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WORKIN' 9:00–5:00 FOR NINE MONTHS: ASSESSING PREGNANCY DISCRIMINATION LAWS IN GEORGIA

Kaitlyn Pettet*

INTRODUCTION

Kimberly Troupe worked at a Lord & Taylor department store as a saleswoman where her work was deemed entirely satisfactory.¹ She became pregnant and started experiencing morning sickness, which resulted in her tardiness to work.² In a period of one month, she was either late to work or left work early on nine out of twenty-one working days.³ The next month she arrived late on three consecutive days.⁴ After receiving a warning from her supervisor, Troupe continued to arrive late due to her pregnancy symptoms and was soon after fired.⁵ Troupe then filed a lawsuit claiming wrongful termination under the Pregnancy Discrimination Act.⁶ The Seventh Circuit Court of Appeals sided with Lord & Taylor, however, and upheld the termination.⁷

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1. *Troupe v. May Dep't Stores Co. (Troupe II)*, 20 F.3d 734, 735 (7th Cir. 1994).

2. *Troupe v. May Dep't Stores Co. (Troupe I)*, No. 92 C 2605, 1993 WL 191792, at *1 (N.D. Ill. June 4, 1993). Because of her morning sickness, Troupe was placed on an afternoon schedule where she would work from 12:00 P.M. to 5:00 P.M. *Id.* In a fifteen-day period, however, Troupe reported to work late seven times ranging from ten minutes to one hour. *Id.* After a verbal warning from her supervisor, Troupe reported to work fifteen minutes late to work and was given a written warning. *Id.* Her tardiness improved after the written warning, but then over a three-day period she was again reporting late to work. *Id.* She was then placed on a sixty-day probationary period and was told that any further tardiness would result in her dismissal. *Id.* During the probationary period, Troupe was again late eleven times and, as a result, was dismissed. *Troupe*, 1993 WL 191792, at *1.

3. *Troupe II*, 20 F.3d at 735.

4. *Id.* (Troupe received both verbal and written warnings from her supervisor).

5. *Id.*

6. *Id.* at 734. The court reflected that “[w]e do not know whether Lord & Taylor was less tolerant of Troupe’s tardiness than it would have been had the cause not been a medical condition related to pregnancy. There is no evidence on this question, vital as it is.” *Id.* at 736.

7. *Id.* at 738 (finding the plaintiff “ha[d] no evidence from which a rational trier of fact could infer that she was a victim of pregnancy discrimination”). The District Court found in favor of May

Debrah Rhett worked for a real estate company and received a salary increase due to her satisfactory job performance.⁸ Soon thereafter, she informed her supervisors and coworkers that she was pregnant and later left work on maternity leave.⁹ While on leave, the company faced an economic downturn and was forced to eliminate several positions, including Rhett's.¹⁰ Rhett filed a lawsuit alleging pregnancy discrimination.¹¹ The Third Circuit Court of Appeals held that the company's actions did not violate the Pregnancy Discrimination Act.¹²

Suzanne Harvender became pregnant while working as a staff laboratory technician.¹³ She received a note from her physician recommending that she should not be exposed to chemicals during her pregnancy for fear of harmful effects on the fetus.¹⁴ The company then placed Harvender on twelve weeks of Family Medical Leave Act (FMLA)¹⁵ leave and stipulated that if she were unable to return

Department Stores holding plaintiff did not establish a prima facie case of discrimination and could not prove satisfactory job performance. *See Troupe I*, 1993 WL 191792, at *3.

8. *Rhett v. Carnegie Ctr. Assocs.*, 129 F.3d 290, 293 (3d Cir. 1997). Carnegie initially hired Rhett as a temporary secretary, but, due to her work performance, granted her a full-time position and a salary increase of \$1,500. *Id.*

9. *Id.* Carnegie hired a temporary secretary to fill in while Rhett was gone on maternity leave. *Id.* Carnegie also did not have a formal maternity leave policy but followed a practice of trying to hold employee's jobs open for them when their maternity leave was completed. *Id.* If the employee contacted the company and something suitable was available at the time, the job would be opened to them. *Id.*

10. *Rhett*, 129 F.3d at 293. While Rhett was on maternity leave, the company experienced a significant economy downturn. *Id.* at 293. The company decided to make a large number of cutbacks to decrease costs, including the elimination of several positions. *Id.* Among the positions eliminated were that of Rhett's supervisor and Rhett herself. *Id.* In a letter to Rhett, the company informed her that it did not consider her an employee at the time. *Id.* Rhett inquired about other positions with the company but was informed that she was not qualified for the jobs and would not be considered for them. *Id.* at 293–94.

11. *Rhett*, 129 F.3d at 295 (stating “it appears that Rhett was an employee of Carnegie on an unpaid leave of absence who sought reinstatement. We need not, however, definitely so determine because even assuming that Carnegie still employed Rhett when it abolished her position . . . she is not entitled to relief”).

12. *Id.* at 297 (holding it is permissible for an employer to consider an employee's absence on maternity leave in making adverse decisions about her employment status).

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

14. *Id.* Harvender requested assignment to the Research and Development Department for a light duty assignment as she had done in an earlier pregnancy. *Id.* Norton responded that her request could not be accommodated due to restructuring and downsizing. *Id.*

15. *Id.* The Family Medical Leave Act allows employees to take unpaid leave for specified medical and family reasons such as the birth of a child. 29 C.F.R. § 825.100 (2009). Employees have their jobs protected while on leave and must be allowed to continue their group health insurance under the same

to her job at the conclusion of the leave, the company would terminate her employment.¹⁶ Harvender responded by filing a lawsuit alleging pregnancy discrimination along with additional claims.¹⁷ The district court held that the company had not engaged in pregnancy discrimination.¹⁸

Cases such as Kimberly Troupe's, Debrah Rhett's, and Suzanne Harvender's demonstrate that there is still a considerable way to go before women are no longer forced to choose between pregnancy and keeping their career. Allegations of pregnancy discrimination in the workplace are also on the rise.¹⁹ In 1997, 4,000 plaintiffs filed complaints with the Equal Employment Opportunity Commission (EEOC).²⁰ By 2011, that number rose to 5,800.²¹ The EEOC won

terms and conditions as if they had not taken leave. 29 C.F.R. § 825.100. FMLA can apply to serious health conditions that do not allow the employee to perform essential functions of their job. 29 C.F.R. § 825.100; *see also* Family and Medical Leave Act, U.S. DEP'T OF LABOR, (1993), <https://www.dol.gov/whd/fmla/>.

16. *Harvender*, 1997 WL 793085 *1.

17. *Id.* Harvender also claimed knowing and intentional violation of the Family and Medical Leave Act and that the company acted with the intention of causing her severe emotional distress. *Id.* The court held that Harvender had failed to allege sufficient facts to establish that Norton's behavior was extreme and outrageous enough to overcome a motion to dismiss. *Id.* at *4. On the FMLA claim, the court ruled that Harvender had failed to stipulate specific facts to create a genuine issue for trial. *Id.* at *8. Summary judgment was entered for Norton. *Id.*

18. *Harvender*, 1997 WL 793085 *8 (holding that "while it may be true that Harvender wished to continue working as a laboratory technician, the fact remains that she could not perform an essential element of that job and therefore could not perform the job satisfactorily. In short, the plaintiff's medical condition prevented her from doing her job").

19. Deborah Brake & Joanna Grossman, *Unprotected Sex: The Pregnancy Discrimination Act at 35*, 21 DUKE J. GENDER L. & POL'Y 67, 68–69 (2013); *see also* D'Andra Millsap, *Reasonable Accommodation of Pregnancy in the Workplace: A Proposal to Amend the Pregnancy Discrimination Act*, 32 HOUS. L. REV. 1411, 1413 (1996); Daniela de la Piedra, *Flirting with the PDA: Congress Must Give Birth to Accommodation Rights that Protect Pregnant Working Women*, 17 COLUM. J. GENDER & L. 275, 276 (2008); Eliza Simon, *Parity by Comparison: The Case for Comparing Pregnant and Disabled Workers*, 30 COLUM. J. GENDER & L. 254, 260 (2015); Joan Williams & Elizabeth Westfall, *Deconstructing the Maternal Wall: Strategies for Vindicating the Civil Rights of "Careers" in the Workplace*, 13 DUKE J. GENDER L. & POL'Y 31, 31–32 (2006).

20. Claire Gordon, *How Employers Get Away with Firing Pregnant Women – Legally*, AOL, <http://jobs.aol.cocm/articles2012/04/05/epidemic-of-pregnant-women-getting-fired-legal-loopholes-to-bla/20197174/> (last visited Oct. 4, 2015). The EEOC handles claims of employment discrimination on basis of race, color, religion, sex—including pregnancy, national origin, age, disability, or genetic information. *Filing A Charge of Discrimination*, EEOC, <http://www.eeoc.gov/employees/charge.cfm> (last visited Oct. 7, 2015). The EEOC is responsible for enforcement of the federal statutes related to discrimination. *Id.* All the laws enforced by the EEOC require a filing of a Charge of Discrimination before a person can file a job discrimination lawsuit against an employer. *Id.*

21. Gordon, *supra* note 20.

significant damages in pregnancy discrimination cases, demonstrating a greater tendency towards discrimination in the workplace.²² Additionally, this rise in claims and awards caught the attention of the nation's media, placing new emphasis on the treatment of pregnant women in the workplace.²³

Against this backdrop of continued struggles by pregnant women to have their rights fully acknowledged on the job, a number of states responded by passing employment laws that require reasonable accommodations for pregnant workers.²⁴ States such as Illinois, Alaska, California, Connecticut, Delaware, Hawaii, Louisiana, and Maryland shifted in the direction of recognizing reasonable accommodations in the workplace similar to workers with disabilities under the Americans with Disabilities Act (ADA).²⁵ In fact, some critics have gone so far as to argue that the ADA should be modified to include pregnancy on its list of protected categories.²⁶ Most other states have thus far resisted this trend, however, and continue only to provide protections that are contained in federal law.²⁷

This note will examine the history of the Pregnancy Discrimination Act (PDA) and some of the relevant case law that informs its application, while arguing that the state of Georgia should

22. Brake & Grossman, *supra* note 19, at 69. The EEOC has obtained monetary benefits in the amounts of \$30 million in 2007, \$12.2 million in 2008, \$16.8 million in 2009, \$18 million in 2010, and \$17.2 million in 2011. *Pregnancy Discrimination Charges*, EEOC, <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm> (last visited Oct. 14, 2015).

23. Brake & Grossman, *supra* note 19, at 69.

24. See, e.g., HAW. CODE R. § 12-46-107 (1990); LA. STAT. ANN. §§ 23:341–342 (1997); 775 ILL. COMP. STAT. ANN. 5/2-102(I)–(J) (West 2015); ALASKA STAT. § 39.20.500(a) (2013); CAL. GOV'T CODE § 12945 (1)–(2) (West 2012); DEL. CODE ANN. tit.19 § 711 (West 2014); CONN. GEN. STAT. §§ 46a-60(a)(7)(B)–(G) (2011); MD. CODE ANN., STATE GOV'T § 20-606 (West 2013); W. VA. CODE ANN. § 5-11B-2 (West 2014); MINN. STAT. § 363A.08 (2015); N.J. Rev. Stat. § 10:5-12(s) (2014).

25. Tanya Marcum & Sandra Perry, *It Doesn't Work At Work: Pregnancy Discrimination in the Workplace*, 66 LAB. L.J. WL 3538782 (2015).

26. Brake & Grossman, *supra* note 19, at 122–23; see also Jeannette Cox, *Pregnancy as 'Disability' and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 485–86 (2012); Simon, *supra* note 19, at 272; Amanda Wachuta, *The ADA Gets Even More Complicated: Analyzing Pregnancy with Complications As A Disability*, 52 DRAKE L. REV. 471, 482 (2004); Joan Williams, Robin Devaux, Danielle Fuschetti, & Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 111 (2013); see generally Deborah Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1 (1995); Marjorie Jacobson, *Pregnancy and Employment: Three Approaches to Equal Opportunity*, 68 B.U. L. REV. 1019 (1988).

27. See generally Marcum & Perry, *supra* note 25.

adopt legislation that strengthens protections for pregnant women in the workplace.²⁸ The note will then analyze the Supreme Court's recent ruling in *Young v. United Parcel Service* and discuss the manner in which the decision will impact future jurisprudence concerning the Pregnancy Discrimination Act.²⁹ Finally, the note will examine the state of pregnancy discrimination law in Georgia and how Georgia has dealt with the question of pregnancy existing as a disability requiring reasonable accommodations from employers. Currently, Georgia does not provide additional protections supplementing federal law against pregnancy discrimination and does not require accommodations beyond what is required by federal law.³⁰ Accordingly, the note will propose statutory changes that Georgia should make to its existing employment laws to provide greater protections for pregnant women and to join the growing number of states requiring reasonable accommodations for pregnant women.³¹

I. BACKGROUND

In the early twentieth century, paternalistic laws intended to protect the health and safety of pregnant women were common.³² For example, an Oregon law restricted the number of hours a woman could work in laundries, and when challenged, the Supreme Court upheld the law.³³ In delivering its opinion, the Court reasoned: “That

28. *See infra* Part II.

29. *See infra* Part III.

30. *Employment Protections for Workers Who Are Pregnant or Nursing*, U.S. DEP'T OF LABOR, <http://www.dol.gov/wb/map/index.htm#Georgia> (last visited Nov. 18, 2015).

31. *See infra* Part IV.

32. Brake & Grossman, *supra* note 19, at 72.

[States] often relied on pregnancy-based classifications when regulating employment generally or setting policies for public employees Such laws ostensibly accommodated the domestic and reproductive obligations of women to protect them from exploitation by employers But this “protection” was often a pretext for preserving better jobs for men and did not affect all women equally. Working-class women and women of color . . . suffered the most from the costs of protection and there women received relatively few of the benefits.

Id.

33. *Muller v. Oregon*, 208 U.S. 412, 416–17 (1908). Oregon law stipulated that no female employer in any laundry facility in the state could work more than ten hours in any one day. *Id.* Violation of the law was a misdemeanor subject to a fine. *Id.* The defendants in the case owned a laundry and were

woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her."³⁴ In the 1940s, a government agency—the Women's Bureau of the Department of Labor—recommended that pregnant women not be permitted to work near the date of delivery or until at least two months after birth.³⁵ Several states adopted laws based on this recommendation.³⁶ In the mid-twentieth century, a number of states banned hiring women both before and after giving birth to their babies to ensure that children were being properly provided for and reared.³⁷

Responding to pressure from advocates in the 1960s, the EEOC issued guidelines³⁸ in 1972 holding that Title VII of the Civil Rights Act extended to pregnancy discrimination.³⁹ The law developed in a mixed fashion, however, before the Supreme Court.⁴⁰ On one hand, in *Cleveland Board of Education v. LaFluer*, the Court heard a

charged with requiring a female employee to work more than ten hours in a day. *Id.* The defendants were brought to trial and convicted of the offense. *Id.*

34. *Id.* at 421.

Even when they [women] are not [burdened by motherhood], by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and, as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Muller, 208 U.S. at 421.

35. Women's Bureau, Office of the Secretary, U.S. DEP'T OF LABOR, Bulletin No. 240, *Maternity Protection of Employed Women* 7 (1952).

36. Marcum and Perry, *supra* note 25 at 12.

37. Deborah Widiss, *Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 982 (2013).

38. *Milestones 1972*, EEOC, <http://www.eeoc.gov/eeoc/history/35th/milestones/1972.html> (last visited Oct. 8, 2015). The EEOC issued guidelines on sex discrimination to prohibit employers from imposing mandatory leave of absences on pregnant women or firing women because they became pregnant. *Id.* The EEOC also prohibited giving pregnant women less favorable health insurance or disability benefits than provided to employees with other temporary medical conditions. *Id.*

39. Brake and Grossman, *supra* note 19, at 73.

40. *Id.*

As bad as these decisions were for pregnant working women, the Supreme Court's pregnancy jurisprudence did not foreclose all challenges to pregnancy-based employment policies. The treatment of pregnant workers could still be successfully challenged if it punished women for the status of being pregnant, without regard to pregnancy's actual effect on women as workers.

Id.

challenge to school districts in Cleveland, Ohio requiring pregnant teachers to stop teaching by their fourth or fifth month of pregnancy.⁴¹ The school prohibited the teacher from returning to teach until the next regular school semester or until the child was at least three months old.⁴² To justify this policy, the school district argued for the need for continuity of instruction,⁴³ the health of the teacher and the unborn child,⁴⁴ and the convenience of the administration.⁴⁵ The Court held these practices violated the Due Process Clause of the Fourteenth Amendment.⁴⁶ The Court reasoned that the Due Process Clause protected fundamental liberties pertaining to personal choices about child birth and the school district could not “needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher’s constitutional liberty.”⁴⁷

On the other hand, two cases before the Court demonstrated the limits of the EEOC guidelines.⁴⁸ In *Geduldig v. Aiello*, the Court heard a challenge to a California disability insurance program that excluded coverage for certain disabilities related to pregnancy.⁴⁹ Contributions from participating employees funded the program, but not every disabling condition was covered.⁵⁰ A denial of benefits resulted if a participating employee was committed as an alcoholic, drug addict, sexual psychopath, or pregnant woman.⁵¹ In its ruling, the Court rejected any notion that classifications based on pregnancy

41. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634 (1974).

42. *Id.* at 635. The school system also required that the teachers obtain a note from their doctor certifying their physical fitness and their ability to resume their teaching responsibilities. *Id.*

43. *Id.* at 635, 6.

44. *Id.* at 641.

45. *Id.*

46. *Cleveland Bd. of Educ.*, 414 U.S. at 640 (stating “by acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of protected freedoms”); see also *Newmon v. Delta Airlines, Inc.* 374 F. Supp. 238, 247 (N.D. Ga. 1973) (holding that a company policy that required ground employees to automatically take maternity leave after the fifth month of pregnancy was unjustified).

47. *Cleveland Bd. of Educ.*, 414 U.S. at 640 (“While the regulations no doubt represent a good-faith attempt to achieve a laudable goal, they cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child.”).

48. *Geduldig v. Aiello*, 417 U.S. 484 (1974); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

49. *Geduldig*, 417 U.S. at 486.

50. *Id.* at 487–88.

51. *Id.* at 488–89.

should be subject to heightened scrutiny.⁵² Instead, the Court found, “[t]here is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not The program divides potential recipients into two groups—pregnant women and non-pregnant persons.”⁵³ The Court held there was simply no connection between the “excluded disability and gender.”⁵⁴

In a second case before the Court, a pregnancy discrimination challenge under the Civil Rights Act of 1964 resulted in denial.⁵⁵ In *General Electric Co. v. Gilbert*, General Electric provided an employee benefit for non-occupational sickness to all employees but specifically excluded any disabilities related to the pregnancy of its employees.⁵⁶ Several female employees whose benefit claims were denied filed a class action lawsuit claiming that the plan violated Title VII of the Civil Rights Act.⁵⁷ The district court reasoned that pregnancy was neither a “disease” nor “accident,” rather it was a disabling condition for a period of six to eight weeks.⁵⁸ The court of appeals affirmed the decision.⁵⁹ The Supreme Court, however, reversed and held that General Electric’s benefits program was not a form of pregnancy discrimination.⁶⁰ The Court treated the exclusion

52. *Id.* at 496–97.

53. *Id.* at 496–97, n. 20.

Absent a showing that distinctions involving pregnancy are mere pretexts designed to effect an invidious discrimination against the members of one sex of the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

Id.

54. *Geduldig*, 417 U.S. at 496–97, n. 20.

The appellee simply contends that, although she has received insurance protection equivalent to that provided all other participating employees, she has suffered discrimination because she encountered a risk that was outside the program’s protection. For the reasons we have stated, we hold that this contention is not a valid one under the Equal Protection Clause of the Fourteenth Amendment.

Id. at 497.

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

56. *Id.* at 127.

57. *Id.* at 128.

58. *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 377 (E.D. Va. 1974).

59. *Gilbert v. Gen. Elec. Co.*, 519 F.2d 661, 668 (4th Cir. 1975).

60. *Gen. Elec. Co.*, 429 U.S. at 145–46.

Absent a showing that distinctions involving pregnancy are mere pretexts

of pregnancy as a form of risk management in order to keep the insurance plan available to all employees, and thus was “not discrimination based on gender at all.”⁶¹ Despite the fact that only women can become pregnant, the Court held that pregnancy was not like other conditions that would typically constitute a disease or disability.⁶²

Popular reaction to the Court’s rulings in *Geduldig* and *Gilbert* was largely negative, with one spokesperson for a leading women’s rights organization denouncing the decision as a “slap in the face to motherhood.”⁶³ Days after the Court handed down the decision, a coalition of feminists and women’s groups created the Coalition to End Discrimination Against Pregnant Workers, vowing to “draft legislation to combat the high court ruling.”⁶⁴ Congress responded by holding hearings and then beginning work on new legislation that would countermand the Court’s ruling and provide new protections for pregnant women in the workplace.⁶⁵ The product of these efforts would be the Pregnancy Discrimination Act of 1978.⁶⁶

Enacted as an express repudiation of the Court’s decision in *Gilbert*, the Pregnancy Discrimination Act passed by wide margins in both houses of Congress.⁶⁷ The text of the Act amended Title VII of the Civil Rights Act of 1964 to clarify that discrimination based on

designed to effect an invidious discrimination against the members of one sex or the other, lawmakers are constitutionally free to include or exclude pregnancy from the coverage of legislation such as this on any reasonable basis, just as with respect to any other physical condition.

Id. at 125.

61. *Id.* at 150. “Gender-based discrimination does not result simply because an employer’s disability benefits plan is less than all inclusive. Petitioner’s plan is no more than an insurance package covering some risks but excluding others and there has been no showing that the selection of included risks creates a gender-based discrimination.” *Id.* at 126.

62. *Id.* at 136.

63. Nicholas Pedriana, *Discrimination By Definition: The Historical and Legal Paths to the Pregnancy Discrimination Act of 1978*, 21 YALE J.L. & FEMINISM 1, 11 (2009).

64. *Id.* Outraged women’s groups vowed to prepare “legislation to counteract the decision and require that disability plans provide for the payment of wages to women out of work because of pregnancy.” *Id.*

65. *Id.*

66. *Id.* at 12.

67. Brake & Grossman, *supra* note 19, at 75. The bill passed in the House 376-43 and passed in the Senate 75-11. *Id.*

sex included pregnancy discrimination.⁶⁸ The text of the Act stated “the terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.”⁶⁹ The Act went on to say that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”⁷⁰ The Act thus categorizes pregnancy discrimination under Title VII’s sex discrimination language.⁷¹ In doing so, the PDA renounces employment practices that force women “to choose between their career and family obligations.”⁷² The PDA also embraces a basic principle that “women affected by pregnancy and related conditions must be treated in the same manner as other applicants and employees on the basis of the ability or inability to work.”⁷³ This means that “an employer will not be liable for dismissing a pregnant woman if she is unable to perform tasks intrinsic to her employment, such as lifting heavy objects or working overtime, unless she can show that the employer did not require the same of other employees.”⁷⁴

68. Pregnancy Discrimination Act Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2000)).

69. *Id.*

70. *Id.*

71. Wendy Ray and Michelle Bell, *Pregnancy Discrimination*, 1 GEO. J. GENDER & L. 617, 620 (2000).

Encompassing discrimination on the basis of ‘pregnancy, childbirth, or related medical conditions,’ the PDA proscribes, for any job-related purpose, discriminatory treatment of a female applicant or employee on the basis that she has been or is pregnant; has given birth or intends to give birth in the future; or has obtained, is presently seeking, or contemplating an abortion. The PDA covers not only female employees but also the spouses of male employees.

Id. at 621.

72. *Id.* at 621.

73. *Id.* at 622; see also Jessica Bergin, “Ability” Means Ability: An Ability-Centric Interpretation that Reinvigorates the Pregnancy Discrimination Act’s Protections for Pregnant Workers, 36 WOMEN’S RTS. L. REP. 36, 36 (2014); Jeanette Blair, *Pregnancy Discrimination*, 2 GEO. J. GENDER & L. 595, 598-600 (2001); Brake & Grossman, *supra* note 19, at 76; Jamie Clanton, *Toward Eradicating Pregnancy Discrimination At Work: Interpreting the PDA to “Mean What It Says,”* 86 J. GENDER & L. 703, 707 (2001); Joanna Grossman & Gillian Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 41 (2009); Millsap, *supra* note 19, at 1425.

74. Ray & Bell, *supra* note 71, at 622 (“Courts have declined to characterize the PDA as a medical leave act; thus, employers do not violate the PDA by discharging an employee for poor attendance in

II. ANALYSIS: THE STATE OF STATES

Before assessing the manner in which Georgia might enact pregnancy discrimination laws, it is important to analyze how other states have approached creating such policies as a comparison. The first states to expand their employment laws to grant additional protections to pregnant employees included Hawaii and Louisiana.⁷⁵ Hawaii requires employers to “make every reasonable accommodation to the needs of the female affected by disability due to and resulting from pregnancy, childbirth, or related medical conditions.”⁷⁶ In Louisiana, employers must grant pregnant employees the same benefits or privileges of employment that are granted to temporarily disabled employees, including transfers to less strenuous or hazardous positions.⁷⁷ An employer must grant a request for temporary job transfer so long as the request is one the employer can reasonably accommodate.⁷⁸ A number of other states enacted laws requiring that employers make reasonable accommodations for pregnant employees, including Illinois, Alaska, California, Connecticut, Delaware, New Jersey, Maryland, West Virginia, and Texas.⁷⁹ These states can loosely be classified into three categories.⁸⁰

connection with a pregnancy, provided that the same poor attendance standards are applied to other employees.”).

75. Marcum & Perry, *supra* note 25.

76. HAW. CODE R. § 12-46-107 (1990).

An employer shall not exclude from employment a pregnant female applicant because of her pregnancy. It is an unlawful discriminatory practice to discharge a female from employment or to penalize her in terms, conditions, and privileges of employment because she requires time away from work for disability due to and resulting from pregnancy, childbirth, or related medical conditions.

Id.

77. LA. STAT. ANN. § 23: 342 (1997).

78. *Id.* It is an unlawful practice for employers:

[T]o refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where such transfer can be reasonably accommodated, provided, however, that no employers shall be required by this Part to create additional employment which the employer would not otherwise have created, nor shall such employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.

Id.; see also Gerald Huffman, *The New Louisiana Employment Statutes: What Hath the Legislature Wrought*, 58 LA. L. REV. 1033, 1058 (1998).

79. Marcum & Perry, *supra* note 25.

A. States That Require Accommodation Even Without A Doctor's Note

Illinois's statute requires employers to make reasonable accommodations for both full-time and part-time pregnant employees during and immediately after their pregnancies.⁸¹ For the purposes of the statute, reasonable accommodations include "frequent or longer bathroom breaks, breaks for increased water intake, and breaks for periodic rest, seating, assistance with manual labor, light duty, temporary transfer to a less strenuous or hazardous position, the provision of an accessible worksite; acquisition or modification of equipment, job restructuring, and leave necessitated by pregnancy."⁸² Employers are not mandated to undergo undue hardship in granting such accommodations and are required to post notices of pregnant employee rights in the workplace.⁸³ Defenders of the law declared that its provisions represented common sense legislation: "These are

80. Amanda Haverstick, *Proliferating State & Local Pregnancy Accommodation Laws Make Modifying ADA/FMLA Procedures A Must For Most Employers*, FORBES (June 17, 2014, 2:15 PM), <http://www.forbes.com/sites/theemploymentbeat/2014/06/17/proliferating-state-local-pregnancy-accommodation-laws-make-modifying-adafmla-procedures-a-must-for-most-employers/print/>.

81. 775 ILL. COMP. STAT. ANN. 5/2-102(D)-(J) (West 2015).

If after a job applicant or employee, including a part-time, full-time, or probationary employee, requests reasonable accommodation, for an employer to not make reasonable accommodations for any medical or common condition of a job applicant or employee related to pregnancy or childbirth, unless the employer can demonstrate that the accommodation would impose an undue hardship on the ordinary operation of the business of the employer.

Id.

82. *Id.*

83. *Id.*

No employer is required by this subdivision to create additional employment that the employer would not otherwise have created, unless the employer does so or would do so for other classes of employees who need accommodation. The employer is not required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job, unless the employer does so or would do so to accommodate other classes of employees who need it For an employer to fail to post or keep posted in a conspicuous location on the premises of the employer where notices to employers are customarily posted, or fail to include in any employee handbook information concerning an employee's rights under this Article, a notice, to be prepared or approved by the Department, summarizing the requirements of this article and information pertaining to the filing of a charge, including the right to be free from unlawful discrimination and the right to certain reasonable accommodations.

Id.

women who are healthy and want to continue workingThey're not looking to get out of work. What they want is a temporary accommodation.”⁸⁴ The law passed the state legislature in a unanimous vote.⁸⁵ Critics of the law, however, complained that it was not encompassing enough because it only applied to employers with fifteen or more employees.⁸⁶

Connecticut requires employers to make reasonable efforts to temporarily transfer pregnant employees to a suitable position when a woman informs the employer in writing of the need, and the employee or employer reasonably believes that continued employment in the previous position could cause injury to the woman or her baby.⁸⁷ Connecticut law does not require written documentation from a health care provider.⁸⁸ Critics of the Connecticut law condemned the lack of health care provider oversight and expressed worries that pregnant women would take advantage of their pregnancies by asking for accommodations that were not needed.⁸⁹

B. States That Require Accommodation with Advice from A Physician

Another group of states require accommodations with the advice of a physician. Alaska requires employers to give pregnant

84. Marsha Mercer, *States Adding More Protections for Pregnant Workers*, THE FLORIDA TIMES-UNION (Jan. 9, 2015), <http://jacksonville.com/breaking-news/2015-01-09/story/states-adding-more-protections-pregnant-workers>.

85. Brigid Schulte, *States Move to Ensure Pregnant Workers Get Fair Chance to Stay on Job*, WASH. POST (Sept. 8, 2014), <https://www.washingtonpost.com/blogs/she-the-people/wp/2014/09/08/states-move-where-congress-wont-to-ensure-pregnant-workers-get-fair-shot-to-stay-on-job/>.

86. *Pregnancy Protections for Workers in States and Localities*, A BETTER BALANCE (July 2016), http://www.abetterbalance.org/web/images/stories/State_and_Local_PWFA_List.pdf.

87. CONN. GEN. STAT. § 46a-60(a)(7)(A)–(G) (2011). It is unlawful for an employer:
[T]o terminate a woman's employment because of her pregnancy; to fail or refuse to make a reasonable effort to transfer a pregnant employee to any suitable temporary position which may be available in any case in which an employee gives written notice of her pregnancy to her employer and the employer and the employer or pregnant employee reasonably believes that continued employment in the position held by the pregnant employee may cause injury to the employee or the fetus.

Id.

88. *See id.*

89. Mercer, *supra* note 84.

employees whose health is affected by their pregnancy the same employment benefits and any other privileges that are granted to other employees who are similarly disabled.⁹⁰ This includes the ability to take disability leave, sick leave, or other accrued leave that the employer chooses to make available to other temporarily disabled employees.⁹¹ Alaska also allows for the employee to request that her employer transfer her to a suitable position.⁹² In a similar vein, California prohibits employers from refusing to provide reasonable accommodations for pregnant employees, so long as the accommodations are made with the advice of a health care provider.⁹³ Employers must not refuse temporary transfer for pregnant employees to less strenuous or hazardous positions for the duration of pregnancy.⁹⁴ The California Chamber of Commerce initially took issue with the law, arguing that the lack of definition for reasonable accommodation would lead to an increase in litigation.⁹⁵

90. ALASKA STAT. § 39.20.500(a) (2013).

91. *Id.*

92. *Id.*

A pregnant employee may request a transfer to a suitable position under this section. An employer may not fill the position with a person other than the requesting employee until the employer has offered the position to the employee and the employee has refused the offer. A position is suitable if it is an existing unfilled position in the same administrative division in which the employee is currently employed and less strenuous or less hazardous than the employee's current position; transfer to the position is recommended by a licensed health care provider; the employee is qualified and immediately able to perform the duties of the position; and the transfer will not subject the employer to legal liability under a collective bargaining contract or employment contract.

Id.

93. CAL. GOV'T CODE § 12945 (1)-(2) (West 2012) (It shall be unlawful "for an employer to refuse to provide reasonable accommodation for an employee for a condition related to pregnancy, childbirth, or a related medical condition, if she so requests, with the advice of her health care provider").

94. *Id.* It shall be unlawful:

[F]or any employer to refuse to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where that transfer can be reasonably accommodated. However, no employer shall be required by this section to create additional employment that the employer would not otherwise have created, no shall the employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job.

Id.

95. OFFICE OF SENATE FLOOR ANALYSIS, BILL ANALYSIS A.B. 1670, 1999–2000 Reg. Sess. (Ca. 1999).

The Chamber also raised concerns about costs for small businesses associated with required accommodations, and expressed reservations that requiring accommodations would create hardships for businesses.⁹⁶ Legislators, however, viewed existing law as adequately defining reasonable accommodation, and the objection was passed over.⁹⁷

The state of New Jersey recognizes that “women are vulnerable to discrimination in the workplace”⁹⁸ such that the Legislature intends to combat such discrimination by “requiring employers to provide reasonable accommodations to pregnant women and those who suffer medical conditions related to pregnancy and childbirth.”⁹⁹ Examples of reasonable accommodations include: “bathroom breaks, breaks for increased water intake, periodic rest, assistance with manual labor, job restructuring or modified work schedules, and temporary transfers to less strenuous or hazardous work.”¹⁰⁰ New Jersey exempts employers from needing to provide reasonable accommodations if they can show that the accommodations will cause undue hardship.¹⁰¹ The bill’s proponents emphasized that it did not seek to treat women favorably, but equally under the law¹⁰², and a sign of their success was that only a single member of the legislature

96. *Id.*

97. *Id.* California law stated that a reasonable accommodation was defined as “making existing facilities used by employees readily accessible to, and usable by, individuals with disabilities, or job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices.” *Id.*

98. S.B. 2995, 215th Leg., Reg. Sess., (N.J. 2013).

99. *Id.*; N.J. Rev. Stat. § 10:5-12(s) (2014).

100. *Id.*

101. *Id.* It is unlawful for:

[A]n employer to treat, for employment-related purposes, a woman employee that the employer knows, or should know, is affected by pregnancy in a manner less favorable than the treatment of other persons not affected by pregnancy but similar in their ability or inability to work. In addition, an employer of an employee who is a woman affected by pregnancy shall make available to the employee reasonable accommodation . . . unless the employer can demonstrate that providing the accommodation would be an undue hardship on the business operations of the employer.

Id.

102. See *Testimony on S.B. No. 2995 to the Senate Labor Committee*, 215th Leg., Reg. Sess., (N.J. 2013) (submitted by Ari Rosmarin, Public Policy Director, American Civil Liberties Union of New Jersey) (Nov. 7, 2013).

voted against the bill.¹⁰³ Opponents of the legislation noted that it would give pregnant women an unfair advantage in the workplace and would shift work responsibilities and burdens unfairly to non-pregnant employees.¹⁰⁴

West Virginia passed the Pregnant Workers' Fairness Act, which requires employers to make reasonable accommodations for pregnancy that an employer would make for temporary disabilities not related to pregnancy.¹⁰⁵ Employees cannot be forced to accept an accommodation that they do not want to accept, and an employee cannot be forced into taking leave if an accommodation can be made.¹⁰⁶ One critique of the bill may be that employers would be subject to innumerable costs associated with being forced to provide accommodations to pregnant women. At the same time, however, it was unclear whether such costs would constitute an undue hardship, although they pointed out that defining an undue hardship was extremely difficult. Passage of the law provided evidence, in the words of one supporter, "that this makes sense both as a matter of policy and politics in a lot of different places."¹⁰⁷

103. Schulte, *supra* note 85.

104. *Id.*

105. W. VA. CODE ANN. § 5-11B-2 (West 2014). It shall be unlawful for any employer: [N]ot to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of a job applicant or employee, following delivery by the applicant or employee of written documentation from the applicant's or employee's health care provider that specifies the applicant's or employee's limitations and suggesting what accommodations would address those limitations, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; deny employment opportunities to a job applicant or employee, if such denial is based on the refusal of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee or applicant; require a job applicant or employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that such applicant or employee chooses not to accept.

Id.

106. *Id.*

107. Bryce Covert, *West Virginia Considers Bold New Protections for Pregnant Workers*, THINKPROGRESS (Feb. 6, 2014), www.thinkprogress.org/economy/2014/06/3259061/west-virginia-pregnant-workers/.

C. States Requiring Accommodation if Pregnancy Causes Disability

A third group of states require accommodation if pregnancy causes disability. Delaware requires that employers make reasonable accommodations for employees who are limited on the basis of pregnancy, unless those accommodations impose an undue hardship on the employer.¹⁰⁸ Employers also may not deny employment opportunities, require an employee to take leave, or take an adverse action against the employee using a reasonable accommodation.¹⁰⁹ The law passed the state legislature in a rare unanimous vote, demonstrating broad support from civil rights groups to the business community.¹¹⁰ Minnesota requires reasonable accommodations for pregnant women, on par with those required for non-pregnant persons who are similar in their ability or inability to work.¹¹¹ The statute also requires transferring pregnant women to less strenuous or hazardous jobs, if such a transfer can reasonably be accommodated.¹¹² However, it only applied to businesses with

108. DEL. CODE. ANN. tit.19 § 711 (West 2014).

109. *Id.* An employer may not:

[D]eny employment opportunities to a job applicant or employee, if such denial is based on the need of the employer to make reasonable accommodations to the known limitations related to the pregnancy of an employee or applicant for employment; require an applicant for employment or employee affected by pregnancy to accept an accommodation that such applicant or employee chooses not to accept; require an employee to take leave under any leave law or policy of the employer if another reasonable accommodation can be provided to the known limitations related to the pregnancy of the employee; or take adverse action against any employee in the terms, conditions, or privileges of employment for requesting or using a reasonable accommodation to the known limitations related to the pregnancy of the employee.

Id.

110. Schulte, *supra* note 85.

111. MINN. STAT. § 363A.08 (2015).

112. *Id.*

Except when based on a bona fide occupational qualification, it is an unfair employment practice for an employer with a number of part-time or full-time employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year equal to or greater than 25 effective July 1, 1992, and equal to or greater than 15 effective July 1, 1994, an employment agency, or a labor organization, not to make reasonable accommodation to the known disability of a qualified disabled person or job applicant unless the employer, agency, or organization can demonstrate that the accommodation would impose an undue hardship on the business, agency, or organization. 'Reasonable accommodation' means steps which must be taken to accommodate

twenty-one or more employees, leaving a large number of small businesses exempt from its requirements.¹¹³

In 2013, Maryland enacted the Reasonable Accommodations for Pregnant Workers Act.¹¹⁴ The Act requires employees to grant reasonable accommodations to pregnant employees and dictates that employers engage in every effort to find reasonable alternative means of accommodation.¹¹⁵ Reasonable accommodations under the law include “(1) changing the employee’s job duties; (2) changing the employee’s work hours; (3) relocating the employee’s work area; (4) providing mechanical or electrical aids; (5) transferring the employee to a less strenuous or less hazardous position; (6) or providing leave.”¹¹⁶ The debate over the Maryland bill also raised concerns about costs associated with accommodations and the burden placed on particularly small businesses.¹¹⁷ Advocates countered that the undue burden requirement would help ensure that any costs imposed would be minimal.¹¹⁸

As this analysis of state pregnancy discrimination laws shows, a discernable trend exists in state laws towards greater protections for pregnant women in the workplace, in spite of objections focusing on cost, fairness, and the breadth of the laws themselves. Despite this trend, the state of Georgia provides no additional protections beyond what federal law requires.¹¹⁹ In particular, Georgia law fails to provide specific prohibitions against pregnancy discrimination, with

the known physical or mental limitations of a qualified disabled person. ‘Reasonable accommodation’ may include but is not limited to, nor does it necessarily require: (1) making facilities readily accessible to and usable by disabled persons; and (2) job restructuring, modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, and the provision of aides on a temporary or periodic basis.

Id.

113. *Pregnancy Protections*, *supra* note 86.

114. MD. CODE. ANN., STATE GOV’T § 20-609 (West 2013).

115. *Id.*

116. *Id.* (“If an employee requests a transfer to a less strenuous or less hazardous position as a reasonable accommodation, the employer shall transfer the employee for a period of time up to the duration of the employee’s pregnancy.”).

117. MARYLAND DEP’T OF LEGIS. SERVS., FISCAL AND POLICY NOTE, H.B. 804, 2013 Sess.

118. *Id.*

119. *Employment Protections for Workers Who Are Pregnant or Nursing*, U.S. DEP’T OF LABOR, <http://www.dol.gov/wb/map/index.htm#Georgia> (last visited Nov. 15, 2016).

the exception of state employees.¹²⁰ Georgia does not provide for accommodations for pregnancy under its law.¹²¹ Finally, Georgia is silent on pregnancy-related disability accommodation.¹²² As the state-level analysis clearly shows, Georgia is increasingly becoming an outlier with regard to protecting against pregnancy discrimination in the workplace.

III. ANALYSIS: THE IMPACT OF *YOUNG*

United Parcel Service (UPS) hired Peggy Young as an early morning “air driver” and she worked on a part-time basis in 2006 and 2007.¹²³ As a condition of the job, UPS expected Young to be able to “‘lift, lower, push, pull, leverage and manipulate’ items ‘weighing up to [seventy] pounds[,]’” and to be able to “[a]ssist in moving packages weighing up to 150 pounds.”¹²⁴ In 2005, Young began *in vitro* fertilization in an effort to get pregnant, and was ultimately successful after three attempts.¹²⁵ She then presented a note to her supervisor from her doctor recommending that she not lift more than twenty pounds while on the job.¹²⁶ Young’s supervisor concluded that she could not perform the essential functions of her job any longer and, per UPS policy, did not qualify for light duty or an alternative work assignment because her restriction was not a consequence of an on-the-job injury.¹²⁷ Despite having exhausted her medical leave, UPS granted Young an unpaid leave of absence, and

120. *Id.*; *Georgia—Laws Relating to Pregnancy*, LEGAL MOMENTUM, <https://www.legalmomentum.org/content/georgia-laws-relating-pregnancy> (last visited Nov. 15, 2016); GA. COMP. R. & REGS. 478-1-.03 (2017).

121. *Georgia—Laws Relating to Pregnancy*, *supra* note 122.

122. *Id.*

123. *Young v. United Parcel Serv., Inc.*, No. DKC 08-2586, 2011 WL 665321, at *1 (D. Md., Feb. 14, 2011).

124. *Id.*

125. *Id.* at *3–4. Young had repeatedly asked for and been granted leaves of absence during her attempts at becoming pregnant. *Id.*

126. *Id.* at *4. Young’s doctor did not feel that a full restriction was warranted at that point in the pregnancy and thus only made a recommendation that her lifting be kept to less than 20 pounds. *Id.*

127. *Young*, 2011 WL 665321, at *5. UPS argued that kinds of persons who were granted accommodations were drivers disabled on the job, those who has lost their Department of Transportation certificates or those who suffered a disability covered by the Americans with Disabilities Act. *Id.* at *11.

she lost her medical coverage at the end of 2006.¹²⁸ Shortly thereafter, Young filed a charge with the EEOC alleging discrimination on the basis of pregnancy.¹²⁹ “The District Court granted summary judgment to UPS, and the Fourth Circuit Court of Appeals affirmed.”¹³⁰ The case was then appealed to the Supreme Court.¹³¹

The Court in *Young* issued a number of important holdings in its decision with significant implications for pregnancy discrimination. First, the Court reviewed the text of the PDA and determined that its language “requires courts to consider the extent to which an employer’s policy treats pregnant workers less favorably than it treats non-pregnant workers similar in their ability or inability to work.”¹³² The Court also reasoned that it must “consider any legitimate, nondiscriminatory, nonpretextual justification for these differences in treatment.”¹³³ In sum, the Court was tasked with determining whether a company’s policy burdened pregnant women and, if so, whether this burden constituted intentional discrimination.¹³⁴

Second, Young argued that if UPS accommodated any employees with a lifting restriction, then it was obligated to accommodate pregnant employees with a similar lifting restriction.¹³⁵ The Court rejected this argument as unsound.¹³⁶ This position, according to the Court, would seem to say that the statute grants pregnant workers a

128. *Id.* at *6. Young gave birth to her child in 2007 and took a maternity leave to spend time with her baby. She also did not feel physically or emotionally ready to return to work at that time. After approximately two months, Young indicated she wished to return to work and she was allowed to do so, resuming the same position she held before the pregnancy. *Id.*

129. *Id.* Young also claimed discrimination on the basis of race but voluntarily dismissed the racial discrimination issue after discovery did not support such a claim in the case. *Id.* at *7.

130. Kay H. Hodge, *Pregnancy Discrimination & Young v. UPS: Employers’ Duties*, AM. L. INST. (2015).

131. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015).

132. *Id.* at 1344; *contra Pelkey v. Colo. Dep’t of Labor & Emp.*, No. 14-CV-02205-RBJ, 2015 WL 1740453, at *4 (D. Co. 2015) (holding that a plaintiff who alleges sex-based discrimination, but does not show that her employer treated her disability differently from those similarly situated, cannot succeed on her discrimination claim).

133. *Young*, 135 S. Ct. at 1344.

134. *Id.*

135. *Id.* at 1349. The Court reflected that the second clause of the PDA required employers to provide the same accommodations to pregnant employees as they did to workplace disabilities that had other cause but were similar in their effects. *Id.*

136. *Id.* at 1349.

“most-favored-nation status,” and this could not have been Congress’ intent when passing the PDA.¹³⁷ Young’s approach would have been too broad in relieving a protesting worker of any burden to prove that bias against her was intentional pregnancy discrimination.¹³⁸ Similarly, the Court also rejected UPS’s argument that the second clause of the PDA does nothing more than “define sex discrimination to include pregnancy discrimination.”¹³⁹ Such a reading of the second clause of the PDA, commentators pointed out, would render it redundant and without purpose.¹⁴⁰

Third, the Court held that a pregnant worker attempting to establish disparate treatment could accomplish this through “indirect evidence” by applying the *McDonnell Douglas* framework. That framework requires that the plaintiff present a prima facie case by demonstrating that she (1) belongs to a protected class, (2) sought accommodation, (3) the employer did not grant that accommodation, and (4) the employer accommodated others similar in their ability or inability to work.¹⁴¹ The employer may then seek to offer a rationale for its refusal to accommodate the plaintiff as long as the reason is nondiscriminatory in nature.¹⁴² This “burden-shifting” analysis by the

137. *Id.* at 1349–50.

As long as an employer provides one or two workers with an accommodation—say, those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked at the company for many years, or those who are over the age of 55—then it must provide similar accommodations to *all* pregnant workers (with comparable physical limitations), irrespective of the nature of their jobs, the employer’s need to keep them working, their ages, or any other criteria.

Young, 135 S. Ct. at 1349–50.

138. Lyle Denniston, *Fashioning a Remedy for Pregnancy Bias*, SCOTUSBLOG (Dec. 15, 2015), www.scotusblog.com/2015/03/opinion-analysis-fashioning-a-remedy-for-pregnancy-bias/.

139. *Young*, 135 S. Ct. at 1349; Denniston, *supra* note 140.

140. Denniston, *supra* note 140. The Court reasoned that statutes should be construed in such a way that no clause should be taken as superfluous, void, or redundant. *Id.* The problem was that UPS’ reading of the PDA would create exactly that problem of the second clause. *Young*, 135 S. Ct. at 1352–53.

141. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

142. *Young*, 135 S. Ct. at 1354. (“But, consistent with the Act’s basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ‘similar in their ability or inability to work’ whom the employer accommodates.”); *see also* *Martin v. Winn-Dixie Louisiana, Inc.*, 132 F. Supp. 3d 794, 819 (M.D. La. 2015) (holding that an employer’s insistence that a pregnant woman take an unwanted leave of absence did not constitute a reasonable accommodation as a matter of law).

Court allows for the burden of proof in a pregnancy discrimination case to be parsed between the plaintiff and the defendant depending on the proof that can be offered.¹⁴³

Finally, the Court reasoned that if the employer can show a legitimate, nondiscriminatory reason, the plaintiff may then attempt to show that the offered reasons are in fact pretextual.¹⁴⁴ On this basis, the Court concluded:

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.¹⁴⁵

This being said, the Court was not clear on what a "legitimate non-discriminatory reason" might be for an employer's failure to offer accommodations.¹⁴⁶ This leaves unresolved the legitimate grounds on which an employer can refuse accommodation to a pregnant employee.¹⁴⁷

143. Sam DiPrimio, *Special Delivery: Young v. United Parcel Service Revives the Pregnancy Discrimination Act While Denying Life to EEOC Guidance*, 67 ADMIN. L. REV. 389, 408 (2015); see generally Nicole Dunlap & Leanne Mehrman, *Supreme Court "Delivers" New Life to Pregnancy Discrimination Claims in Young v. United Parcel Service, Inc.*, 89 FLA. B.J. 59 (2015); Kay Hodge, *Young v. United Parcel Service, Inc. Summary*, 22 ALI-CLE 17 (2015); Vicki Schultz, *Taking Sex Discrimination Seriously*, 91 DENV. U. L. REV. 995 (2015); Ellen Taylor, Nathan Koskella, & Paul Kang, *Young v. United Parcel Service, Inc.*, 62 FED. LAW 72 (2015); Brinton Wilkins, *Supreme Court Weighs in on Disparate Treatment of Pregnant Employees*, 20 UTAH EMP. L. LETTER 1 (2015).

144. Taylor et al., *supra* note 145. See also Grochowski v. Science Applications Intern, Corp., No. ELH-13-3771, 2015 WL 5334051, at*14 (D. Md. Sept. 11, 2015) (deciding that if a plaintiff can establish a prima facie case of discrimination, an employer may introduce legitimate, nondiscriminatory reasons for its actions, to which the plaintiff may respond that such reasons were a pretext for discrimination).

145. *Young*, 135 S. Ct. at 1354.

146. John DiMugno, *Court Breathes New Life into the Pregnancy Discrimination Act*, 36 CAL. TORT REP. NL 1 (2015). The Court stated that it is not enough that a policy be stated in pregnancy-neutral terms and that a desire to avoid cost does not qualify either. *Id.*

147. *Id.*

In the end, the Court concluded that Young could create an issue of material fact of whether a significant burden exists by showing that her employer accommodates a large number of non-pregnant workers and refuses to accommodate a large number of pregnant workers.¹⁴⁸ In so deciding, however, the Court left unanswered how many comparators are required to create an inference of discrimination, especially when dealing with companies of far smaller size than UPS.¹⁴⁹ The Court also noted that Young could add to her evidence the fact that UPS has multiple policies to accommodate non-pregnant employees with lifting restrictions to show that its reasons for excluding pregnant women are not sufficiently strong and could give rise to an inference of intentional discrimination.¹⁵⁰ This interpretation of the PDA is consistent with Congress' decision to supersede *Gilbert's* finding that denying coverage to pregnant women on a neutral basis was legal.¹⁵¹ As such, it remained for the Fourth Circuit to determine whether Young's treatment compared to other non-pregnant employees was pretextual.¹⁵²

Young's loss in the case would potentially enable employers to reject even reasonable accommodations for pregnant women.¹⁵³ It would also leave "pregnancy in a growing gap between the PDA and the Americans with Disabilities Act, despite the compatible and mutually reinforcing purposes of the two Acts."¹⁵⁴ Moreover, as

148. *Young*, 135 S. Ct. at 1354. The Court reasoned that if the facts are as Young claims them to be, she could show that UPS accommodates most non-pregnant employees with lifting accommodations while completely refusing to accommodate pregnant employees with lifting accommodations. *Id.*

149. DiMugno, *supra* note 148.

The Court made its observation that the accommodation of "many" workers with non-pregnancy-related limitations may establish an inference discriminatory intent in the context of a dispute with a large, multi-national corporation with thousands of employees. It is doubtful that the Court intended to limit the ability of employees at smaller companies with far fewer employees to prove a pregnancy discrimination claim.

Id.

150. *Young*, 135 S. Ct. at 1354.

151. *Id.* at 1355.

152. *Id.*

153. Brake & Grossman, *supra* note 19, at 72.

154. *Id.* at 72–73

Even though the Americans with Disabilities Amendments Act of 2008

previously stated, while many states worked in the past to increase the protections for pregnant workers, no substitute exists for strong federal-level protections for pregnant female workers.¹⁵⁵

The *Young* case provides an easier route for plaintiffs to advance pregnancy accommodation claims that had previously not survived summary judgment.¹⁵⁶ It will also likely instigate more lawsuits under the PDA and give rise to a broader range of claims by pregnant women who believe they have been discriminated against in the workplace.¹⁵⁷ This will hopefully reverse the trend in states such as Georgia with regard to pregnant plaintiffs establishing their pregnancy discrimination claims.¹⁵⁸ Finally, *Young* increases pressure on states such as Georgia—states without any protections for pregnant women beyond federal law—to implement legislation to give guidance to employers on pregnancy discrimination laws and to grant protections to pregnant women without the need to file lawsuits.

IV. PROPOSAL: GEORGIA'S PATH TO ACCOMMODATION

Georgia's decision not to implement any protections for working pregnant women beyond what is required by federal law is clearly

broadened the universe of disabilities that require accommodations to include temporary impairments and less severe impairments, normal pregnancy is still not considered to be an impairment under the ADA. And yet, since many of the temporary disabilities now protected under the ADAAA have similar work-related effects as pregnancy, they should raise bar for accommodating pregnant workers as well.

Id.

155. Deborah Brake & Joanna Grossman, *Introduction to Amici Curiae Brief in Young v. United Parcel Service, Inc.*, 36 WOMEN'S RTS. L. REP. 66, 73 (2014).

156. Robert Meyer, *Supreme Court Issues Decision Regarding Accommodation of Pregnant Employees*, THE NAT'L L. REV. (Apr. 28, 2015), <http://www.natlawreview.com/article/supreme-court-issues-decision-regarding-accommodation-pregnant-employees>.

157. *Id.*

158. See generally *Hubbard v. Meritage Homes of Fla., Inc.*, 520 F. App'x 859 (11th Cir. 2013); *Grace v. Adtran, Inc.*, 470 F. App'x 812 (11th Cir. 2012); *Slater v. ESG, Inc.*, 441 F. App'x 637 (11th Cir. 2011); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309 (11th Cir. 1999); *Anderson v. Dunbar Armored, Inc.*, 678 F. Supp. 2d 1280 (N.D. Ga. 2009); *Welch v. Lincare, Inc.*, No. 7-09-CV-150 (HL), 2011 WL 1303319 (M.D. Ga. Apr. 4, 2011); *Walden v. Verizon Bus. Network Servs., Inc.*, No. 1:06-CV-2394-WSD-WEJ, 2008 WL 269619 (N.D. Ga. Jan. 29, 2008); *Sermons v. Fleetwood Homes of Ga.*, 227 F. Supp. 2d 1368 (S.D. Ga. 2002).

out of step with what many other states are legislating.¹⁵⁹ Pregnant women in Georgia are placed at increased risk of workplace discrimination, especially in terms of granting these women reasonable accommodations for pregnancy-related symptoms.¹⁶⁰ As such, Georgia should enact a pregnancy discrimination law that closes the federal gap and ensures that pregnant women are afforded equal protection of the laws and their right to work.

A. Adhering to the PDA's Four Criteria

The origin of the proposed Georgia law should consider careful adherence to the PDA's four criteria for determining a related medical condition.¹⁶¹ First, the condition must be gender specific to females, which addresses the very heart of the intention of the Act, protecting women.¹⁶² Nothing in the history of the PDA indicates that its intention is to protect men or that its purpose is something other than protecting the rights of women.¹⁶³ That being said, men are still given protection under Title VII against sex discrimination.¹⁶⁴ Second, for a condition to constitute a related medical condition it must be based upon the mother's status as an employee.¹⁶⁵ In a number of instances, claims have been made under the PDA that appear consistent with the Act, yet courts have ruled that the

159. See *Employment Protections*, *supra* note 121. States that have enacted pregnancy discrimination laws include Alaska, Nevada, Utah, Wyoming, Arizona, North Dakota, South Dakota, Nebraska, Oklahoma, Texas, Louisiana, Missouri, Iowa, Wisconsin, Michigan, Ohio, Kentucky, West Virginia, Pennsylvania, Maryland, New Jersey, Massachusetts, Delaware, New Hampshire, South Carolina, and Florida. *Id.* States that have enacted legislation protecting workplace lactation and breastfeeding include Minnesota, Indiana and Tennessee. *Id.* States that have enacted both types of laws include California, Oregon, Montana, Colorado, New Mexico, Illinois, Arkansas, Mississippi, Virginia, New York, Vermont, Maine, Connecticut, Rhode Island, and the District of Columbia. *Id.* States not enacting either type of law include (CHANGED from "are") Idaho, Kansas, Alabama, North Carolina, and Georgia. *Id.*

160. See Molly Edwards, *The Conceivable Future of Pregnancy Discrimination Claims: Pregnancy Not Required*, 4 CHARLESTON L. REV. 743, 751 (2010).

161. *Id.* at 750–51.

162. *Id.* at 750. In *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, the Supreme Court held that the PDA was enacted to "guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life." 479 U.S. 272, 289 (1987) (emphasis added).

163. Edwards, *supra* note 162, at 751.

164. Ruth Bader Ginsburg, *Muller v. Oregon: One Hundred Years Later*, 45 WILLAMETTE L. REV. 359, 376 (2009).

165. Edwards, *supra* note 162, at 753.

activities were for the benefit of the child rather than the mother as an employee.¹⁶⁶ To prevent an unfair advantage for female employees over males, the Act should only be applied to situations where the condition is primarily affecting the employee.

Third, a “related medical condition” is one associated with pregnancy.¹⁶⁷ The fact that “the general term ‘other related medical conditions’ follows the specific terms ‘pregnancy’ and ‘childbirth,’ [means] other related medical conditions must reference and therefore create a causal link to pregnancy, childbirth, or both.”¹⁶⁸ The Act narrowly focuses on pregnancy and pregnancy-related claims and is not intended to apply to every condition affecting women.¹⁶⁹ Finally, a related medical condition does not require favorable treatment of women protected by the Act, but only treatment equal to that given to employees with similar medical conditions.¹⁷⁰ Thus, an employer who does not provide disability benefits to employees is not compelled under the Act to provide such benefits to pregnant women.¹⁷¹

While these criteria relate to the PDA, they can serve as a guideline to Georgia in structuring a pregnancy discrimination law that carries out the PDA’s intentions. This would also help Georgia align itself with the Court’s decision in *Young*.¹⁷² The Court in *Young* made it more difficult for employers to offer a defense to PDA claims by allowing employees to prove discrimination through evidence that the employer’s policies posed a significant burden on pregnant workers.¹⁷³ If the employer’s reasons for this discriminatory conduct

166. See *Fleming v. Ayers & Ass’n*, 948 F.2d 993, 996–97 (6th Cir. 1991); *Fejes v. Gilpin Ventures, Inc.* 960 F. Supp. 1487, 1492 (D. Colo. 1997); *McNill v. N.Y. Dep’t of Corr.* 950 F. Supp. 564, 569–70 (S.D.N.Y. 1996).

167. Edwards, *supra* note 162, at 754.

168. *Id.*

169. *Id.*

170. *Id.* at 755 (“Without unequal treatment compared to a person ‘not so affected but similar in their ability or inability to work,’ a protected woman would not have a claim under the PDA.”).

171. *Id.* It was not the intention of Congress that the Act create a system of preferential treatment for women or a scheme in which women enjoyed some favored advantage under the law. *Id.* Women were simply to be treated equally under the law and placed on par with all other employees. Edwards, *supra* note 162, at 755.

172. Dunlap & Mehrman, *supra* note 145.

173. *Id.*

are not sufficient to justify the burden, this insufficiency can create something analogous to a disparate impact claim wherein the employer is held responsible for conduct even in the absence of intent to discriminate.¹⁷⁴

Georgia, like all states, is interested in protecting employers as well as pregnant women. Protecting pregnant workers is essential for families in that it allows pregnant women to maintain their income. Further, businesses benefit by keeping productive employees on the job, and women can feel comfortable about the health of the unborn when they do not feel compelled to perform work that their doctors recommend they should avoid.¹⁷⁵ The Court's decision in *Young* also places employers on more uncertain ground than in the past in dealing with pregnancy discrimination claims.¹⁷⁶ Georgia can help to fill this void with clear legislation that articulates the duties and responsibilities of employers when confronting pregnancy in the workplace.

B. Right of Accommodation

To be truly effective, however, Georgia law should go beyond the PDA and guarantee a right of accommodation for pregnant women in the workplace. To accomplish this legislation, Georgia would do well to model its legislation on the Americans with Disabilities Act.¹⁷⁷ The ADA was enacted in 1990 and amended in 2008 and exists to prohibit discrimination on the basis of disability.¹⁷⁸ Additionally, the ADA requires employers to reasonably accommodate employees with disabilities with the exception of when those accommodations

174. *Id.*

175. Allison Steinberg, *Top 10 Reasons Why Protecting Pregnant Workers Is Good for Us All*, ACLU (Dec. 15, 2015), www.aclu.org/blog/speak-freely/top-10-reasons-why-protecting-pregnant-workers-good-us-all.

176. DiMugno, *supra* note 148.

177. Mikaela Shaw, *The Resurgence of the Maternal Wall: Revisiting Accommodation Under the Pregnancy Discrimination Act*, U. CHI. LEGAL F. 565, 601 (2014); *see also* Joanna Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEORGETOWN L. J. 567, 625 (2010); Maryn Oyoung, *Until Men Bear Children, Women Must Not Bear the Costs of Reproductive Capacity: Accommodating Pregnancy in the Workplace to Achieve Equal Employment Opportunities*, 44 MCGEORGE L. REV. 515, 529–36 (2013); Widiss, *supra* note 37, at 1035.

178. Simon, *supra* note 19, at 270.

would cause an “undue hardship.”¹⁷⁹ Initially after the passage of the ADA, the Supreme Court construed the Act narrowly and required a demanding standard for someone being able to qualify as disabled.¹⁸⁰ Congress responded to this constricted interpretation by passing the ADA Amendments Act of 2008 (ADAAA).¹⁸¹ The ADAAA expanded the ADA significantly, broadening the definition of disability and making a point to extend protections to previously excluded conditions.¹⁸² The ADAAA expanded the definition of disability to include: “(A) a physical or mental impairment that substantially limits one or more major life activities . . . ; (B) a record of such impairment; or (C) being regarded as having such an impairment.”¹⁸³ Major life activities now include “performing manual tasks” and “sleeping, walking, standing, lifting, and bending.”¹⁸⁴ Moreover, the statute makes clear that the condition is not required to last longer than six months to qualify for ADA coverage.¹⁸⁵

Given that the ADAAA now covers temporary conditions, it seems natural that the ADAAA would apply to pregnancy and that the ADAAA’s accommodations requirements would be applicable to pregnant workers. This has not, however, proven to be the case. Some courts hold that pregnancy cannot be a disability because it represents a natural life process.¹⁸⁶ Other courts focus on the

179. *Id.*

180. *Toyota Motor Mfg. Ky., Inc. v. Williams*, 534 U.S. 184, 197–98 (2002) (“We 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.”); *see also Stevens v. Stubbs*, 576 F. Supp. 1409, 1414 (N.D. Ga. 1983).

181. *Simon*, *supra* note 19, at 271.

182. *Id.* *See also* Amelia Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 360–61 (2010); Nicole Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 17 (2014); Joan Williams et al., *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL’Y REV. 97, 99, 112 (2013); Michelle Travis, *Impairment as Protected Status: A New Universality for Disability Rights*, 46 GA. L. REV. 937, 938 (2012); Carol Miller, *EEOC Reinforces Broad Interpretation of ADAAA Disability Qualification: But What Does “Substantially Limits” Mean?*, 76 MO. L. REV. 43, 56 (2011); Kevin Barry, Brian East & Marcy Karin, *Pleading Disability After the ADAAA*, 31 HOFSTRA LAB. & EMP. L.J. 1, 1 (2013).

183. 42 U.S.C. §§ 12102(1)(A)-(C) (2012).

184. 42 U.S.C. § 12102(2)(A).

185. 29 C.F.R. § 1630.2(j)(1)(ix) (2012).

186. *Gudenkauf v. Stauffer Commc’ns, Inc.*, 922 F. Supp. 465, 473 (D. Kan. 1996)

voluntary nature of pregnancy as a reason to disqualify it from disability coverage.¹⁸⁷ Additionally, the EEOC provided guidance in which it stated that “conditions, such as pregnancy, that are not the result of a physiological disorder are . . . not impairments” with respect to the ADA.¹⁸⁸ At the same time, the EEOC has also stated that, while pregnancy is not a disability under the ADA, pregnancy-related impairments may be significant enough to be covered under the ADA.¹⁸⁹

C. Comparators

Despite the reluctance to bring pregnant women under the auspices of the ADA at the federal level, the ADA accommodations model should serve as a guide for Georgia in crafting legislation at the state level. A number of states have already used the ADA’s language in crafting their own pregnancy discrimination laws.¹⁹⁰ There are also compelling reasons why the ADA’s language and structure would be a good model for Georgia. First, many women require accommodations in the workplace to continue working during pregnancy. In particular, women in physically demanding jobs are most likely to lose their jobs after becoming pregnant.¹⁹¹ Women most likely to be affected by lack of accommodations on the job are

Pregnancy is a physiological condition, but it is not a disorder. Being the natural consequence of a properly functioning reproductive system, pregnancy cannot be called an impairment. All of the physiological conditions and changes related to a pregnancy are also not impairments unless they exceed normal ranges or are attributable to some disorder.

Id.

187. See, e.g., *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 136 (1976). See also *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 553 (7th Cir. 2011).

188. Section 1630.2(h) Physical or Mental Impairment, Appendix to Part 1630—Interpretive Guidance on Title I of the Americans With Disabilities Act, 29 C.F.R. pt. 1630, app. (2011).

189. *Simon*, *supra* note 19, at 273. Courts have been split in recognizing the EEOC reasoning. In *Price v. UTI*, *Nayak v. St. Vincent Hospital*, and *Alexander v. Trilogy Health Services*, courts have found in favor of pregnancy and disability discrimination claims and have validated the EEOC’s line of thinking. In other instances, however, courts have refused to follow the EEOC’s lead. See *Price v. UTI*, No. 4:11-CV-1428 CAS, 2013 WL 798014, at *3 (E.D. Mo. Mar. 5, 2013); *Nayak v. St. Vincent Hospital*, No. 1:12-CV-0817-RLY-MJD, 2013 WL 121838 at *3 (S.D. Ind. Jan. 9, 2013); *Alexander v. Trilogy*, No. 1:11-CV-295, 2012 WL 5268701 at *11–12 (S.D. Ohio Oct. 23, 2012).

190. See *supra* Part III.

191. *Cox*, *supra* note 26, at 453.

those who work in historically male professions and women in low-income employment.¹⁹² In these occupations, women are often placed in the unenviable position of choosing between their health and the health of their unborn children or their careers. Accommodations for such women during pregnancy are imperative.

Second, contrary to the fears of many feminists that characterizing pregnancy as a disability would stigmatize pregnant women and make them appear less capable of doing their jobs, the ADAAA's recent expansion would create just the opposite perception. If Georgia embraces the ADA's accommodations language for pregnant women in the workplace, there is little fear that it would be characterizing pregnant women as disabled and not capable of performing their work.¹⁹³ Rather than drawing renewed attention to pregnancy's physical limitations, the ADA's accommodations framework would simply place pregnancy on the same footing as "diabetes, arthritis, asthma, and back problems that impose short-term lifting restrictions."¹⁹⁴ Pregnancy becomes just one more physical condition that may necessitate accommodations for certain types of jobs. It imposes no more of a stigma than other conditions creating a short-term disability in need of accommodation.

Third, Georgia's use of the ADA accommodations model for its legislation provides a useful comparator for litigation that requires

192. *Id.*

Rigid work rules restrict workers' ability to consume water, vary their working positions, and curtail repetitive, physically demanding activities. In these industries, women able to fully conform to employer expectations oriented around male norms during the rest of their work lives predictably lose their jobs when they become pregnant. This job loss not only directly reduces the number of women in predominately male occupations but also indirectly contributes to occupational sex segregation by discouraging other women from pursuing jobs they risk losing when they become pregnant.

Id.

193. *Id.* at 468–69.

194. *Id.* at 472

[By way] of comparison, whereas over 40 percent of the population will become pregnant at some point in their lives, less than 2 percent of the population is pregnant each year. Accordingly, in any given year, the number of persons with diabetes and hypertension (as well as the probably larger number of persons with back problems) eligible for ADA accommodations will likely eclipse the number of eligible pregnant workers.

Id.

assessment of accommodations needs for pregnant women. For example, “many pregnant workers who are denied accommodations” would be able to “point to similarly impaired employees with ADA accommodations as comparators who were treated better.”¹⁹⁵ Moreover, the expansion of pregnancy as a comparator to ADA-covered employees is crucial for maintaining the integrity of the PDA itself.¹⁹⁶ Without including pregnancy as a disability, the group of comparators for PDA plaintiffs would shrink to an inconsequential amount. Plaintiffs would then find it virtually impossible “to identify a ‘large percentage’ of non-pregnant, impaired workers who were treated better because those workers would be covered by the ADA, and therefore unavailable.”¹⁹⁷ Pregnant workers would effectively become the only temporarily impaired employees not subject to accommodations in the workplace. This result falls far short of the demand of courts that pregnant employees be treated equally to other workers and undermines the purpose of the PDA. This result cannot be what Georgia intends and, therefore, necessitates the implementation of the ADA accommodations model into pregnancy discrimination legislation.

On the other hand, Georgia is a right-to-work state and is known for having a business friendly environment.¹⁹⁸ Legislation following the ADAAA accommodations model has been proposed in Georgia but has not been passed.¹⁹⁹ Part of the reason for the lack of passage is continued concerns on the part of businesses about the costs of

195. Simon, *supra* note 19, at 276. (“Given courts’ traditional reluctance to view pregnancy-related impairments as disabilities, as well as the Supreme Court’s emphasis in *Young* on the centrality of the *McDonnell Douglas* framework to proving pregnancy discrimination claims, this expansion of the pool of comparators available to PDA claimants may prove to be critical.”).

196. Widiss, *supra* note 37, at 1024–25.

197. Simon, *supra* note 19, at 276. Since the ADAAA was enacted, no court has explicitly addressed whether PDA plaintiffs may use ADA-covered workers as comparators. *Id.* Some early cases suggest that the comparison is inappropriate and some scholars have agreed with this assessment. *Id.* But most of these judgments were taken pre-*Young* and have not been update given the Court’s ruling in that case. *Id.* To date, no case has explicitly stated that ADA comparators were never available to PDA plaintiffs and other cases suggest the comparisons are completely appropriate. *Id.*

198. See *Georgia Right to Work Laws*, FINDLAW.COM, statelaws.findlaw.com/georgia-law/georgia-right-to-work-laws.html (last visited Dec. 15, 2015); *America’s Top States for Business 2014*, CNBC, www.cnbc.com/2014/06/24/americas-top-states-for-business.html (last visited Dec. 15, 2015).

199. S.B. 417, 152d Gen. Assemb., Reg. Sess. (Ga. 2013).

requiring accommodations for pregnant women and the desire for independence and autonomy in structuring business operations and handling personnel issues.²⁰⁰ Put simply, businesses tend to resist further regulations on their practices rather than to embrace them. Moreover, many businesses still balk at the idea of making accommodations for a condition that is largely a product of personal choice, and see such accommodations as being unfair to other non-pregnant workers.²⁰¹ Therefore, the path to accommodations for pregnant women in Georgia will likely remain an uphill struggle.

CONCLUSION

The PDA intended to provide broad protections for pregnant women in the workplace by ending pregnancy discrimination and providing women with legal avenues to pursue claims for alleged discriminatory activity by employers. While the PDA advanced the cause of equality in the workplace to a large extent, many states have gone beyond the PDA to incorporate accommodations legislation that mandates employers to provide reasonable accommodations to pregnant employees. Georgia, thus far, has been reluctant to join this growing list and has left pregnant employees without the benefit of the full protection of the law. As such, Georgia should pass accommodation legislation to ensure the equal treatment of pregnant women in the workplace.

Georgia has a vested interest in protecting the health and wellbeing of working mothers, while recognizing the financial obligations many women have requiring them to continue working throughout their pregnancies. In an ideal situation, women would have the financial resources to choose whether they remain employed during pregnancy. The time has come for Georgia to recognize that pregnant workers often cannot afford to be out of work and most certainly cannot risk losing their jobs. Women simply should not be forced to choose between being pregnant and being employed. Reasonable

200. Cox, *supra* note 26, at 477.

201. *Id.* at 481.

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accommodations legislation ensures that women are not placed in this position. Further, pregnant employees would be guaranteed treatment equal to other temporarily disabled employees. Such accommodations are currently not guaranteed to pregnant women in Georgia and Georgia women demand and deserve equal employment options under the law.