NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

TESTIMONY OF EMILY J. MARTIN
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NATIONAL WOMEN'S LAW CENTER
ON DISCRIMINATION ON THE BASIS OF PREGNANCY AND CAREGIVING
TO THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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My name is Emily Martin, and I am the Vice President and General Counsel of the National Women's Law Center. Since 1972, the Center has been involved in virtually every major effort to secure and defend women's legal rights. I appreciate your invitation to testify before the Commission on the issue of discrimination on the basis of pregnancy and caregiving.

Before Congress passed the Pregnancy Discrimination Act of 1978[1] (PDA), it was common for employers to categorically exclude pregnant women from the workforce or impose arbitrary restrictions on the place, time, and manner of their work.[2] The PDA changed this forever by guaranteeing two substantive rights: (1) the right not to be treated adversely because of pregnancy, childbirth, or related medical conditions; and (2) the right to be treated the same as other employees "not so affected but similar in their ability or inability to work" with respect to all aspects of employment, including benefits, insurance, and leave policies.[3] The Family and Medical Leave Act has enhanced women's ability to remain in the workforce as mothers, by guaranteeing covered employees twelve weeks of unpaid, job-protected leave for the birth of a child and for serious medical conditions, including conditions caused by pregnancy or childbirth.[4]

Through these guarantees, the PDA has been tremendously successful in ensuring that pregnancy does not force women out of work. Today, women make up about half the workforce.[5] The past forty years have seen a significant shift, as more women have continued to work while they are pregnant, through later stages of pregnancy. For example, two-thirds of women who had their first child between 2006 and 2008 worked during pregnancy (compared to a little more than half of women who had their first child between 1971 and 1975), and 88 percent of these first-time

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[1] Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified at 42 U.S.C. § 2000e(k)).
[2] *See generally* Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEORGETOWN L. J. 567, 595-600 (2010).
[3] 42 U.S.C. § 2000e(k).
[4] 29 U.S.C. § 2601 *et seq.*
[5] U.S. Congress Joint Economic Committee, *Women and the Economy 2010:25 Years of Progress But Challenges Remain*, Majority Staff of the Joint Economic Committee (2010), available at: http://jec.senate.gov/public/?a=Files.Serve&File_id=8be22cb0-8ed0-4a1a-841b-aa91dc55fa81.

mothers worked into their last trimester (compared to 64 percent of working first-time mothers between 1971 and 1975).[6] The great majority of women also return to the workforce after pregnancy: in 2010, 71 percent of mothers (almost 28 million women) were in the labor force.[7]

Nevertheless, pregnant women still face challenges on the job. Indeed, charges of pregnancy discrimination filed with the Commission have risen markedly over recent years, from 4,160 in FY 2000 to 6,119 in FY 2010.[8] Published court decisions suggest that pregnancy discrimination claims are especially likely to arise in jobs that require rigorous physical activity like running, lifting, moving, standing, or repetitive motion—activities that may pose challenges during pregnancy. Many of these pregnancy discrimination cases arise in jobs traditionally held by men, including law enforcement and trucking, while others come out of female-dominated, often low-wage work like nursing assistance, cleaning, and cashier positions.

The barriers that pregnant women continue to face on the job function to exclude women from many high-paying positions traditionally held by men—jobs that already are often particularly difficult for women to enter for reasons ranging from harassment to steering and where women are particularly likely to confront gender stereotypes. They also take a particular toll on low-income women, who are more likely to work in physically demanding jobs that offer limited flexibility.

Mothers' earnings are crucial to their families' financial security. In 2010, 13.9 million married couples with children relied on both parents' earnings, representing 58.1 percent of all married couples with children.[9] Forty percent of working mothers were their family's primary breadwinner that year.[10] When women face a physical conflict between work and childbearing, if the PDA does not offer a solution, they will often lose their job, and their families will suffer a loss of income at the very moment financial needs increase.

Today, I will be discussing trends in the PDA cases brought by women who sought temporary modification of job duties or employment policies because of pregnancy, childbirth, or related

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[6] U.S. Census Bureau, U.S. Dep't of Commerce, *Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008* 4, 6 (2011).

[7] NWLC Calculations from U.S. Census Bureau, America's Families and Living Arrangements Survey: 2011, Tables FG1, FG5 One parent, FG5 Two parent, and UC3, available at http://www.census.gov/population/www/socdemo/hh-fam/cps2011.html (last visited Feb. 7, 2012).

[8] U.S. Equal Employment Opportunity Commission, *Pregnancy Discrimination Charges: EEOC & FEPAs Combined: FY 1997 - FY 2011*, at http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm.

[9] NWLC calculations from U.S. Census Bureau, America's Families and Living Arrangements Survey: 2011, Table FG2: Married Couple Family Groups, by Family Income, and Labor Force Status of Both Spouses: 2011, available at http://www.census.gov/population/www/socdemo/hh-fam/cps2011.html (last visited Dec. 7, 2011). Family households are used in this figure to be consistent with the statistics on single mothers.

[10] Maria Shriver & the Center for American Progress, THE SHRIVER REPORT: A WOMAN'S NATION CHANGES EVERYTHING 32 (2009).

medical conditions; the PDA's promise for ensuring equal treatment of these women's needs;, and the importance of the EEOC issuing further guidance regarding the scope and meaning of the PDA to help clarify the proper interpretation of the law moving forward.

The PDA and Availability of Modified Work Duty

Women in physically demanding jobs such as law enforcement may seek light duty assignments, modifying their usual job duties, at some point in their pregnancy. Many workplaces offer light or modified duty assignments only to employees who seek such accommodations as the result of an on-the-job injury (often in order to save workers' compensation costs) and thus refuse to modify job duties on account of pregnancy. But the language of the PDA requires equal treatment for pregnant women and those "similar in their ability or inability to work," thus defining the sole relevant criterion for comparison to be ability to do the job. "As such, the PDA explicitly alters the analysis to be applied in pregnancy discrimination cases. While Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated 'in all respects,' . . . the PDA requires only that the employee be similar in his or her 'ability or inability to work.'"[11] This plain language prohibits employers from creating criteria that deny accommodations to pregnant women when accommodations are provided to those similar in their ability or inability to work.[12]

While the majority of circuits have not ruled on the issue, some courts have found restricting availability of light duty to employees with on-the-job injuries to violate the PDA, when evidence demonstrated that the policies were inconsistently applied.[13] For example, in *Adams v. Nolan*,[14] the Eighth Circuit held plaintiff established discrimination in violation of the PDA when she showed that, despite a policy limiting light duty assignments to officers with on the job injuries, some officers with off-the-job injuries or conditions other than pregnancy in fact were given such assignments. The court in *Sumner v. Wayne County*,[15] found that a police officer who took time off to give birth and was fired for violating her department's policy of no leave for probationary employees made a prima facie case of discrimination when she identified a male officer whose probationary period was extended after receiving an on-the-job injury. The court explained:

> Contrary to defendants' arguments, the distinction that [the male officer's] temporary disability was as a result of an injury sustained on the job, while Sumner's was as a result of her pregnancy (presumably sustained while she was off-duty), is not material. The proper focus under the comparison prong is whether the employees are similar in their ability or inability to work, regardless of the source of the injury or illness.[16]

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[11] *Ensley-Gaines v. Runyon*, 100 F.3d 1220 (6th Cir. 1996) (internal citation somitted).
[12] *See* Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J. L. & FEM. 15, 36 (2009).
[13] *See Ensley-Gaines*, 100 F.3d at 1226-27.
[14] 962 F.2d 791 (8th Cir. 1992).
[15] 94 F. Supp. 2d 822 (E.D. Mich. 2000).
[16] *Id.* at 826.

The *Sumner* court further held that the police department's rebuttal—that it was simply enforcing its policies regarding on-the-job injuries and leave in a pregnancy-blind, nondiscriminatory way—was unavailing, explaining again that under the PDA, distinctions between on-the-job injuries and off-the-job injuries are immaterial.[17]

Similarly, in *Lochren v. Suffolk County*,[18] six female police officers challenged a police department policy limiting light duty to officers with on-the-job injuries. At trial, a jury found the policy to constitute unlawful disparate treatment, in part based on evidence that after adoption of the "on-the-job" requirement, officers with non-job-related disabilities other than pregnancy were allowed to remain in the light duty positions they held. A claim that the same policy was a pretext for discrimination when applied to the county's park police was also allowed to proceed to a jury in *Germain v. County of Suffolk.*[19]

However, a number of courts have ignored the language of the PDA and termed on-the-job injury requirements for light duty a "pregnancy blind" rule, concluding that pregnant workers are not similarly situated to workers injured on the job in workplaces that have adopted such rules. For example, in *Reeves v. Swift Transportation*,[20] Amanda Reeves, a pregnant truck driver, was instructed by her obstetrician not to lift more than 20 pounds and sought light duty work as her usual duties required her to lift up to 75 pounds. Her employer terminated her, as it offered light duty only to those injured on the job. The Sixth Circuit affirmed the grant of summary judgment to the employer; rejecting the argument that the language of the statute requires that analysis of equal treatment focus on capacity to work, the court instead applied a judicial gloss common in PDA cases, stating that "the Act merely requires employers to 'ignore' employee pregnancies."[21] According to the court, in the absence of evidence that the on-the-job injury requirement was a pretext for discrimination against pregnant workers, the PDA was not offended.[22] Some courts have gone even further, finding that pregnant workers are not similarly situated to workers with on-the-job injuries, short circuiting a plaintiff's case at the prima facie stage[23] and leaving her with no opportunity even to introduce evidence of pretext to rebut an employer's asserted nondiscriminatory rationale.[24]

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[17] *Id.* at 826-27.
[18] No. 01-3925, 2008 WL 2039458 (E.D.N.Y. 2008).
[19] No. 07-CV-2523 (ADS)(ARL), 2009 WL 1514513 (E.D.N.Y. May 29, 2009); *see also E.E.O.C. v. Horizon/CMS Healthcare Corp.*, 220 F.3d 1184 (10th Cir. 2000) (finding unlawful discrimination when pregnant nurse assistant was denied modified duty based on on-the-job injury policy when evidence showed non-pregnant employees with off-the-job injuries were treated more favorably than plaintiff).
[20] 446 F.3d 637, 641 (6th Cir. 2006).
[21] *Id.* at 641.
[22] *Id*. at 641-43.
[23] *See genera*lly *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).
[24] *See Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1313 (11th Cir. 1999); *Urbano v. Cont'l Airlines*, 138 F.3d 204, 206 (5th Cir. 1998); *but see Horizon/CMS Healthcare Corp.*, 220 F.3d at 1195 n.7 ("If a plaintiff is compared only to non-pregnant employees injured off the job, her case would be 'short circuited' at the prima facie stage . . . The better approach would be to hold that

These courts have permitted employers to treat pregnant women differently from those workers similar in their ability or inability to work based on employer-selected criteria irrelevant to the statutorily required analysis. The effect of these rulings is to force women out of physically demanding workplaces even when they could continue to do their job with slight modifications. Women must then go onto unpaid leave for the duration of their pregnancies—which may cause them to lose not only income, but also health coverage, seniority, or promotion rights—or be forced from their job altogether. This is in conflict with both the text of PDA and one of its primary purposes--"to prohibit employer policies which force women who become pregnant to stop working regardless of their ability to continue."[25]

Accommodation and Disparate Impact Theory under the PDA

The first clause of the PDA makes clear that Title VII's prohibition of discrimination on the basis of sex includes discrimination on the basis of "pregnancy, childbirth, or related medical conditions," thus permitting pregnancy discrimination claims to proceed under any theory available to challenge sex discrimination under Title VII, including disparate impact. Disparate impact theory, which ensures that employers cannot adopt policies that amount to a "built-in headwind" for a protected class in the absence of business necessity,[26] holds the potential to reshape work rules that harm pregnant women when alternative policies that would serve an employer's business needs equally well are available.

For example, in *Lochren v. Suffolk County*,[27] the plaintiffs prevailed at trial not only on their disparate treatment claim, but also their disparate impact challenge to the Suffolk County police department's restriction of light duty to those with on-the-job injuries. Plaintiffs showed that prior to the adoption of the on-the-job injury requirement, pregnant women had been more likely to use light duty than other officers. They also showed that women had been affected more than by the restriction of light duty to those with on-the-job injuries. In a separate case, a jury found that the same county policy as applied to park police officers had an unlawful disparate impact.[28] Similarly, in *Lehmuller v. Incorporated Village of Sag Harbor*,[29] the court permitted plaintiff to proceed in her disparate impact challenge to a policy restricting light duty to those with on-the-job injuries.

Courts have found that other workplace policies may also constitute pregnancy discrimination under disparate impact theory. For example, in *Garcia v. Women's Hospital of Texas*,[30] the Fifth Circuit held that a plaintiff nurse challenging a hospital's 150 pound lifting requirement would establish a prima facie case of disparate impact if she introduced medical testimony that no

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a plaintiff has satisfied the fourth element of her prima facie case by showing that she was treated differently than a non-pregnant, temporarily disabled employee.")

[25] S. Rep. No. 331, 95th Cong, 2d Sess. 6 (1978).

[26] *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971),

[27] No. 01-3925, 2008 WL 2039458 (E.D.N.Y. 2008).

[28] *Germain v. County of Suffolk*, No. 07-CV-2523 (ADS) (ARL), 2009 WL 1514513 (E.D.N.Y. May 29, 2009).

[29] 944 F. Supp. 1087 (E.D.N.Y. 1996).

[30] 97 F.3d 810, 813 (5th Cir. 1996).

pregnant woman would advised by her physician to lift 150 pounds, even in the absence of statistical evidence demonstrating the policy's impact. Some cases have also found that inadequate leave policies may violate the PDA because of their disparate impact. For example, the D.C. Circuit reversed summary judgment for the employer in a disparate impact claim brought by an administrative assistant who was fired for taking a maternity leave of longer than ten days when workplace policy imposed a ten-day maximum on any leave.[31] The court concluded, "the ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age—an impact no male would ever encounter."[32] These holdings are consistent with Commission regulations, which state, "Where the termination of an employee who is temporarily disabled is caused by an employment policy under which insufficient or no leave is available, such a termination violates the Act if it has a disparate impact on employees of one sex and is not justified by business necessity."[33]

Despite this regulation and these precedents, however, other courts have demonstrated hostility to applying disparate impact analysis in the context of pregnancy, characterizing such claims as bids for preferential treatment, at least when applied to rules relating to attendance or leave. For example, in *Dormeyer v. Comerica Bank-Illinois*,[34] the Seventh Circuit rejected the disparate impact challenge to an employer's attendance policy by a plaintiff who had been fired for tardiness due to morning sickness, holding that such a claim would constitute "subsidizing a class of workers . . . and the concept of disparate impact does not stretch that far."[35]

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[31] *Abraham v. Graphic Arts Int'l Union*, 660 F.2d 811 (D.C. Cir. 1981).

[32] *Id.* at 819. *See also Millller-Wohl Co. v. Comm'r of Labor & Indus.*, 692 P.2d 1243, 1251-52 (Mont. 1984) (concluding, in the course of upholding a state law requiring leave for pregnancy, that an employer's no-leave policy for employees during their first year of work had a disparate impact on women), vacated and remanded, 479 U.S. 1050 (1987), judgment and opinion reinstated, 744 P.2d 871 (Mont. 1987); *Scherr v. Woodland Sch. Community Consol. Dist. No. 50*, 867 F.2d 974, 982 (7th Cir. 1988) (reversing district court's summary judgment against plaintiff on disparate impact challenge to leave policy, stating that "rather than insisting on proof of the hypothetical non-pregnant teacher who would combine paid sick leave with unpaid general leave, the district court should look to the proof of the needs of pregnant teachers and compare that to the actual coverage"); *E.E.O.C. v. Warshawsky*, 768 F. Supp. 647 (N.D. Ill. 1991) (holding that employer's policy of discharging all first-year employees who requested long-term sick leave had a disproportionately negative effect on women because of their capacity to become pregnant and was not justified by business necessity).

[33] 29 C.F.R. § 1604.10(c).

[34] 223 F.3d 579, 583 (7th Cir. 2000).

[35] *See also, e.g.*, *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 861 (5th Cir. 2002) ("If *Garcia* is taken to its logical extreme, then every pregnant employee can make out a *prima facie* case against her employer for pregnancy discrimination, unless the employer grants special leave to all pregnant employees. This is not the law--the PDA does not require preferential treatment of pregnant employees and does not require employers to treat pregnancy related absences more leniently than other absences."); *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) ("[D]isparate impact is a permissible theory of liability under the Pregnancy Discrimination Act, as it is under other provisions of Title VII. . . . But, properly understood,

When courts summarily reject disparate impact claims on the theory that the PDA requires only equality of treatment and plaintiffs pressing such claims in fact seek favoritism, they ignore the Supreme Court's holding in *California Federal Savings & Loan Ass'n v. Guerra* that "Congress intended the PDA to be a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise."[36] They also ignore the intent of disparate impact theory, which is meant to restructure workplaces when unnecessary rules or practices act to force workers out based on a protected characteristic. Together, these two principles mean that workplace accommodation of pregnancy is sometimes necessary to avoid discrimination, even in the absence of previous accommodation of a similarly situated comparator.

The Interaction of the PDA and the Americans with Disabilities Act

The PDA requires employers to make accommodations for pregnant women to the extent they accommodate other employees "similar in their ability or inability to work." "It is today a settled principle that the PDA and Title VII are violated when pregnant employees are denied privileges afforded non-pregnant temporarily disabled employees."[37] While this standard permits employers in many circumstances to refuse to modify work rules for pregnant women as long as they also refuse to modify rules for those with comparable physical restrictions,[38] since the 2008 ADA Amendments Act (ADAAA),[39] employers are legally obligated to accommodate a range of permanent and temporary disabilities comparable to typical pregnancy symptoms and restrictions. The ADAAA has changed the rules of the workforce, expanding employers' accommodation duty to reach impairments such as temporary back injuries that leave employees unable to lift more than 20 pounds, or conditions that cause individuals to experience shortness of breath and fatigue when walking reasonable distances. In other words, employers are today legally required to accommodate many who are "similar in their ability or inability to work" to women experiencing typical pregnancy symptoms. In such situations, the PDA requires that the same accommodations be made to pregnant women. That is, the PDA's requirement that pregnant women be treated like those similar in ability to work incorporates the ADAAA's requirement to accommodate impairments such as a temporary back injury resulting in a 20-pound lifting restriction,[40] or a leg condition that precludes standing for more than two hours without significant pain,[41] or hypertension.[42]

Courts have not yet addressed the interaction of the amended ADA and the PDA, but two recent district court opinions have broadly misconstrued the relevance of the ADA to pregnancy discrimination claims. These two courts refused to consider individuals accommodated under the ADA as appropriate comparators for PDA analysis, precisely *because* employers were

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disparate impact as a theory of liability is a means of dealing with the residues of past discrimination, rather than a warrant for favoritism.").

[36] 479 U.S. 272, 280 (1987).

[37] *Byrd v. Lakeshore Hosp.*, 30 F.3d 1380 (11th Cir. 1994).

[38] As discussed above, however, employers may still have to make such modifications if necessary to avoid disparate impact.

[39] Pub. L. No. 110-325, 122 Stat. 3553 (2008).

[40] 29 C.F.R. pt. 1630 app. § 1630.2(j)(1)(vii).

[41] *Id.* at §1630.2(j)(4).

[42] *Id.* at § 1630.2(j)(1)(vii).

legally obligated to accommodate these individuals on account of their disabilities. Such an analysis ignores the text and purposes of the PDA, and, particularly in light of the expansion of the ADA's coverage, threatens a perverse result in which a wide swath of individuals "similar in their ability or inability to work" to pregnant women are deemed to be not similarly situated to pregnant women as a matter of law.

In *Serednyj v. Beverly Healthcare LLC*,[43] the district court considered the PDA claim of Victoria Serednyj, who was terminated from her work in a nursing home after her employer refused to adjust her work duties so she could avoid moving heavy objects as instructed by her doctor following pregnancy complications. The nursing home's policy permitted such "light duty" modifications for employees with non-work-related conditions only "'as one form of reasonable accommodation under the Americans with Disabilities Act (ADA) or comparable state law, where medically necessary for qualified individuals with disabilities to perform essential job functions'" and stated that no other limited duty was permitted for non-work-related injuries or conditions. The court characterized this policy as "lawful on its face" and "pregnancy blind."[44] It concluded that Ms. Serednyj failed to make a prima facie case of pregnancy discrimination because she could not point to a comparator offered an accommodation who was "comparable to her in all material respects."[45] According to the court, "material points of comparison" included "disability within the meaning of the ADA."[46] The court then rejected a comparator identified by Ms. Serednyj because "Ms. Serednyj alleges [the comparator] was disabled, and the ADA presumably would apply if she were disabled."[47] In other words, the court first accepted without analysis the lawfulness of a policy restricting accommodations to those required by the ADA, without considering whether the PDA would be offended if accommodated employees were similar in their ability or inability to work to women affected by pregnancy, childbirth, or related medical conditions. Next, the court compounded this error, holding that individuals accommodated under the ADA were categorically impermissible comparators for purposes of establishing a prima facie case of pregnancy discrimination.

In *Young v. United Parcel Service, Inc.*,[48] the court adopted a similar holding, again with little analysis, finding no problem under the PDA with a policy that restricted light duty to employees suffering "a qualifying disability within the meaning of the ADA which prevents him/her from being able to perform some aspect of his/her job."[49] Here too, the court characterized the policy as "pregnancy-blind" and found that Young (a UPS driver who was restricted from lifting more than 20 pounds during her pregnancy) failed to make out a prima facie case of discrimination because the comparators identified by Young who had received light duty accommodations when they were physically unable to perform some aspects of their job were accommodated under the ADA, while Young was ineligible for ADA accommodation.[50]

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[43] 2010 WL 1568606 (N.D. Ind. Apr. 16, 2010).
[44] *Id.* at *7.
[45] *Id.* at *9.
[46] *Id.*
[47] *Id.* at *10.
[48] 2011 WL 65321 (D. Md. Feb. 14, 2011).
[49] *Id.* at *2.
[50] *Id.* at *13.

Neither the language nor the purpose of the PDA supports the approach of these courts. Employers' legal duty to accommodate employees with qualifying disabilities does not shield those employees from comparison to women affected by pregnancy and childbirth for PDA purposes. Rather, the comparison required by the PDA ensures that the duty to accommodate employees with disabilities necessarily also reaches women suffering similar impairments as a result of pregnancy, childbirth, or related medical conditions, because the PDA guarantees such equality of treatment. There is no basis in law or logic for ignoring employees with comparable physical restrictions in determining equality of treatment under the PDA simply because an employer also has legal obligations with regard to these employees.

The ADAAA has expanded employer obligations to accommodate to reach employees with even temporary disabilities that substantially limit activities such as standing, lifting, or bending. Excluding from comparison all employees who are accommodated pursuant to the ADA would thus make it impossible as a matter of law for many employees affected by pregnancy, childbirth, or related medical conditions to demonstrate that an employer has accommodated employees with analogous temporary disabilities. This is precisely because the great majority of such accommodations now arguably come within the ADA's scope. Expansion of protections for employees with disabilities was never intended and should not be interpreted to render the PDA impotent and harm pregnant workers in this way.

More fundamentally, *McDonnell Douglas* does not require a pregnant employee to identify an actual, similarly situated, nonpregnant employee who was treated better than her in order to make her case under the PDA. Such a comparison is only one method among many available for raising an inference of discrimination.[51] If a pregnant employee has a physical condition, like a lifting restriction, similar to a condition that must be accommodated under the ADA, the ADA duty to accommodate such a restriction and the presumption that an employer will comply with the ADA should support an inference of discrimination if the employer denies such an accommodation to the pregnant employee. Even in the absence of an employee with a disability

[51]For example, repeated remarks reflecting gender stereotypes about pregnant women and mothers may support such an inference, even in the absence of any employee who was not pregnant but otherwise similarly situated to the plaintiff and treated better. *See, e.g.*, *McDonnell Douglas,* 411 U.S. at 802 n.13 (noting that "facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations"); *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467 (2d Cir. 2001) (holding that courts find an inference of discriminatory intent in many circumstances including, but not limited to "the employer's continuing, after discharging the plaintiff, to seek applicants from persons of the plaintiff's qualifications to fill that position; or the employer's criticism of the plaintiff's performance in ethnically degrading terms; or its invidious comments about others in the employee's protected group; or the more favorable treatment of employees not in the protected group; or the sequence of events leading to the plaintiff's discharge"); *cf. Back v. Hastings on Hudson Union Free Sch. Dist.*, 365 F.3d 107, 121 (2d Cir. 2004) (in Equal Protection Clause case, finding that repeated discriminatory remarks about mothers supported inference of sex discrimination against pregnant employee even in the absence of a comparator).

similar to the pregnant woman at issue who has in fact received these accommodations, duties to accommodate under the ADA impose comparable duties under the PDA.

Recommendations and Conclusion

Given that this area of the law is still developing, and particularly in light of the recent enactment of the ADAAA and its potential impact for treatment of pregnancy in the workplace, it is critically important that the Commission continue to ensure that workplaces are open to pregnant and caregiving women, by providing interpretive guidance and vigorously enforcing these protections:

- In 2009, the Commission recommended as a best practice that employers provide modified job duties in order to accommodate pregnancy.[52] It is of great importance that the Commission augment this recommendation by specifically setting out how the PDA applies to policies restricting light or modified duty assignments to employees who have sustained on-the-job injuries. This guidance should track the text of the PDA and its identification of ability to do the job as the sole relevant inquiry in determining whether women affected by pregnancy, childbirth, or related medical conditions have been treated equally to their co-workers.

- There is a great need for guidance from the Commission making clear that while ability to do the job is the relevant criterion for comparison under the PDA, identifying a nonpregnant comparator who received better treatment than a pregnant employee is not the only method for raising an inference of discrimination. Because pregnancy is a unique condition, it will often be difficult or impossible, particularly in small establishments, to identify a comparator similar to plaintiff in all relevant respects. In many workplaces, evidence of stereotypes regarding pregnancy and pregnant workers, or of departure from employer policies in treatment of pregnant or childbearing women, will be more readily available than comparator evidence and is at least as probative of discrimination.

- Commission guidance applying disparate impact analysis to pregnancy discrimination is necessary to rebut the suggestion by some courts that amending workplace rules to avoid a disparate impact on the basis of pregnancy or childbirth amounts to prohibited preferential treatment. Application of the PDA's antidiscrimination principle in some instances requires modification of rules that serve no business necessity in order to accommodate pregnancy and childbirth; the Commission should provide needed clarity as to the standards courts should apply in these cases.

- The Commission has not addressed the treatment of pregnancy under the ADA since the 2008 amendments. Given the recent misinterpretations and their troubling implications, there is a great need for the Commission to set out guidance explaining the interaction of the PDA and the amended ADA. This guidance should make

[52] U.S. Equal Employment Opportunity Comm'n, *Employer Best Practices for Workers with Caregiving Responsibilities* (2009).

explicit that in many instances employers' duty to accommodate under the amended ADA will, through the PDA's requirement of equality of treatment, extend to a duty to accommodate women who require adjustments to work rules as a result of pregnancy or childbirth. It should walk through the relevant comparisons between, for example, the ADA duty to accommodate a back injury requiring a 20-pound lifting restriction and the concurrent duty under the PDA to accommodate a 20-pound lifting restriction stemming from pregnancy.

- Enforcement of the PDA's protection against disparate impact discrimination, of the PDA's guarantee of access to light duty provided to other employees similar in their ability to work, and of the PDA's protection of the rights of pregnant workers comparable to those to whom an accommodation duty is owed under the ADAAA is also crucial. Enforcement efforts should be coordinated with the Department of Labor, as discrimination on the basis of pregnancy or caregiving may also take the form of retaliation for exercising rights protected under the Family and Medical Leave Act or the Affordable Care Act's lactation breaks provision.

Thank you for the opportunity to speak with you about this important topic today. I look forward to your questions.