NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

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ON DISCRIMINATION ON THE BASIS OF PREGNANCY AND CAREGIVING RESPONSIBILITIES
TO THE U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

MARCH 1, 2012

In response to questions posed by the Chair and the Commissioners at the February 15, 2012 meeting on Unlawful Discrimination Against Workers on the Basis of Pregnancy and Caregiving Responsibilities, I am submitting the following supplemental testimony, further setting out the legal analysis regarding the interaction between the ADA Amendments Act of 2008 and the Pregnancy Discrimination Act and the obligations that employers have to accommodate pregnant workers who are experiencing symptoms or impairments similar to impairments that an employer would have an obligation to accommodate under the ADA, as I described at the meeting. Thank you for the opportunity to provide this additional information.

I. The Pregnancy Discrimination Act Requires Employers to Treat Women Affected by Pregnancy, Childbirth, or Related Medical Conditions at Least as Well as Those Employees Similar in Their Ability or Inability to Work Who Are Accommodated Under the Americans with Disabilities Act.

The Pregnancy Discrimination Act (PDA) states that discrimination on the basis of pregnancy, childbirth, or related medical conditions is a form of sex discrimination and further provides 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." Through this language, the Supreme Court has noted, the PDA "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions."[1] As a result, "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."[2] The principle that the effects of pregnancy should be treated no worse than any other condition when they impair an employee's ability to work was a central purpose behind the PDA.[3] The PDA thus requires employers to make accommodations for those women affected by pregnancy, childbirth, and related medical conditions, including modifications of

[1] *Newport News Shipbuilding Co. v. E.E.O.C.*, 462 U.S. 669, 684 (1983).
[2] *Byrd v. Lakeshore Hosp.*, 30 F.3d 1380 (11th Cir. 1994).
[3] H.R. No. 948, 95th Cong. 2, *reprinted in* 1978 U.S. Code Cong. & Admin. News, 4749-50 (Congress' intent in enacting the PDA was to codify EEOC guidelines that required employers to "treat disabilities caused or contributed by pregnancy, miscarriage, abortion, childbirth and recovery therefrom as all other temporary disabilities."); *id.* at 4753 ("This bill would prevent employers from treating pregnancy, childbirth, and related medical conditions in a manner different from their treatment of other disabilities.").

work rules and procedures, when they accommodate and make modifications for other employees similar in ability or inability to work.[4]

This obligation gains new relevance in light of the ADA Amendments Act of 2008 (ADAAA), which has significantly expanded the universe of individuals with disabilities to whom an employer owes a reasonable accommodation. In so doing, it has changed the rules of the workforce in ways important to workers who are pregnant or have recently given birth. First, under the ADAAA employers owe duties of reasonable accommodation to employees with temporary disabilities that substantially limit a major life activity, overturning previous court decisions applying the ADA's protections only to individuals with long-term or permanent conditions.[5] As Commission regulations make clear, "The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section."[6] PDA case law and legislative history indisputably requires employers to treat the effects of pregnancy, childbirth, or related medical conditions at least as well as they treat other temporary disabilities.[7]

Second, the ADAAA extends employers' accommodation duty to reach impairments that many courts previously would not have considered severe enough to qualify as a disability. Thus, the ADAAA reaches impairments such as a temporary back injury resulting in a 20-pound lifting restriction,[8] or a leg condition that precludes standing for more than two hours without significant pain,[9] or hypertension,[10] or a condition that causes an individual to experience shortness of breath and fatigue when walking reasonable distances.[11] Commission guidance

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[4] The PDA may also require such modifications in other circumstances, as for example when a facially neutral rule has a disparate impact on the basis of pregnancy.

[5] *E.g.*, *Toyota Motor Mfg. v. Williams*, 534 U.S. 184, 185 (2002) ("The impairment's impact must . . . be "permanent or long term.").

[6] 29 C.F.R. § 1630.2(j)(1)(ix); *see also* EEOC, *Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008*, available at http://www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm ("8. Do the regulations require that an impairment last a particular length of time to be considered substantially limiting? No. Even a short-term impairment may be a disability if it is substantially limiting."). *See generally* 42 U.S.C. § 12102(4)(A) ("The definition of disability in this chapter shall be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter.")

[7] The text of the PDA does not limit the relevant comparison to employees with temporary disabilities, and thus an employer should also treat a worker affected by pregnancy, childbirth, or related medical conditions at least as well as employees with permanent disabilities that render them similar in their ability or inability to work. Given that some cases and some legislative history refers to treatment of temporary disabilities as a relevant inquiry under the PDA, however, the ADAAA's change in the treatment of temporary disabilities under law adds important clarity to complementary obligations under the PDA.

[8] 29 C.F.R. pt. 1630 app. § 1630.2(j)(1)(vii).

[9] *Id.* at §1630.2(j)(4).

[10] *Id.* at § 1630.2(j)(1)(vii).

[11] *Id.* at § 1630.2(j)(4).

further specifies that under the ADAAA an employee will be considered to have a disability when he or she has an impairment that prevents him from working in a class of jobs, even if he or she remains able to work in other types of jobs: "For example, if a person whose job requires heavy lifting develops a disability that prevents him or her from lifting more than fifty pounds and, consequently, from performing not only his or her existing job but also other jobs that would similarly require heavy lifting, that person would be substantially limited in working because he or she is substantially limited in performing the class of jobs that require heavy lifting."[12] As a result of these expansions, employers are today legally required to accommodate many who are "similar in their ability or inability to work" to women experiencing typical pregnancy symptoms.

When the ADAAA requires reasonable accommodations for these sorts of conditions, the PDA requires that reasonable accommodations also be made to pregnant women. "[T]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees 'shall be treated the same for all employment-related purposes' as nonpregnant employees similarly situated with respect to their ability or inability to work."[13] As a result, the PDA's requirement that pregnant women be treated like those similar in ability to work incorporates the ADAAA's requirement to accommodate. In *Troupe v. May Department Stores Co.*,[14] Judge Posner famously stated that the PDA allows "employers [to] treat pregnant women as badly as they treat similarly affected but nonpregnant employees."[15] But as the Eighth Circuit has pointed out, "The opposite, however, is also true—employers must treat pregnant women as well as they treat similarly affected employees. The PDA does not require an employer to overlook the work restrictions of pregnant women *unless* the employer overlooks the comparable work restrictions of other employees."[16] Because employers are now required to accommodate employees with comparable work restrictions in many circumstances, they must treat pregnant women at least equally well.

This duty of accommodation applies whether or not a pregnancy-related impairment itself constitutes a disability under the amended ADA. As the Commission has explained, because pregnancy is "not the result of a physiological disorder," it is not considered an "impairment" under the ADA, though "a pregnancy-related impairment that substantially limits a major life activity is a disability."[17] Courts hearing claims brought under the ADA based on pregnancy-related conditions and symptoms have traditionally expended much energy seeking to "draw a distinction between a normal, uncomplicated pregnancy, and an abnormal one—*i.e.*, one with a complication or condition arising out of, but distinguishable from, the pregnancy" in determining whether the ADA provides protection.[18] But under the amended ADA, it will most often be unnecessary for courts to analyze whether a pregnancy-related condition constitutes an abnormal

[12] *Id.* at Substantially Limited in Working.
[13] *Johnson Controls v. UAW*, 499 U.S. 187, 205 (1991) (internal citation omitted).
[14] 20 F.3d 734, 738 (7th Cir.1994).
[15] Of course, if a rule has a disparate impact on pregnant workers, for example, or was adopted with a discriminatory purpose, the PDA may still require its modification, even if it also affects other employees similar in their ability or inability to work.
[16] *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 43, 4371 (8th Cir. 1998) (emphasis added).
[17] 29 C.F.R. pt. 1630 app. § 1630.2(g).
[18] *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 553 (7th Cir. 2011) (citing cases).

impairment or a normal symptom of pregnancy. Whether or not an employer has a direct duty under the ADA to accommodate a pregnancy-related condition (in some instances an employer definitely will have such an obligation[19]), the employer certainly has a duty to accommodate under the PDA if under the ADA the employer is obligated to accommodate an employee similar in ability or inability to work. Thus, for example, if a pregnant employee has a 20-pound lifting restriction, whether the lifting restriction is considered a symptom of a normal, uncomplicated pregnancy or an abnormal one, an employer has a duty to reasonably accommodate that restriction, given that an employee with a temporary back injury resulting in such a restriction would be entitled to reasonable accommodation.[20] "[T]o the extent that an employer either provides, or has a policy of providing, a reasonable accommodation to a non-pregnant employee whose pregnant counterpart is 'similar in [her] ability or inability to work,' the employer must also reasonably accommodate the pregnant employee."[21]

II. The Pregnancy Discrimination Act Imposes this Equal Duty of Accommodation Whether or Not the Employer Has in Fact Accommodated an Actual Similarly-Situated Employee With a Disability.

If a pregnant employee has a physical condition that affects her ability to work, like a lifting restriction or an inability to stand for hours a time, and that is similar to a condition that must be reasonably accommodated under the ADA, an inference of discrimination arises if the employer denies the reasonable accommodation to the pregnant employee, whether or not the pregnant employee can point to an example of the employer in fact accommodating a nonpregnant employee's comparable condition. The *McDonnell Douglas*[22] test for establishing a prima facie case of discrimination under Title VII 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. Such a comparison is only one method among many available for raising an inference of discrimination.[23] The presumption that the employer will follow the law and provide any legally

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[19] *See, e.g.*, *Darian v. Univ. of Mass. Boston*, 980 F. Supp. 77, 87 (D. Mass. 1997) (concluding plaintiff's pregnancy complications constituted a disability under the ADA).

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

[21] *Gratton v. Jetblue Airways*, No. 04 Civ. 7561(DLC), 2005 WL 1251786, *X (S.D.N.Y. May 25, 2005), 86 Empl. Prac. Dec. P 41,964 (internal citation omitted).

[22] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

[23] This is so because "[t]he importance of *McDonnell Douglas* lies, not in its specification of the discrete elements of proof there required, but in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on [an illegal] discriminatory criterion . . . ." *International Broth. of Teamsters v. United States*, 431 U.S. 324, 38 (1977). "The method suggested in *McDonnell Douglas* . . . was never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). As *McDonnell Douglas* itself recognized, "[F]acts 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." 411 U.S. at 802 n.13. *See, e.g.*, *George v. Leavitt*, 407 F.3d 405, 412 (D.C. Cir. 2005) ("We have made clear that a plaintiff makes out a prima facie case of disparate-treatment discrimination by establishing that: (1) she is a member of a protected class;

required accommodation to an employee with a comparable disability is sufficient to support a prima facie case of pregnancy discrimination under *McDonnell Douglas* if the same accommodation has been denied the pregnant employee.

The correct analysis in such a situation is similar to that applied by the Eleventh Circuit in *Byrd v. Lakeshore Hospital.*[24] There, the appeals court reversed the trial court's conclusion that a pregnancy discrimination plaintiff who claimed that she had been fired for using her sick leave pursuant to her employer's sick leave policy was required to show that other nonpregnant employees had not been fired for using sick leave. The Eleventh Circuit held that given that the employer had a sick leave policy "the only logical inference" was that the employer customarily allowed employees to use the sick days allotted to them under that policy. "A contrary result would amount to a presumption . . . that [the employer] commonly discharges employees for taking their allotted sick leave time. If such is the case, then the burden was on [the employer] to prove this unusual scenario."[25] The presumption that the employer will follow the law must be at least as strong as the presumption in the absence of evidence to the contrary that an employer will follow its own policies. Even in the absence of an employee with a disability similar to the pregnant woman at issue who has in fact received these accommodations, duties to accommodate under the ADA therefore impose comparable duties under the PDA.

III. Reasonable Accommodations for Workers Affected by Pregnancy, Childbirth, or Related Medical Conditions and Similar in their Ability to Work to Worker with Disabilities Include Adjustments in Work Schedules, Modifications in Work Policies, Leave, and Light Duty.

For the reasons set out above, workers affected by pregnancy, childbirth, or related medical conditions are certainly entitled to the same reasonable accommodations that employees with covered disabilities who are similar in their ability or inability to work to employees are entitled to receive under the ADA. The ADA states that "reasonable accommodation" can include measures such as "job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or

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(2) she suffered an adverse employment action; and (3) the unfavorable action gives rise to an inference of discrimination. One method by which a plaintiff can satisfy the third prong of this test is by demonstrating that she was treated differently from similarly situated employees who are not part of the protected class. But this is not the only way."); *Abdu-Brisson v. Delta Air Lines, Inc.*, 239 F.3d 456, 467 (2d Cir. 2001) (holding that courts may 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"); *Hunter v. Mobis Alabama, LLC*, 59 F. Supp. 2d 1247, 1256-57 (M.D. Ala. 2008) (in PDA case, holding comparator evidence to be unnecessary to prima facie case when other circumstantial evidence supported inference of discrimination).

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

[25] *Id.* at 1383.

modifications of examinations, training materials or policies, . . . and other similar accommodations for individuals with disabilities."[26] Accordingly, these accommodations are also required for women similarly in need because of pregnancy, childbirth, or related medical conditions.

For example, under the ADA, schedule modification as a reasonable accommodation "may involve adjusting arrival or departure times, providing periodic breaks, [and] altering when certain functions are performed."[27] Such an accommodation may be appropriate for an employee suffering from severe morning sickness, for example. Modifying workplace policies can include modifying a no food or drink policy for an employee who has a medical reason for eating or drinking on the job.[28] For example, this form of accommodation could be appropriate for a pregnant employee who experiences painful or potentially dangerous uterine contractions when she does not regularly drink water.

In appropriate circumstances, permitting use of accrued paid leave and (upon exhaustion of paid leave) unpaid leave will also be a reasonable accommodation when it can be granted without undue hardship.[29] In some instances, an employee will be entitled to a longer unpaid leave as a reasonable accommodation than that to which the employee would be entitled under the Family and Medical Leave Act.[30] Thus, a pregnant employee who is required to be on bed rest for pregnancy complications, for example, will sometimes be entitled to leave as a reasonable accommodation independent of whether she is also entitled to FMLA leave or the amount of FMLA leave to which she is entitled.

Reassigning an employee to a light duty position for which she is qualified can also constitute a reasonable accommodation, if a reasonable accommodation will not allow an employee to perform the essential functions of her current position. The Commission's *Technical Assistance Manual on Title I of the ADA* explains:

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[26] 42 U.S.C. § 12111(9).
[27] EEOC, *Enforcement Guidance on Reasonable Accommodation and Undue Hardship Under the Americans with Disabilites Act* Q.22 (2002).
[28] *Id.* at Q.24.
[29] *Id.* at Q.17-Q.21 (2002); EEOC, *Technical Assistance on Title I of ADA,* sec. 3.10(4) (1992).
[30] The Commission's Enforcement Guidance explains this in some detail, including through the following example:

> An employee with an ADA disability needs 13 weeks of leave for treatment related to the disability. The employee is eligible under the FMLA for 12 weeks of leave (the maximum available), so this period of leave constitutes both FMLA leave and a reasonable accommodation. Under the FMLA, the employer could deny the employee the thirteenth week of leave. But, because the employee is also covered under the ADA, the employer cannot deny the request for the thirteenth week of leave unless it can show undue hardship. The employer may consider the impact on its operations caused by the initial 12-week absence, along with other undue hardship factors.

EEOC, *supra* note 26 at Q.21.

> [I]f an employer already has a vacant light duty position for which an injured worker is qualified, it might be a reasonable accommodation to reassign the worker to that position. If the position was created as a temporary job, a reassignment to that position need only be for a temporary period. . . . It may be necessary to provide additional reasonable accommodation to enable an injured worker in a light duty position to perform the essential functions of that position.[31]

Commission guidance also makes clear that an employer cannot avoid reassigning an employee to a light duty position as a reasonable accommodation by reliance on a rule that light duty positions are reserved for employees with on-the-job injuries. Instead, the ADA requires an employer to reassign an employee with a disability to the light duty position as a reasonable accommodation if she can perform the position's essential functions and such a reassignment does not pose an undue hardship to the employer.[32] As a result, under the PDA nondiscrimination requirements, a police department that makes light duty positions available to officers injured on the job, for example, can be required to reassign a pregnant police officer to an available light duty position if at some point during her pregnancy she is physically unable to perform essential duties of her usual position.

These Commission materials setting out employers' obligations under the ADA provide important background and guidance regarding the accommodations that employers in many instances are obligated to offer workers whose ability to do their job is impaired by pregnancy, childbirth, or related medical conditions and is similar to that of workers with a qualifying disability under the amended ADA.

IV. The Commission Should Provide Guidance Explaining the Interaction of the Amended ADA and the PDA.

Courts, employees, and employers are in critical need of guidance setting out the interaction between the amended ADA and the PDA. The Commission should provide such guidance, making explicit that in many instances employers' duty to accommodate under the amended ADA will, through the PDA's nondiscrimination requirements, extend to a duty to accommodate women who require adjustments to work rules as a result of the effects of pregnancy or childbirth. This guidance 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 nondiscrimination duty under the PDA to accommodate a 20-pound lifting restriction stemming from pregnancy. The Commission should make clear that this duty to provide a reasonable accommodation arises whether or not the employer has in fact accommodated an employee similar in ability or inability to work, as long as the employer is legally obligated to provide such an accommodation to a similarly situated employee. Commission guidance should also set out the types of accommodations required in appropriate circumstances for employees affected by pregnancy, childbirth, or related medical conditions under this analysis, including modifying schedules and work policies, job restructuring, providing paid or unpaid leave

[31] EEOC, *Technical Assistance on Title I of ADA*, sec. 9.4 (1992).
[32] EEOC, *EEOC Enforcement Guidance: Workers Compensation and the ADA* (2000) Q.28.

independent of obligations to provide leave under the FMLA, reassigning to an available light duty position regardless of whether such positions are typically reserved for employees on the job, and other similar accommodations.

Thank you again for the opportunity to provide this information and to address this important topic.