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Accommodating Pregnancy Five Years After Young v. UPS: Where We Are & Where We Should Go

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ACCOMMODATING PREGNANCY FIVE YEARS AFTER *YOUNG V. UPS*: WHERE WE ARE & WHERE WE SHOULD GO

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ABSTRACT

This Article will explore how pregnant employees fare when they are denied accommodations in the workplace that would have allowed them to work safely through their pregnancies. The two most commonly used legal avenues for pregnant plaintiffs are the Pregnancy Discrimination Act (PDA) and the Americans with Disabilities Act (ADA). Successful cases under the ADA were rare until Congress expanded the ADA's definition of disability in 2008. PDA claims became easier after the Supreme Court's 2015 decision in Young v. United Parcel Service, Inc. This Article will analyze both the body of PDA cases decided since Young, and all of the ADA cases where pregnancy is the claimed disability since the ADA was amended in 2008. Although the picture isn't quite rosy for pregnant plaintiffs, it is perhaps more positive than many scholars predicted it would be. Nevertheless, there remain many gaps in protection—some caused by the statutes' limitations—but many caused by litigants' and judges' inability (or unwillingness) to properly interpret these two statutes. This Article will explain where we are and explore options for where we should go in the future.

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I. INTRODUCTION

Although many (if not most) pregnancies proceed without complications, many pregnant women will need *some* modifications to their jobs when they are pregnant,[1] especially if their jobs are physically rigorous. These modifications (often called "accommodations") might be as simple as taking extra breaks[2] to drink water,[3] sit down to rest, or use the restroom; sitting on a stool instead of standing for an entire shift;[4] or a bit more complicated, such as a waiver from all heavy lifting. But employers often refuse to provide accommodations for pregnancy, leaving pregnant employees performing tasks that are detrimental to the health and well-being of their pregnancies[5] or being forced to take leave (often unpaid) when they could be working with minor adjustments to their jobs. Employers' refusal to provide accommodations for pregnancy falls more harshly on women in low-income jobs[6] and on women in historically male professions like firefighting, construction work, and law enforcement.[7] Many of these women lose their jobs because of their employers' refusal to accommodate the limitations caused by their pregnancies.[8] In addition to the hardship borne by these women and their families, the failure of employers to accommodate their pregnant employees "indirectly contributes to occupational sex segregation by discouraging other women from pursuing jobs that they risk losing when they

1. Thelma L. Harmon, Young v. United Parcel Service, Inc.*: The Equal Treatment Fallacy*, 20 J. GENDER RACE & JUST. 97, 106 (2017) (noting that 71% of pregnant workers need more breaks; 61% need schedule changes; 53% need a change in job duties to allow more sitting or less lifting; 40% need other types of workplace adjustments).

2. See, for example, *Colas v. City Univ. N.Y.*, 17-CV-4825 (NGG) (JO), 2019 WL 2028701, at *1 (E.D.N.Y. May 7, 2019), where the plaintiff was harassed for taking restroom breaks and having to sit down. She eventually quit, claiming constructive discharge. *Id.* at *2.

3. See *Wiseman v. Wal-Mart Stores, Inc.*, No. 08–1244–EFM, 2009 WL 1617669, at *1 (D. Kan. June 9, 2009), where a pregnant employee lost her job because drinking water while working violated store policy.

4. *See* Stephanie A. Pisko, *Towards Reasonable: The Rise of State Pregnancy Accommodation Laws*, 23 MICH. J. GENDER & L. 147, 153 (2016) (giving the example of a bank teller whose pregnancy caused swollen feet and high blood pressure, so her doctor recommended that she sit on a stool).

5. See, for example, *Thomas v. Fla. Pars. Juv. Just. Comm'n*, No. 18-2921, 2019 WL 118011, at *2 (E.D. La. Jan. 7, 2019), where the plaintiff was refused a waiver from completing a 1.5-mile run test while she was pregnant. Attempting the run led to her experiencing severe pain and having to be transported to the emergency room. *Id.* at *2–3. *See also* Harmon, *supra* note 2, at 106 (stating that many women never ask for the accommodations they need).

6. Pisko, *supra* note 5, at 154 (stating that a narrow reading of the PDA has had negative consequences for low-income women, who need to continue to work during their pregnancies and cannot afford to take leave).

7. Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 454 (2012).

8. *Id.*

become pregnant."[9] If a pregnant employee wants to challenge these actions, the two most common legal avenues are the Americans with Disabilities Act (ADA)[10] and the Pregnancy Discrimination Act (PDA).[11]

Although claims under both of these statutes were rarely successful,[12] two legal developments have contributed to their increased success. First, the ADA was amended in 2008 (effective January 1, 2009) to dramatically expand the definition of disability.[13] And second, in 2015, the Supreme Court decided a case, *Young v. United Parcel Service, Inc.*,[14] that made it easier for pregnant employees to seek accommodations under the PDA. We are now five years past that decision in *Young*. Thus, this is a good time to see where we are and to attempt to draw some conclusions about where we should be.

Specifically, this Article will analyze the body of cases decided since the *Young v. UPS* decision, and all of the ADA cases where pregnancy is the claimed disability since the ADA was amended in 2008. Although the picture is not quite rosy for pregnant plaintiffs, it is perhaps more positive than many scholars predicted it would be. Nevertheless, there remain many gaps in protection—some caused by the statutes' limitations—but many caused by litigants' and judges' inability (or unwillingness) to properly interpret these two statutes. This Article will explain where we are and explore options for where we should go in the future.

This Article proceeds in four additional parts. Part II will provide a brief history of pregnancy discrimination and accommodation protections, proceeding chronologically from the passage of the PDA in 1978, through the passage of the ADA in 1990 and the ADA Amendments Act (ADAAA) in 2008, and finally, to the Supreme Court's 2015 decision in *Young v. UPS*. Part III will discuss all of the cases decided under the PDA since *Young*, as well as the ADA cases discussing pregnancy as a disability. Finally, Part IV will attempt to draw some conclusions from the cases discussed in Part III, and, perhaps more importantly, will provide some advice for how these protections might be more successful in the future for assisting pregnant women in receiving the accommodations they need in the workplace. Part V will briefly conclude.

9. *Id.*

10. The ADA requires employers to provide reasonable accommodations to individuals with disabilities as long as those accommodations do not cause an undue hardship. 42 U.S.C. § 12112(b)(5)(A).

11. As will be discussed below, the PDA requires employers to treat pregnant women the same as other workers who are similar in their ability or inability to work. Thus, courts have sometimes treated the PDA as requiring employers to provide some accommodations to pregnant workers. This is discussed in more detail *infra* Parts II.A, C.

12. John C. Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 111 (2013).

13. Alex B. Long, *Introducing the New and Improved Americans With Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U. L. REV. COLLOQUY 217, 218 (2008).

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

II. CHRONOLOGICAL HISTORY OF PREGNANCY DISCRIMINATION PROTECTIONS

A. Enactment and Early Days of the Pregnancy Discrimination Act

The PDA was passed in 1978, as an amendment to Title VII.[15] It was a reaction to the Supreme Court's decision in *Gilbert v. General Electric Co.*,[16] in which the Court held that an employer's otherwise comprehensive temporary disability policy that excluded pregnancy was not sex discrimination under Title VII.[17] The Court reasoned that because not all women are or will become pregnant, and because the employer's policy at issue did not discriminate against all women, pregnancy discrimination was not sex discrimination.[18]

Congress disagreed and passed the PDA[19] in 1978. The PDA amends the definition of "sex" under Title VII and has two clauses.[20] The first clause makes explicit that discrimination based on sex includes discrimination because of "pregnancy, childbirth, or related medical conditions."[21] So a refusal to hire a pregnant woman because she is pregnant would be unlawful sex discrimination under Title VII. But the second clause does more—it provides 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."[22]

After the PDA was passed, courts differed regarding how to interpret the PDA's second clause.[23] Some courts held that employer policies that were "pregnancy blind," such as policies that reserved light duty positions for employees with workplace injuries, did not violate the PDA.[24] In other words, employees who had been given accommodations (often "light duty") because of

15. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.
16. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).
17. *Id.* at 145–46.
18. *Id.* at 136.
19. 42 U.S.C. § 2000e(k).
20. *Id.*
21. *Id.*
22. *Id.*
23. *See generally* Lynn Ridgeway Zehrt, *A Special Delivery: Litigating Pregnancy Accommodation Claims after the Supreme Court Decision in* Young v. United Parcel Service, Inc., 68 RUTGERS U. L. REV. 683, 684–86 (2016) (discussing courts' different approaches).
24. Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After* Young v. UPS, 50 U.C. DAVIS L. REV. 1423, 1428 (2017); Zehrt, *supra* note 24, at 685 (listing the 4th, 5th, 7th, and 11th Circuits as narrowly interpreting the second clause; if the employer only offers light duty to those with occupational injuries, they do not need to offer it to pregnant workers). *But see id.* (stating that the 6th, 8th, and 10th Circuits interpreted the PDA more broadly, comparing the relative abilities of pregnant and non-pregnant workers, rather than the source of injury).

some "neutral" policy were not appropriate comparators.[25] As one scholar pointed out, courts often insisted on finding animus against pregnancy before allowing the plaintiff's PDA claim; as long as the reason for the accommodation given to other employees was an external source (such as workers' compensation laws, the ADA, or a collective bargaining agreement), this sufficed as a valid reason to treat pregnant women worse than other employees.[26] Many scholars became critical of the PDA, arguing that it could not address the fact that "pregnant women are ready and able to work, but require some level of accommodation to maintain their health while performing their job duties at an adequate level."[27]

B. Pregnancy as a Disability under the Americans with Disabilities Act

1. Original ADA

The ADA was passed in 1990 with overwhelming support.[28] But it was not too long before the federal courts, especially the Supreme Court, began narrowly interpreting the definition of disability.[29] Under the ADA, a disability is defined as a physical or mental impairment that substantially limits one or more major life activities, a record of such an impairment, or being regarded as having such an impairment.[30] Through a series of four Supreme Court decisions,[31] and

25. Using comparators is one of the most common ways of proving discrimination. For instance, imagine an employer with two employees that perform the exact same job (e.g., cashier in a grocery store). One is pregnant and the other is not. If the employer allowed the non-pregnant cashier to take frequent breaks to smoke cigarettes, but refused to let the pregnant worker take frequent breaks to use the restroom or drink water, the pregnant worker could point to the non-pregnant worker as a comparator to establish that the employer's refusal to let her take the breaks was discrimination based on her pregnancy.

26. Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 580 (2017) [hereinafter *Shifting Sands*]; Deborah L. Brake, *On Not "Having It Both Ways" and Still Losing: Reflections on Fifty Years of Pregnancy Litigation Under Title VII*, 95 B.U. L. REV. 995, 1001 (2015).

27. *See, e.g.*, Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA's Pregnancy Exclusion*, 27 WIS. J.L. GENDER & SOC'Y 1, 8 (2012).

28. *See* Long, *supra* note 14, at 217 (stating that the expectations for the original ADA had been very high).

29. *See* Michelle A. Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 938 (2012) (stating that Congress enacted the ADAAA to overturn a set of United States Supreme Court decisions that narrowly interpreted the definition of disability).

30. 42 U.S.C. § 12102(1).

31. The first three decisions (called the "*Sutton* trilogy") held that, when determining if someone has a disability, that person's impairment should be considered in its mitigated state—i.e., with any medication or assistive devices that ameliorate the effect of the person's impairment. Sutton v. United Air Lines, Inc., 527 U.S. 471, 488–89 (1999) (holding that fully correctable myopia is not a disability using the just-announced mitigating measures rule); Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999) (holding that the plaintiff's hypertension, which was lowered with medication, was not a disability); Albertson's, Inc. v. Kirkingburg, 527 U.S. 555,

hundreds of lower-court decisions, conditions such as diabetes, cancer, AIDS, bipolar disorder, multiple sclerosis, monocular vision, epilepsy, cerebral palsy, and intellectual disabilities were all found not to be disabilities under the original ADA.[32] Scholars referred to the courts as having engaged in a "backlash" against the ADA.[33] In fact, one study demonstrated that employers had prevailed in ninety-two percent of ADA cases filed in court.[34]

Thus, it should not be surprising that, under the original ADA, courts did not often consider pregnancy to be a disability.[35] In fact, as stated by one scholar, before the ADAAA was passed, courts routinely denied ADA coverage to pregnant women who experienced limitations during pregnancy, such as severe headaches, dizziness, vomiting, extreme fatigue, and the need to curtail heavy lifting and exposure to hazardous chemicals.[36] Courts thought that pregnancy was "normal"[37] and, if anything, represented heightened rather than diminished biological functioning.[38] Moreover, the *Toyota* Court's "long-term or permanent" requirement to establishing a covered disability made it almost impossible for courts to see pregnancy (which is, inevitably, *not* permanent or long-term) as a disability.[39] And most scholars were not advocating for the ADA to cover pregnancy as a disability because they were worried that providing

565–66 (1999) (holding that the plaintiff's monocular vision was not a *per se* disability and the court on remand should consider whether the plaintiff's brain's ability to cope with his monocular vision renders it not substantially limiting). The fourth decision clarified the correct meaning of "substantially limits" and "major life activities." *See* Toyota Motor Mfg. v. Williams, 534 U.S. 184, 197–98 (2002). The Court held that the ADA only applies to major life activities that are of "central importance to most people's daily lives." *Id.* at 197. In defining "substantially limits" in the definition of disability, the Court stated: "We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term." *Id.* at 198.

32. Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 3 (2014).

33. *See, e.g.*, Matthew Diller, *Judicial Backlash, the ADA, and the Civil Rights Model*, 21 BERKELEY J. EMP. & LABOR L. 19, 22 (2006); SUSAN GLUCK MEZEY, DISABLING INTERPRETATIONS: THE AMERICANS WITH DISABILITIES ACT IN FEDERAL COURT 48–58 (2005).

34. RUTH COLKER, THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT 79 (2005). *See also* Williams et al., *supra* note 13, at 111 (stating that by 2006, defendants were winning ninety-seven percent of all ADA cases resolved in court).

35. *See* Alemzadeh, *supra* note 28, at 6 (citing to several cases pre-ADAAA where courts held that pregnancy is not a disability).

36. Cox, *supra* note 8, at 446–47.

37. Alemzadeh, *supra* note 28, at 9–10 (stating that courts often engaged in the effort of trying to distinguish normal from abnormal pregnancies).

38. Cox, *supra* note 8, at 447.

39. Alemzadeh, *supra* note 28, at 10.

pregnancy coverage under the ADA would reinstate outdated views that women's physical differences are deficiencies.[40]

2. The ADA Amendments Act of 2008

Because Congress was unhappy with the narrowed definition of disability, it passed the ADAAA, which went into effect on January 1, 2009.[41] The ADAAA did not change the basic definition of disability.[42] Instead, it included several rules of construction to assist courts in interpreting the definition of disability in conformity with the broad definition Congress envisioned.[43]

Most relevant to this Article, the ADAAA's main changes included: overruling the "mitigating measures" rule announced in the *Sutton* trilogy of cases,[44] disagreeing with the *Toyota* Court's stringent definition of "substantially limits",[45] and broadening the definition of "major life activities."[46] With regard to the expansion of the definition of major life activities, the inclusion of work-related tasks like standing, lifting, and bending can help pregnant women because restrictions on such activities are common during pregnancy.[47] The Equal Employment Opportunity Commission (EEOC) issued regulations implementing the ADAAA, which became effective on May 24, 2011.[48] The regulations accomplished several things; the one most relevant

40. Cox, *supra* note 8, at 448. *See also* Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995, 1076–77 (2015) (noting that many believed that women's status would be demeaned by comparing pregnancy to disability).

41. Long, *supra* note 14, at 217.

42. *Id.* at 218.

43. Porter, *supra* note 33, at 15.

44. *See* 42 U.S.C. § 12102(4)(E)(i) (stating that the determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures such as: medication, medical supplies, hearing aids, assistive technology, etc.).

45. *See id.* §§ 12102(4)(A), (B) (stating that the definition of disability shall be construed in favor of broad coverage, but ultimately punting on the definition of "substantially limits" and instead deferring to the EEOC to define the phrase). *See also* Williams et al., *supra* note 13, at 115 (stating that the ADAAA eases the burden on plaintiffs proving that their major life activities were substantially limited).

46. Prior to the ADAAA, the statute itself did not define major life activities; instead, the EEOC had provided a fairly narrow definition. The ADAAA defines major life activities in the statute itself to include: "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating and working." 42 U.S.C. § 12102(2)(A). It also states that major life activities include "the operation of a major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions." *Id.* § 12102(2)(B).

47. Cox, *supra* note 8, at 461.

48. Regulations to Implement the Equal Employment Provisions of the Americans With Disabilities Act, as Amended, 76 Fed. Reg. 58, 16978 (Mar. 25, 2011) (to be codified at 29 C.F.R. pt. 1630).

to pregnancy is that the regulations state: "The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."[49]

Below, I will discuss the post-ADAAA cases considering whether pregnancy constitutes a disability.[50] As for the literature on pregnancy as a disability, scholars are divided on whether they believe that pregnancy *should be* a disability.[51] But a lengthy discussion of the theoretical arguments for and against classifying pregnancy as a disability is beyond the scope of this Article.

C. 2015: The Supreme Court's Decision in Young v. UPS

The landscape of pregnancy accommodations changed when the Supreme Court decided *Young v. UPS*.[52] The plaintiff, Peggy Young, was a part-time driver for UPS, where her duties included pickup and delivery of packages that had arrived by air the prior night.[53] After several miscarriages, she finally became pregnant in 2006.[54] Because of her history of miscarriages, her doctor advised her to avoid lifting more than twenty pounds during the first twenty weeks of her pregnancy and more than ten pounds thereafter.[55] Because UPS required drivers to be able to lift parcels weighing up to seventy pounds, UPS told Young that she could not work with her lifting restriction.[56] Accordingly, she was placed on unpaid leave most of her pregnancy and eventually lost her medical coverage.[57]

Young brought a lawsuit under the PDA, arguing that UPS accommodated other drivers who were similar in their ability or inability to work.[58] In doing so, she pointed to several classes of individuals who *were* accommodated by UPS, which included (1) those with workplace injuries, (2) those who had disabilities as defined by the ADA, and (3) those who lost their Department of

49. 29 C.F.R. § 1630.2(j)(1)(ix) (2019). *See also* Cox, *supra* note 8, at 462–63 (discussing the importance of the relaxing of the durational requirements); Williams et al., *supra* note 13, at 114.

50. *See infra* Part III.A.

51. *Compare* Alemzadeh, *supra* note 28, at 1, 16 (arguing in favor of pregnancy being considered a disability), Cox, *supra* note 8 (same), *and* Harmon, *supra* note 2, at 138 (stating that pregnancy should be viewed as a variation of a disability and not an anomaly), *with* Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125, 1163–66 (2016) (discussing the problems associated with classifying pregnancy as a disability).

52. 575 U.S. 206 (2015).

53. *Id.* at 211.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Young*, 575 U.S. at 211.

58. *Id.*

Transportation (DOT) certifications.[59] After discovery, UPS filed a motion for summary judgment, and the district court granted it, concluding that UPS offered a legitimate non-discriminatory reason for not accommodating Young—because she did not fall into any of the pregnancy-blind categories of employees for which UPS provides accommodations.[60] The Fourth Circuit affirmed, stating that Young's comparators (all three classes of employees who were accommodated according to UPS's policies) were not "similarly situated" to Young because their limitations were caused by reasons other than pregnancy.[61] Young petitioned the Supreme Court to hear the case, and the Court granted certiorari.

The Court recognized that the parties had very different interpretations of the second clause of the PDA.[62] The plaintiff argued that whenever an employer accommodates a subset of workers with disabling conditions, a PDA violation exists if pregnant workers who are similar in their ability or inability to work do not receive the same accommodation.[63] UPS argued that the second clause does no more than "define sex discrimination to include pregnancy discrimination."[64]

The Court rejected both of these views. The Court said that Young's approach would grant pregnant women "most-favored-nation" status; as long as an employer provides *any* employee with an accommodation (such as someone who has been with the company for a long time or who works in a particularly hazardous job), the employer would have to give pregnant workers the same accommodation.[65] The Court did not believe that Young's approach was consistent with Congress's intent when passing the PDA.[66] The second clause of the PDA uses the open-ended term "other persons"; it does not say that the employer must treat pregnant employees the same as "*any* other persons."[67] The Court also disagreed with UPS's interpretation that the second clause simply defines sex discrimination to include pregnancy discrimination.[68] The Court noted that the first clause accomplished this objective when it expressly amended Title VII to define "because of sex" to include because of pregnancy.[69] Moreover, UPS's interpretation would fail to carry out Congress's clear intent

59. *Id.* at 211–12. One of the reasons that a driver might lose DOT certification is if they were convicted for drunk driving. *See id.* at 217. In other words, drunk drivers were accommodated but pregnant women were not.

60. Young v. United Parcel Serv., Inc., No. DKC 08–2586, 2011 WL 665321, at *17, *22 (D. Md. Feb. 14, 2011).

61. Young v. United Parcel Serv., Inc., 707 F.3d 437, 450 (4th Cir. 2013).

62. *Young*, 575 U.S. at 219.

63. *Id.* at 220.

64. *Id.*

65. *Id.* at 221.

66. *Id.*

67. *Young*, 575 U.S. at 222.

68. *Id.* at 226.

69. *Id.*

to overturn both the holding and reasoning of the *Gilbert* decision.[70] Simply including pregnancy among Title VII's protected traits would not respond to the *Gilbert* Court's determination that an employer can treat pregnancy less favorably than diseases or disabilities resulting in a similar inability to work.[71] The second clause was intended to do more than simply overturn *Gilbert*'s reasoning that pregnancy discrimination is not sex discrimination. It was also intended to overrule the holding in *Gilbert* and illustrate how discrimination against pregnancy is to be remedied.[72]

Accordingly, the Court started with the *McDonnell Douglas* framework, which is how most disparate treatment cases are analyzed.[73] The Court noted that the first step in the analysis, the plaintiff's *prima facie* case, is not intended to be an onerous burden, and it should not require the plaintiff to show that those whom the employer favored and disfavored were similar in all but the protected ways.[74] Thus the plaintiff alleging that a denial of an accommodation constituted disparate treatment under the PDA's second clause may demonstrate a *prima facie* case by showing that: (1) she belongs to the protected class; (2) she sought accommodation; (3) the employer did not accommodate her; and (4) the employer did accommodate others "similar in their ability or inability to work."[75] The burden would then shift to the employer to justify its refusal to accommodate the plaintiff by relying on legitimate, non-discriminatory reasons for denying her the accommodation.[76] But (and this is key), the reason "normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates. After all, the employer in *Gilbert* could . . . have made such a claim."[77] It is not entirely clear what reasons the

70. *Id.*

71. *Id.*

72. *Young*, 575 U.S. at 228.

73. *Id.* at 210–13. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) is a famous Title VII race discrimination case that set out the burden-shifting framework for intentional discrimination cases under Title VII. The plaintiff claimed a discriminatory failure to hire. The Court stated that the plaintiff first bears the burden of proof to establish a *prima facie* case of discrimination, which includes four elements: (1) that he belongs to a protected class; (2) that he applied for and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications, he was rejected; and (4) that after his rejection, the position remained open and the employer continued to seek applicants from persons of the plaintiff's qualifications. *Id.* at 802. Because most cases are not failure-to-hire cases, courts have modified the *prima facie* case accordingly. Assuming the plaintiff can meet the *prima facie* case, the employer then has the burden to articulate a legitimate non-discriminatory reason for the decision. Assuming that burden is met, the plaintiff has the opportunity to prove that the employer's articulated reasons were not the real reasons for the decision but were instead a pretext for discrimination. *Id.*

74. *Young*, 575 U.S. at 228.

75. *Id.* at 229.

76. *Id.*

77. *Id.*

Court thought would suffice for this stage of the analysis, but some commentators have argued that the Court suggested that permissible reasons might include things like age, seniority, job classifications, or job requirements.[78]

The burden then shifts to the employee to show that the employer's proffered reasons are in fact pretextual.[79] And this is where the Court's decision gets a little strange. The Court stated:

> We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.[80]

As to the "significant burden" the Court mentioned, the Court stated that the plaintiff can create a genuine issue of material fact by "providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[81] Using the facts of the instant case, the Court suggested that the plaintiff could show that UPS accommodated most nonpregnant employees with lifting limitations while categorically refusing to accommodate most pregnant employees with lifting limitations.[82] She might also point to the fact that UPS had multiple policies that accommodate nonpregnant employees with lifting restrictions and that this suggests that "its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination."[83]

Accordingly, the Court vacated the Fourth Circuit's judgment, stating that "there is a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young's."[84] This provided the proof needed for the fourth element of the *prima facie* case.[85] Young also introduced evidence that UPS had three separate accommodation policies that, taken together, significantly burdened pregnant women.[86] The Fourth Circuit did not consider the combined effects of these

78. Zehrt, *supra* note 24, at 702.
79. *Young*, 575 U.S. at 229.
80. *Id.*
81. *Id.* at 229–30.
82. *Id.* at 230.
83. *Id.*
84. *Young*, 575 U.S. at 231.
85. *Id.*
86. *Id.*

policies, nor did it consider the strength of UPS's justifications for its policies.[87] As the Court stated, "[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?"[88]

Scholars had mixed reactions to the Supreme Court's opinion in *Young*. Most commentators agreed that the Court's decision deviated from normal disparate treatment law, especially at the pretext stage.[89] But almost all scholars recognized that the case was a positive step in the right direction for accommodating pregnant women.[90] At the same time, many hoped that the Court would have gone further and held that the PDA required accommodations for pregnancy as long as any other employee had been accommodated or would be accommodated if they were similar in their ability or inability to work.[91]

III. WHERE WE ARE

This Part will first discuss the ADA cases where pregnant plaintiffs sought accommodations. It will then discuss the cases brought under the PDA since the decision in *Young*. Because the ADA was amended in 2008, effective January 1, 2009, the ADA cases go back to the effective date of the ADAAA, whereas the PDA cases are limited to the period after *Young v. UPS* was decided in 2015.

A. ADA Pregnancy Accommodation Cases

As mentioned above, prior to the ADAAA, bringing an ADA claim based on pregnancy was very difficult. The definition of disability was interpreted very narrowly, and pregnancy was seen as a natural function of women's bodies that, at most, had only short-term effects on women's ability to go about their daily activities. However, the ADAAA's expanded definition has allowed for more pregnant women to claim a covered disability. In the cases I discovered where

87. *Id.*

88. *Id.* Ultimately the court remanded to the Fourth Circuit to determine whether Young created a genuine issue of material fact as to whether UPS's reasons for treating Young less favorably than other nonpregnant employees were pretextual. *Young*, 575 U.S. at 232.

89. *See, e.g.*, *Shifting Sands*, *supra* note 27, at 584–85; Widiss, *supra* note 25, at 1433 (describing the opinion as "unusual"); Zehrt, *supra* note 24, at 687 (stating that the case "further complicates pregnancy accommodation decisions, leaving many unanswered questions for lower federal courts to resolve in future cases.").

90. *See, e.g.*, *Shifting Sands*, *supra* note 27, at 590; Widiss, *supra* note 25, at 1433 (agreeing with the decision and stating it makes "practical sense").

91. *See, e.g.*, Areheart, *supra* note 52, at 1138 ("[T]he holding is still a far cry from what Young and most amici sought: a guaranteed right to pregnancy accommodations. Unless Congress now chooses to amend the PDA, it appears the Supreme Court has closed the door on the statute's possible guarantee of accommodation rights."); Widiss, *supra* note 25, at 1425–26 (stating that the Court in *Young* stopped short of endorsing the argument that intent was irrelevant as long as the plaintiff could show other workers received more favorable treatment); Zehrt, *supra* note 24, at 705 (stating that the *Young* decision leaves many open questions and Congress should intervene and amend the PDA to provide pregnant workers a clear, affirmative right of accommodation).

the alleged disability was pregnancy, courts allowed the plaintiff's ADA claim to survive in seventeen of them and dismissed the plaintiff's ADA claim (on the coverage question) in seven of them.

1. Pregnancy Is a Disability

As discussed earlier, the definition of disability is a physical or mental impairment that substantially limits a major life activity. Plaintiffs prove a covered disability by establishing that (1) they have an impairment; (2) the impairment affects a major life activity; and (3) the impairment *substantially limits* the major life activity. The cases that discuss pregnancy as a disability address one or more of these three steps to proving disability.

a. Pregnancy as an Impairment

The EEOC used to have a so-called pregnancy exclusion, stating that pregnancy is ordinarily not an impairment.[92] Although that language still exists, the regulations also state: "[A] pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition."[93] Some post-ADAAA courts are willing to recognize pregnancy as an impairment as long as there are complications arising from or restrictions because of the pregnancy. Thus, for instance, in *Mayorga v. Alorica, Inc.*,[94] the plaintiff was a customer service representative who had a high-risk pregnancy.[95] Her complications included premature contractions; irritation of the uterus; severe pelvic, back, and lower abdominal pain; headaches; and other pregnancy-related conditions.[96] At one point she was put on bed rest for three weeks.[97] Upon returning from three weeks of leave, she was terminated, with one of her supervisors stating: "Sorry. I cannot accommodate you. This is a company. We need you here. So, since you can't be here because you are pregnant, we cannot accommodate you."[98] She brought both an ADA claim and a PDA claim, but the employer only moved to dismiss the ADA claim. The court held that the ADA claim survived the employer's motion to dismiss.[99] The court noted that pregnancy-related impairments can constitute a disability if they substantially

92. *Fact Sheet for Small Businesses: Pregnancy Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (June 14, 2014), https://www.eeoc.gov/laws/guidance/fact-sheet-small-businesses-pregnancy-discrimination.

93. 34 C.F.R. app. § 1630.2(h) (2019).

94. No. 12–21578–CIV., 2012 WL 3043021 (S.D. Fla. July 25, 2012).

95. *Id.* at *1.

96. *Id.*

97. *Id.* Although her employer initially denied her leave request stating, "I am not going to treat you special because you are pregnant," subsequently, her leave was approved. *Id.*

98. *Mayorga*, 2012 WL 3043021, at *1.

99. *Id.* at *2–3.

limit a major life activity.[100] "Thus, where a medical condition arises out of a pregnancy and causes an impairment separate from the symptoms associated with a healthy pregnancy, or significantly intensifies the symptoms associated with a healthy pregnancy, such medical condition may fall within the ADA's definition of a disability."[101] Accordingly, the court held that the plaintiff had pleaded sufficient facts to survive the defendant's motion to dismiss.[102]

Similarly, in *Colas v. City of University of New York*,[103] the court noted that the plaintiff's pregnancy-related symptoms, which included "periodic leg muscle spasms, neck pain, fatigue and shortness of breath, episodes of cramping and contractions, ligament pain, back pain, [ ] joint pain, nausea and headaches,"[104] could be considered a disability.[105]

b. Major Life Activities

One of the primary reasons that pregnant plaintiffs are able to establish disabilities more readily after the ADAAA is because the Amendments specifically include "lifting" as a major life activity, and many pregnant women are on doctors' orders to avoid heavy lifting. For instance, in *Heatherly v. Portillo's Hot Dogs, Inc.*,[106] the plaintiff's pregnancy was high risk so her doctor ordered her to avoid working more than six to eight hours per day and to avoid heavy lifting.[107] Although the court did not discuss the hour restriction, it did hold that her restriction on lifting was enough to establish that her pregnancy could be considered a disability.[108]

Similarly, in *Bray v. Town of Wake Forest*,[109] the plaintiff was a police officer who was still a probationary employee when she discovered that she was pregnant.[110] She submitted a doctor's note requesting that she be placed on light duty.[111] The employer refused because it reserved light duty for those who suffered from workplace injuries and terminated the plaintiff.[112] The plaintiff's complaint alleged that she was substantially limited in lifting, bending, running,

100. *Id.* at *4.
101. *Id.* at *5.
102. *Id.* at *6.
103. 17-CV-4825 (NGG) (JO), 2019 WL 2028701 (E.D.N.Y. May 7, 2019).
104. *Id.* at *1.
105. *Id.* at *3 (stating that pregnancy related impairments may qualify as ADA disabilities if they substantially limit a major life activity).
106. 958 F. Supp. 2d 913 (N.D. Ill. 2013).
107. *Id.* at 920.
108. *Id.* at 921. Note, however, that her accommodation claim was denied because the court held that the employer did in fact accommodate her. *Id.* at 922.
109. No. 5:14–CV–276–FL., 2015 WL 1534515 (E.D. N.C. Apr. 6, 2015).
110. *Id.* at *1.
111. *Id.* at *2.
112. *Id.* at *3.

and jumping.[113] Citing to all the correct post-ADAAA law,[114] the court noted that the plaintiff had three doctors' notes stating that she could not lift more than twenty pounds, run, jump or have physical altercations; this was sufficient to establish that she had a disability.[115]

A similar fact scenario was present in *Colas v. City of University of New York.*[116] There the court held that there was sufficient evidence to demonstrate that the plaintiff's pregnancy-related complications substantially limited her in bending and lifting.[117] And in *Varone v. Great Wolf Lodge of the Poconos, LLC*,[118] the plaintiff worked as a massage therapist when she became pregnant. Her doctor requested that she have ten-minute breaks in between the massages.[119] The defendant failed to accommodate her, which led to her lawsuit. In response to the defendant's motion to dismiss, the court noted that the plaintiff had alleged that she could not stand for long periods of time and that her pregnancy caused pain and cramping in her legs and stomach.[120] She argued she was limited in the major life activity of lifting (along with other major life activities).[121] The court held that she had pleaded enough to survive the employer's motion to dismiss.[122]

Besides lifting, other major life activities claimed by pregnant plaintiffs can survive dismissal. For instance, in *Nayak v. St. Vincent Hospital & Health Care Center, Inc.*,[123] the plaintiff successfully claimed the major life activity of working.[124] And in *Price v. UTI, U.S., Inc.*,[125] the plaintiff successfully pointed to limitations of her reproductive system to survive a motion to dismiss her ADA accommodation claim.[126] In an education setting (rather than employment), a pregnant plaintiff successfully claimed that her pregnancy substantially limited her ability to learn and attend school.[127] In *Oliver v. Scranton Materials, Inc.*,[128]

113. *Id.* at *9.

114. *Bray*, 2015 WL 1534515, at *9.

115. *Id.* at *11.

116. 17-CV-4825 (NGG) (JO), 2019 WL 2028701 (E.D.N.Y. May 7, 2019).

117. *Id.* at *4. *See also* LaSalle v. City of New York, No. 13 Civ. 5109(PAC), 2015 WL 1442376, at *4 (S.D.N.Y. Mar. 30, 2015) (25-pound lifting restriction was enough for the plaintiff to survive a motion to dismiss on her disability discrimination claim when the employer refused to accommodate her lifting restriction).

118. No. 3:15-CV-304, 2016 WL 1393393 (M.D. Pa. Apr. 8, 2016).

119. *Id.* at *2.

120. *Id.* at *3.

121. *Id.*

122. *Id.*

123. No. 1:12–cv–0817–RLY–MJD, 2013 WL 121838 (S.D. Ind. Jan. 9, 2013).

124. *Id.* at *2–3.

125. No. 4:11–CV–1428 CAS, 2013 WL 798014 (E.D. Mo. Mar. 5, 2013).

126. *Id.* at *3.

127. Khan v. Midwestern University, 147 F. Supp. 3d 718, 722 (N.D. Ill. 2015).

128. 3:14-CV-00549, 2016 WL 3397679 (M.D. Pa. June 13, 2016).

the plaintiff successfully claimed that the complications resulting from her pregnancy substantially limited her in sleeping and eating (she was on a liquid-only diet).[129]

c. Substantially Limits: Short-Term Issue

One of the reasons pregnancy was denied protection prior to the ADAAA was because of the Supreme Court's requirement that only impairments that were permanent or long-term were protected.[130] But after the ADAAA, impairments that are short-term can still constitute disabilities if they are sufficiently severe. For instance, in *Heatherly*, discussed above, the employer tried to argue that the short-term nature of the plaintiff's pregnancy restrictions precluded her pregnancy from being a disability.[131] But the court disagreed, pointing to the regulations implementing the ADAAA, which state that an impairment that is short-term can still be substantially limiting.[132]

Similarly, in *Nayak*,[133] the court stated that a short-term impairment can be substantially limiting.[134] Likewise, in *Price v. UTI, U.S., Inc.*,[135] the plaintiff's accommodation claim under the ADA survived, with the court holding that there was evidence that she was disabled given her multiple physiological disorders and conditions that affected her reproductive system, and that conditions no longer need to be long-term to be substantially limiting.[136] And in *Mayorga*, discussed above, even though the plaintiff's complications were only three weeks long, they were severe enough that the short-term nature did not preclude the plaintiff from surviving a motion to dismiss.[137]

129. *Id.* at *11 n.12.

130. Toyota Motor Mfg. v. Williams, 534 U.S. 184, 198 (2002).

131. Heatherly v. Portillo's Hot Dogs, Inc., 958 F. Supp. 2d 913, 920 (N.D. Ill. 2013).

132. *Id.* Relying on this case, another court held in an education, not employment, case that the short-term nature of the plaintiff's pregnancy does not preclude it from being considered a disability. *See Khan*, 147 F.Supp.3d at 722–23.

133. Nayak v. St. Vincent Hosp. & Health Care Ctr., No. 1:12–cv–0817–RLY–MJD, 2013 WL 121838 (S.D. Ind. Jan. 9, 2013).

134. *Id.* at *3 (noting that complications that lasted most of her pregnancy and beyond were sufficient to establish a disability under the ADAAA). Interestingly, the court contrasted this case's facts with another case, *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011), stating that the pregnancy complications were longer-lasting in the case at hand, *Nayak*, 2013 WL 121838, at *3, but *Serednyj* is not a post-ADAAA case. Despite the fact that it was decided in 2011, the facts of the case (the pregnancy and termination) took place in 2007. *Serednyj*, 656 F.3d at 547. The ADAAA is not retroactive so courts only apply the expanded definition of disability when the facts of the case occurred after January 1, 2009, the effective date of the ADAAA. *See* ADA Amendments Act, Pub. L. No. 110-325 § 3406 (2008).

135. No. 4:11–CV–1428 CAS, 2013 WL 798014 (E.D. Mo. Mar. 5, 2013).

136. *Id.* at *3.

137. Mayorga v. Alorica, Inc., No. 12–21578–CIV., 2012 WL 3043021, at *1, *6 (S.D. Fla. July 25, 2012). *See also* Oliver v. Scranton Materials, Inc., 3:14-CV-00549, 2016 WL 3397679, at

d. Disability Conceded

In some cases, the defendant concedes the disability issue or the court just assumes that pregnancy is a disability.[138] For instance, in *Alexander v. Trilogy Health Services, LLC*,[139] the plaintiff was instructed not to work because of her high blood pressure after she learned she was pregnant in May 2010.[140] The dispute in this case was whether the employer failed to provide her a leave of absence in order for her to stabilize her pregnancy-related high blood pressure.[141] The defendant simply conceded that the plaintiff was disabled, although the plaintiff claimed hypertension as the impairment, rather than the pregnancy *per se*.[142] The court held that the plaintiff was subject to suspension and termination when the defendant denied her a reasonable accommodation for her preeclampsia in violation of the ADA.[143]

Similarly, in *EEOC v. Absolut Facilities Management, LLC*,[144] the EEOC brought a class claim against the employer, alleging that the employer refused to offer any accommodations to pregnant women or individuals with disabilities, basically refusing to let anyone work with restrictions.[145] The initial claim involved a pregnant woman who had a twenty pound lifting restriction and was forced by the employer to take leave instead of having her lifting restriction accommodated.[146] The court approved a consent decree, issuing a permanent injunction against the employer's failure to accommodate and also awarding back pay, as well as compensatory and punitive damages.[147]

In *Everett v. Grady Memorial Hospital Corp.*,[148] the plaintiff worked as a program manager for a car seat safety program at the hospital. Her job involved a great deal of standing, walking, bending, and occasional heavy lifting.[149] When

*11 (M.D. Pa. June 13, 2016) (noting that the short-term nature of pregnancy no longer matters in determining whether someone is disabled under the ADA).

138. *See, e.g.*, Townsend v. Town of Brusly, 421 F. Supp. 3d at 355, 367 (M.D. La. Nov. 8, 2019) (assuming that the plaintiff, who was a police officer when she became pregnant and required light duty work, was disabled under the ADA).

139. No. 1:11–cv–295, 2012 WL 5268701 (S.D. Ohio Oct. 23, 2012).

140. *Id.* at *2–3.

141. *Id.* at *11–12.

142. *Id.* at *11.

143. *Id.* at *12.

144. No. 1:18-CV-01020 EAW, 2018 WL 5258057 (W.D.N.Y. Oct. 19, 2018).

145. *Id.* at *1–2.

146. *Id.*

147. *Id.* at *3. *See also* EEOC v. Tricore Reference Lab'ys, 849 F.3d 929, 938 (10th Cir. 2017) (in this discovery dispute, the defendant appeared to concede and the court assumed that the plaintiff's restrictions because of her pregnancy constituted a disability; the question was whether the employer denied her an accommodation when it did not allow her to automatically transfer into a vacant position).

148. 703 F. App'x 938 (11th Cir. 2017).

149. *Id.* at 940–41.

she became pregnant, her pregnancy was high risk.[150] Eventually, her doctor put her on bed rest and she requested to work from home, which the employer refused.[151] The employer in this case conceded that she was disabled by her pregnancy and the only issue was whether a work-from-home accommodation would allow her to perform the functions of her job.[152]

2. Pregnancy Is Not a Disability

Some of the cases in which plaintiffs could not establish that their pregnancies were a disability appear to be the result of either poor lawyering (although one of the plaintiffs was *pro se*) or the court's failure to recognize the broad post-ADAAA standards. A third reason some plaintiffs could not successfully pursue a claim under the ADA is because their restrictions (leading to their requested accommodations) were preemptive, rather than related to any complications caused by their pregnancies. This sub-part will address each of these three reasons in turn.

a. Poor Lawyering

In one example of what I believe was poor lawyering, the plaintiff's pregnancy caused her doctor to restrict her lifting to no more than ten pounds.[153] The employer refused to accommodate her lifting restrictions.[154] Because she ended up going on leave for the last five months of her pregnancy, the employer terminated her because she exceeded the twelve weeks of leave allowed under the Family Medical Leave Act (FMLA).[155] Although the court recognized that pregnancy can sometimes be a disability, and that the plaintiff should have easily been able to demonstrate that she was substantially limited in the major life activity of lifting,[156] the plaintiff argued that she was substantially limited in her ability to reproduce and carry her pregnancy to term.[157] The court held she was not disabled.[158]

150. *Id.* at 940.

151. *Id.* at 941, 944.

152. *Id.* at 942. *See also* Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595, 600, 603 (6th Cir. 2018) (defendant conceded that the pregnant plaintiff, who was an in-house attorney, was disabled when she was put on bed rest and requested to work from home).

153. Scheidt v. Floor Covering Assocs., Inc., No. 16-cv-5999, 2018 WL 4679582, at *2 (N.D. Ill. Sept. 28, 2018).

154. *Id.*

155. *Id.* at *2–3. The facts appear quite egregious. They approved her to be on leave longer than the twelve weeks but then terminated her for exceeding it. *Id.*

156. *See* cases cited *supra* Part III.A.1.b.

157. *Scheidt*, 2018 WL 4679582, at *6.

158. *Id.* at *7.

In *Sam-Sekur v. Whitemore Group, Ltd.*,[159] the plaintiff proceeded *pro se*.[160] Most of her medical issues occurred *after* she had returned from maternity leave.[161] Her medical problems included a breast cancer scare, appendectomy, infection from an intrauterine device, an infected oral implant,[162] some of which caused swelling, fevers, and something called "chronic cholecystitis."[163] The court held that all but the last of these conditions were too short-term to be substantially limiting.[164] Fortunately, with respect to the chronic cholecystitis, the court gave the plaintiff leave to amend her complaint to explain how this condition was linked to her pregnancy.[165]

In *Love v. First Transit, Inc.*,[166] the plaintiff was a customer service representative who began bleeding while she was pregnant and subsequently miscarried.[167] She was terminated because she did not present a doctor's note after she miscarried.[168] The court noted that the ADAAA has had only a modest impact when applied to pregnancy-related conditions.[169] Pregnancy itself is not a disability even though pregnancy-related work restrictions might be a disability—conditions such as anemia, sciatica, carpal tunnel syndrome, gestational diabetes, depression, etc.[170] The court stated: "Thus, where a medical condition arises out of a pregnancy and causes an impairment separate from the symptoms associated with a healthy pregnancy, or significantly intensifies the symptoms associated with a healthy pregnancy, such medical condition may fall within the ADA's definition of a disability."[171] The plaintiff in this case tried to argue that her pregnancy substantially limited the major life activities of working, concentrating, and interacting with others.[172] The court held that, given that the plaintiff was only off work for one day, she could not successfully argue

159. No. 11–cv–4938 (JFB)(GRB), 2012 WL 2244325 (E.D.N.Y. June 15, 2012).

160. *Id.* at *1.

161. *Id.* at *2.

162. *Id.*

163. *Id.* at *6.

164. *Sam-Sekur*, 2012 WL 2244325, at *7. The court, however, cited to pre-ADAAA law regarding the short-term issue. Thus, this case could also fall under the category of "Court Errors."

165. *Id.* at *9. Chronic cholecystitis is defined as a repeated and prolonged inflammation of the gallbladder. *See* Judi Marcin, *Chronic Cholecystitis*, HEALTHLINE (Oct. 23, 2017), https://www.healthline.com/health/chronic-cholecystitis. There does appear to be an increased risk of this condition with pregnant women, so perhaps the plaintiff would be able to successfully amend her complaint. However, it is unclear to me why the court needed to link this condition to her pregnancy rather than consider it a stand-alone disability.

166. No. 16-cv-2208, 2017 WL 1022191 (N.D. Ill. Mar. 16, 2017).

167. *Id.* at *1.

168. *Id.*

169. *Id.* at *5.

170. *Id.*

171. *Love*, 2017 WL 1022191, at *5.

172. *Id.* at *6.

that any of her claimed major life activities were substantially limited.[173] I consider this a case of poor lawyering because the plaintiff would have had better luck arguing that her major bodily function of reproduction was substantially limited.[174]

b. Court Errors

One very frustrating case was *Abbott v. Elwood Staffing Services, Inc.*,[175] in which the pregnant plaintiff worked in a car manufacturing plant (through a staffing agency), when she started spotting after she strained to do her job.[176] Because of the spotting, her doctor put her on restrictions.[177] In discussing the issue of whether the plaintiff's pregnancy could be considered a disability, the court first noted that pregnancy, absent unusual circumstances, is not considered a disability.[178] Although the court recognized that, under the ADAAA, a pregnancy-related impairment *may* be considered a disability if it substantially limits a major life activity, here, there was no evidence that the plaintiff's pregnancy was not healthy or had complications.[179] Even though the plaintiff argued that she was put on restrictions after straining at work and bleeding, the court stated that this does not mean there was anything wrong with her pregnancy.[180] In an issue I am exploring elsewhere, the court also focused on the fact that the plaintiff did not specifically state she was disabled during her deposition. The court stated, "Finally, and tellingly in her deposition, the plaintiff stated that her condition 'wasn't a disability, it was pregnancy and on-the-job injury, I wasn't disabled. I was at all times physically able to work with requirements and restrictions.' She never considered herself disabled . . . ."[181]

In *Selkow v. 7-Eleven, Inc.*,[182] the plaintiff worked in a 7-Eleven store when she became pregnant. She was supposed to scan the beer in the cooler but that involved lifting a lot of heavy items. She tried performing the task but it began hurting her back because of her pregnancy, so she asked a coworker to help, and he did.[183] She told her supervisor that she needed help with heavy lifting and the supervisor agreed; she was never asked to lift heavy objects again.[184] To be clear,

173. *Id.*

174. Williams, et al., *supra* note 13, at 116 (stating that any condition that, if left untreated, would result in a miscarriage, should be a disability under the theory that it substantially limits the major bodily function of reproduction).

175. 44 F. Supp. 3d 1125 (N.D. Ala. 2014).

176. *Id.* at 1159.

177. *Id.* at 1159.

178. *Id.* at 1165.

179. *Id.*

180. *Abbott*, 44 F. Supp. 3d at 1138.

181. *Id.* at 1166.

182. No. 8:11–cv–456–T–33EAJ, 2012 WL 2054872 (M.D. Fla. June 7, 2012).

183. *Id.* at *1.

184. *Id.*

this was not a failure-to-accommodate claim.[185] However, she still claimed that her termination was discriminatory based on her pregnancy, which she alleged was a disability.[186] Although the court held that she could not rebut the defendant's legitimate reason for terminating her, namely an allegation that she had engaged in theft,[187] the court nevertheless addressed the disability issue.[188] It held that her claim failed because her lifting restriction was not the result of a "severe" complication with her pregnancy.[189] In doing so, however, the court did not cite to any post-ADAAA law or discuss the fact that lifting should be considered a major life activity.[190]

c. Preemptive Accommodations

One of the difficulties with using the ADA for accommodations related to pregnancy is if the accommodation requested is not needed for any complications arising from the pregnancy, but rather is simply a preemptive measure to avoid any harm to an otherwise healthy pregnancy. This usually occurs in situations where the work is inherently dangerous. For instance, in *Brown v. Aria Health*,[191] the pregnant plaintiff was a nurse and requested a doctor's note to exclude her from working in rooms where fluoroscopy (a type of x-ray) was used.[192] Her supervisor said they would try to limit her contact but noted that in the past, other pregnant nurses had worked in those areas without issue.[193] The employer also gave her the option of stepping out of the room and/or wearing a fetal monitoring badge, but the plaintiff did not accept any of these options.[194] The plaintiff was also worried about areas of the hospital where bone cement was being used and obtained a doctor's note precluding her from working in such areas.[195] The plaintiff resigned because the hospital could not guarantee that it could comply with her restrictions.[196] The court held that the plaintiff's disability discrimination claim failed because her pregnancy was routine, meaning it was without any complications. Her desire to avoid some

185. *Id.* Instead, she was terminated after there was a shortage in her cash register and the surveillance tape looked like she had pocketed cash. *Id.* at *1–3.

186. *Selkow*, 2012 WL 2054872, at *3.

187. *Id.* at *10.

188. *Id.* at *11. Even though the court arguably reached the right result (because she cannot establish that the employer's reason for terminating her was pretextual), it is still troubling when courts get the disability analysis wrong because later courts will rely on the faulty reasoning, thereby perpetuating the court's error.

189. *Id.* at *14.

190. *Id.*

191. No. 17-1827, 2019 WL 1745653 (E.D. Pa. Apr. 17, 2019).

192. *Id.* at *2.

193. *Id.*

194. *Id.*

195. *Id.*

196. *Brown*, 2019 WL 1745653, at *3.

aspects of her job was not based on actual restrictions but rather an abundance (perhaps over-abundance?) of caution.[197]

B. PDA Accommodation Claims Post-Young

This sub-part will discuss the cases decided post-*Young v. UPS* that specifically address the pregnancy accommodation issue. There are obviously other PDA cases that only address discrimination issues (and not accommodation issues).[198] I have not included those in this discussion. This part will first discuss the pregnancy accommodation cases that were successful (thirteen of them) and then the ones that were not (eleven of them).

1. PDA Accommodation Claim Succeeds

One of the relatively early post-*Young* cases has already received much attention.[199] In *Legg v. Ulster County*,[200] the plaintiff was a corrections officer at a county jail when she became pregnant after earlier pregnancy-related complications.[201] Because of those complications, her doctor classified her pregnancy as high risk and recommended that she have no contact with inmates. After the employer initially denied the request, another lieutenant agreed to assign her to a light duty position if she was able to submit a note stating that she was free to work without restrictions.[202] In order to avoid going on leave, she produced that note and was able to work light duty for a period of time.[203] However, before long, she was back to working with inmates again, and, while seven months pregnant, she was bumped as one of two fighting inmates ran past her.[204] She left work and did not return until after she gave birth.[205]

Her subsequent case went to trial, and the district court granted defendant's motion for judgment as a matter of law at the close of her case, holding that the employer's policy of only allowing light duty for on-the-job injuries was

197. *Id.* at *5. Interestingly, however, the plaintiff's PDA claim succeeded. *Id.* at *7.

198. *See, e.g.*, Oliver v. Scranton Materials, Inc., No. 3:14-CV-00549, 2016 WL 3397679, at *2, *5 (M.D. Pa. June 13, 2016) (pregnancy discrimination claim survived in part because of comments made about her pregnancy (she was pregnant with triplets), which included, "You're not going to be able to work with those three fucking babies at home."); Mayer v. Prof'l Ambulance, LLC, 211 F. Supp. 3d 408, 411, 415 (D.R.I. 2016) (plaintiff who was terminated for wanting to pump breast milk after she returned from maternity leave had a valid PDA discrimination claim).

199. This is in part because it's a Court of Appeals case (Second Circuit), whereas most of the cases are still at the District Court level.

200. 820 F.3d 67 (2d Cir. 2016).

201. *Id.* at 70–71.

202. *Id.* at 71. It appears that the employer wanted to hide the fact that it was giving her light duty, for whatever reason.

203. *Id.*

204. *Id.*

205. *Legg*, 820 F.3d at 71.

pregnancy-neutral and therefore did not violate the PDA.[206] During the pendency of the appeal, *Young v. UPS* was decided.[207] Accordingly, using the *prima facie* case announced in *Young*,[208] the court stated that she proved the *prima facie* case.[209] She sought an accommodation while pregnant; the employer refused; and there were employees similar in their ability or inability to work who did receive accommodations, namely those injured on the job.[210] For the employer's legitimate non-discriminatory reason, it argued that New York Municipal law required them to pay corrections officers who are injured on the job (if they are not able to work), so the employer creates and reserves light-duty positions for those employees. The court held that this reason met the employer's burden.[211]

As is true with most discrimination cases, the plaintiff's case turned on the issue of pretext with the court holding that the plaintiff had established sufficient evidence of pretext. The court pointed to two primary pieces of evidence that established pretext. First, the employer presented inconsistent justifications for not providing the plaintiff with light duty.[212] One supervisor said that the employer wanted everyone to build up sick time and did not "believe in light duty" accommodations for those injured off the job.[213] Another supervisor said that they refused her light duty in order to protect the safety of her unborn child.[214] A third explanation was that it was more costly to provide light duty to pregnant employees.[215] And finally, the employer claimed at the appellate stage that the policy was justified because they were complying with state law.[216]

Second, the court held that the plaintiff could prove pretext using the analysis under *Young*.[217] Similar to the *Young* case, the employer denied light duty to all pregnant employees.[218] Although it was unclear whether the county accommodated a large percentage of non-pregnant employees in practice, they were at least eligible under the employer's policy.[219] Although the employer tried to argue that pregnant employees were not significantly burdened because

206. *Id.* at 71.
207. *Id.* at 72–73.
208. *See supra* Part II.C.
209. *Legg*, 820 F.3d at 74.
210. *Id.*
211. *Id.* at 74–75.
212. *Id.*
213. *Id.*
214. *Legg*, 820 F.3d at 75. This explanation makes no sense. Refusing her light duty but continuing to let her work (and insisting that she have contact with inmates) undoubtedly put her and her unborn child at more risk than if they had given her light duty work.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Legg*, 820 F.3d at 76.

the plaintiff was the only employee who had been pregnant, the court disagreed with this analysis, stating, "[U]nder *Young*, the focus is on how many pregnant employees were denied accommodations in relation to the total number of pregnant employees, not how many were denied accommodations in relation to all employees, pregnant or not."[220] Thus, the court held that this fact demonstrated the significant burden on the plaintiff.[221]

The employer also tried to argue that the plaintiff did not need an accommodation because she continued working after the employer promised her light duty and then took it away.[222] The court responded that a policy that denies pregnant employees light duty and places them at risk of violent confrontations is a significant burden on pregnant employees under the *Young* analysis.[223] In sum, the court held that the defendants' reasons were not sufficiently strong to justify the burden on pregnant workers.[224] And just because state law required accommodating on-the-job injuries did not mean that state law precluded the employer from providing those same accommodations to pregnant workers.[225] Finally, although the employer argued that cost was a factor in not providing light duty to pregnant workers, the court responded that cost cannot be considered under *Young*.[226]

Although *Legg* is the only published appellate case,[227] there are other district court cases where plaintiffs survived on the analysis under *Young*.[228] For

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.*

224. *Legg*, 820 F.3d at 77.

225. *Id.*

226. *Id.*

227. The one other appellate published case is *Hicks v. City of Tuscaloosa*, 870 F.3d 1253 (11th Cir. 2017). This is an important case that held that lactation is a medical condition related to pregnancy and therefore protected by the PDA, and that plaintiff's PDA claim survived using the analysis in *Young*. While the city was not required to provide Hicks with special accommodations for her lactation needs (which involved not wanting to be a patrol officer because the ballistic vest would interfere with lactation), because other employees were given alternative duties, she should have been as well. *Id.* at 1258–60.

228. To be clear, the plaintiffs survived motions for summary judgment or motions to dismiss in several other cases as well, but in the interest of space, I will only be discussing the cases with the most significant discussions of the accommodation analysis post-*Young*. Other cases where the plaintiff's claim survived include: Allen-Brown v. District of Columbia, 174 F. Supp. 3d 463 (D.D.C. 2016) (involving a police officer who requested accommodation to avoid having to wear a bullet-proof vest after her maternity leave because it interfered with her lactation; PDA accommodation claim succeeded); Borders v. Wal-Mart Stores, Inc., No. 17-cv-0506-MJR-DGW, 2018 WL 9645780, at *1–2, *6 (S.D. Ill. Mar. 29, 2018) (plaintiffs' class action survived motion to dismiss because employer accommodated workplace injuries and disabilities but not pregnancy); Bray v. Town of Wake Forest, No. 5:14-CV-276-FL, 2015 WL 1534515, at *3, *6 (E.D. N.C. Apr. 6, 2015) (plaintiff police officer's PDA claim survived because she was refused light duty while two male officers received light duty and there is evidence to rebut the employer's explanation that

instance, in *Thomas v. Florida Parishes Juvenile Justice Commission*,[229] the plaintiff worked as a juvenile detention staff officer, which put her in contact with potentially violent detainees.[230] She informed her employer of her pregnancy on April 1, 2016, and asked to have her bi-annual physical fitness test moved so that she could complete it earlier in her pregnancy.[231] Her employer allowed her to complete four components of the test on the same day as her request, but said that the 1.5 mile run would take place as originally scheduled on April 21, 2016. She failed the run, and, because she was feeling ill after the run, she went to the emergency room where she was diagnosed with a placental bleed.[232] She was on bed rest for two days and then told to be on light duty for two weeks; however, the employer refused, so she had to take personal leave for two weeks.[233] She returned to work without restrictions, but when her run was rescheduled for June 6, her doctor wrote a note stating that she should avoid running and heavy lifting due to her high-risk pregnancy.[234] In response to this note, the employer told her that she had to do the run and should not turn in the note.[235] The employer explained that it would not excuse pregnant women from the 1.5 mile run even with a doctor's note.[236] Apparently, however, there were situations where it excused non-pregnant employees with physical limitations from the run.[237] Relying on the advice of her boss, she attempted and failed the

they reserved light duty only for on-the-job injuries); Brown v. Aria Health, No. 17-1827, 2019 WL 1745653, at *7–8 (E.D. Pa. Apr. 17, 2019) (allowing plaintiff's PDA accommodation claim to go forward based on her request to avoid certain aspects of her job as a nurse that her doctor believed might pose a risk to her pregnancy; constructive discharge based on the employer's failure to accommodate her); EEOC v. Absolut Facilities Management, LLC, No. 1:18-CV-01020 EAW, 2018 WL 5258057, at *3 (W.D.N.Y. Oct. 19, 2018) (approving a consent decree issuing a permanent injunction against the employer's discrimination of pregnant women and individuals with disabilities by refusing all accommodations); LaSalle v. City of New York, No. 13 Civ. 5109(PAC), 2015 WL 1442376 (S.D.N.Y. Mar. 30, 2015) (allowing plaintiff's PDA claim to survive when her employer refused to accommodate her lifting restriction; although employer argued that the accommodation requested would not allow her to perform the essential functions of her job, the employer offered no explanation for why her requested accommodation was reasonable when she was pregnant in 2008 and yet they refused it in 2012); Martin v. Winn-Dixie La., Inc., 132 F. Supp. 3d 794, 802–03, 822 (M.D. La. 2015) (plaintiff's PDA claim survived after she was refused an accommodation to avoid lifting over ten pounds, forced on leave, and then terminated); McQuistion v. City of Clinton, 872 N.W.2d 817, 820–21, 829–30 (Iowa 2015) (paramedic for fire department was refused light duty while pregnant; state law claim relying on *Young* reversed summary judgment granted to employer).

229. No. 18-2921, 2019 WL 118011 (E.D. La. Jan. 7, 2019).
230. *Id.* at *1.
231. *Id.* at *2.
232. *Id.*
233. *Id.*
234. *Thomas,* 2019 WL 118011, at *2.
235. *Id.*
236. *Id.*
237. *Id.*

run on June 6, which led to severe pain and another trip to the emergency room.[238] The doctor ordered light duty, which the employer initially refused and only granted when the plaintiff filed a workers' compensation claim.[239] The plaintiff worked in a light duty position until she was ordered on bed rest; she returned to work after the baby was born.[240]

The plaintiff had brought claims under both the ADA and PDA but she only opposed the employer's motion for summary judgment on the PDA claim.[241] Even though she was eventually accommodated, her PDA claim alleged that the employer violated the PDA for refusing to accommodate her pregnancy-related restriction on running by forcing her to complete the run test.[242] The court first noted that she had direct evidence of discrimination because her supervisor said that the employer did not allow pregnant employees to be excused from the 1.5-mile run, but it had allowed other employees to be excused from the run.[243] The court also upheld her claim using the *Young* analysis.[244] The employer tried to argue that she did not suffer an adverse employment action because she was not terminated or forced on leave.[245] In response, the plaintiff argued that her injuries from having to perform the 1.5-mile run constituted an adverse employment action, as was the fact that her workers' compensation claim resulted in a reduction in pay.[246] But the court (correctly, in my opinion) held that an adverse employment action is not an element of the *prima facie* case when bringing a claim under the PDA for a failure to accommodate.[247] This issue of whether an adverse employment action is a necessary element in a failure-to-accommodate case has also arisen under the ADA,[248] so I was happy to see the court in this case address it and come to the correct conclusion that an adverse employment action is not a necessary element of a failure-to-accommodate claim under the PDA.

Another issue that is being debated by the courts post-*Young* is how similar the comparator must be under the fourth element of the *prima facie* case. This issue was addressed in *Townsend v. Town of Brusly*,[249] in which the plaintiff was a police officer when she became pregnant in 2015.[250] Her doctor advised light

238. *Id.* at *3.
239. *Thomas*, 2019 WL 118011, at *3.
240. *Id.*
241. *Id.* at *4.
242. *Id.* at *5.
243. *Id.* at *6.
244. *Thomas*, 2019 WL 118011, at *7.
245. *Id.*
246. *Id.*
247. *Id.* at *8.
248. Nicole Buonocore Porter, *Adverse Employment Actions in Failure-to-Accommodate Cases: Much Ado About Nothing*, 95 NYU L. REV. (ONLINE) 1, 5 (2020).
249. 421 F. Supp. 3d 352, 363 (M.D. La. 2019).
250. *Id.* at 355.

duty work for her, but the employer refused.[251] She obtained a lawyer to help her navigate the negotiations for an accommodation with the employer.[252] During one of the meetings with the plaintiff, her lawyer, and the employer's representatives, the Mayor stated that if the plaintiff wanted to keep her job, she should not remain pregnant.[253] Towards the end of her pregnancy, the plaintiff was able to return to work full duty, and in a meeting between the plaintiff and the employer to discuss her return, the employer's attorney advised the plaintiff that if she dropped her EEOC charge and lawsuit, they would consider reinstating her to her prior position.[254] The Plaintiff declined to do so and was fired on the spot.[255] Another complication for the plaintiff in this case was that a certification the plaintiff needed to perform her job as a police officer lapsed while she was pregnant.[256] The employer tried to justify its termination of her by arguing that she was no longer qualified.[257]

After a lengthy discussion of the facts and holding of *Young*,[258] the court first found that there was direct evidence of discrimination—the employer's statement that she should not stay pregnant if she wanted to keep her job, and the fact that the Chief of Police admitted that the employer never considered placing the plaintiff on light duty.[259] The court then addressed the *prima facie* case under *Young*. The employer tried to argue that the plaintiff was not qualified because she could not carry a firearm due to her pregnancy, but the court stated that the qualified inquiry is not an element of a PDA claim post-*Young*.[260]

Regarding the issue of a comparator (the fourth element of the *prima facie* case under *Young*), the employer focused on the different professional experience of the plaintiff's chosen comparator, who was given light duty following eye surgeries.[261] The court responded that determining a PDA comparator should not include an analysis of the difference in professional experience, disciplinary record, or available leave time.[262] Instead, the sole basis for comparison is the similarity in the physical restrictions of the employees and the need for similar accommodations.[263] Thus, both of the comparators that

251. *Id.* at 356.
252. *Id.*
253. *Id.*
254. *Townsend*, 421 F. Supp. 3d at 356.
255. *Id.*
256. *Id.*
257. *Id.*
258. *Id.* at 358–59.
259. *Townsend*, 421 F. Supp. 3d at 360.
260. *Id.* at 362–63. This is a debated issue, as will be discussed in Part IV.
261. *Id.* at 363.
262. *Id.*
263. *Id.*

plaintiff pointed to were valid comparators to meet the fourth element of the *prima facie* case.[264]

The court assumed without discussion that the employer's alleged legitimate non-discriminatory reasons were sufficient to meet its burden.[265] These reasons included: (1) that the plaintiff was no longer qualified because of her restrictions and the fact that her certification had lapsed, and (2) that her position had been filled while she was on leave.[266] Turning to pretext, the court first relied on the fact that the Chief of Police resented the plaintiff's assertion of her legal rights and had stated that the defendant never even considered giving the plaintiff light duty work.[267] In response to the defendant's argument that state law does not require the employer to provide light duty to pregnant workers (as it does to workers injured on the job), the court stated that reliance on state law can still be pretextual if the reason for not also giving the pregnant employee the accommodation is because of cost concerns.[268] As the Court noted in *Young*, the fact that accommodating pregnant workers would cost more is not a sufficient reason for refusing to do so.[269] The court stated:

> The same could be said in the present case, particularly considering the complete failure to even consider accommodating Plaintiff while others with physical restrictions were accommodated, and in light of the comments made to Plaintiff that were hostile to her pregnancy or demonstrated a blanket refusal to accommodate her pregnancy. Accordingly, Defendant is not entitled to summary judgment on Plaintiff's PDA claim.[270]

2. PDA Accommodation Claim Fails

Of the eleven cases I identified where the PDA accommodation claim failed post-*Young*, several of them involved courts incorrectly applying the framework the Court announced in *Young*. Other claims that failed did so because the employer's relatively small size meant that there were not any comparators. And some failed simply because of bad facts.[271]

264. *Townsend*, 421 F. Supp. 3d at 364.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at 365.

269. *Townsend*, 421 F. Supp. 3d at 365.

270. *Id.* at 366.

271. *See, e.g.*, Jones v. Brennan, No. 16–CV–0049–CVE–FHM, 2017 WL 5586373, at *6 (N.D. Okla. Nov. 20, 2017) (plaintiff loses her PDA accommodation claim because she actually *was* accommodated); Everett v. Grady Mem'l Hosp. Corp., 703 F. App'x 938, 948–49 (11th Cir. 2017) (accommodation claim failed because accommodation requested of working from home was not reasonable).

a. Court Errors

Courts appear to be struggling with how to apply the Supreme Court's odd framework announced in *Young*. For instance, in *Adduci v. Federal Express Corp*.,[272] the plaintiff's job required her to be able to lift seventy-five pounds unassisted.[273] When she informed her supervisor that she was pregnant and was on a twenty-five pound lifting restriction, the employer told her that she could not keep working, and that she was not eligible for "TRW (temporary return to work)" because she was a part-time employee.[274] Therefore, she was put on unpaid leave.[275] While on leave and still pregnant, they demanded she return with no restrictions, and when she could not, the employer terminated her.[276]

The court analyzed the plaintiff's disparate treatment claim[277] using the *McDonnell Douglas* framework normally used for disparate treatment cases, rather than the *prima facie* case announced in *Young* for pregnancy accommodation cases.[278] Thus, the court was applying the stricter comparator test, where the comparator must be similarly situated in all relevant respects.[279] Moreover, when the plaintiff pointed to the policy allowing part-time workers with a workplace injury to apply for light duty assignment, the court responded that the relevant inquiry is whether there actually was another employee who received more favorable benefits, not simply whether some hypothetical employee would be given more favorable benefits under the employer's policy.[280] This analysis makes it very difficult for pregnant plaintiffs to prove their cases. In other words, for this particular employer, the policy's terms allowed full-time and part-time employees with workplace injuries to apply for light duty. It also allowed full-time employees with a non-workplace injury to apply for light duty. The only group that was excluded was part-time employees with a non-workplace injury. It seems likely that most such workers (part-time employees with a non-workplace injury) are going to be pregnant women, and yet the court never analyzed this plaintiff's claim under the unique burden-shifting framework announced in *Young*.

272. 298 F. Supp. 3d 1153 (W.D. Tenn. 2018).

273. *Id.* at 1155. Note that this is a very similar factual context to *Young v. UPS*.

274. *Id.* at 1156.

275. *Id.*

276. *Id.* at 1157.

277. She also brought a disparate impact claim. *Adduci*, 298 F. Supp. 3d at 1159. Perhaps surprisingly, this claim survived. *Id.* at 1165.

278. *Id.* at 1159–60.

279. *Id.* at 1162.

280. *Id.* at 1163.

Similarly, in *Chino v. Lifespace Communities, Inc*.,[281] a nursing assistant had a twenty-five pound lifting restriction, but the employer had a policy that every nursing assistant would be immediately removed if they had a lifting restriction.[282] However, if the employee was injured on the job, the employer would try to place the employee on light duty where possible or practicable.[283] Otherwise, the employee would be terminated.[284] Accordingly, when the plaintiff told her employer that she was pregnant, the supervisor responded: "You know what's going to happen now . . . You're going to have to take your 12 weeks, then you'll have your baby, we'll terminate you, you'll come back, re-apply and we'll hire you back." The plaintiff was also told that the employer doesn't "make accommodations" and "you do the job that you're hired for or you don't work."[285]

The court cited to *Young* but arguably misinterpreted it. First, the court assumed without deciding that the plaintiff could establish a *prima facie* case, but then stated that the plaintiff's "claim fails because she cannot establish that [the employer's] proffered reason for denying her light duty is a mere pretext for discrimination."[286] After discussing and dismissing plaintiff's pretext arguments not related to the analysis in *Young,* the court then turned to a discussion of *Young*.[287] The court stated the *Young* Court took no position on whether the policies in *Young* actually met the pretext standard, "a holding that suggests, without more, the existence of facially neutral policies that offer some workers better treatment than others does *not* establish discrimination . . . ."[288] The court also stated that, because the plaintiff had not pointed to anything "outside of her own experience," she had not proven that the employer's policy imposed a significant burden on pregnant workers.[289] The court appeared to be arguing that, because the plaintiff did not specifically point to other pregnant workers who were affected by the policy, the burden on pregnant women was not very great. However, given that nursing assistants are overwhelmingly women,[290] it seems highly likely that other nursing assistants have been or would become pregnant and therefore would be affected by the employer's policy.

281. 203 F. Supp. 3d 997 (D. Minn. 2016). This case was brought under a state statute, but one which is modeled after and appears to follow federal law for pregnancy discrimination claims. *Id.* at 1003.

282. *Id.* at 1000.

283. *Id.*

284. *Id.* at 1001.

285. *Chino*, 203 F. Supp. 3d at 1001.

286. *Id.* at 1005.

287. *Id.* at 1005–06.

288. *Id.* at 1006–07.

289. *Id.* at 1007.

290. Campbell Robertson & Robert Gebeloff, *How Millions of Women Became the Most Essential Workers in America*, INT'L N.Y. TIMES (Apr. 18, 2020), https://www.nytimes.com/2020/04/18/us/coronavirus-women-essential-workers.html.

In a case that received some attention,[291] *Durham v. Rural/Metro Corp.*,[292] the plaintiff, an EMT, told her employer that her doctor restricted her from lifting more than fifty pounds.[293] Her boss told her that she would not be able to work as an EMT with the lifting restriction.[294] She requested either light duty or a dispatch position.[295] The employer refused both requests because its light duty policy only applied to employees who had a workplace injury, and they did not have a need for any more dispatch employees.[296] Because she was not eligible for leave under the FMLA, the employer advised the plaintiff to apply for unpaid personal leave, but told her that if she did so, she would not be allowed to seek unemployment compensation, or to try to find another job.[297] Accordingly, she declined to apply for such leave and then filed a charge with the EEOC and the instant lawsuit.[298]

Although the court cited to *Young*, it did not utilize the *prima facie* case method used in *Young*; instead, it cited to the ordinary *McDonnell Douglas* framework, which does not mention accommodation at all.[299] As the reader likely knows, the modified *McDonnell Douglas* framework generally requires the plaintiff to prove: (1) she was a member of a protected class; (2) she was qualified to do the job; (3) she was subjected to an adverse employment action; and (4) similarly situated employees outside the protected class were treated differently.[300] Interestingly, the court cited to *Young*[301] when it listed the elements of the *prima facie* case, but ignored the fact that, nine pages later, the Supreme Court in *Young* announced a different *prima facie* case that should be used when the plaintiff is alleging a denial of an accommodation under the second clause of the PDA.[302] As discussed above, the *prima facie* case in pregnancy accommodation cases requires: "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[303]

291. *See* Robert Iafolla, *11th Cir. Mulls Pregnancy Bias in Light of High Court Ruling*, BLOOMBERG L. NEWS (Jan. 14, 2020), https://www.bloomberglaw.com (search for "11th Cir. Mulls Pregnancy Bias in Light of High Court Ruling," choose "Bloomberg Law News" under "Content Types").

292. 4:16-CV-01604-ACA, 2018 WL 4896346 (N.D. Ala. Oct. 9, 2018).

293. *Id.* at *1.

294. *Id.*

295. *Id.*

296. *Id.* at *2.

297. *Durham*, 2018 WL 4896346, at *2.

298. *Id.*

299. *Id.* at *3.

300. *Id.*

301. Young v. United Parcel Serv., Inc., 575 U.S. 206, 213 (2015).

302. *Id.* at 229.

303. *Id.*

Because the *Durham* court was applying the incorrect *prima facie* case, it detoured to a discussion of whether unpaid leave was an adverse employment action. Despite the fact that it seems obvious that an unpaid leave would be considered an adverse employment action, the court stated: "Given these disputes, the court cannot determine as a matter of law that Ms. Durham suffered an adverse employment action."[304]

Despite that conclusion, the court went on to discuss the comparator issue. First, the court stated that employees who were injured on the job were not relevant comparators.[305] According to the court, the "PDA does not require an employer to provide special accommodations to its pregnant employees; instead, the PDA only ensures that pregnant employees are given the same opportunities and benefits as *nonpregnant* employees who are similarly limited in their ability to work."[306] The court's discussion here only cited to pre-*Young* cases.[307] The court also distinguished *Young* because the employer in the instant case only accommodated one "discrete group of employees, not several different types of disabilities where 'many' found accommodation by UPS."[308] It is true that UPS accommodated two other classes of employees besides those injured on the job (those with disabilities and those who lost their DOT certification), but that fact was ultimately relevant to the pretext discussion in *Young*, not the discussion of whether the fourth element of the *prima facie* case was met.[309] And more importantly, the court in *Durham* ignored the fact that, even if the employer did not have an explicit policy of accommodating disabled workers, the ADA requires the employer to do so. Accordingly, the employer would be accommodating two groups of employees: those injured on the job and those who have a disability under the ADA.

The court in *Portillo v. IL Creations Inc.*,[310] made the same mistake as the *Durham* court. First, the accommodation requested in this case was very minor—the pregnant plaintiff asked to be allowed to remain seated while at the cash register—and the employer refused.[311] The court skipped a discussion of the *prima facie* case, and instead addressed the employer's non-discriminatory reason.[312] The employer argued that it did not permit cashiers to sit while

304. Durham v. Rural/Metro Corp., 4:16-CV-01604-ACA, 2018 WL 4896346, at *3 (N.D. Ala. Oct. 9, 2018). The court appears to be stating the burden backwards. Given that the employer filed the motion for summary judgment, it is the employer's burden to establish that there is no genuine issue of material fact with regard to any element of the plaintiff's claim.

305. *Id.*

306. *Id.* at *4.

307. *Id.*

308. *Id.*

309. Young v. United Parcel Serv., Inc., 575 U.S. 206, 229–30 (2015).

310. No. 17-1083 (RDM), 2019 WL 1440129 (D.D.C. March 31, 2019).

311. *Id.* at *5.

312. *Id.* at *6.

working the registers because it did not think this was an appropriate "appearance."[313] The plaintiff pointed to a comparator who was able to sit while working as a cashier, but the court (confusingly) stated that this fact does not answer the ultimate question of whether the employer intentionally discriminated.[314] Although the court cited *Young*, it did not engage with the analysis in *Young* at all. The court seemed to be requiring a finding of animus, which is not a requirement of pretext under *Young*. Another problem exposed in this case is one I discuss more below: the employer is too small to have a sufficient number of comparators. I turn to that next.

b. Too Few Comparators

Several of the cases in which plaintiffs lost their PDA accommodation claims involved employers quite different from UPS, the employer in the *Young* case. UPS is a very large employer with several formal policies for the accommodation process.[315] Many smaller employers do not have formal policies at all and might not have many employees seeking accommodations for any reason. Plaintiffs have struggled in these cases to survive the *Young* analysis.

For instance, in *Luke v. CPlace Forest Park SNF, L.L.C.*,[316] the plaintiff was a certified nursing assistant (CNA)[317] who was pregnant with twins. Because of her pregnancy, she was put on a thirty-pound lifting restriction, but the employer refused to accommodate her lifting restriction, asserting that there was no light duty work available.[318] When she could not return to work without restrictions because she was still pregnant, the employer fired her.[319] The court did not engage in a detailed analysis under *Young*; instead, it stated that the plaintiff was not qualified to perform the job because the accommodation she requested would eliminate an essential function of the job, the ability to lift patients.[320] The plaintiff tried to present evidence that some workers were given accommodations that involved less lifting, but the court responded that in those situations one employee was simply receiving informal help from another employee, which is different from an employer-provided accommodation.[321]

313. *Id.*

314. *Id.*

315. *See* Young v. United Parcel Serv., Inc., 575 U.S. 206, 211–12 (2015).

316. 747 F. App'x 978 (5th Cir. 2019).

317. Three out of the next four cases discussed involve the health care industry, specifically CNAs. This is not surprising. As I have argued elsewhere, the realities of many healthcare jobs—long hours, physical rigor, and sensitive safety issues—make it difficult for employers to find the right accommodation. *See* Nicole Buonocore Porter, *The Difficult Accommodating Health Care Workers*, 9 ST. LOUIS U. J. HEALTH L. & POL'Y 1, 2–6 (2015).

318. *Luke*, 747 F. App'x at 978.

319. *Id.* at 979.

320. *Id.* at 979–80.

321. *Id.* at 980.

Because the plaintiff had not "pointed to any other CNAs that were accommodated when they had a similar medical restriction on heavy lifting, there is no evidence that would allow a jury to conclude that [the employer] is insincere when it says that such lifting is an essential part of the job."[322] Thus, unlike the *Young* case, where UPS had several different classes of employees who received light duty, this employer was apparently too small to have formal policies that provided light duty to certain groups of employees. Even informally, the employer apparently did not provide light duty or accommodations that would allow CNAs to avoid heavy lifting.

Similarly, in *Jackson v. J.R. Simplot Company*,[323] the plaintiff was an operator for a fertilizer plant, a job that required carrying heavy weights and exposure to chemicals and gases.[324] The plaintiff was undergoing fertility treatment, and pursuant to her doctor's advice, she requested two different accommodations—light duty to avoid heavy lifting and no chemical exposure.[325] Even though she could point to comparators who were given light duty when they were unable to meet the lifting requirements of their jobs, none of those employees also had to avoid exposure to chemicals.[326] Because of this lack of comparators, the court held that the plaintiff could not prove pretext.[327]

The lack of a comparator also doomed the plaintiff in *Salmon v. Applegate Homecare & Hospice, LLC*.[328] The plaintiff was a pregnant CNA with a lifting restriction.[329] The employer told her they could not accommodate her because there were no light duty positions available; thus, she was terminated once her leave had expired and she could not return without the lifting restriction.[330] The court held that the plaintiff's PDA accommodation claim failed because the plaintiff could not prove that other CNAs were accommodated regardless of the availability of light duty work.[331] In other words, because the employer was not large enough to always reserve light duty work for those who have restrictions, the plaintiff could not use a CNA who had been given light duty when it was available as a comparator.

Finally, in *Turner v. Hartford Nursing and Rehab*,[332] another CNA became pregnant, and, because of a previous miscarriage, her pregnancy was high risk

322. *Id.*
323. 666 F. App'x 739 (10th Cir. 2016).
324. *Id.* at 740.
325. *Id.*
326. *Id.* at 743.
327. *Id.* at 742–43.
328. No. 1:13-cv-00109-DN, 2016 WL 389987, at *10 (D. Utah Feb. 1, 2016).
329. *Id.* at *2.
330. *Id.* at *3.
331. *Id.* at *10.
332. No. 16-cv-12926, 2017 WL 3149143 (E.D. Mich. July 25, 2017).

so she was restricted from lifting more than ten pounds.[333] The employer refused to accommodate her lifting restriction, stating that it reserved light duty only for those who are injured on the job.[334] Because the plaintiff had not been employed long enough to be entitled to a leave of absence, the employer terminated her.[335] The plaintiff tried to point to evidence that the employer allowed non-pregnant workers who were injured on the job to get light duty, but because the plaintiff could not actually identify any such employees who were given light duty for any reason, her claim failed.[336]

Keep in mind that in all of these cases, it is likely that if the employer was larger, the plaintiff would be able to point to comparators. It is the small size of the employer that doomed the plaintiffs' claims. The claims also failed because the courts were looking for *actual* comparators, not simply *hypothetical* comparators—individuals who would have been accommodated if they had requested an accommodation.

IV. LESSONS LEARNED—WHERE TO GO FROM HERE

This Part will identify the gaps in protection between the two different statutes. I will then provide some advice for plaintiffs and their lawyers when trying to bring a pregnancy accommodation claim under either the ADA or PDA.

A. The Gaps in Protection

Generally speaking, plaintiffs' lawyers who are representing pregnant employees who were denied[337] accommodations should bring a claim under *both* the ADA and the PDA, if at all possible. Some scholars have argued that the ADA claim is often the more straightforward claim to bring. [338] I tend to agree with that. This subpart will discuss problems plaintiffs have when bringing both types of claims.

1. When the ADA Will Not Work

ADA coverage will fail in cases where the pregnant employee is not currently experiencing any complications from the pregnancy, but works in a

333. *Id.* at *1.

334. *Id.*

335. *Id.* at *2.

336. *Id.* at *6.

337. If possible, it would certainly be better for a pregnant woman to get a lawyer's help obtaining accommodations *before* she is denied a needed accommodation that would lead to her termination. And in an ideal world, employers would be routinely providing these accommodations and we would not need to resort to litigation. It certainly is possible that this is already happening on a large scale and we simply don't have the data to know that.

338. Zehrt, *supra* note 24, at 709.

position where her doctor is recommending preemptive accommodations.[339] This happened in a couple of the cases in my dataset. First, in *Brown v. Aria Health*,[340] the plaintiff was a pregnant nurse who asked to be excluded from rooms where a certain type of x-ray was used and rooms where bone cement was used.[341] Although the employer tried to accommodate her in various ways, she eventually resigned. Her disability claim failed because her pregnancy was routine and without complications.[342]

In a similar case, *Jackson v. J.R. Simplot Company*,[343] the plaintiff was an operator for a fertilizer plant, a job which required exposure to various chemicals and gases. When she began fertility treatment, her doctor advised her to avoid the exposure to chemicals.[344] She would not have been able to prove that she had a disability; accordingly, she relied on a claim under the PDA.[345]

An ADA accommodation claim is also unlikely to be successful in a few other situations (even if the plaintiff can establish the coverage question—that complications with her pregnancy constitute a disability under the ADA). Those situations are if the plaintiff's restrictions are such that there would not be a reasonable accommodation that would allow her to perform the essential functions of her job.[346] For instance, if a pregnant woman works alone in a position that requires heavy lifting, there might not be an accommodation possible that would allow her to comply with a lifting restriction.[347] As another example, if an employee needs to be on bed rest, and her job is not amenable to working from home, the court is likely to hold that her ADA claim fails because there is not a reasonable accommodation that would allow her to perform the essential functions of the job.[348]

Finally, an ADA claim is not likely to be successful when the plaintiff is asking the employer to create a new position. Courts generally hold that a request for "light duty" work is a request to create a new position. And even when

339. Williams et al., *supra* note 13, at 136 (describing situations where the ADA won't work, such as a police officer who "wants to be taken off the beat and given desk work for fear that she might be hit hard in the womb during a scuffle," or an employee who wants to avoid toxins in the workplace).

340. No. 17-1827, 2019 WL 1745653 (E.D. Pa. Apr. 17, 2019).

341. *Id.* at *2–3.

342. *Id.* at *5.

343. 666 F. App'x 739 (10th Cir. 2016).

344. *Id.* at 740.

345. *Id.* at 741.

346. 42 U.S.C. § 12111(8) (defining qualified individual as someone who can perform the essential functions of the job with or without reasonable accommodation).

347. *See, e.g.*, Chino v. Lifespace Cmtys, Inc., 203 F. Supp. 3d 997, 1000 (D. Minn. 2016).

348. *See, e.g.*, Everett v. Grady Mem'l Hosp. Corp., 703 F. App'x 938, 945–46 (11th Cir. 2017) (working from home is not a reasonable accommodation when the job as a program manager required her to teach classes in person, among other tasks that could not be done at home).

employers have such positions, they often reserve them for those employees with workplace injuries.[349] The ADA has not disrupted this norm.

2. When the PDA Has Not Worked

As noted above, the main problem with bringing a PDA case is the lack of comparators if the employer is small. If smaller employers have never given a particular accommodation, they will argue that there are no comparators.[350] Advice for getting around this problem is discussed below.

B. Advice for Litigants

1. Pleading Disability

Despite the fact that we are more than ten years out from the ADAAA, courts and litigants are still making errors when pleading the disability coverage issue under the ADA.[351] In order to argue that pregnancy is a disability, plaintiffs' lawyers should:

- Explain the complications caused by the pregnancy.[352]
- If lifting is restricted, make sure to plead that the impairment caused by the pregnancy substantially limits the major life activity of lifting.[353]
- If the pregnant employee's doctor has issued restrictions because of fear of miscarriage (especially in cases where there have been prior miscarriages), the plaintiff should also plead that she is substantially limited in the major bodily function of reproduction (which is a major life activity).[354]

349. *See, e.g.*, Abbott v. Elwood Staffing Servs., Inc., 44 F. Supp. 3d 1125, 1159 (N.D. Ala. 2014).

350. *See* Widiss, *supra* note 25, at 1439 (discussing concern about plaintiffs who work for small employers who may not have had an employee who needed an accommodation pursuant to the ADA); Williams et al., *supra* note 13, at 120; Zehrt, *supra* note 24, at 707–08 (The Court points out that the UPS policy was an extreme example and suggests that the employer's refusal to accommodate a pregnant worker must be more than an isolated event. If only a couple of people are affected, it seems like it will be difficult to meet the pretext element explained in *Young*.); Pisko, *supra* note 5, at 152 (*Young* will not help if employers do not provide accommodations to any of their workers).

351. *See generally* Nicole Buonocore Porter, *Explaining "Not Disabled" Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL'Y 383 (2019).

352. Pregnant women still have to work around the default assumption that a perfectly "normal" pregnancy is not an impairment. But complications associated with the pregnancy can constitute a disability, so it's important to point to the complications.

353. Not only is lifting a major life activity under the ADAAA, 42 U.S.C. § 12102(2)(A) (defining major life activities to include lifting), most of the successful cases discussed above were able to point to a substantial limitation on lifting.

354. *Id.* § 12102(2)(B). *See also* Williams et al., *supra* note 13, at 116.

- Mention the demise of the duration requirement; short-term impairments can still be considered disabilities.[355]

Finally, litigants should cite to cases and other sources mentioned in this paper to support the arguments made here.

2. Claims Under the PDA

As courts struggle to deal with the still relatively new pregnancy accommodation doctrine post-*Young*, they are continuing to make mistakes of which litigants need to be aware so they can hopefully steer the courts in the right direction. First, remember that the modified *prima facie* case that the Court announced in *Young* requires the plaintiff to prove that: (1) she belongs to the protected class; (2) she sought accommodation; (3) the employer did not accommodate her; and (4) the employer did accommodate others "similar in their ability or inability to work."[356]

Some courts have required elements that are not part of the *prima facie* case in *Young*. For instance, several courts required the plaintiff to prove she was "qualified,"[357] using the heightened standard of "qualified" under the ADA, even though proving "qualified" is not technically an element announced in *Young*.[358] Litigants should be prepared to counter this argument.

The other element that courts sometimes impute into the *Young prima facie* case is a requirement to prove an "adverse employment action."[359] As noted above, this is not an element of the *prima facie* case announced in *Young*. But employers will often try to argue that a denial of an accommodation is not always an adverse employment action. For instance, in *Thomas v. Florida Parishes*

355. Williams et al., *supra* note 13, at 135.

356. Young v. United Parcel Serv., Inc., 575 U.S. 206, 229 (2015).

357. *See, e.g.*, Everett v. Grady Mem'l Hosp. Corp., 703 F. App'x 938, 948–49 (11th Cir. 2017) (stating that the plaintiff is not qualified even with an accommodation, because the accommodation, working from home, would eliminate essential functions of the job); Luke v. CPlace Forest Park SNF, L.L.C., 747 F. App'x 978, 979–80 (5th Cir. 2019) (stating that the plaintiff is not qualified, because if the employer complied with her lifting restriction, she would be unable to perform the essential functions of the job as a CNA).

358. *See* Widiss, *supra* note 25, at 1143 (stating that *Young* does not require proof of qualifications at the *prima facie* case stage). *See also* Townsend v. Town of Brusly, 421 F. Supp. 3d 352, 362–63 (M.D. La. 2019) (noting that qualified is not a necessary element of the *prima facie* case).

359. *See, e.g.*, Allred v. Home Depot USA, Inc., No. 1:17-cv-00483-BLW, 2019 WL 2745731, at *13 (D. Idaho June 28, 2019) (stating that, even though the *Young* Court does not explicitly require an adverse employment action as part of the plaintiff's *prima facie* case, the plaintiff nevertheless has to prove that she suffered an adverse employment action); Brown v. Aria Health, No. 17-1827, 2019 WL 1745653, at *7 (E.D. Pa. Apr. 17, 2019) (not using the *Young prima facie* case, court required an adverse employment action, but argued that plaintiff can establish one because the employer refused to let her follow her doctor's restrictions); Durham v. Rural/Metro Corp., 4:16-cv-01604-ACA, 2018 WL 4896346, at *3 (N.D. Ala. Oct. 9, 2018) (requiring an adverse employment action).

Juvenile Justice Commission,[360] the employer required the plaintiff to attempt a 1.5 mile test run despite her doctor's orders that she should not run (in part because she had already attempted the run once while pregnant and ended up in the hospital with a placental bleed).[361] The employer tried to argue that the plaintiff did not suffer an adverse employment action because she was not terminated or forced on leave.[362] In response, the plaintiff argued that her injuries from having to perform the 1.5 mile run constituted an adverse employment action, along with the fact that her workers' compensation claim resulted in a reduction in pay.[363] But the court (correctly, in my opinion) held that an adverse employment action is not an element of the *prima facie* case when bringing a claim under the PDA for a failure to accommodate.[364] Pregnant plaintiffs and their attorneys need to be ready to steer the court in the right direction by citing to cases and other authorities that explain that there is not a requirement under *Young* to prove an adverse employment action.

The other problem with PDA claims (as discussed above) is demonstrating that there is a comparator when the employer is small.[365] Smaller employers are unlikely to have official policies (like UPS did in the *Young* case). They are also less likely to have many (if any) employees who had the same restrictions as the pregnant employee's restrictions. Thus, this makes it difficult to point to a comparator. However, plaintiffs should be prepared to argue that, because of the expanded definition of disability under the ADA, the employer would be *required* to provide an accommodation if one of its employees had a disability with limitations similar to the pregnant plaintiff's. This still might not win the day, because the *Young* pretext analysis is stated in terms of percentages—plaintiff can prove pretext by "providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[366] But it allows plaintiffs to get closer to establishing the necessary comparator.

3. Dealing with the Light Duty Problem

One of the most pressing problems in these cases (under both the ADA and PDA) is the light duty problem. Although *Young* dealt with an employer who offered light duty to three classes of employees—those with workplace injuries, those with disabilities under the ADA, and those who had lost their DOT certification[367]—most employers only offer light duty to employees who have

360. No. 18-2921, 2019 WL 118011 (E.D. La. Jan. 7, 2019).
361. *Id.* at *2.
362. *Id.* at *7.
363. *Id.*
364. *Id.* at *7–8.
365. *See* cases cited *supra* Part III.B.2.b.
366. Young v. United Parcel Serv., Inc., 575 U.S. 206, 229 (2015).
367. *Id.* at 211–12.

workplace injuries.[368] Courts routinely hold that it does not violate the ADA for an employer to reserve those light duty jobs for employees with workplace injuries.[369] In other words, even if an employer has such a light duty position available, it does not have to give it to a disabled employee as a reasonable accommodation. Furthermore, some courts will characterize a request for light duty as a request to create a new position, and creating a new position is *never* a reasonable accommodation under the ADA.[370]

This fact also creates a problem for PDA claims. If a pregnant employee is asking for a light duty accommodation, and the employer only gives light duty to employees with workplace injuries, the plaintiff will have difficulty establishing pretext under the test announced in *Young*[371] because there will likely *not* be a large percentage of employees that the employer does accommodate. Importantly, pregnant employees will not be able to point to disabled employees as comparators in most situations because most employers (unlike UPS) do not give light duty to disabled employees (unless their disabilities were caused by a workplace injury).

How can we solve this problem? One simple (albeit perhaps incomplete) answer—employees and their medical professionals should avoid asking for "light duty" using those words. "Light duty" is a catch-all term for other job-related restrictions. Pregnant plaintiffs would be better off asking for the specific accommodations they need. Often, light duty means a restriction on lifting. Ask to be excused from heavy lifting. Sometimes, light duty also means that the employee needs frequent breaks (if the job is physically rigorous). If that is the case, the pregnant plaintiff (and her doctor) should ask for more frequent breaks. In other words, instead of the doctor writing a note that describes the pregnancy-related complications and advises "light duty," the doctor should instead write something like this: "employee is advised not to lift more than twenty pounds and should have a five-minute, sit-down break every hour." It is still possible that the employer might argue that the accommodations would eliminate an essential function of the job (and therefore the plaintiff is not qualified) or that there is not a comparator that has received such an accommodation. But avoiding

368. The reason for this is workers' compensation laws, which require employers to pay for leaves of absence for employees who cannot work because of a workplace injury. Accordingly, given the choice between paying an employee to stay home and do nothing, versus paying an employee to do "light duty" work, most employers will set aside a few "light duty" positions so they can avoid having to pay employees injured on the job to stay at home and collect a paycheck. *See* Nicole Buonocore Porter, *Martinizing Title I of the ADA*, 47 GA. L. REV. 527, 577 (2013).

369. *See id.* at 577–78 (discussing this issue).

370. *See, e.g.*, Turner v. Hershey Chocolate USA, 440 F.3d 604, 614 (3d Cir. 2006); Hoskins v. Oakland Cnty. Sheriff's Dep't, 227 F.3d 719, 729 (6th Cir. 2000); Fedro v. Reno, 21 F.3d 1391, 1396 (7th Cir. 1994).

371. Young v. United Parcel Serv., Inc., 575 U.S. 206, 229 (2015).

the phrase "light duty" should assist the pregnant plaintiff and her lawyer in arriving at a reasonable accommodation that would work for everyone.

V. CONCLUSION

Five years after the Supreme Court's opinion in *Young v. UPS,* and eleven years after the ADAAA went into effect, pregnant plaintiffs are still struggling to get the simple accommodations they need to continue working through their pregnancies. Although the legal landscape has improved for pregnancy accommodations, there remains work to be done. On the ADA side, we need courts to understand the breadth of the ADA, and to stop instinctively excluding pregnancy from the class of individuals who are protected by the ADA.

As for the PDA, I imagine the Supreme Court might have to step in at some point in the future to clear up some of the confusion caused by the *Young* case. Issues that will need resolution include: (1) whether the plaintiff has to prove she is qualified;[372] (2) whether the plaintiff has to prove she suffered an adverse employment action;[373] and (3) whether hypothetical comparators count—i.e., if the employer would have to accommodate an employee with a disability that has the same restrictions as the pregnant plaintiff, would the pregnant plaintiff be able to use that hypothetical comparator? This last issue is probably the most important, because it will affect a plaintiff's ability to receive accommodations when she works for a smaller employer. As we know from the FMLA context, it is often lower-income women who work for smaller employers and smaller employers tend to provide less generous benefits.[374] Allowing these women to continue to work instead of being forced on unpaid leave or being terminated is vitally important.

One legal issue that would affect claims brought under both statutes is whether an employer should be able to reserve its light duty jobs for employees with workplace injuries. This privileging of workplace injuries makes sense because of worker's compensation mandates but is troubling in the accommodation context. Because I do not expect a fix to this problem any time soon, I believe plaintiffs would be well-advised to quit asking for light duty as an accommodation, and instead, ask for the specific restrictions their doctors are advising.

372. My answer to this question, simply based on the *prima facie* case analysis in *Young*, is "no," the plaintiff does not have to prove she is qualified as part of her *prima facie* case. However, it is still possible that the employer's defense (its legitimate non-discriminatory reason) will be that the plaintiff is not qualified because any accommodation would eliminate essential functions of the job.

373. Again, my answer to this is "no"—as I've argued in the ADA context as well, the failure to accommodate substitutes for the adverse employment action. *See generally* Porter, *supra* note 249, at 1.

374. Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, A New Solution*, 31 HOFSTRA LABOR & EMP. L.J. 327, 339–40 (2014).

Finally, one issue this Article does not tackle is whether these protected-class accommodation mandates (under the ADA and PDA) are the best way to address pregnant women's needs for accommodations in the workplace. As I[375] (and others)[376] have argued elsewhere, perhaps universal accommodation mandates would better serve the needs of pregnant women without creating what I refer to as "special treatment stigma."[377] In the interest of space constraints, that is a topic better left for another day.

375. Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85, 108 (2016).

376. *See, e.g.*, Areheart, *supra* note 52, at 1168–69 (advocating for a universal accommodation mandate).

377. *See* Porter *supra* note 375, at 108–10. *See also* Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 43 PEPP. L. REV. 213, 233–38 (2016) (describing special treatment stigma).