

October 22, 2019

The Honorable Suzanne Bonamici  
Chairwoman  
Subcommittee on Civil Rights and Human Services  
Education and Labor Committee  
U.S. House of Representatives  
Washington, D.C. 20515

The Honorable James Comer  
Ranking Member  
Subcommittee on Civil Rights and Human Services  
U.S. House of Representatives  
Washington, D.C. 20515



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Susan Herman  
*President*

Anthony Romero  
*Executive Director*

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*National Political Director*

RE: **Statement in Support of the “*Long Overdue:  
Exploring the Pregnant Workers’ Fairness Act (H.R.  
2694)*” Hearing**

Dear Chair Bonamici and Ranking Member Comer:

On behalf of the American Civil Liberties Union (ACLU), we submit this statement for the record and offer our thanks for convening this critical hearing to examine the plight of pregnant workers and the promise of the Pregnant Workers Fairness Act (H.R. 2694). We also extend our thanks to Rep. Bobby Scott, chair of the Education and Labor Committee, for his support of this hearing and of the Pregnant Workers Fairness Act.

The ACLU is a nonpartisan public interest organization with more than 4 million members and supporters, and 53 affiliates nationwide dedicated to protecting the principles of freedom and equality set forth in the Constitution. For nearly 100 years, the ACLU has been our nation’s guardian of liberty, working in courts, legislatures, and communities to defend and preserve individual rights and civil liberties.

We have long fought to advance women’s equality and opportunity by challenging laws and policies that discriminate against women in the workplace and by dismantling the stereotypes that constrained women’s full engagement and participation at work.<sup>1</sup> Although the Pregnancy Discrimination

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<sup>1</sup> See Lenora Lapidus & Ariela Migdal, ACLU Women’s Rights Project, *Fighting Sex Stereotypes in the Law: Reflections on 40 Years of the ACLU Women’s Rights Project* (2012), at [https://www.aclu.org/sites/default/files/field\\_document/2012.12.20\\_released\\_version\\_of\\_wrp\\_40th\\_report.pdf](https://www.aclu.org/sites/default/files/field_document/2012.12.20_released_version_of_wrp_40th_report.pdf)

Act has played a critical role over the past 40 years in securing women’s place in the workforce, too many women continue to be marginalized at work because of their decision to become pregnant and have children. This kind of discriminatory treatment has become most obvious when pregnant workers – predominantly women in physically demanding or male-dominated jobs, low-wage workers, and women of color – request temporary accommodations to address a medical need and instead are terminated or placed on unpaid leave, causing devastating economic harm.

We strongly support the Pregnant Workers Fairness Act and urge Congress to step in and provide employers and pregnant workers the support and clarity that is needed.

**A. Pregnancy Discrimination, the PDA, and *Young v. United Parcel Service, Inc.***

Pregnancy and childbirth are often locus points for discrimination against women in the workforce. Policies excluding or forcing the discharge of pregnant women from the workplace were common in the 1970s and reflected the stereotype that a woman’s primary or sole duties were to be a homemaker and raise children. The adoption of the Pregnancy Discrimination Act (PDA) in 1978, an amendment to Title VII of the Civil Rights Act of 1964, established that discrimination because of “pregnancy, childbirth, and related medical conditions” was a form of discrimination “because of sex.”<sup>2</sup> It was intended to dismantle the stereotype, and the policies based on it, that viewed pregnant women’s labor force participation as contingent, temporary, and dispensable without regard to their individual capacity to do the job in question.<sup>3</sup>

The PDA also mandated that pregnant workers “be treated the same for all employment-related purposes...as other persons not so affected but similar in their ability or inability to work.”<sup>4</sup> This meant that employers were required to treat pregnant workers the same as other temporarily disabled workers because Congress recognized that working women contributed to their families’ economic stability and should not have to choose between a career and continuing a pregnancy.<sup>5</sup>

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<sup>2</sup> 42 U.S.C. § 2000e(k).

<sup>3</sup> See, e.g., Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 Harv. C.R.-C.L. L. Rev. 415, 484 (2011); Joanna Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 Geo L.J. 567 (2010).

<sup>4</sup> 42 U.S.C. § 2000e(k).

<sup>5</sup> Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model*, 21 Yale J.L. & Feminism 15, 33 (2009) (the statute “specifically requires equal treatment with a defined comparison group – workers who are temporarily disabled by causes other than pregnancy, but ‘similar in their ability or inability to

Despite the PDA, pregnancy discrimination persists<sup>6</sup> and for many years courts routinely ruled against workers who brought pregnancy accommodation cases where they alleged discrimination when an employer provided a job modification to an employee temporarily unable to work but failed to do the same for a pregnant worker. The most common fact pattern concerned an employer that maintained a policy of accommodating only employees whose impairments arose from on-the-job injuries – a definition that necessarily excluded pregnant workers. In most cases, courts determined that such workers were insufficiently “similar” to pregnant workers to warrant the “same” treatment, and thus failed to make out a *prima facie* case – *i.e.*, that similarly-situated non-pregnant workers were treated more favorably.<sup>7</sup> The exceptions to this negative track record chiefly were disparate treatment cases where an employer was shown to have granted accommodations to non-pregnant workers with non-work-related injuries or illnesses, notwithstanding its policy to the contrary.<sup>8</sup>

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work.”); Daniela M. de la Piedra, *Flirting with the PDA: Congress Must Give Birth to Accommodation Rights that Protect Working Women*, 17 Colum. J. Gender & L. 275, 285-86 (2008).

<sup>6</sup> See, e.g., U.S. Equal Employment Opportunity Commission, “Pregnancy Discrimination Charges, EEOC & FEPAs Combined: FY 1997-2011, available at <https://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm>; National Partnership on Women and Families, *Listening to Mothers: The Experiences of Expecting and New Mothers in the Workplace* (Jan. 2014), available at <http://www.nationalpartnership.org/our-work/resources/economic-justice/pregnancy-discrimination/listening-to-mothers-experiences-of-expecting-and-new-mothers.pdf>; Jessica Silver-Greenberg & Natalie Kitroeff, “Miscarrying at Work: The Physical Toll of Pregnancy Discrimination,” *The New York Times* (Oct. 21, 2018), available at <https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html>; Natalie Kitroeff & Jessica Silver-Greenberg, “Pregnancy Discrimination is Rampant Inside America’s Biggest Companies,” *The New York Times* (June 15, 2018), available at <https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html>; Jessica Silver-Greenberg & Natalie Kitroeff, “Miscarrying at Work: The Physical Toll of Pregnancy Discrimination,” *The New York Times* (Oct. 21, 2018), available at <https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html>.

<sup>7</sup> Compare *Ensley-Gaines v. Runyon*, 100 F. 3d 1220, 1226 (6th Cir. 1996) (reversing summary judgment for employer, finding favorable treatment of employees with on-the-job injuries sufficient to satisfy fourth prong of *prima facie* case) with *Serednyj v. Beverly Healthcare, LLC*, 656 F. 3d 540, 547, 552 (7th Cir. 2011) (affirming summary judgment where policy accommodated only workers injured on the job or workers qualifying for accommodation under the ADA; plaintiff could not make out fourth prong); *Reeves v. Swift Transp. Co.*, 446 F. 3d 637, 640, 643 (6th Cir. 2006) (affirming summary judgment; reserving accommodations for employees with occupational injuries showed no intent to discriminate); *Spivey v. Beverly Enterprises, Inc.*, 196 F. 3d 1309, 1312, 1314 (11th Cir. 1999) (affirming summary judgment where on-the-job injuries accommodated; plaintiff neither was “qualified” nor could show she was treated less well than co-workers with impairments incurred off-the-job); *Urbano v. Continental Airlines, Inc.*, 138 F. 3d 204, 206, 208 (5th Cir. 1998) (same).

<sup>8</sup> Additionally, with respect to lactating workers’ need to pump breast milk at work, several courts even declined to find lactation a “medical condition” that is “related” to pregnancy under the PDA. See, e.g., *Ames v. Nationwide Mutual*, 2012 WL 12861597 (S.D. Iowa Oct. 16, 2012), *aff’d* 747 F.3d 509 (8th Cir. 2014); *Martinez v. NBC*, 49 F. Supp. 2d 305, 309-10 (S.D.N.Y. 1999); *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869-70 (W.D. Ky. 1990), *aff’d*, 951 F.2d 351 (table), 1991 WL 270823 (6th Cir. 1991) (*per curiam*); see also Stephanie Bornstein, Work, Family, and Discrimination at the

In *Young v United Parcel Service, Inc.*,<sup>9</sup> the Supreme Court granted certiorari to resolve a split in the Circuits and for the first time addressed the PDA's application in the context of an employee who needed an accommodation due to pregnancy. The Court concluded that the statute's mandate applied with equal force in these circumstances and articulated a modified analysis for failure-to-accommodate cases. Under the new standard, a plaintiff makes out a *prima facie* case if she shows that (1) she belongs to a protected class; (2) that she sought accommodation; (3) that the employer did not accommodate her; (4) that the employer did accommodate others similar in their ability or inability to work.<sup>10</sup>

The Court also offered a new pretext analysis that plaintiffs may rely on when litigating claims under the PDA's second clause. After the employer put forward "legitimate, nondiscriminatory" reasons for denying her accommodation," the plaintiff could reach a jury "by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers and that the employer's . . . stated reasons are not sufficiently strong to justify the burden, but rather – when considered along with the burden imposed – give rise to an inference of intentional discrimination."<sup>11</sup> According to the Court, the key questions are feasibility and fairness: "[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?"<sup>12</sup>

Since *Young*, the reflexive approval of employer policies favoring workers with occupational injuries has largely disappeared; indeed, the mere existence of such a policy has been found sufficient to satisfy the fourth prong of the *prima facie* case.<sup>13</sup> (The case of ACLU's client, Michelle Durham, is an unfortunate notable exception to this trend, and is discussed further *infra*.) However, the bright-line deference to employer policies, and the overbroad reading of such policies as "pregnancy-blind," has been replaced, in many instances, with an unduly demanding standard for plaintiffs in making a showing of differential treatment – even at the initial pleading stage, prior to having the benefit of discovery. These

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Bottom of the Ladder, 19 Geo. J. on Poverty L. & Pol'y 1, 8, 11 (Winter 2012). And even when a landmark appellate decision rejected such precedent, it still stopped short of finding that the PDA required employers to *accommodate* lactating employees. *E.E.O.C. v. Houston Funding II Ltd.*, 717 F.3d 425, 429 n.6 (5th Cir. 2013).

<sup>9</sup> 135 S. Ct. 1338 (2015)

<sup>10</sup> *Id.* at 1354.

<sup>11</sup> *Id.* at 1343.

<sup>12</sup> *Id.* at 1355.

<sup>13</sup> See *Legg v. Ulster Cty.*, 820 F.3d 67, 70 (2d Cir. 2016) (citing *Young*, reversing judgment for employer because policy of accommodating employees injured on the job, while "facially neutral with respect to pregnancy," could support finding of intent if inadequately justified); *Bray v. Town of Wake Forest*, No. 5:14-CV-276, 2015 WL 1534515, at \*6 (E.D.N.C. Apr. 6, 2015) (motion to dismiss denied where plaintiff alleged two male colleagues with similar physical limitations resulting from work-related injuries had been granted light duty); *Elease S., Complainant*, EEOC DOC 0120140731, 2017 WL 6941010, at \*5 (Dec. 27, 2017).

cases fall into three main categories: (1) the court finds the plaintiff has failed to identify individual comparators, even though the employer's stated policy (or past practice) shows accommodation of non-pregnant workers; (2) the plaintiff identifies comparators, but the court refuses to find them "comparable"; and/or (3) notwithstanding the merits of the plaintiff's comparator evidence, the court refuses to consider other probative, circumstantial evidence of discrimination. All of these trends undermine *Young's* intent of demanding that employers justify failures to accommodate pregnancy. Instead, they impose unwarranted – and often insurmountable – burdens of proof on pregnant workers that increasingly confer "least favored nation" status on the protected trait of pregnancy.

Requiring individual comparators. Since *Young*, courts have granted motions to dismiss – that is, they have foreclosed pregnant workers' ability to challenge failures to accommodate prior to those workers even having the opportunity to conduct discovery – based on the plaintiff's failure to identify individual non-pregnant comparators who received accommodations.<sup>14</sup> Others have granted summary judgment for the same reason.<sup>15</sup> The burden of identifying specific individual comparators before discovery is an impossible one for many PDA plaintiffs. The plaintiff might be new to the work environment, or she may work in just one department or location of a large employer. In any event, accommodation decisions regarding her colleagues are likely to be (appropriately) confidential. And even after discovery, identification of comparators can be difficult; at a smaller employer, for instance, the plaintiff might be the first person, or one of the first, to seek an accommodation. Tethering a pregnant worker's ability to vindicate her statutory rights to the vagaries of her employer's workforce contravenes Congress's intent of assuring pregnancy does not drive women out of the workforce.

Overly restrictive standards for comparators. Courts have also taken an unduly narrow approach to the question of who can be a proper comparator under the PDA. Overly strict standards for comparators have included requiring a similar *source* of impairment,<sup>16</sup> similar *type* of impairment,<sup>17</sup> and the same supervisor or

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<sup>14</sup> See *LaCount v. S. Lewis SH OPCO, LLC*, No. 16-CV-0545, 2017 WL 1826696, at \*5 (N.D. Okla. May 5, 2017), *reconsid. denied*, No. 16-CV-0545, 2017 WL 2821814 (N.D. Okla. June 29, 2017); *Anfeldt v. United Parcel Serv., Inc.*, No. 15 C 10401, 2017 WL 839486, at \*3 (N.D. Ill. Mar. 3, 2017).

<sup>15</sup> See *Washington v. Donahoe*, No. CV-13-02444, 2016 WL 9455309, at \*5 (D. Ariz. Mar. 31, 2016), *aff'd*, 692 F. App'x 486 (9th Cir. 2017); *Sanchez-Estrada v. MAPFRE PRAICO Ins. Co.*, 126 F. Supp. 3d 220 (D.P.R. 2015), *app. dismissed*, No. 15-2221 (1st Cir. Jan. 15, 2016).

<sup>16</sup> See *LaCount*, 2017 WL 1826696, at \*5 (employees needing accommodation due to ADA-qualifying disabilities with no appropriate comparators); *Washington*, 2016 WL 9455309, at \*5 (comparators granted time off for non-medical reasons not "similar").

<sup>17</sup> See *Jackson v. J.R. Simplot Co.*, 666 Fed. App'x 739, 743 (10th Cir. 2016) (employees needing light duty due to lifting restrictions not comparable to pregnant employee needing limited exposure to chemicals); *LaCount*, 2017 WL 1826696, at \*5 (granting motion to dismiss because plaintiff did "not explain what physical or mental impairments the [other] employees had or how the employees were accommodated").

work location.<sup>18</sup> This reasoning defies the Supreme Court’s recognition in *Young* that the proper focus is on the comparator’s ability or inability to work, full stop. Courts also have refused to consider as comparators pregnant workers whose pregnancies distinguished them from the plaintiff – such as by needing different accommodations, or needing no accommodations at all.<sup>19</sup>

Ignoring traditional evidence of pretext. As previously discussed, *Young* outlined a modified standard for proving pretext in failure-to-accommodate claims.<sup>20</sup> But in outlining this new pretext standard, the Court also left undisturbed the “longstanding rule that a plaintiff can use circumstantial proof” of an employer’s discriminatory *animus*<sup>21</sup> – such as hostile statements, shifting reasons for its actions, or failure to comply with its own policies. Alarming, some post-*Young* courts alarmingly appear to consider comparator evidence now to be the predominant route, if not the *sole* one, by which a plaintiff may make out the fourth prong of the *prima facie* case or create a question of fact as to pretext.<sup>22</sup> This approach further narrows pregnant workers’ protections, in plain contravention of the PDA’s plain terms, PDA jurisprudence, and *Young*’s specific interpretive directives.

## **B. ACLU Clients Harmed by the Failure to Accommodate Pregnancy**

Long before the Supreme Court took up the issue of pregnancy accommodation in *Young*, the ACLU represented pregnant workers denied the job modifications needed to continue doing their jobs. Unfortunately, since *Young*, our PDA docket on behalf of such clients – both as direct counsel and as lead *amicus* – has remained full. Below is a sampling of our past and recent cases.

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<sup>18</sup> See *Washington*, 2016 WL 9455309, at \*5; *Lawson v. City of Pleasant Grove*, 2016 WL 2338560, at \*10 n.6.

<sup>19</sup> See *Mercer v. Gov't of the Virgin Islands Dep't of Educ.*, No. 2014-50, 2016 WL 5844467, at \*11 (D.V.I. Sept. 30, 2016); *Luke v. CPlace Forest Park SNF, LLC*, No. 12-00402, 2016 WL 4247592, at \*3 (M.D. La. Aug. 9, 2016); *Lawson*, 2016 WL 2338560, at \*9-10; *Frederick v. State of New Hampshire*, No. 14-cv-403, 2016 WL 4382692, at \*9-10 (D.N.H. Aug. 16, 2016) (motion to dismiss granted where breastfeeding plaintiff pointed only to other lactating employees granted). *But see Martin v. Winn-Dixie Louisiana, Inc.*, 132 F. Supp. 3d 794, 819 (M.D. La. 2015) (favorable treatment of coworkers probative evidence of pretext); *Gonzales v. Marriott Int'l, Inc.*, 142 F. Supp. 3d 961 (C.D. Cal. 2015) (evidence that other workers, including other lactating employees, were provided accommodations was sufficient to establish *prima facie* case).

<sup>20</sup> *Young*, 135 S. Ct. at 1343.

<sup>21</sup> *Id.* at 1355.

<sup>22</sup> *Jackson*, 666 Fed. App'x at 742-43; *Jones v. Brennan*, No. 16-CV-0049, 2017 WL 5586373, at \*8 n.8 (N.D. Okla. Nov. 20, 2017); *LaCount*, 2017 WL 1826696, at \*5; *Luke*, 2016 WL 4247592, at \*3; *Lawson*, 2016 WL 2338560, at \*11; *Salmon v. Applegate Homecare & Hospice, LLC*, 1:13-CV-001092016 WL 389987 (D. Utah Feb. 1, 2016).

*Lochren v. Suffolk County*<sup>23</sup>: In one of the earliest PDA accommodation cases and one of the few pre-*Young* victories, ACLU and the New York Civil Liberties Union represented Sandra Lochren and five other police officers in a lawsuit against the Suffolk County Police Department (SCPD) for refusing to temporarily reassign pregnant officers to desk work and other non-patrol jobs, even though it did so for officers injured on the job. But for those officers who opted to keep working patrol, SCPD also failed to provide bullet-proof vests or gun belts that would fit pregnant officers. As a result, pregnant officers' only safe option was to go on unpaid leave long before their due date. In 2006, a federal court found SCPD's policy discriminatory. As a result, it changed its policy to cover pregnant officers.

*Cole v. SavaSeniorCare*: When Jaimie Cole, a certified nursing assistant, was in her third trimester, she developed a high risk of preeclampsia, a condition that can lead to preterm labor or even death. Her doctor advised her not to do any heavy lifting. Cole's job required her to regularly help patients in and out of bed and assist with bathing, so she asked for a temporary light duty assignment. Instead, her employer sent her home without pay for the rest of her pregnancy because, according to her supervisor, pregnant women weren't eligible for light duty. Under the settlement negotiated by the ACLU and ACLU of North Carolina in 2014 after filing a U.S. Equal Employment Opportunity Commission (EEOC) charge of discrimination, SavaSeniorCare adopted a new policy ensuring that pregnant workers get light duty or other accommodations on the same terms as other employees needing temporary job changes.

*Myers v. Hope Healthcare Center*<sup>24</sup>: Asia Myers, a certified nursing assistant, experienced complications early in her pregnancy and was told by her doctor that she could continue to work, but should not do any lifting on the job. Although Hope Healthcare Center had a history of providing light duty to workers with temporary lifting restrictions, including workers who had been injured on the job, Myers was told not to return to work until her restrictions were lifted. As a result, she was out of work for over a month with no income or health insurance coverage. Myers was able to return to work after her complications had passed, but she suffered significant financial hardship. Under the settlement negotiated by the ACLU and ACLU of Michigan in 2015, the company adopted a pregnancy accommodation policy.

*Hicks v. City of Tuscaloosa*<sup>25</sup>: Stephanie Hicks, a narcotics investigator with the Tuscaloosa Police Department in Alabama, wanted to breastfeed her new baby, but her bulletproof vest was restrictive, painful, and prone to causing infection in her breasts. She asked for a desk job so that she would not need to wear a vest for protection, but her employer refused, even though it routinely granted desk jobs to

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<sup>23</sup> No. 08-2723-cv (E.D.N.Y.).

<sup>24</sup> No. 2:13-cv-14459 (E.D. Mich.).

<sup>25</sup> 870 F.3d 1253 (2017).

officers unable to fulfill all of their patrol duties. Instead, her employer only offered her an ill-fitting vest that put her at risk. Hicks quit her job rather than perform it unsafely. She won at trial, but her employer appealed. The ACLU, along with the Center for WorkLife Law, submitted an amicus brief arguing that accommodation of the need to pump was covered by the *Young* paradigm. The Eleventh Circuit agreed, affirming the jury verdict for Hicks and becoming the first appellate court to extend *Young* to employees who are breastfeeding.

*Luke v. CPlace SNF, LLC*<sup>26</sup>: Nursing assistant Eryon Luke was denied accommodation of her lifting restriction during her pregnancy, even though her employer routinely allowed assistants to seek assistance with lifting and had mechanical lifts available for such a purpose, as well. In 2016, the district court ruled against Luke, finding she had failed to identify sufficient comparators to make out a PDA claim.<sup>27</sup> The ACLU, the ACLU of Louisiana, A Better Balance, and the Center for WorkLife Law authored an amicus brief in support of Luke. Unfortunately, the U.S Court of Appeals for the Fifth Circuit affirmed the lower court's ruling, erroneously eschewing the *Young* analysis, instead concluding that lifting was an "essential function" of Luke's job and further, that her inability to fulfill that function – which of course was the very reason she needed accommodation – justified her discharge.

*LaCount v. S. Lewis SH OPCO, LLC*<sup>28</sup>: Nursing assistant Whitney LaCount was denied accommodation of her lifting restriction during her pregnancy, even though the facility where she worked had a policy of accommodating non-pregnant workers with various limitations, after her supervisor deemed her a "liability." In 2016, the district court dismissed LaCount's complaint because she had not identified individual comparators, despite the existence of those policies and despite the explicit bias reflected by the employer's statement.<sup>29</sup> The ACLU, ACLU of Oklahoma, and the Center for WorkLife Law drafted an *amicus* brief urging reversal. The U.S. Equal Employment Opportunity Commission also submitted a supportive brief. The parties settled prior to oral argument.

*Legg v. Ulster County*<sup>30</sup>: Corrections Officer Ann Marie Legg was denied temporary assignment to light duty during her pregnancy, even though Ulster County gave such assignments to guards injured on the job. In her third trimester, Legg had to intervene in an inmate fight, prompting her to go on leave rather than face future risks. After a trial, a federal judge in 2017 refused to find that the County's policy imposed a discriminatory disparate impact on pregnant workers,

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<sup>26</sup> 747 Fed. App'x 978 (5th Cir. 2019).

<sup>27</sup> *Luke v. CPlace SNF, LLC*, No. 13-00402-BAJ-EWD, 2016 WL 4247592 (M.D. La. Aug. 9, 2016).

<sup>28</sup> No. 17-5075 (10th Cir.).

<sup>29</sup> No. 16-CV-0545-CVE-TLW, 2017 WL 1826696 (N.D. Okla. May 5, 2017), reconsideration denied, No. 16-CV-0545-CVE-TLW, 2017 WL 2821814 (N.D. Okla. June 29, 2017).

<sup>30</sup> No. 17-2861 (2d Cir.).



even though he acknowledged that under the County’s policy, a pregnant officer never will qualify for light duty.<sup>31</sup> Rather, he concluded, Legg would have to show that every pregnant officer would need, and be denied, light duty in order to prove disparate impact. On appeal, the ACLU drafted an *amicus* brief with the Center for WorkLife Law, urging reversal. The case remains pending.

*Allen v. AT&T Mobility*<sup>32</sup>: Cynthia Allen lost her job because she accumulated too many “points” under AT&T Mobility’s punitive attendance policy due to pregnancy-related symptoms such as nausea. The policy makes accommodation for late arrivals, early departures, and absences due to thirteen enumerated reasons, some medical and some not, but not those due to pregnancy and pregnancy-related symptoms. The class action, which ACLU is litigating with ACLU of Georgia and the law firm of Cohen, Milstein, Sellers & Toll, is pending in the Northern District of Georgia.

*Durham v. Rural/Metro Corp.*<sup>33</sup>: Michelle Durham was an Emergency Medical Technician (EMT) in Alabama whose job often required her to lift patients on stretchers into an ambulance. When she became pregnant, her health care provider imposed a restriction on heavy lifting. Durham asked Rural/Metro for a temporary modified duty assignment during her pregnancy, but was rejected, despite the company’s policy of giving such assignments to EMTs injured on the job and those with ADA-qualifying disabilities. She was told her only option was to take unpaid leave for the duration of her pregnancy. In 2018, a lower court judge approved the employer’s actions and dismissed Durham’s case, erroneously relying on pre-*Young* precedent to conclude that EMTs injured on the job were not “similarly situated” to Durham, within the meaning of the PDA; the court did not address the employer’s policy of affording accommodations to disabled workers.<sup>34</sup> ACLU and ACLU of Alabama joined in appealing the case to the Eleventh Circuit, where it now is pending. Oral argument is scheduled for January 2020.

### **C. Why Congress Should Pass the Pregnant Workers Fairness Act**

It is indisputable that *Young* was an important step forward to combat pregnancy discrimination. The Supreme Court’s affirmance of accommodations as among the “benefits” that the PDA demands be afforded pregnant workers on equal terms as their non-pregnant peers was an historic moment. Yet, too many pregnant workers continue to face insurmountable obstacles in HR offices, where employers misunderstand their obligations under the PDA, and in courtrooms across the

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<sup>31</sup> *Legg v. Ulster Cty.*, No. 1:09-cv-550 (FJS/RFT), 2017 WL 3207754 (N.D.N.Y. July 27, 2017).

<sup>32</sup> No. 1:18-cv-03730 (N.D. Ga.).

<sup>33</sup> No. 18-14687 (11th Cir.).

<sup>34</sup> *Durham v. Rural/Metro Corp.*, No. 4:16-CV-01604, 2018 WL 4896346 (N.D. Ala. Oct. 9, 2018).

country, where judges use *Young* to hinder access to needed accommodations.<sup>35</sup> Despite the clear mandates of the PDA, the current legal landscape leaves exposed and unprotected those pregnant workers who want to continue working while maintaining a healthy pregnancy.<sup>36</sup>

Similarly, many pregnant workers have not found protection or recourse under the Americans with Disabilities Act of 1990 because absent complications, pregnancy is not considered a disability that substantially limits a major life activity. This legal reality means that many of the symptoms of a normal pregnancy that can disrupt a worker's ability to do her job – such as extreme fatigue, morning sickness, or limitations on her mobility – are not entitled to accommodation. Moreover, many pregnant workers seek accommodation precisely because they wish to *avoid* the conditions that might disable them or endanger their pregnancy.<sup>37</sup> Yet because the ADA is so expansive with respect to other conditions that qualify as disabilities, the population of non-pregnant workers entitled to reasonable accommodation is exponentially larger than when the PDA was enacted more than 40 years ago. Accordingly, without such express entitlement to accommodation, pregnant workers face an untenable “least favored nation” status in the workplace.

The simple solution to this no-win situation is the Pregnant Workers Fairness Act. This legislation, modeled after the ADA and using a framework familiar to most employers, takes a thoughtful and measured approach to balancing the needs of working people and employers by requiring businesses with fifteen or more employees to provide workers with temporary, reasonable accommodation for known limitations related to pregnancy, childbirth, or related medical conditions if

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<sup>35</sup> A Better Balance, The Work and Family Legal Center, *Long Overdue: It is Time for the Federal Pregnant Workers Fairness Act* (May 2019), available at <https://www.abetterbalance.org/long-overdue/>.

<sup>36</sup> Workers who are breastfeeding also continue to face denial of their need to pump on the job. See, e.g., Frederick, *supra* n.19. Although the Affordable Care Act's Break Time for Nursing Mothers provision has provided some measure of support 29 U.S.C. § 207(r), those protections are severely limited – most notably because the law only covers workers who qualify as “non-exempt” under the Fair Labor Standards Act and contains no private right of action for employees whose employers violate it.

<sup>37</sup> See generally Wendy Chavkin, *Walking a Tightrope: Pregnancy, Parenting, and Work, in Double Exposure: Women's Health Hazards on the Job and at Home*, 196, 200 (Wendy Chavkin ed., 1984); Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 *Stetson L. Rev.* 1, 3-8 (1995) (discussing scientific research about the maternal and fetal hazards in the workplace); Jeannette A. Paul et al., *Work Load and Musculoskeletal Complaints During Pregnancy*, 20 *Scandinavian J. Work, Env'T & Health* 153, 156-57 (1994) (noting the effect of the hormone relaxing on joint stability during pregnancy); J. A. Nicholls & D. W. Grieve, *Performance of Physical Tasks in Pregnancy*, 35 *Ergonomics* 301, 301, 304 (1992) (finding that pregnant women had more difficulty performing thirty-two of forty-six ordinary tasks); Karen J. Kruger, *Pregnancy & Policing: Are They Compatible?: Pushing the Legal Limits on Behalf of Equal Employment Opportunities*, 22 *Wis. Women's L.J.* 61, 70-71 (2007) (describing the impact of pregnancy-related physical changes on police officer's job duties).

doing so would not place an undue hardship on business. It also prohibits employers from forcing a pregnant employee to take a leave of absence if a reasonable accommodation can be provided; prevents employers from denying job opportunities to an applicant or employee because of the individual's need for a reasonable accommodation; prevents an employer from forcing an applicant or employee to accept a specific accommodation; and prohibits retaliation against individuals who seek to use PWFA to protect their rights.

At a time when women constitute nearly 60 percent of the workforce and contribute significantly to their families' economic well-being, PWFA is a dire necessity. When a pregnant worker is forced to quit, coerced into taking unpaid leave, or fired because her employer refuses to provide a temporary job modification, the economic impact can be severe; if she is the sole or primary breadwinner for her children, as nearly half of working women are, her entire family will be without an income when they most need it. She further may be denied unemployment benefits because she is considered to have left her job voluntarily. She may have few if any additional resources on which to rely. PWFA ensures that women would not face such devastating consequences. Instead, it treats pregnancy for what it is – a normal condition of employment.

PWFA promotes women's health. Accommodations make a difference in physically demanding jobs (requiring long hours, standing, lifting heavy objects, etc.) where the risk of preterm delivery and low birth weight are significant.<sup>38</sup> The failure to provide accommodations can be linked to miscarriages and premature babies who suffer from a variety of ailments.<sup>39</sup> This bill would be an important contribution in the fight to improve maternal health and mortality.

There is also a strong business case for PWFA. Providing pregnant employees with reasonable, temporary accommodations increases worker productivity, retention, and morale, decreases re-training costs, and reduced health care costs associated with pregnancy complications. PWFA can also reduce litigation costs by providing greater clarity regarding an employer's legal obligations to pregnant workers. These benefits apply to small and large businesses.<sup>40</sup>

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<sup>38</sup> Mayo Clinic, *Pregnancy Week by Week* (last visited October 18, 2019), available at <https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/pregnancy/art-20047441>.

<sup>39</sup> A Better Balance, The Work and Family Legal Center, *Long Overdue: It Is Time for the Federal Pregnant Workers Fairness Act* at 25 (May 2019), available at <https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf>.

<sup>40</sup> Kent Oyler, President and CEO of Greater Louisville Inc., *Legislation would help Kentucky Women in the Workforce* (January 4, 2019), available at <https://www.bizjournals.com/louisville/news/2019/01/04/guest-comment-legislation-would-help-kentucky.html> (“Most large HR departments long ago enacted policies to retain their valuable female employees throughout their pregnancies, but many small-to-midsize businesses are forced to navigate complex circumstances like childbirth without the aid of a robust HR department or in-

Recently, a group of leading private sector employers— Adobe, Amalgamated Bank, Chobani, Cigna Corp, Facebook, ICM Partners, L’Oreal USA, Levi Strauss & Co., Microsoft Corporation, and Spotify – expressed their support for PWFA and noted that “women’s labor force participation is critical to the strength of our companies, the growth of our economy and the financial security of most modern families.”<sup>41</sup> Their support for the bill was in line with their commitment to “strive to create more equitable workplaces.”

Finally, twenty-seven states<sup>42</sup> across the political and ideological spectrum -- from California, Nebraska, South Carolina, Kentucky, New Jersey, and Maine – and the District of Columbia, have recognized the benefits of providing reasonable accommodations to pregnant workers. Congress should ensure that all pregnant workers, not just some, have the protections they are due.


Adoption of the Pregnant Workers’ Fairness Act is indeed long overdue. It is time for Congress to clarify what the Pregnancy Discrimination Act requires and to meet the needs of pregnant workers and employers across the country. We urge swift passage of PWFA in the 116<sup>th</sup> Congress.

Thank you for your consideration of our views. If you need additional information, please contact Vania Leveille, senior legislative counsel, at [vleveille@aclu.org](mailto:vleveille@aclu.org).

Sincerely,



Ronald Newman  
National Political Director



Vania Leveille  
Senior Legislative Counsel



Gillian Thomas  
Senior Staff Attorney

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house counsel... Beyond clarifying the rules, [the Kentucky pregnant worker fairness bill] will help boost Kentucky’s female workforce participation rate, which ranks 44<sup>th</sup> in the nation.”)

<sup>41</sup> National Partnership for Women, *An Open Letter in Support of the Pregnant Workers Fairness Act from Leading Private-Sector Employers* (July 2019), available at <http://www.nationalpartnership.org/our-work/resources/economic-justice/coalition/an-open-letter-in-support-of-PWFA-from-private-sector-employers.pdf>.

<sup>42</sup> The states are Alaska, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New York, North Carolina, North Dakota, Oregon, Rhode Island, South Carolina, Texas, Utah, Vermont, Washington, and West Virginia.