The Resurgence of the Maternal Wall: Revisiting Accommodation under the Pregnancy Discrimination Act

Mikaela Shaw
Mikaela.Shaw@chicagounbound.edu
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INTRODUCTION

Increasingly first-time mothers are choosing to work both during their pregnancies and until a later time into their pregnancies.1 Additionally, women are the primary breadwinners in more than 41 percent of families and in 70 percent of low-wage families, indicating that these women’s ability to continue working while pregnant has far-reaching effects.2 At the same time, claims of pregnancy discrimination to the Equal Employment Opportunity Commission (EEOC) increased at a fast pace; from 2005 to 2011 claims rose nearly 23 percent.3 Thus, pregnant women are integral to the workforce,

† BA 2012, Indiana University-Bloomington; JD Candidate 2015, The University of Chicago Law School. I would like to thank Professor Laura Weinrib for her valuable insights and ideas throughout the Comment process.

1 “Between 1961 and 1965, for example, 44 percent of first-time mothers worked during their pregnancies; in contrast, between 2006 and 2008, nearly two-thirds of first-time mothers worked while pregnant. Women are also working later into their pregnancies. Between 1961 and 1965, less than 35 percent of working first-time mothers were still on the job one month or less before giving birth. But times have changed. Now an overwhelming majority of first-time mothers are working late into their pregnancies. Almost nine out of ten (88 percent) first-time mothers who worked while pregnant worked into their last two months of pregnancy in 2006-2008, and more than eight out of ten (82 percent) worked into their last month of pregnancy.” See Emily Martin, et al, *It Shouldn’t Be a Heavy Lift: Fair Treatment for Pregnant Workers* at *3 (National Women’s Law Center 2013), online at http://www.nwlc.org/sites/default/files/pdfs/pregnant_workers.pdf (visited Oct 18, 2014); United States Census Bureau, *Maternity Leave and Employment Patterns of First-time Mothers: 1961-2008* at *4 (Oct 2011), online at http://www.census.gov/prod/2011pubs/p70-128.pdf (visited Oct 18, 2014).

2 See Martin, *It Shouldn’t Be a Heavy Lift* at *3 (cited in note 1).

and pregnancy discrimination protections should be a top concern.  

Title VII of the Civil Rights Act of 1964 did not specifically include pregnancy, so in 1978 Congress adopted the Pregnancy Discrimination Act (PDA) to prohibit sex discrimination on the basis of pregnancy. However, since its enactment, the language of the PDA has proved difficult to interpret consistently. The Act stipulates that employers must treat women affected by pregnancy, childbirth, or related medical conditions equal to other employees on the basis of their ability or inability to work. Further, Congress intended the PDA to prohibit both state and private employers from treating pregnancy differently than other disabilities covered by temporary disability policies. 

The PDA’s first clause adds “pregnancy, childbirth, or related medical conditions” to the definition of sex, while the second clause establishes that pregnant employees shall be treated the same as similar ability workers. However, the law does not explicitly address the nature of this same treatment. For example, the law fails to specify if and how an employer should make accommodations for a pregnant employee in relation to accommodations the employer makes for other employees. Confusion arises when courts attempt to reconcile the language of these two clauses, but all PDA accommodation claims require identifying a comparator individual or group who is similarly situated but treated differently than the pregnant employee with respect to ability to work. Courts have widely

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8 See HR Rep No 95-1786 at 53 (cited in note 7).
9 “This bill would require that women disabled due to pregnancy . . . be provided the same benefits as those provided other disabled workers. This would include temporary and long-term disability insurance, sick leave, and other forms of employee benefit programs.” See HR Rep No 95-948, 95th Cong, 2d Sess 51, 5 (1978); see also S 995, 95th Cong, 2d Sess 5 (1978).
10 42 USC § 2000e(k).
11 The fourth prong of the indirect evidence framework for a prima facie case of pregnancy discrimination requires a showing that there is a nexus between her pregnancy and the adverse employment decision. That fourth element can be demonstrated through comparison to “another employee who is similarly situated in her
held that suitable comparators are non-pregnant workers who are temporarily disabled whom employers treat better than pregnant workers with similar limitations.\textsuperscript{12} 

The comparator standard has given rise to a prominent circuit split that further complicates this area of law. The Fourth, Fifth, Seventh, and Eleventh Circuits held that the only appropriate comparators are those who became disabled off the job.\textsuperscript{13} These courts comprise the majority and have interpreted employer policies that accommodate employees disabled off the job, but not on the job, as “pregnancy-blind,” and thus valid under the PDA.\textsuperscript{14} Meanwhile the Sixth, Eighth, and Tenth Circuits form the minority rule; these circuits held that the similarly situated analysis should compare a pregnant employee to any other employee who has a similar ability or inability to perform the job, including those who became temporarily disabled due to a workplace injury while on the job.\textsuperscript{15}

or his ability or inability to work [and who] received more favorable benefits.” See Ensley-Gaines v Runyon, 100 F3d 1220, 1226 (6th Cir 1996). See also Deborah A. Widiss, Gilbert Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act, 46 UC Davis L Rev 961, 1016 (2013).

\textsuperscript{12} See Ensley-Gaines, 100 F3d at 1226 (holding that an individual employee “need only demonstrate that another employee who was similar in her or his ability or inability to work received the employment benefits denied to her”); Serednyj v Beverly Healthcare, LLC, 656 F3d 540, 548 (7th Cir 2011) (explaining that an “employer is not required to provide an accommodation to a pregnant employee unless it provides the same accommodation to its similarly situated nonpregnant employees”); Urbano v Continental Airlines, Inc, 138 F3d 204, 208 (6th Cir 1998) (explaining that an employer is entitled to deny a pregnant employee a light-duty assignment as long as it treats other workers injured off duty the same).

\textsuperscript{13} See Young v United Parcel Service, Inc, 707 F3d 437, 449 (4th Cir 2013) (holding that where a policy treats pregnant workers and nonpregnant workers alike, the employer has complied with the PDA); Urbano, 138 F3d at 208 (holding that as long as pregnant employees are treated the same as other employees injured off duty, a light-duty policy that only accommodates on-duty injuries is compliant with the PDA); Spivey v Beverly Enterprises, Inc, 196 F3d 1309, 1312–13 (11th Cir 1999) (finding that “pregnant employees must be treated the same as every other employee with a non-occupational injury”); Troupe v May Department Stores Co, 20 F3d 734, 738–39 (7th Cir 1994) (holding that “employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees” and noting the court’s “doubt that finding a comparison group would be that difficult”).

\textsuperscript{14} Young, 707 F3d at 446 (holding that “UPS has crafted a pregnancy-blind policy. . . . Such a policy is at least facially a ‘neutral and legitimate business practice’”); Serednyj, 656 F3d at 548–49 (finding that since the employer’s modified work policy is pregnancy-blind it is valid); Spivey, 196 F3d at 1313 (holding that an “employer must ignore an employee’s pregnancy and treat her ‘as well as it would have if she were not pregnant’”), quoting Piraino v International Orientation Resources, Inc, 84 F3d 270, 274 (7th Cir 1996). Urbano, 138 F3d at 206 (holding an employer policy valid because the light-duty policy treated pregnant employees the same as non-pregnant employees).

\textsuperscript{15} See Ensley-Gaines, 100 F3d at 1226 (holding that the plaintiff “need only
In the thirty-six years since the passage of the PDA, many women have sought the protections of the PDA. However, the circuit split creates inconsistent PDA application and job security for pregnant employees.\(^{16}\) Additionally, over the last decade the number of PDA cases has also increased.\(^{17}\) Thus as pregnancy increasingly becomes a more common workplace experience, the application of the PDA assumes greater importance. EEOC Chair Jacqueline A. Berrian explained, “\([W]e\) continue to see a significant number of charges alleging pregnancy discrimination, and our investigations have revealed the persistence of overt pregnancy discrimination, as well as the emergence of more subtle discriminatory practices.”\(^{18}\) In the response, the EEOC placed a renewed focus on pregnancy discrimination. The EEOC’s December 2012 Strategic Enforcement Plan (SEP) identified accommodating pregnancy related limitations under the PDA as an enforcement effort focus.\(^{19}\) And in July 2014, the EEOC issued the Enforcement Guidance on Pregnancy Discrimination and Related Guidance.\(^{20}\)

demonstrate that another employee who was similar in her or his ability or inability to work received the employment benefits denied to her); \(Adams v Nolan, 962 F2d 791, 794 (8th Cir 1992)\) (holding that the plaintiff demonstrated that some officers with off the job injuries or conditions other than pregnancy in fact were given light duty assignments to accommodate their condition); \(EEOC v Ackerman, Hood & McQueen, Inc, 956 F2d 944, 948 (10th Cir 1992)\) (holding that the “clear language of the PDA requires the court to compare treatment between pregnant persons and ‘other persons not so affected but similar in their ability or inability to work’”).

\(^{16}\) See notes 14 and 15.


The EEOC’s new guidance is the only comprehensive update since the first pregnancy discrimination manual was published over 30 years ago.\textsuperscript{21} It lays out the essential PDA requirements that an employer may not discriminate against an employee on the basis of pregnancy, childbirth, or related medical conditions and that women affected by pregnancy, childbirth, or related medical conditions must be treated the same as other persons similar in their ability or inability to work.\textsuperscript{22} Despite the updated guidance, the EEOC will continue to struggle in light of the existing circuit split. The first step requires resolving the circuit split to provide a predictable and clear legal standard.\textsuperscript{23} Therefore, this Comment provides timely insight into the complicated issue of an employer’s accommodation responsibility to its pregnant employees.

This Comment contends that while the majority’s application of the PDA is facially neutral, it allows for pregnant women to be discriminated against—contrary to the purpose of the statute. The minority view application facilitates the statute’s intended result; one where pregnant women are not discriminated against. Thus, this Comment argues that the term “similarly situated” is best interpreted to mean another individual of the same ability in the present moment—as long as the employee met the required job ability level at the time of hiring and the injury is only temporary. Using this comparator group is better because it remains truest to Congress’s legislative intent to eliminate pregnancy discrimination.

This Comment proceeds in four parts. Part I provides a brief history of the PDA.\textsuperscript{24} Part II explains how a plaintiff can establish a prima facie case of pregnancy discrimination utilizing the \textit{McDonnell Douglas}\textsuperscript{25} test.\textsuperscript{26} Part III introduces the

\begin{footnotesize}
\begin{enumerate}
\item On July 1, 2014, the Supreme Court granted writ of certiorari for a Fourth Circuit case, \textit{Young v United Parcel Service}. See \textit{Young v United Parcel Service}, 134 S Ct 374 (2013). In \textit{Young}, the Fourth Circuit held that an employee injured off the job with a similar ability is the only acceptable comparator for a pregnant employee. \textit{Young}, 797 F3d at 450–51. See notes 157–164 and accompanying text. This case provides an avenue for the Supreme Court to resolve the current split.
\item See notes 29–83 and accompanying text.
\item \textit{McDonnell Douglas Corp v Green}, 411 US 792, 802 (1973).
\item See notes 84–117 and accompanying text.
\end{enumerate}
\end{footnotesize}
circuit split and analyzes each side’s interpretation, application, and results.\textsuperscript{27} Part IV examines why the minority rule is more reflective of the PDA’s objectives, explores why similarly situated is best understood to mean another employee with a similar ability or inability to work, and advocates adopting this definition as a solution to the circuit split.\textsuperscript{28}

I. SETTING THE STAGE: A BRIEF HISTORY OF THE LAW UNDERLYING PREGNANCY DISCRIMINATION

To reach a fuller understanding of the PDA and the conditions that led to its adoption, this Section outlines relevant federal laws addressing pregnancy discrimination and the principal Supreme Court case. After reviewing the history leading to the PDA’s adoption, this part will discuss the PDA’s key language. This Section then concludes by reviewing the Supreme Court’s primary interpretation of the PDA in \textit{California Federal Savings & Loan Association v Guerra},\textsuperscript{29} where the Court held that the PDA is a statutory floor, or minimum standard, for admissible treatment of pregnant employees.\textsuperscript{30}

A. Federal Treatment of Pregnancy Discrimination in Employment before the PDA

Congress enacted the Civil Rights Act of 1964 “to provide equal access to the job market for both men and women” without discrimination based on an individual’s race, color, religion, sex, or national origin.\textsuperscript{31} The Equal Employment Opportunity Act (EEOA) of 1972 aimed to further bolster the government’s powers for eliminating discrimination in employment.\textsuperscript{32} Specifically, the EEOA enabled the EEOC to bring federal lawsuits to enforce Title VII guarantees.\textsuperscript{33} Also in 1972, the EEOC amended its guidelines to require that disabilities related

\textsuperscript{27} See notes 118–219 and accompanying text.
\textsuperscript{28} See notes 220–269 and accompanying text.
\textsuperscript{29} 479 US 272 (1987).
\textsuperscript{30} Id at 280, 285.
\textsuperscript{31} \textit{Diaz v Pan American World Airways, Inc.}, 442 F2d 385, 386 (5th Cir 1971).
\textsuperscript{33} See id.
to pregnancy be covered by any health insurance, temporary disability insurance, or sick leave associated with employment. 34

Over the next three years the courts heard several challenges to the EEOC’s guidelines. These cases determined whether an employee could claim employment discrimination in violation of Title VII. Employees sued on the ground that the employer’s sickness and disability benefits plans were not paid in connection with absences arising from conditions attendant to pregnancy, childbirth, or childrearing. All six Federal Courts of Appeals that considered the issue agreed with the EEOC’s view that Title VII prohibited discrimination in employment based on pregnancy. 35 However, in 1976 the Supreme Court overruled both the unanimous appellate courts and these guidelines.

B. Gilbert: The Supreme Court Overrules EEOC Guidelines and the Appellate Courts

In 1976, the Supreme Court in General Electric Co v Gilbert 36 considered whether an employer’s disability plan that did not cover disabilities arising from pregnancy violated Title VII. 37 Despite a vigorous dissent, the Court held that a disability plan that did not cover pregnancy-related disabilities does not violate Title VII. 38 In doing so, the Court reversed six unanimous appellate courts and invalidated the EEOC guidelines. The Court emphasized that without the plaintiffs’ making the requisite showing of gender-based effects of the plan either by the terms of the plan or the effects of the plan, no sex based discrimination could be found. 39 Relying on Geduldig v

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34 The guideline provides that “[d]isabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment.” See 29 CFR § 1604.10(b) (1972).

35 See General Electric Co v Gilbert, 429 US 125, 147 (1976) (Brennan dissenting); for the specific appellate cases, see also Communications Workers of America v American Telephone and Telegraph Co, 513 F2d 1024, 1032 (2d Cir 1975); Wetzel v Liberty Mutual Insurance Co, 511 F2d 1024, 1032 (2d Cir 1975); Gilbert v General Electric Co, 519 F2d 661, 667 (4th Cir 1975); Tyler v Vickery, 517 F2d 1089, 1105 (6th Circuit 1975); Satty v Nashville Gas Co, 522 F2d 850, 855 (6th Cir 1975); Hutchinson v Lake Oswego School District, 519 F2d 961, 968 (9th Cir 1975).


37 Id at 127–28.

38 Id at 145–46.

39 Id at 135–37.
Aiello, which upheld a similar disability plan against a Fourteenth Amendment equal protection challenge, the Gilbert Court concluded that removing pregnancy from the list of compensable disabilities was not discrimination on the basis of sex. Thus, by viewing the employer's disability plan as representing a gender-free assignment of risks, the Court found the lone exclusion of pregnancy is not a violation of Title VII since all other disabilities were mutually covered for both sexes.

As for the EEOC guidelines, the Court discussed the type of deference they should receive at length. Specifically, the court applied Skidmore deference, which means that an administrative agency's interpretative rules deserve deference according to their persuasiveness. The Court seemed prepared to apply deference to the EEOC guidelines when it remarked that they are "entitled to consideration in determining legislative intent." However, the Court still invalidated the entirety of the EEOC's guidelines pertaining to disability coverage for pregnancy.

In contrast, Justice Brennan, writing for the dissent, called for analyzing the General Electric disability plan under a different framework: one that focused upon the risks excluded from the otherwise comprehensive program and the purported justifications for such exclusions. Thus, when adopting the "plaintiffs' perception of the plan as a sex-conscious process

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41 See General Electric, 429 US at 133–36.
42 Id at 136.
43 Id at 140–45.
44 The Gilbert majority explained that Skidmore has the most comprehensive statement of the role of interpretative rulings: Skidmore reads as follows:

We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.

45 See General Electric, 429 US at 141–43.
46 Id at 143–46.
47 Id at 147 (Brennan dissenting).
expressive of the secondary status of women in the company’s labor force,” the effects of the unequal exclusion of pregnancy became apparent.\textsuperscript{48} Brennan argued that the majority failed to consider two sets of the plan’s effects that demonstrated the plan’s prima facie violation of Title VII.\textsuperscript{49} A proper analysis required allowing the plaintiff to make a showing that the facially neutral classification has the effect of discriminating against members of a defined class, which requires applying the Supreme Court’s \textit{McDonnell Douglas} test.\textsuperscript{50} The \textit{McDonnell Douglas} test is critical to the PDA’s application today. Generally, the \textit{McDonnell Douglas} burden-shifting framework sets forth the framework for Title VII disparate treatment claims; it will be analyzed in depth in Part II. Additionally, Justice Brennan’s emphasis of the shallowness of the majority’s under-inclusive application is a key concept that will be explored in Part III.

C. Public Response to \textit{Gilbert} and the Quick Congressional Adoption of the PDA

Following the Supreme Court’s momentous decision, there was a large public response and intense lobbying from activist groups.\textsuperscript{51} The same day that the \textit{Gilbert} decision was announced, ACLU attorney Susan Dellar Ross and International Union of Electrical Workers Association General Counsel Ruth Weyand began organizing support to amend Title VII and invalidate the Supreme Court’s ruling.\textsuperscript{52} The ensuing coalition of more than 200 organizations established a drafting committee that led the efforts that shaped the PDA.\textsuperscript{53}

\textsuperscript{48} Id at 152–55.

\textsuperscript{49} See \textit{General Electric}, 429 US at 155 (“General Electric’s disability program has three divisible sets of effects. First, the plan covers all disabilities that mutually afflict both sexes, . . . . Second, the plan insures against all disabilities that are male-specific or have a predominant impact on males. Finally, all female-specific and female-impacted disabilities are covered, except for the most prevalent, pregnancy. . . . [T]he EEOC and plaintiffs rely upon the unequal exclusion manifested in effects two and three to pinpoint an adverse impact on women.”).

\textsuperscript{50} See id at 153 n 6, 154–55.

\textsuperscript{51} See Widiss, 46 UC Davis L Rev at 993 (cited in note 11).

\textsuperscript{52} Id.

\textsuperscript{53} Id. See also David S. Cohen, \textit{The Stubborn Persistence of Sex Segregation}, 20 Colum J Gender & L 51, 63–67 (2011).
The PDA’s legislative history gives insight into Congress’s original intentions of the Civil Rights Act and the intended effect of the PDA. The House Education and Labor Committee recognized the confusion the Supreme Court encountered when interpreting the Civil Rights Act of 1964.\(^\text{54}\) Specifically, Congress determined that the dissent correctly applied the EEOC “as a reasonable interpretation and implementation of the broad social objectives of Title VII.”\(^\text{55}\) Congress recognized that amending the Civil Rights Act would not reflect new legislation or affect changes in practices, costs, or benefits beyond Title VII.\(^\text{56}\) Instead, “the narrow approach utilized by the bill is to eradicate confusion by expressly broadening the definition of sex discrimination in Title VII to include pregnancy-based discrimination.”\(^\text{57}\) The Committee notes explained that Congress needed to clarify its original intent to avoid “an intolerable potential trend in employment practices” that would follow if the Supreme Court’s interpretation of Title VII were allowed to stand.\(^\text{58}\)

The House Report specifically explained that the proposed legislation “does not require employers to treat pregnant employees in any particular manner . . . . H.R. 6075 in no way requires the institution of any new programs where none currently exist.”\(^\text{59}\) This view indicated that the PDA precluded distinctions that negatively affected pregnant women, but did not mandate preferential treatment of pregnant women. However, the report also emphasized that “H.R. 6075 unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, and specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work.”\(^\text{60}\) Furthermore, the Act did not foreclose the possibility that employees could voluntarily provide benefits to pregnant workers that were not available to other temporarily disabled

\(^{54}\) See HR Rep No 95-948 at 2 (cited in note 9).

\(^{55}\) Id.

\(^{56}\) Id at 3–4.

\(^{57}\) Id at 4.

\(^{58}\) See HR Rep No 95-948 at 4 (cited in note 9).

\(^{59}\) Id. See also S Rep No 95-331, 95th Cong, 1st Sess 41 (1977) (remarks of Senator Williams).

\(^{60}\) HR Rep No 95-948 at 3 (cited in note 9).
workers. This view denoted that the PDA would not function as a pure prohibition on differentiating between pregnant and nonpregnant employees.

President Carter signed the PDA into law on October 31, 1978. The PDA amends the Civil Rights Act of 1964 such that discrimination “because of sex” or “on the basis of sex” includes discrimination on the basis of pregnancy, childbirth, or related medical conditions. In pertinent part, it provides:

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; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.

The first clause is a definition without any additional substantive requirements. Thus, the first clause simply defines the protected classes that can affirmatively bring suit under Title VII. As a result, the language of the first clause may be substituted for “sex” in any other portion of Title VII. The second clause, hereinafter, the “same treatment” clause, creates a distinct substantive standard that employers must satisfy. Specifically, the same treatment clause requires that employers

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61 Id at 4.
62 Pregnancy Disability Amendment to Title VII of the Civil Rights Act of 1964, 99 Labor Rel Rptr 19, 3 (1978).
64 Id.
65 The first clause reads, “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.” 42 USC § 2000e(k) (2012).
67 The second clause reads, “[w]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title shall be interpreted to permit otherwise.” 42 USC § 2000e(k).
treat pregnant employees the same as other employees with similar abilities.69 Congress explained “same treatment’ may include employer practices of transferring workers to lighter assignments, requiring employees to be examined by company doctors or other practices, so long as the requirements and benefits are administered equally for all workers in terms of their actual ability to perform work.”70 This same treatment definition is integral to the current interpretation debate because it elucidates the types of treatment Congress envisioned the PDA encompassing.

D. The Supreme Court’s Interpretation of the PDA as a Benefit Floor in California Federal Savings

Following the PDA’s enactment, a circuit split developed regarding what type of coverage the PDA allowed and required. In 1987, the Supreme Court granted certiorari in California Federal Savings71 to consider whether the PDA preempted a state statute that required employers to provide leave and reinstatement to employees disabled by pregnancy.72 California Federal Savings proved a difficult case because it enabled the Court to address whether pregnancy could be treated more favorably than other disabilities.73 The Court found that the Congressional Reports, as well as Congress’s debates and hearings clearly exhibited Congress’s intent for the PDA “to provide relief for working women and to end discrimination against pregnant workers.”74 As clarification, the Court explicitly stated its belief that Congress intended for the same treatment clause to overrule the Court’s holding in Gilbert and “to illustrate how discrimination against pregnancy is to be remedied.”75 Furthermore, in California Federal Savings the Court held that the similarly situated language of the PDA gives

69 See Daniela M. 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, 292 (2008) (“The Sixth Circuit has reasoned that the PDA mandates pregnant employees be treated the same as non-pregnant employees similarly situated in their ability to work, regardless of how or where the limitations arose.”).
70 See HR Rep No 95-948 at 5 (cited in note 9).
72 Id at 274–75.
73 See Widiss, 46 UC Davis L Rev at 1004 (cited in note 11).
75 Id at 285.
employers the freedom to treat pregnant women the same as other non-pregnant persons but similar in their ability or inability to work.\textsuperscript{76}

The majority thoroughly explored the PDA’s legislative history and highlighted that the PDA’s thrust is 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.”\textsuperscript{77} In light of that, “employers are free to give comparable benefits to other disabled employees,”\textsuperscript{78} which would amount to treating pregnant workers no better than other workers who are “similar in their ability or inability to work.”\textsuperscript{79} Thus, the Court held 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.’”\textsuperscript{80} Additionally, the Court highlighted that if “Congress had intended to prohibit preferential treatment” then it would have extended its conversations to discuss the intention to expressly forbid preferential treatment.\textsuperscript{81} Therefore, the PDA functions as a benefit floor and does not preclude more expansive state law.\textsuperscript{82} The concept of the PDA as a floor is critical to its application today and a concept that will be analyzed in depth in Part IV.\textsuperscript{83}

II. ESTABLISHING A PRIMA FACIE CASE OF PREGNANCY DISCRIMINATION UNDER TITLE VII: APPLYING THE MCDONNELL DOUGLAS TEST

Before PDA interpretations can be properly explored, it is important to understand the legal test applied in pregnancy discrimination cases. As noted by Justice Brennan in \textit{Gilbert},\textsuperscript{84} the Supreme Court and every Court of Appeals have established how a plaintiff may establish a prima facie case of pregnancy discrimination.\textsuperscript{85} Generally, under Title VII, this occurs in one of

\textsuperscript{76} Id at 291.
\textsuperscript{77} Id at 289, quoting 123 Cong Rec 29658 (1977).
\textsuperscript{78} \textit{California Federal Savings}, 479 US at 291.
\textsuperscript{79} Id.
\textsuperscript{80} Id at 285.
\textsuperscript{81} Id at 287 (emphasis original).
\textsuperscript{82} \textit{California Federal Savings}, 479 US at 285.
\textsuperscript{83} See Part IV.
\textsuperscript{84} 429 US at 154–55. See also Part I.B.
\textsuperscript{85} \textit{Gilbert}, 429 US at 154–55.
three ways: (1) by presenting direct evidence of discrimination; (2) by presenting statistical evidence of disparate treatment; or (3) by establishing a prima facie case of discrimination under the McDonnell Douglas test. Due to the difficulties establishing evidence of direct discrimination or statistical evidence of disparate treatment, most cases proceed under the McDonnell Douglas test. Each circuit applies the same test with slight variations in the language.

In McDonnell Douglas Corp v Green, the plaintiff explicitly complained that he was discharged from employment for racial, rather than licit, motives. The complaint focused primarily on the effects of the employer's decision on the plaintiff, so the case only tangentially considered the policy's effects on an entire class of employees. Despite this, the Court held that a prima facie violation of Title VII could still be proved without affirmatively demonstrating that purposeful discrimination occurred. Then the Court set forth the basic allocations of burdens of proof for Title VII cases where statistics or direct evidence are unavailable to allege discriminatory treatment.

The McDonnell Douglas test proceeds in three parts: (1) "the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination;" (2) "if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate,
nondiscriminatory reason for the employee’s rejection;”95 (3) “should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.”96 Since courts generally use the McDonnell Douglas framework to analyze Title VII cases where a plaintiff lacks direct evidence of intentional discrimination, the burden-shifting test is readily utilized in PDA claims.97 The rest of this section explains the previously noted three prongs of the McDonnell Douglas test in detail.

A. Prong One: Plaintiff-Employee’s Burden of Proof Requires Demonstrating Four Elements

At the prima facie stage, the McDonnell Douglas analysis only requires a plaintiff to raise an inference of discrimination—not to dispel the non-discriminatory reasons subsequently proffered by the defendant.98 How a plaintiff demonstrates a prong-one prima facie case is a matter of interpretation. Plaintiffs must demonstrate four elements to satisfy prong one: “(1) membership in a protected class; (2) satisfactory job performance; (3) adverse employment action; and (4) that similarly-situated employees outside the protected class received more favorable treatment.”99 Generally, all courts applying the McDonnell Douglas test require that the first three elements be met in this exact form.100 Different courts allow some variation for what satisfies the fourth element requirement that another employee be a similarly situated comparator component, but the result is the same.101

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95 Id (internal quotation and citation omitted).
96 Id.
97 See EEOC v Horizon/CMS Healthcare Corp, 220 F3d 1184, 1192 (10th Cir 2000).
98 See MacDonald v Eastern Wyoming Mental Health Center, 941 F2d 1115, 1119 (10th Cir 1991).
99 Young, 707 F3d at 449–50, quoting Gerner v County of Chesterfield, 674 F3d 264, 266 (4th Cir 2012).
100 See Arzanoska v Wal-Mart Stores, Inc, 682 F3d 698, 702 (7th Cir 2012).
101 Compare Spicey, 196 F3d at 1312–13 (finding that “pregnant employees must be treated the same as every other employee with a non-occupational injury”) and Serednyj, 656 F3d at 551 (“Employees are similarly situated if they are ‘directly comparable to her in all material respects’ . . . . A plaintiff need not show complete identity with a proposed comparator, but she must show ‘substantial similarity’.”), with Latowski v Northwoods Nursing Center, 2013 US App LEXIS 25738, *14–17 (6th Cir) (holding that it did not
B. Prong Two: The Burden Shifts to Defendant-Employer to Demonstrate a Nondiscriminatory Rationale for the Employment Decision

If an employee successfully proves a prima facie case of sex discrimination based on a pregnancy-related condition, the burden shifts to the employer "to articulate some legitimate, nondiscriminatory reason" for the employer’s decision.102 With this shift, the employer’s burden is one of production, not persuasion.103 It is sufficient that the employer’s evidence raise "a genuine issue of fact as to whether it discriminated against the plaintiff."104 To satisfy this burden, the employer must clearly delineate its reasons for the employment decision.105 The provided explanation must be "legally sufficient to justify a judgment for the [employer]."106 The Supreme Court refused to attempt to "detail every matter which fairly could be recognized as a reasonable basis" for an employment decision.107 However, an employee’s unlawful conduct, a written policy against accommodation for employees injured off the job, and an economics-driven policy change have been found sufficient explanations for employment decisions initially deemed discriminatory.108 For example, the Eighth Circuit upheld the accommodation policy of an employer who changed it for economic reasons.109 This example will be discussed further in Part III.B.2.

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103 Horizon, 220 F3d at 1191; Texas Department, 450 US at 255–56 ("Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext."). To rebut the presumption of discrimination, an employer must produce evidence that the employment decision was made for a legitimate, nondiscriminatory reason. See McDonnell Douglas, 411 US at 802.
104 Texas Department, 450 US at 254.
105 Id at 255.
106 Id.
107 See McDonnell Douglas, 411 US at 802–03.
108 Id at 803; Piraino, 84 F3d at 278; Walker v Fred Nesbit Distributing Co, 156 Fed Appx 880, 884–85 (8th Cir 2005).
C. Prong Three: The Plaintiff-Employee Can Refute the Employer’s Justification as Pretextual

Under prong three, the burden again shifts to the employee to show pretext by (1) demonstrating “that the proffered reason is factually false”\(^{110}\) or (2) “by showing the defendant’s proffered non-discriminatory explanations for its actions are so incoherent, weak, inconsistent, or contradictory that a rational factfinder could conclude [the explanations are] unworthy of belief.”\(^{111}\) Relevant evidence of pretext includes facts regarding the employer’s treatment of the employee, the employer’s general policy and practice with respect to pregnant employees, the strength of the plaintiff’s prima facie case, and the probative value of the proof that the employer’s explanation is false.\(^{112}\)

D. The \textit{McDonnell Douglas} Test as Applied in the PDA Context

Due to the difficulty of showing a similarly situated employee to the plaintiff, many times the issues revolve around the first step of the \textit{McDonnell Douglas} test.\(^{113}\) A similarly situated comparator ensures that all the employee’s other qualities are the same, which reveals when discrimination based on pregnancy occurred.\(^{114}\) The standard is a “flexible, commonsense one,”\(^{115}\) but still requires a pregnant employee to identify a comparator that is outside her protected class of pregnant employees.\(^{116}\) Most courts hold that employers are not required to make accommodations that are not made for other employees

\(^{110}\) \textit{Tabor v Hilti, Inc}, 703 F3d 1206, 1218 (10th Cir 2013).
\(^{111}\) \textit{Conroy v Vilack}, 707 F3d 1163, 1172 (10th Cir 2013). See also \textit{Texas Department}, 450 US at 276 (Plaintiff may demonstrate pretext “indirectly by showing that the employer’s proffered explanation is unworthy of credence.”).
\(^{112}\) \textit{See McDonnell Douglas}, 411 US at 804–05; \textit{Tysinger v Police Department of City of Zanesville}, 463 F3d 569, 576 (6th Cir 2006).
\(^{113}\) Most often a pregnant employee is unable to point to a similarly situated employee outside her protected class who was treated more favorably. See, for example, \textit{Arizanova}, 682 F3d at 702. The Seventh Circuit requires a comparator to be an employee who was not subject to the employer’s modified work policy in the same way as the pregnant employee. See \textit{Servajoy}, 656 F3d at 551 (“Employees are similarly situated if they are ‘directly comparable to her in all material respects’…. A plaintiff need not show complete identity with a proposed comparator, but she must show ‘substantial similarity.’”), quoting \textit{Patterson v Avery Dennison Corp}, 281 F3d 676, 680 (7th Cir 2002) and \textit{Radue v Kimberly-Clark Corp}, 219 F3d 612, 617–18 (7th Cir 2000).
\(^{114}\) \textit{See Arizanova}, 682 F3d at 703; \textit{Young}, 707 F3d at 451.
\(^{115}\) \textit{See Henry v Jones}, 507 F3d 558, 564 (7th Cir 2007).
\(^{116}\) Id.
injured off the job, but it is unclear where the dividing line lies between pregnancy and other off the job conditions, such as sport injuries, attempted suicides, venereal diseases, injuries resulting from a fight, and elective cosmetic surgery. This confusion has given rise to the prominent circuit split discussed below.

III. PDA CIRCUIT SPLIT: INTERPRETING THE SAME TREATMENT CLAUSE IN ACCOMMODATION CLAIMS

Following the Supreme Court’s holding in California Federal Savings, a circuit split developed regarding the interpretation of the “similar in their ability or inability to work” clause in the PDA. It is generally accepted that the comparison is “between pregnant and nonpregnant workers, not between men and women;” the debate surrounds defining and interpreting similarly situated and ability level. Federal courts of appeals disagree as to what type of treatment the same treatment clause requires when it comes to accommodation claims stemming from a “denial of a request from an employee that standard workplace procedures be modified in her favor.” At the heart of this debate lie contrary definitions of who qualifies as a suitable, similarly situated comparator for the pregnant employer as required by the same treatment clause—either an employee who was injured off the job or an employee similar in her ability or inability to work. This section will describe the major accommodation cases on each side of this split.

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117 See General Electric, 429 US at 151.
118 479 US at 286.
119 See note 67.
120 The Fourth, Fifth, Seventh, and Eleventh Circuits have taken the majority view that the only appropriate comparators are those who became disabled off the job. See generally Young, 707 F3d at 437; Urbano, 138 F3d at 204; Troupe, 20 F3d at 734; Spicey, 196 F3d at 1309. The Sixth and Tenth Circuits comprise the minority view that any worker that is similar in his or her ability or inability to work should receive the same treatment. See generally Ensley-Gaines, 100 F3d at 1220; Ackerman, 956 F2d at 944.
121 See Ackerman, 956 F2d at 948.
122 See note 67.
123 Widiss, 46 UC Davis L Rev at 1018 (cited in note 11).
124 See note 67.
A. Majority Approach: The Fourth, Fifth, Seventh, and Eleventh Circuits Require an Off-the-Job Injury Comparator

The Fourth, Fifth, Seventh, and Eleventh Circuits hold that the only appropriate comparators for pregnant employees are those employees who became temporarily disabled by an off-the-job injury. In other words, the majority rule holds that an employee injured on the job is not a suitable comparator. To better understand this application, the primary accommodation cases from each circuit in the majority rule shall be analyzed chronologically.

Early accommodation cases under the PDA upheld the practice of distinguishing between on the job and off the job injuries. An on the job injury encompasses any injury that occurred at work or performing work related duties while off the job refers to incidents that happened outside of the workplace and unrelated to work. The first circuit to consider this issue was the Fifth Circuit, and it applied this rationale when addressing a pregnant worker's lift restriction in Urbano v Continental Airlines, Inc. The employer, an airline, followed a transitional duty policy that granted light-duty assignments only to employees who suffered an occupational injury. Light-duty assignments are modifications to allow a pregnant woman to continue working, such as reassignment to alternate positions, more frequent breaks, or enabling the employee to sit when justified by a particular woman's medical condition. Any employee with a non-occupational injury or illness could apply

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125 See Young, 707 F.3d at 449 (holding that where a policy treats pregnant workers and nonpregnant workers alike, the employer has complied with the PDA); Urbano, 138 F.3d at 208 (holding that the PDA does not "require employers to offer maternity leave or take other steps to make it easier for pregnant women to work"); Spitcey, 196 F.3d at 1312–13 (finding that "pregnant employees must be treated the same as every other employee with a non-occupational injury").

126 See Reeves v Swift Transportation Co, 446 F.3d 637, 638–39 (6th Cir 2006); Spitcey, 196 F.3d at 1312–13; Urbano, 138 F.3d at 208.

127 See note 35 and accompanying text.

128 See Tysinger, 463 F.3d at 574.

129 138 F.3d 204 (5th Cir 1998).

130 Id at 205.

for a less physically demanding position through the company’s normal assignment system, which made assignments based on seniority.\textsuperscript{132} The employee argued that since pregnant employees and nonpregnant employees who were injured off the job have the same ability or inability to work, they should be treated in the same manner.\textsuperscript{133} However, the court rejected this.\textsuperscript{134}

In analyzing the company’s treatment of the pregnant employee and her medically imposed twenty-pound lift restriction, the Fifth Circuit held that the employer treated her the same as “any other worker who was injured off the job.”\textsuperscript{135} Specifically, the court found that to demonstrate discrimination, the ideal comparator for a pregnant employee is another employee with a non-occupational injury who received different treatment.\textsuperscript{136} Since the pregnant employee failed to show such disparate treatment, the court held that it was not a violation of the PDA for the employer to deny light duty assignments to pregnant employees even though employees who were injured on the job were provided with such assignments.\textsuperscript{137} The Fifth Circuit further stated that “Urbano’s claim is thus not a request for relief from discrimination, but rather a demand for preferential treatment; it is a demand not satisfied by the PDA.”\textsuperscript{138}

The Eleventh Circuit reached a similar conclusion in \textit{Spivey v Beverly Enterprises, Inc.}.\textsuperscript{139} In \textit{Spivey}, the pregnant employee worked as a certified nurse’s assistant, which required her to be able to lift patients.\textsuperscript{140} However, during her pregnancy Spivey’s doctor imposed a medical restriction against lifting more than 25 pounds.\textsuperscript{141} After the employee received this restriction, Beverly Enterprises informed Spivey that she “would not be provided with an accommodation due to the company’s modified duty policy.”\textsuperscript{142} The court upheld the accommodation denial, noting

\begin{itemize}
  \item \textsuperscript{132} Id.
  \item \textsuperscript{133} \textit{Urbano}, 138 F.3d at 207.
  \item \textsuperscript{134} Id at 206.
  \item \textsuperscript{135} Id.
  \item \textsuperscript{136} Id.
  \item \textsuperscript{137} \textit{Urbano}, 138 F.3d at 208.
  \item \textsuperscript{138} Id.
  \item \textsuperscript{139} 196 F.3d 1309 (11th Cir 1999).
  \item \textsuperscript{140} Id at 1311.
  \item \textsuperscript{141} Id.
  \item \textsuperscript{142} Id.
\end{itemize}
that under the PDA, an employer must ignore an employee’s pregnancy and treat her “as well as it would have if she were not pregnant.”

Even when an employer ignores a woman’s pregnancy, that employer still has an employee with a limitation that did not arise from an off the job injury. Thus, the court explicitly applied the Fifth Circuit’s reasoning from Urbano. As such, the court concluded that the correct comparison was between the pregnant employee and other employees who suffered non-occupational disabilities, not between the pregnant employee and other employees who were injured off the job. The Eleventh Circuit also noted that holding otherwise would require employers to give preferential treatment to pregnant employees, since employers do not give accommodations to other employees injured off the job.

In Arizanovska v Wal-Mart Stores, Inc the Seventh Circuit also addressed an employer policy that did not allow for accommodations of light duty, temporary alternative duty, or reassignment for individuals with non-disability medical conditions—including pregnancy—the pregnant employee—worked as a stocker, which required that an employee be able to lift up to fifty pounds. However, once pregnant, Arizanoska had a medical restriction to not lift more than ten pounds, which meant she could no longer perform the essential lifting function of her stocker position. Wal-Mart refused to grant Arizanovska any accommodation, and instead told her to take a leave of absence until she could meet the stocker lift requirement. The Seventh Circuit upheld summary judgment for the employer because the employee failed to identify “a similarly-situated employee outside her protected class—i.e., non-pregnant.” The court explained that the “purpose of the ‘similarly-situated’ comparator is to ensure

143 Spicey, 196 F3d at 1313, citing Piraino, 84 F3d at 274.
144 Id.
145 Id.
146 Id.
147 Spicey, 196 F3d at 1312.
148 682 F3d 698, 702 (7th Cir 2012).
149 Id at 701.
150 Id at 700.
151 Id at 701.
152 Arizanovska, 682 F3d at 702.
153 Id at 703 (emphasis original).
that all other variables are discounted so that discrimination can be inferred.”154 In other words, the Seventh Circuit explained that evidence of an employer taking action against an employee in a protected class, but not taking the same action against a comparator employee who is not a member of that class would enable a court to infer discrimination in the prima facie stage.155 Without this comparator, the court refused to find for the pregnant employee.

Most recently the Fourth Circuit considered the issue of who is an acceptable comparator in *Young v UPS*.156 In *Young*, the employee’s pregnancy resulted in a restriction that prevented her from lifting more than twenty pounds. This made her unable to continue performing her usual job, so Young took an unpaid extended leave of absence.157 The employer, however, maintained a policy that provided temporary alternate work to employees that were “unable to perform their normal work assignments due to an off the job injury.”158 This policy allowed a pregnant employee to continue working provided that she could perform the essential functions of her job; a pregnant employee would not be eligible for light duty work if a limitation arose solely from her pregnancy.159 Young argued that her employer’s policy offering limited light-duty work to those injured off the job but not to pregnant workers violated the PDA’s command to treat pregnant employees the same “as other persons not so affected but similar in their ability or inability to work.”160 The Fourth Circuit held that a pregnant employee with a temporary lifting restriction is not similar in her “ability or inability to work” to an ADA-disabled employee, an employee who lost her legal ability to drive her *UPS* vehicle, or an employee injured off the job.161 The court reasoned that accepting the plaintiff’s interpretation of the PDA would “[compel] employers to grant pregnant employees a ‘most favored nation’ status with others based on their ability to work, regardless of whether such status

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154 Id.
155 Id.
156 707 F.3d 437 (4th Cir. 2013).
157 Id. at 437–41.
158 Id. at 439 (emphasis original).
159 Id. at 440.
160 *Young*, 707 F.3d at 445, quoting 42 USC § 2000e(k).
161 Id. at 450.
was available to the universe—male and female—of nonpregnant employees.” The Fourth Circuit emphasized that without an explicitly similarly situated employee who received more favorable treatment, there was insufficient evidence to establish pregnancy discrimination.

B. Minority Approach: The Sixth, Eighth, and Tenth Circuits Require a Similar Ability Comparator

In contrast, the minority of circuits hold that the PDA explicitly altered the discrimination analysis applicable in pregnancy discrimination cases. The Sixth, Eighth, and Tenth Circuits have found that employees with the similar ability or inability to work as a pregnant employee should be used as appropriate comparators in accommodation actions. The minority grounds its reasoning in the same treatment clause of the PDA, which requires employers to treat pregnant women the same as others “similar in their ability or inability to work.” Thus the nature of the injury—on the job or off the job—is irrelevant to determining if an employee is a suitable comparator for establishing a prima facie discrimination case.

In *Ensley-Gaines v Runyon*, the Sixth Circuit contemplated which considerations are relevant to determining when accommodations are necessary for a pregnant employee. The employer, the Postal Service, maintained a policy allowing an employee who was temporarily unable to perform her duties to submit a written request for alternative assignments. Notably the policy made a distinction between light duty and limited duty: “[l]imited duty’ is available to those workers injured on the job, while ‘light duty’ is available to employees

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162 Id at 446.
163 Id at 451.
164 See *Ensley-Gaines*, 100 F3d at 1226; *Adams v Nolan*, 962 F2d at 794.
165 See note 15.
166 See note 10 and accompanying text.
167 See *Ensley-Gaines*, 100 F3d at 1226 (finding that unlike the typical Title VII requirement “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’”), quoting 42 USC § 2000e(k); accord *Ackerman*, 956 F2d at 948 (same).
168 100 F3d 1220 (6th Cir 1996).
169 Id at 1222.
170 Id.
whose injuries are not employment-related." The pregnant employee argued that she was given light-duty status in name only since she was not given an accommodation to allow her to work a full eight-hour day. Additionally, the employee identified a number of non-pregnant, temporarily disabled employees who received more favorable treatment after requesting alternative duties.

The amicus curiae brief emphasized the PDA's own bona fide occupational qualification that "unless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'" The Sixth Circuit agreed and rejected the distinction between on the job and off the job injuries, holding that such a distinction pertains to the "terms of employment, not to an employee's ability or inability to work, as provided in the PDA." In arriving at this conclusion, the Sixth Circuit emphasized that the Supreme Court recognized that, "[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 to work." The court explained that "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.'" Thus, a comparator for use in establishing a prima facie case must be similar in his ability to complete the necessary work, but the source of the injury is irrelevant.

The Eighth Circuit applied the same reasoning. In Adams v Nolan, the pregnant employee served as a patrol officer.

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171 Id at 1222.
172 Ensley-Gaines, 100 F3d at 1223.
174 Ensley-Gaines, 100 F3d at 1226.
175 Id, quoting California Federal Savings, 479 US at 297 (emphasis original).
176 Id at 1225.
177 962 F2d 791 (8th Cir 1992).
178 Id at 792.
The police department’s policy granted use of sick leave, vacation leave, and/or other earned paid time off for employees who suffered non-work related injury or illness, including pregnancy, that caused temporary disability. Based on that policy, the plaintiff’s request for light duty work was denied. On appeal, the pregnant employee argued that she was passed over for light duty assignments and thus met the requirements for a prima facie case. Despite reservations as to “whether the leave policy itself even qualifies as a ‘nondiscriminatory’ basis for defendants’ actions,” the Eighth Circuit applied the McDonnell Douglas analysis. Since the plaintiff demonstrated that some officers with off the job injuries or conditions other than pregnancy were in fact given light duty assignments to accommodate their conditions, the burden shifted to the employer to provide a reason for the decision. The police department submitted that it denied plaintiff the light duty assignment because it follows a specific policy. The plaintiff then had the opportunity to demonstrate the employer’s reason was pretextual. Since the exact light duty job was given to another officer sharing the same circumstances as the plaintiff except that his medical impairments were not pregnancy-related, the Eighth Circuit held that the proffered reason for the adverse action against the employee was a pretext for intentional discrimination on the basis of sex.

In EEOC v Horizon/CMS Healthcare Corp, the Tenth Circuit confirmed the necessity of using a comparator who is similarly situated in her ability or inability to work regardless of where the injury was sustained. The pregnant employees worked for the Horizon/CMS Healthcare Corporation, a long-term health care services provider. Each had work restrictions, including various limitations on the amount each

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180 Id.
181 Id at 793.
182 Adams, 962 F2d at 793.
183 Id at 794.
184 Id at 796.
185 Id at 795.
186 Adams, 962 F2d at 796.
187 Id at 795–96.
188 220 F3d 1184 (10th Cir 2000).
189 Id at 1192.
190 Id at 1189.
woman was allowed to lift, but could perform all duties of her job except for heavy lifting.\textsuperscript{191} The employees argued that their employer violated the PDA by refusing to place them in modified-duty assignments.\textsuperscript{192} In finding for the employees, the court noted, “if a plaintiff is compared only to non-pregnant employees injured off the job, her case would be 'short circuited' at the \textit{prima facie} stage and she would be denied the opportunity to show that the policy . . . is actually a pretext for unlawful discrimination.”\textsuperscript{193} Thus at the \textit{prima facie} stage, the relevant consideration was “whether the employee has introduced some evidence that she possesses the objective qualifications \textit{necessary to perform the job sought}.”\textsuperscript{194} Accordingly, the court concluded that evidence that pregnant women were treated differently than other temporarily disabled employees, regardless of whether it was due to occupational or non-occupational injury, was sufficient to satisfy the \textit{prima facie} stage under the \textit{McDonnell Douglas} discrimination framework.\textsuperscript{195}

The Eighth Circuit examined an accommodation policy changed for economic reasons in \textit{Walker v Fred Nesbit Distributing Co.}\textsuperscript{196} The employer, a food distribution company, allegedly adopted a policy change that only allowed reassignment to light duty if the employee was injured off the job.\textsuperscript{197} Walker presented evidence of other employees who were injured off the job and given subsequent accommodation.\textsuperscript{198} In response, Nesbit admitted that before Fall 2001 it allowed light duty assignment for employees injured off the job, but that it stopped providing accommodation for off the job injuries because “it did not make 'economic sense' to pay two people to do the job of one.”\textsuperscript{199} The pregnant employee argued that the policy change was never put in writing and the company handbook was not

\textsuperscript{191} Id.
\textsuperscript{192} \textit{Horizon}, 220 F3d at 1189.
\textsuperscript{193} Id at 1195 n 7.
\textsuperscript{194} Id at 1193 (emphasis in original).
\textsuperscript{195} Id.
\textsuperscript{196} 156 Fed Appx 880 (8th Cir 2005).
\textsuperscript{197} Id at 882.
\textsuperscript{198} Id at 883.
\textsuperscript{199} Id at 884.
amended. Furthermore, there were no other employee requests for accommodations for off the job injuries between the time of accommodation for the broken foot injury and the pregnant employee’s request, a period of seven months. The court found for the employer and affirmed that an accommodation policy change driven by economic considerations is not pretextual. Specifically, the court recognized that the “jury apparently concluded that Nesbit was truthful in its statement . . . to change its policy of [accommodation]” and that a “reasonable jury could have believed that Nesbit had implemented its new accommodation policy in the fall of 2001, despite not committing the new policy to writing.” Although the pregnant employee established a similarly situated group of employees who were treated differently—that is, given accommodations—despite their off the job injuries, and the pregnant employee was denied similar accommodations, the employee did not prevail. This case demonstrates the difficulties that arise in pregnancy discrimination cases even after establishing a similarly situated comparator.

More recently, in Latowski v Northwoods Nursing Center, the Sixth Circuit explicitly addressed the nature of the comparator employee. Latowski worked at Northwoods Nursing Center assisting nursing home residents with daily living activities. During Latowski’s pregnancy her doctor implemented a lifting restriction of fifty pounds, which the doctor relayed to Northwoods pursuant to its policy to get a note for “anything medical.” In response, Northwoods informed Latowski that she could no longer work because “[Northwoods] would accommodate only restrictions resulting from work-

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200 Walker, 156 Fed Appx at 885.
201 Id at 883-84.
202 Id at 884-85.
203 Id at 885.
204 Walker, 156 Fed Appx at 883-84 (“The district court stated that ‘there is no question that drivers injured off the job who could not fulfill the lifting requirements are similarly situated to [Walker].’”)
205 Id at 885.
207 Id at *10–11.
208 Id at *2.
209 Id at *3.
When Latowski still reported to work, another Northwoods nurse told Latowski that “she had ‘resigned’” and a second letter from the Northwoods administrator “accepted Latowski’s ‘resignation.’” Latowski never resigned and emphasized that the Northwoods owners made discriminatory comments to her, including that “her ‘belly would be in the way.’” Thus, Latowski argued that her employer’s facially nondiscriminatory policy still had a discriminatory impact on her. Based on the discriminatory comments and Latowski’s satisfactory job performance tests, the court held that the plaintiff satisfied the prima facie test. Those same comments sufficiently rebutted her employer’s pretextual reasons for the employment decisions regarding the plaintiff. The court found that the pregnant employee and the other employee must be similarly situated in their ability to work based on having a similar workplace limitation, such as a lifting restriction. Furthermore, it did not matter if one employee’s medical condition was work-related and the pregnant employee’s was not; the essential similarity must be the ability of the employee to perform her work.

These two lines of interpretation exhibit a clear circuit split over which type of employee can be used as a comparator employee for a Title VII discrimination claim. As a review, the majority of jurisdictions have held that employers that accommodate pregnant employees in the same manner as other employees injured off the job—but not on the job—are pregnancy-blind and, therefore, valid under the PDA.

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211 Id at *5.
212 Id.
213 Id at *8–9.
215 Id at *14–17.
216 Id at *11.
217 Id.
218 “The concept of pregnancy-blindness captures this right: An employer can treat the pregnant woman as well or as badly as it treats anyone else, as long as it is blind to her pregnancy as an independent variable.” Joanna L. Grossman and Gillian L. Thomas, Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model, 21 Yale J L & Feminism 15, 27 (2009). See also Troupe, 20 F3d at 738 (holding that ‘employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees’ and noting the court’s ‘doubt that finding a comparison group would be that difficult’); notes 14, 125–126 and accompanying text.
Conversely, other courts have held that the “similarly situated” analysis should compare a pregnant employee to any other employee who has a similar ability or inability to perform the job, including those who became temporarily disabled due to an injury while on the job.\textsuperscript{219} Resolving this split is of top importance for enabling pregnant women to have full access to Title VII pregnancy discrimination protections.

\section*{IV. PROPOSED RESOLUTION: USING A PLAIN MEANING INTERPRETATION OF THE PDA'S SAME TREATMENT CLAUSE FULFILLS THE PURPOSE OF TITLE VII PROTECTION AGAINST PREGNANCY DISCRIMINATION}

The PDA requires that employers treat pregnant women the same as other similarly situated employees.\textsuperscript{220} However, when an injured employee and a pregnant employee are treated differently, there exists much room for discrimination. This discrimination against pregnant employees is exactly what the PDA aims to prevent.\textsuperscript{221} This section discusses why the correct comparator does not consider injury location and instead focuses on ability or inability to work. It then explores whether the choice of comparator in this manner amounts to preferential treatment and concludes it does not.

Specifically, Part A explores the structure and legislative history of the PDA and why structural considerations necessitate interpreting the PDA's second clause as requiring a similar ability comparator. Part B explains why a similar ability comparator does not amount to preferential treatment, identifies likely counterarguments, and demonstrates why they do not preclude this intended interpretation. Finally, Part C proposes to eliminate the circuit split by allowing comparators that reflect the ability level of the pregnant employee and removes the current ambiguities.

\textsuperscript{219} See notes 164–167 and accompanying text.

\textsuperscript{220} See note 67 and accompanying text.

\textsuperscript{221} See Part I.C and I.D. See also Brake and Grossman, 21 Duke J Gender L & Pol at 77 (cited in note 66) (arguing that the PDA's second clause establishes "an independent violation of the PDA if pregnant workers are treated worse than other workers similar in their ability to work . . . [which] best matches the text and legislative history of the Act").
A. Statute Structure and Legislative History Compel Interpreting the Same Treatment Clause to Require a Similar Ability Comparator

Since the legislative history demonstrates that Congress intended for the PDA to ensure that pregnant women are to be treated the same as others on the basis of their ability or inability to work, it is unlikely that Congress would have left pregnant women without a cause of action in cases where a similarly able employee injured on the job exists, but a similarly able employee injured off the job does not. In direct response to Gilbert, Congress enacted the PDA to overturn Gilbert and “establish a robust commitment to treating pregnancy at least as well as other conditions that place comparable limitations on employees.” Thus, the relevant consideration ought to be the nature of the limitation—not the origin of the limitation. For pregnant women, the on the job versus off the job injury distinction offers a shallow differentiation since pregnancy is a temporary life condition, as opposed to an injury occurring in a specific location. Requiring a comparator who was injured off the job does not satisfy the PDA’s goal and puts women in an inferior position given that establishing such a comparator is not required by the second clause and can be extremely challenging, particularly in small or new workplaces.

Current PDA interpretation gives much deference to the idea that the PDA does not require preferential treatment—especially the majority rule. In fact, courts agree that the PDA does not “impose an affirmative obligation on employers to grant preferential treatment to pregnant women.” Still, circuits that have adopted the majority rule continue to be concerned about preferential treatment. While a valid concern, the majority’s

222 “H.R. 6075 unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, and specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work.” HR Rep No 95-948 at 3 (cited in note 9). See also notes 54–62 and accompanying text.

223 See Widiss, 46 UC Davis L Rev at 1004 (cited in note 11).

224 See note 125.

225 See, for example, Urbano, 138 F3d at 207; see also California Federal Savings, 479 US at 287–88; Stout v Baxter Healthcare Corp, 282 F3d 856, 861 (5th Cir 2002); note 125.

226 See note 125.
interpretation of the PDA’s second clause limits equal treatment for pregnant women.

Further, the majority rule prevents the disparate impact theory from operating as a backstop or absolute floor against discrimination, which is what the Supreme Court required in California Federal Savings. Notably, the PDA’s legislative history only discusses Congress’s “intent not to require preferential treatment.” As noted, the Supreme Court highlighted that if “Congress had intended to prohibit preferential treatment” then it would have extended its conversations to discuss the intention to expressly forbid preferential treatment. The minority rule avoids this outcome by requiring a comparator to be of the ability of the pregnant employee. This recognizes both congressional intent and the importance of a pregnant employee’s ability to work while avoiding discriminatory effects. Furthermore, the Act is silent as to the location where an inability to work arose. The Court also found that the Legislative Record supports the notion that the PDA must only operate as a floor. The House Report explained that the proposed legislation “does not require employers to treat pregnant employees in any particular manner . . . [and it] in no way requires the institution of any new programs where none currently exist.” Where a program does exist, however, the PDA allows a pregnant employee to benefit when coverage or accommodation is given to another employee who is similar in ability or inability to work. An accommodation model for pregnant workers might take different forms, but the fundamental goal is to enable capable pregnant workers with similar abilities to other employees to continue working.

227 See 67.
229 California Federal Savings, 479 US at 287.
230 Id (emphasis in original).
231 Id at 285.
232 HR Rep No 95-948 at 4 (cited in note 9). See also S Rep No 95-331 at 41 (remarks of Senator Williams) (cited in note 59).
233 See note 67.
B. Similar Ability Comparators Do Not Amount to Preferential Treatment

The majority rule reasons that comparing pregnant women to employees injured on the job would grant a pregnant woman an inappropriate preference—that is, she would be treated like those injured on the job, even though her disability originated off the job.\(^{234}\)

However, this argument overlooks the true intent of the PDA’s second clause. As analyzed in Part IV.A, Congress intended for a pregnant women’s ability or inability to work to be compared to an injured worker’s ability—not the location of an injury.\(^ {235}\) Despite Congress’ intent, the majority rule holds that the appropriate comparator is an employee who was injured off the job.\(^ {236}\) As is, this standard is incredibly difficult to satisfy. The smaller or newer the workplace, the less likely a pregnant employee is able to establish a comparator who was injured off the job.

Furthermore, the majority rule incentivizes employers to provide no accommodations to any workers injured off the job. Employers hope to avoid workers’ compensation costs by not accommodating pregnant employees.\(^ {237}\) However, the PDA same treatment clause\(^ {238}\) requires treating pregnant women the same as other similarly situated workers and the majority holds that the only comparator workers are those with similar ability level who were injured off the job. Thus in order to comply with the law, employees who do not wish to accommodate a pregnant employee will also opt not to accommodate other employees injured off the job. This is permissible under the idea that an employer can treat a pregnant employee as poorly as it treats other similarly situated, non-pregnant employees.\(^ {239}\) Thus, all

\(^{234}\) See note 138 and accompanying text.

\(^{235}\) See HR Rep No 95-948 at 3 (cited in note 9). See also notes 57–61, 222 and accompanying text.

\(^{236}\) See Troupe, 20 F3d at 738–39 (holding that “employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees” and noting the court’s “doubt that finding a comparison group would be that difficult”); Spicey, 196 F3d at 1312–13 (finding that “pregnant employees must be treated the same as every other employee with a non-occupational injury”). See also note 125.


\(^{238}\) See note 67.

\(^{239}\) Troupe, 20 F3d at 738–39 (holding that “employers can treat pregnant women as
workers stand to be harmed by this standard. Supporters of the majority position argue that the cost of providing pregnant employees the same accommodations as employees injured on the job harms non-pregnant employees.\textsuperscript{240} The logic is that workers compensation and other accommodation costs would raise the cost of employment such that an employer is likely to either cut wages or benefits across-the-board for all employees.

Despite its prevalence, this position is untenable for a number of reasons. First, benefits for on the job injuries predate the PDA by decades; if Congress wanted to allow differential treatment, then it likely would have carved out an on the job injury benefit as an exception to the PDA’s equality requirement.\textsuperscript{241} This could take the form of an explicit statement recognizing that on the job injuries are unique and require distinct treatment. However, Congress included no such carve out. Additionally, when the PDA was drafted and enacted, employers claimed it would greatly increase costs.\textsuperscript{242} Congress, however, analyzed the varying economic estimates and found that the costs could “be sustained without any undue burden on employers.”\textsuperscript{243} Specifically, the Congressional Budget Office found that the PDA would result in no additional cost to the government,\textsuperscript{244} and the Department of Labor calculated a total estimated cost of $191.5 million for employers, which amounted to a 3.5 percent rise in the cost of temporary disability plans and a 0.05 percent increase in total payroll costs for workers covered by those plans.\textsuperscript{245} Furthermore, employers who focus on the cost of pregnancy accommodation are shortsighted. Pregnancy affects an employee for a matter of months, a small proportion compared to the long career that an employee could have in the

\textsuperscript{240} See HR Rep No 95-948 at 6 (cited in note 9).

\textsuperscript{241} See Appellant’s Brief, Barbara Harvey, Ensley-Gaines v Runyon, Civil Action No 95-1038, *35–36 (ED Mich filed July 17, 1995). For example, workers compensation is only applied to injuries that occur in the workplace or in performance of work duties. Thus, workers compensation is a carved out exception for a benefit that is only given to job-related injuries.

\textsuperscript{242} See S Rep No 95-331 at 159 (cited in note 59).

\textsuperscript{243} Id.

\textsuperscript{244} See id at 163.

\textsuperscript{245} See Pregnancy Disability Amendment at 6 (cited in note 62).
ensuing years. By focusing on the short-term costs, employers forgo the potential for long-term employment relationships with otherwise qualified and productive employees.246

Another concern is that employers will be less willing to provide accommodations for the off the job injuries if they know they will also have to extend these same accommodations to pregnant employees.247 This argument similarly derives from fears of increased employment costs. Indeed, primary opposition to the PDA arose from those concerned about the cost of including pregnancy in health- and disability-benefit plans.248 However, accommodations are an exception, not a norm; only in certain cases does a pregnant woman need an accommodation.249 Therefore, the fear that accommodating pregnant women will be an unbearable expense is unfounded. Furthermore, the same short-term versus long-term costs rationale discussed above applies. What an employer may spend during an employee’s pregnancy it saves in other areas, such as a more experienced workforce and avoided litigation costs.250

An additional counterargument states that giving a pregnant woman the same accommodation as an employee injured on the job—and one unavailable to an employee injured off the job—amounts to reverse discrimination on the basis of sex.251 The concerns—that this could amount to preferential, rather than equal, treatment of pregnant employees—are real.


247 Opponents of the legislation warned that it could have the unintended effect of discouraging the creation of disability and medical benefit plans for employees who are not covered. See HR Rep No 95-948 at 6 (cited in note 9).

248 Id. See also note 250.

249 See Pregnancy Disability Amendment at 6 (cited in note 62) (explaining that the average time away from work was only seven-and-one-half weeks).

250 See S Rep No 95-331 at 161 (cited in note 59) (noting that "even a very high cost could not justify continuation of the policy of discrimination against pregnant women which has played such a major part in the pattern of sex discrimination in this country").

251 The majority rule accepted the employer’s argument that calls the request for a comparator with an employee injured on the job a demand for preferential treatment that would harm other, non-pregnant employees. See Brief of Appellee, Robin E. Curtis and Margaret Coullard Phillips, *Urbano v Continental Airlines, Inc*, Civil Action No 96-21115, *6 (SD Tex filed May 13, 1997); Urbano*, 138 F3d at 208 (holding that "Urbano's claim is thus not a request for relief from discrimination, but rather a demand for preferential treatment").
However, these concerns are insufficient to overcome the countervailing benefits. Pregnancy is not an injury in the sense of a harm that occurs either on the job or off the job. It is a natural event for many women, but courts still have recognized that “pregnancy is unique” and “[t]hat pregnancy itself is not an ‘abnormal medical condition.’”252 The Supreme Court even stated that, “[n]ormal pregnancy is an objectively identifiable physical condition with unique characteristics.”253 Therefore, a legal distinction between pregnancy and injury should exist. Pregnancy is a natural and necessary part of life while injuries are typically unwanted and often occur due to carelessness. Interpreting the PDA to accommodate pregnancy as an employer would accommodate an on the job injury, as Congress intended, both recognizes these distinctions and benefits both sexes since it allows mothers to maintain their jobs and continue supporting their families during pregnancy and after delivery.254

In explaining the majority rule’s off the job injury requirement, the Seventh Circuit expressed doubt “that finding a comparison group would be that difficult.”255 This implies that establishing a similarly situated employee would be easy.256 However, in the nineteen years since that decision, only three appellate level cases found that a pregnant employee established an appropriate comparator.257 These decisions came from the Sixth and Eighth Circuits—both circuits applying the minority rule—and only in two cases did the appellate courts find in favor of a pregnant employee who sought to prove her differential treatment by demonstrating another group was

254 See notes 1–2, 74 and accompanying text.
255 Troupe, 20 F3d at 739.
256 See id.
257 See Latowski, 2013 US App LEXIS 25738 at *14–17 (holding that it did not matter if one employee’s medical condition was work-related and the pregnant employee’s was not; the essential similarity must be the ability of the employee to perform her work); Walker, 156 Fed Appx at 885 (holding that although the employee identified a suitable, similarly situated comparator, the court found the employer’s reason for the policy change to be legitimate); Adams, 962 F2d at 795–96 (holding that the plaintiff demonstrated that some officers with off the job injuries or conditions other than pregnancy in fact were given light duty assignments to accommodate their condition).
treated more favorably. Thus, even in cases where a pregnant employee is able to establish a similarly situated comparator group or individual, pregnant women have largely been unable to succeed. If a pregnant woman cannot prevail in a situation with a similarly situated comparator and no written evidence supporting the employer’s offered reason for denial of accommodation, then when can a pregnant woman prevail under the current majority test? If the Seventh Circuit’s argument that identifying a comparator were as easy as asserted, then pregnant women should have more success establishing a comparator of similarly situated employees and winning in those cases. Pregnant women, however, rarely establish a comparator and almost never win Title VII claims; a pregnant woman has never succeeded in a circuit following the majority rule. While the evidentiary standard is not insurmountable, the majority rule includes an unnecessary hurdle for pregnant employees.

One possible reason for the lack of successful cases is that employers are no longer discriminating against pregnant women. Thus, the argument suggests that while it used to be common practice to treat pregnant women worse than employees injured off the job, such as in a car accident or home repair accident, it simply is not the case anymore. However, during the same time period that discrimination allegedly diminished, the number of PDA cases has continued to increase and the EEOC issued new guidance for handling pregnancy discrimination. Thus, pregnancy discrimination cases are still frequently filed and the majority rule interpretation seems to be preventing pregnant employees from accessing the tools provided by the PDA.

Employers have argued that adopting the minority rule “construction of the PDA would be to except the claims of pregnant workers from Title VII’s requirement of proof of discrimination and from the traditional McDonnell Douglas . . .

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258 The court in Walker found the employer’s economic reasons for the employment decision valid. See Walker, 156 Fed Appx at 885. The courts held for the plaintiff in the other two instances. See Latoucki, 2013 US App LEXIS 25738 at *14–17; Adams, 962 F2d at 795–96.

259 The Eighth Circuit affirmed a finding for the employer, despite the pregnant employee’s demonstration of a similarly situated class that received distinct treatment accommodations. See Walker, 156 Fed Appx at 882.

260 See notes 17–20 and accompanying text.
analytical framework.” However, this argument does not reflect the actual application of the minority rule framework; under the minority construction the *McDonnell Douglas* framework is applied in exactly the same manner except for the nature of the comparator that will satisfy prong four.²⁶²

C. Applying the Proposed Solution: Only Require Comparators with Similar Ability Level

Many commentators advocate for accommodation legislation modeled on the Americans with Disabilities Act.²⁶³ At this stage, however, it is more important to recognize how difficult passing new legislation currently is and consider other options. A more tenable solution involves the simple but powerful act of interpreting the PDA’s same treatment clause as it was intended—comparing ability to another employee with a similar ability level no matter where the injury originated.²⁶⁴ This means that the comparator for a pregnant employee would be another employee who is similarly situated in his ability or inability to work without regard to the cause of the inability to work. As analyzed throughout, but particularly in Part I.C and Part IV, this interpretation matches the congressional intent and allows pregnant women equal employment opportunities. Thus, the solution is simply to follow the PDA as it was intended.

Current conditions provide further rationale for solving the circuit split in a simple but effective manner.²⁶⁵ As discussed,

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²⁶² See text accompanying note 99.
²⁶³ The specific accommodations could include short-term modifications of tasks, assignments to alternate positions, more frequent breaks, or enabling the employee to sit when justified by a particular woman’s medical condition. See Grossman, 98 Georgetown L J at 625 (cited in note 131). See also Widiss, 46 UC Davis L Rev at 969, 1035 (cited in note 11) (arguing that ADA-accommodated employees are the appropriate comparators for PDA analysis); 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, 539–42 (2013) (advocating for a new federal law accommodating pregnancy that requires “reasonable accommodation for women’s unique reproductive capacities”).
²⁶⁴ “H.R. 6075 unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, and specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work.” HR Rep No 95-948 at 3 (cited in note 9).
²⁶⁵ The number of claims of pregnancy discrimination to the Equal Employment
the number of pregnancy discrimination cases is on the rise. The EEOC has responded by issuing new pregnancy discrimination guidance and by including pregnancy-related accommodation limitations in its latest Strategic Enforcement Plan. These EEOC efforts demonstrate the importance of using the PDA to eliminate pregnancy discrimination, as the Act intended. However, the current split prevents consistent and effective litigation of pregnancy discrimination. Appellate courts can move to adopt the minority rule by focusing on the text of the same treatment clause. The courts following the majority rule may distinguish their existing precedent by revisiting the legislative history, acknowledging that the PDA establishes a floor (as opposed to a ceiling), and identifying a similar ability comparator when presented such evidence. In light of the growing number of women choosing to work during pregnancy, the increasing number of pregnancy discrimination filings, and the different outcomes depending on jurisdiction, it is time for the Supreme Court to again examine the PDA’s accommodation clause.

V. CONCLUSION

Increasingly more women are choosing to work during their pregnancies—with nearly two-thirds of pregnant women working, and the number of pregnancy discrimination cases


266 See note 3 and accompanying text.


268 See note 67.

269 The Supreme Court granted Petitioner’s writ of certiorari on July 1, 2014. Oral arguments are set for December 3, 2014. See Young v United Parcel Service, 134 S Ct 374 (2013). In Young, the Fourth Circuit held that an employee injured off the job with a similar ability is the only acceptable comparator for a pregnant employee. Young, 707 F3d at 450-51. See notes 156-163 and accompanying text.

270 ‘Between 1961 and 1965, for example, 44 percent of first-time mothers worked during their pregnancies; in contrast, between 2006 and 2008, nearly two-thirds of first-time mothers worked while pregnant. Women are also working later into their pregnancies. Between 1961 and 1965, less than 35 percent of working first-time mothers
expanded nearly 23 percent between 2005 and 2011.\footnote{271} With the growing role of women in the labor market,\footnote{272} enabling capable women to continue working is a top concern. However, a circuit split over the interpretation of the same treatment clause of the PDA makes it increasingly difficult for pregnant women who are discriminated against to recover under Title VII. The issue revolves around which type of employee establishes a suitable comparator for the pregnant employee. The majority rule holds that the suitable comparator is a similarly situated employee who was injured off the job.\footnote{273} In contrast, the minority rule disregards the location of the injury and requires that a comparator be similar in his or her ability or inability to work.\footnote{274} The majority interpretation—while arguably facially neutral—enables the ongoing discrimination of pregnant women. Instead, the minority rule focuses on the ability level, as the same treatment clause requires.\footnote{275} This plain meaning interpretation of the PDA more closely aligns with the legislative intent\footnote{276} and enables discriminated against pregnant women to recover until Title VII. Thus, by realigning the comparator to focus on ability level, the circuit split can be resolved and the PDA fulfill Congress’ intentions. To continue on the path towards equal employment opportunities for all—irrespective of race, color, religion, sex and national origin—pregnant women must also

\footnote{271}{The number of claims of pregnancy discrimination to the Equal Employment Opportunity Commission from pregnant women increased nearly 23 percent from 2005 to 2011. See Equal Employment Opportunity Commission, Pregnancy Discrimination Charges (cited in note 3).}


\footnote{273}{See note 13; see also Part III.A.}

\footnote{274}{See note 15; see also Part III.B.}

\footnote{275}{See note 67; see also Part IV.B and C.}

\footnote{276}{"H.R. 6075 unmistakably reaffirms that sex discrimination includes discrimination based on pregnancy, and specifically defines standards which require that pregnant workers be treated the same as other employees on the basis of their ability or inability to work." HR Rep No 95-948 at 3 (cited in note 9).}
receive equal accommodations as employees of similar ability levels.