ as part of a strategy to raise workers’ awareness of their rights and encourage employers to live up to their statutory obligations. Current trends in the labor movement also pair well with this framework. One current trend, “Social Movement Unionism,” focuses on the importance of the “community’s stake” in safe and respectful workplaces.¹⁷¹ This trend frames workplace issues as “moral issue[s] demanding a response.”¹⁷² Alternatively called “common-good unionism,” this trend in the labor movement aims to address “social conditions whether or not they are directly related to traditional terms and conditions of employment. . . . Like the eight-hour day and the weekend before it, common-good unionism is bringing about positive change not just for the benefit of union members but for all people who are similarly situated.”¹⁷³

The Fight for \$15 is a strong example of such a campaign. It involves organized labor partnering with workers in nonunion workplaces for better treatment and dignity in the workplace. This campaign is supported by the SEIU, with both the union’s organizing expertise and its financial backing.¹⁷⁴ The campaign’s titular goal is to raise the minimum wage to \$15 per hour, and its members include fast-food

¹⁶⁹ Rose, *supra* note 20.

¹⁷⁰ Collins, *supra* note 58, at 74 (emphasis omitted) (internal quotations omitted) (quoting co-chair of the joint UAW-Michigan taskforce on sexual harassment, Joyce Kornbluh).

¹⁷¹ See Oswald, *supra* note 151, at 95 (internal quotations omitted) (quoting JULIUS GETMAN, RESTORING THE POWER OF UNIONS: IT TAKES A MOVEMENT 132–33 (2010)). Examples of “Social Movement Unionism” include the Justice for Janitors campaign organized by SEIU and the Hotel Workers Rising campaign organized by HERE. *Id.*

¹⁷² *Id.* (internal quotations omitted) (quoting STEVEN HENRY LOPEZ, REORGANIZING THE RUST BELT: AN INSIDE STUDY OF THE AMERICAN LABOR MOVEMENT 114, 153 (2004)).

¹⁷³ Kimberly M. Sánchez Ocasio & Leo Gertner, *Fighting for the Common Good: How Low-Wage Workers’ Identities Are Shaping Labor Law*, 126 YALE L.J.F. 503, 505–06 (2017), <https://www.yalelawjournal.org/forum/fighting-for-the-common-good> [<https://perma.cc/9UQE-72SN>].

¹⁷⁴ Selyukh, *supra* note 153.

workers, retail workers, home health aides, and childcare workers.¹⁷⁵ The campaign has garnered a broad base of support, with tens of thousands of workers from many workplaces rallying, walking out, sitting in, and marching to demand a higher wage.¹⁷⁶ The Fight for \$15 grounds its message in a community-minded ethos focused on “people who do the real work—struggling to survive.”¹⁷⁷

The campaign has support from political leaders, including Senator Bernie Sanders, and has embraced other social movements, including Black Lives Matter.¹⁷⁸ This indicates that coalitions of interest groups can form around a uniting goal, like raising wages, if that goal can be tied back to related issues like racial justice or gender equality. The campaign has coincided with rising wages in more than 20 states.¹⁷⁹ Pressure from the campaign has likely also played a part in wage increases from major employers like Walmart, Amazon, and Target.¹⁸⁰ President Biden has committed to raising the minimum wage to \$15 per hour by 2025.¹⁸¹

Since 2012, the Fight for \$15 has aimed to bring \$15 per hour wages and the right to unionize to low-wage workers across the country.¹⁸² Additionally, this campaign inextricably links other social justice issues that stem from systemic discrimination, like racism and sexism.¹⁸³ For example, workers involved in the Fight for \$15 were on the job at a McDonald’s restaurant in Ferguson, Missouri, the day police killed Black teenager Michael Brown—a galvanizing event in the Black Lives Matter movement.¹⁸⁴ Rasheen Aldridge, a fast-food worker and Fight for \$15

¹⁷⁵ *About Us*, FIGHT FOR \$15, <https://fightfor15.org/about-us/> [<https://perma.cc/W6RW-TQQB>] [hereinafter FIGHT FOR \$15].

¹⁷⁶ Selyukh, *supra* note 153.

¹⁷⁷ FIGHT FOR \$15, *supra* note 175.

¹⁷⁸ Selyukh, *supra* note 153.

¹⁷⁹ *Id.*

¹⁸⁰ *Id.*

¹⁸¹ Jacob Pramuk, *Democrats Reintroduce \$15 Minimum Wage Bill With Unified Control of Congress*, *White House*, CNBC (Jan. 26, 2021, 3:16 PM), <https://www.cnbc.com/2021/01/26/democrats-reintroduce-15-minimum-wage-bill-with-unified-control-of-congress.html> [<https://perma.cc/XC9J-NNZG>].

¹⁸² Sánchez Ocasio & Gertner, *supra* note 173, at Part III.

¹⁸³ *Id.* at 504–05.

¹⁸⁴ Dominic Rushe, ‘*Hopefully it Makes History*’: *Fight for \$15 Closes in on Mighty Win for US Workers*, *GUARDIAN* (Feb. 13, 2021, 5:00 EST), <https://www.theguardian.com/us-news/2021/feb/13/fight-for-15-minimum-wage-workers-labor-rights> [<https://perma.cc/DC4S-L4L2>].

activist from Ferguson, observed the link between racial and economic justice: “You can’t really talk racial injustice without talking economic injustice Those workers were the same workers that also went to the streets . . . because they feel like Mike Brown could have been them, regardless if they was working at McDonald’s or if they was working at a healthcare facility.”¹⁸⁵

Viewing workplace issues as connected to social justice issues more broadly is a helpful lens for pregnancy discrimination. When advocates talk about issues faced by pregnant workers, it is important to note that low-wage workers are more likely to face discrimination but fail to get answers for the discrimination they face.¹⁸⁶ Additionally, Black workers face proportionately higher rates of pregnancy discrimination at work.¹⁸⁷ Efforts to raise awareness of the protections offered by the PDA can be more effective by acknowledging the intersecting identities¹⁸⁸ of pregnant workers and how those identities can impact their experiences in the workplace. Black women are also more likely to experience health issues during pregnancy, meaning that a loss of health benefits due to a discriminatory firing or refusal to accommodate will lead to compounding, negative impacts.¹⁸⁹ As explained by the Fight for \$15 activist Aldridge, workers recognize that social justice and economic justice are deeply connected.¹⁹⁰

This also ties into “Bargaining for the Common Good,” a coalition effort of unions and community groups that aims to “win bigger and broader demands at the bargaining table and in the streets.”¹⁹¹ The coalition advances a theory of collective bargaining that identifies key structural issues within the community and attempts to include solutions in union contracts. Such issues are not typical “terms and conditions of employment” like wages or working hours that only impact union members, but rather broader issues that affect the communities to which workers

¹⁸⁵ *Id.*

¹⁸⁶ Ellmann & Frye, *supra* note 18.

¹⁸⁷ *By the Numbers*, *supra* note 15.

¹⁸⁸ Professor Kimberle Crenshaw explains that in focusing on identity, it is important to avoid “conflat[ing] or ignor[ing] intragroup differences,” and to instead acknowledge the “intersectional identities” of women of color. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242–43 (1991).

¹⁸⁹ *By the Numbers*, *supra* note 15.

¹⁹⁰ Rushe, *supra* note 184.

¹⁹¹ BARGAINING FOR THE COMMON GOOD, *supra* note 154.

belong. The Chicago Teachers Union, for example, included demands that the city commit to increased funding for school nurses and counselors, and affordable housing assistance for community members during a 2019 strike.¹⁹² One striking teacher observed, “[this] is what unions are for, right? To get us to think outside our own individual experiences and understand where we’re connected in this larger network of people and institutions.”¹⁹³ Unions can prioritize pregnancy discrimination in these types of conversations, and in turn, the broader community will gain awareness of the issue and its potential solutions under the PDA.

Another trend in the labor movement that aligns with better enforcement of PDA is “alt-labor,”¹⁹⁴ a catchall term that describes workers organizing “for better working conditions but not necessarily collective bargaining.”¹⁹⁵ Worker centers like the Restaurant Opportunities Center (ROC) fit into this trend. ROC describes itself as “a nonprofit organization fighting to improve wages and working conditions for the nation’s restaurant workforce.”¹⁹⁶ The organization does not seek to represent workers in collective bargaining, one of the main roles of a traditional labor union, but rather supports workers across the restaurant industry to achieve better working conditions and pay.¹⁹⁷ Michael M. Oswald, in his article “Alt-Bargaining,” describes alt-labor as evidence of a change in organized labor’s involvement with nonunion workers:

The term alt-labor tends to refer to organizing efforts aimed at improving working conditions primarily through avenues other than collective bargaining. Because unions support and even fund many alt-groups and alt-campaigns, marking where “traditional” labor ends and alt-labor begins can be debatable. But in terms of organizing, definitions are less important than the descriptive fact that the very rise of “alternative” campaigns signals a shift in labor’s orientation with the law.

¹⁹² Alan Maass, *Chicago Teachers Strike for the Common Good*, JACOBIN (Oct. 27, 2019), <https://www.jacobinmag.com/2019/10/chicago-teachers-union-strike-ctu-cps> [<https://perma.cc/ZQN7-9YGU>].

¹⁹³ *Id.*

¹⁹⁴ Oswald, *supra* note 151, at 89.

¹⁹⁵ *Id.*

¹⁹⁶ *History*, REST. OPPORTUNITIES CTRS. UNITED, <https://rocunited.org/history/> (last visited Feb. 14, 2021).

¹⁹⁷ *Id.*

The change reverberates in the movement's current approach to membership, jurisdiction, and legal doctrine itself.¹⁹⁸

One example of alt-labor working to improve conditions for non-union workplaces occurred in Pittsburgh. In 2016, ROC worked with local business owners in Pittsburgh to create a sick-leave policy for employees after court challenges delayed a similar city ordinance that would have required such a policy for nearly a year.¹⁹⁹ This model can fill gaps in the PDA, as highlighted in the discussion of the proposed Pregnant Workers Fairness Act above. Worker centers could encourage employers to follow an accommodations model based on that proposed legislation, which is a more generous standard for workers. Advocacy from worker centers can also help with the problem of awareness and underenforcement of the PDA in its current form. Public awareness campaigns significantly impact workers' knowledge of their rights and willingness to speak up about violations. This is evidenced by lobbying efforts by employer interest groups aimed at stopping employment rights awareness campaigns organized by the Department of Labor during the Obama administration.²⁰⁰

OUR Walmart, a coalition made up of Walmart workers focused on improving working conditions, is another example of successful union backing for nonunion workers, particularly on the issue of pregnancy discrimination.²⁰¹ The group received support from the United Food and Commercial Workers Union (UFCW) and started the "Respect the Bump" campaign to advocate for better treatment of pregnant workers at Walmart.²⁰² Stories like Bene't Holmes' tragically point to the need for better enforcement of the PDA at Walmart. In 2014, Holmes miscarried her child the day after Walmart refused her request for lighter duty.²⁰³ In addition to the physical and emotional pain from this incident, Homes faced economic pressures: Walmart

¹⁹⁸ Oswalt, *supra* note 151, at 96.

¹⁹⁹ Mark Nootbaar, *Advocacy Group Working to Enforce 'Unenforceable' Law One Restaurant at a Time*, WESA (Sept. 21, 2016, 7:00 PM), <https://www.wesa.fm/post/advocacy-group-working-enforce-unenforceable-law-one-restaurant-time> [<https://perma.cc/YF69-M353>].

²⁰⁰ Weil, *supra* note 142, at 12.

²⁰¹ Amien Essif, *Walmart's Inhumane Policies for Pregnant Workers*, IN THESE TIMES (Nov. 6, 2014), <https://inthesetimes.com/article/walmart-inhumane-pregnancy-policies> [<https://perma.cc/AAY2-3K7P>].

²⁰² *Whose Walmart? Our Walmart.*, UNITED FOR RESPECT, <https://united4respect.org/campaigns/walmart/> [<https://perma.cc/XNT6-7N4P>].

²⁰³ Essif, *supra* note 201.

reprimanded her for the unexcused absences after she missed 18 days of work.²⁰⁴ Respect the Bump called on Walmart to comply with the PDA and to improve its pregnancy policies.²⁰⁵

OUR Walmart and Respect the Bump are helpful examples of the promise and challenges that come with this type of advocacy. OUR Walmart struggled with its overall goal of unionizing Walmart workers,²⁰⁶ but the Respect the Bump campaign was a success. In 2014, Walmart announced a new, improved pregnancy policy.²⁰⁷ Room for improvement remains, but the union was able to support Walmart workers in advocating for themselves and claiming their rights under the PDA.

Even informal organizing and collective action can enable workers to better understand their position in the economy and the power they wield. One emerging tactic is sharing salary information across industries so that individual workers can compare their pay with others of similar roles. Baristas in Philadelphia, for instance, contributed to a collective spreadsheet tracking wages at different coffee shops and cafes, as did adjunct professors and museum workers.²⁰⁸ These spreadsheets are an act of “transparency and solidarity,” and they also appeal to public sentiment.²⁰⁹

The PDA is not the best possible option for ensuring fair, safe workplaces for pregnant workers.²¹⁰ However, better enforcement of the existing law is a short-term solution for the ongoing problem of pregnancy discrimination. The campaigns and coalitions above all explore ways that workers and their allies can think creatively to uphold existing law and create popular support for better conditions. Pregnant workers are very often the primary wage-earners in their households, and low-wage workers are particularly vulnerable to pregnancy discrimination.²¹¹ Public campaigns like UFCW’s Respect the Bump can draw attention to employers’ unfair practices

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ Peter Olney, *Where Did the OUR Walmart Campaign Go Wrong?*, IN THESE TIMES (Dec. 14, 2015), <https://inthesetimes.com/article/our-walmart-union-ufcw-black-friday> [https://perma.cc/PR86-GN87].

²⁰⁷ Lydia DePillis, *Under Pressure, Wal-Mart Upgrades Its Policy for Helping Pregnant Workers*, WASH. POST (Apr. 5, 2014, 9:03 AM), <https://www.washingtonpost.com/news/wonk/wp/2014/04/05/under-pressure-walmart-upgrades-its-policy-for-helping-pregnant-workers/> [https://perma.cc/P4V3-ABCA].

²⁰⁸ Juliana Feliciano Reyes, *Philly Baristas, Too, Are Sharing Their Wages in a Crowdsourced Spreadsheet*, PHILA. INQUIRER (Oct. 2, 2019), <https://www.inquirer.com/news/philly-barista-coffee-shop-wages-pay-spreadsheet-20191002.html> [https://perma.cc/3VZT-XQTC].

²⁰⁹ *Id.*

²¹⁰ See BAKST ET AL., *supra* note 14.

²¹¹ See NAT’L WOMEN’S L. CTR. & A BETTER BALANCE, *supra* note 32.

and encourage reform to protect the company image. Public hearings like those held by UAW activists on sexual harassment can raise public awareness of the issue of pregnancy discrimination and increase workers' knowledge that pregnancy discrimination is, in fact, against the law. Creating networks of nonunion workers, like the ROC and the Philadelphia baristas, can help workers gain power and win protections or improved conditions. Focusing on social justice as a broad goal can help community groups and unions to strategize for "common good" wins in collective bargaining agreements. All of these strategies offer pathways for increasing worker awareness of the PDA and encouraging workers to claim their rights under the Act.

IV. CONCLUSION

Pregnancy discrimination frequently impacts workers in the United States; the more precarious a worker's position is, the more likely they are to face this type of discrimination when they become pregnant. Workers' lack of knowledge of their rights under the PDA is a key barrier to the Act's enforcement, and fear of retaliation dampens potential claims. Organized labor can and should continue to engage with workers in low-wage, nonunion workplaces to increase awareness and encourage collective action so that pregnant workers can better enforce their rights under the Act.