No. 18-14687-A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

KIMBERLIE MICHELLE DURHAM,
Plaintiff - Appellant,

v.

RURAL/METRO CORPORATION,
Defendant - Appellee.

On Appeal from the United States District Court
for the Middle District of Alabama, No. 4:16-cv-1604-ACA
Hon. Annemarie Carney Axon, United States District Judge

# BRIEF OF THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF - APPELLANT AND IN FAVOR OF REVERSAL

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rules 26.1-1, 26.1-2, and 26.1-3, I hereby certify that to the best of the Commission's knowledge, the Certificate of Interested Persons enclosed in the appellant's opening brief is a complete list of persons and entities having an interest in this case, with the following additions:

Gantz, Julie L., Attorney, EEOC

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Pursuant to Federal Rule of Appellate Procedure 26.1, Amicus Curiae the Equal Employment Opportunity Commission, as a government entity, is not required to file a corporate disclosure statement.

s/ Julie L. Gantz
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## STATEMENT OF INTEREST

The Equal Employment Opportunity Commission ("EEOC") is charged by Congress with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.*, which includes the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k). In this case, the district court ruled that the plaintiff failed to establish the fourth prong of her prima facie case of pregnancy discrimination stemming from the company's failure to accommodate her pregnancy-related lifting restriction. The court's decision relied on abrogated caselaw and is contrary to the Supreme Court's decision in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015).

The EEOC has a strong interest in ensuring that *Young* is applied correctly. The court's misapplication hampers the EEOC's enforcement efforts and makes it more difficult for individuals acting as private attorneys general to pursue meritorious claims. We therefore offer our views to the Court pursuant to Federal Rule of Appellate Procedure 29(a).

## STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that Durham failed to establish a prima facie case of pregnancy discrimination under *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015), where she offered evidence that the defendant routinely accommodated nonpregnant employees who were similar in their ability or inability to work.

2. Whether the district court erred in failing to send Durham's case to a jury where Rural/Metro offered no reason for its policy of accommodating only workers who were injured on the job, and where Durham offered evidence that Rural/Metro's policy substantially burdened pregnant workers.

## STATEMENT OF THE CASE

### A. Statement of the Facts

Defendant Rural/Metro provides ambulance and fire protection services. R.43-5. Durham worked for Rural/Metro as an emergency medical technician (EMT) beginning in March 2015. R.42-1 at 16-17 (Durham Dep.). The job duties were primarily "lifting and moving patients from Point A to Point B." R.43-4 at 11 (Watkins Dep.). The job description required that

EMTs "frequently lift and/or move up to 20 pounds and occasionally lift and/or move, with help, up to 100 pounds." R.42-2 at 115. Durham described her job as "to drive the ambulance and maintain it . . . and assist my medic with anything needed in patient care." R.42-1 at 17 (Durham Dep.). She had to lift "the stretcher, [t]he patient from their bed to the stretcher or any location they might be," as well as "equipment that we would move between trucks." *Id.*

Six months after starting work, Durham disclosed to her manager, Mike Crowell, that she was pregnant and that her doctor had given her a fifty-pound lifting restriction. R.42-1 at 18-20 (Durham Dep.). Both Durham and Crowell agreed she could not work her regular job "on the truck." R.42-1 at 21 (Durham Dep.); R.42-3 at 31-32 (Crowell Dep.). Durham had checked the job board at work and noted that there were several ambulance dispatch positions open. R.43-2 ¶3 (Durham Decl.). She asked Crowell to move her to light duty or dispatch. R.42-1 at 21 (Durham Dep.); R.43-3 ¶3 (Durham Decl.). Crowell told her the company's policy was to provide light duty only for those employees who suffered on-the-job

injuries and were on workers' compensation. R.42-1 at 22-23 (Durham Dep.); *see also* R.42-6 at III.A (Transitional Work Program policy). Rural/Metro would not create new positions for these employees, but it would find work they could do within their medical restrictions, such as stocking the bins for the ambulance or doing clerical work. R.42-3 at 38-39 (Crowell Dep.); R.42-2 at 48-49 (Morris Dep.). Rural/Metro did not offer a reason that light duty was reserved for on-the-job injuries. R.42-2 at 53-54 (Morris Dep.) ("I don't think I can answer why the company would have made that decision.").

Human resources officials subsequently confirmed that Durham was ineligible for light duty because she did not have an on-the-job injury. R.42-3 at 36-37 (Crowell Dep.); R.43-1 ¶6 (Harmon Aff.). According to an email from Crowell, Rural/Metro could have created a dispatch position for Durham: "We do not have any dispatch positions posted but if we needed to create a position for her we could." R.43-10. Nonetheless, Crowell testified, "I told [Durham] we had no open positions in dispatch, . . . [a]nd I was told not to create a position" by human resources. R.42-3 at 38.

Rural/Metro removed Durham from the schedule on September 28. R.43-2 at ¶9 (Durham Decl.); R.42-2 (Action Notice).

Because Durham had worked only six months, she was ineligible for FMLA leave. R.42-1 at 23 (Durham Dep.). Rural/Metro offered her a ninety-day unpaid leave of absence. R.42-1 at 26-27 (Durham Dep.26-27). Human resources manager Jennifer Harmon mailed the policy to Durham with an unpaid personal leave request form for her to complete. R.42-1 at 35-36. The policy states: "Unpaid personal leave will not be granted for more than 90 days or for the purpose of pursuing another position, temporarily trying out new work or venturing into business." R.42-1 at 35. Durham testified that she understood the terms of the policy to preclude her from seeking employment elsewhere, which, she testified, she could not afford. "I was not allowed to find another job. I was not allowed to file for unemployment, and I would effectively have no income for those months." R.42-1 at 24 (Durham Dep.). Durham therefore did not submit the personal leave request form. R.42-1 at 26-27 (Durham Dep.).

Durham called Harmon to ask if there were any other options because she could not take unpaid leave. R.42-1 at 27 (Durham Dep.). Harmon responded that unpaid leave was her only option. *Id.* Durham also called Crowell repeatedly about her options, but the calls "went unanswered." R.43-2 ¶11 (Durham Decl.).

Durham consulted with an attorney, who informed Rural/Metro by letter that Durham considered herself constructively discharged and was preparing to file a charge of pregnancy discrimination with the EEOC. R.43-5 at 5-8 (11/3/15 letter); R.42-1 at 29 (Durham Dep.). The letter detailed the factual basis for her claims and reminded the company of its obligations to preserve evidence. R.43-5 at 5-8. Rural/Metro did not respond to the letter. R.43-6 Nos. 2-3 (Defendant's Admission Responses).

Durham filed a charge of discrimination alleging sex discrimination based on pregnancy. R.43-13 (11/12/15 EEOC charge). Although Rural/Metro received notice of the charge, the company did not submit a response to the Commission. R.43-6 No.5 (Defendant's Admission Responses). Rural/Metro administratively terminated Durham's

employment at the end of December 2015. R.42-2 (Action Notice stating reason for termination as "[f]ailure to work minimum hours"); R.42-2 at 196 (Morris Dep.).

About a year after Durham stopped working at Rural/Metro, another employee under Crowell's supervision became pregnant. That employee, Sapphire Gewalt, also had a lifting restriction. R.42-3 at 26 (Crowell Dep.). When Crowell was asked what Rural/Metro did to accommodate Gewalt's lifting restriction, he answered that "Gewalt went on personal leave, FMLA." *Id.* at 27.

Meanwhile, the record reflects, at least three employees working under Crowell during the same year as Durham experienced on-the-job injuries—all of whom received accommodation of their lifting restrictions: Chris Doubek, Daniel Trussell, and Billy McKiven. R.43-15 (Employee Transitional Work Assignment Offer Agreements); 42-3 at 29 (Crowell Dep.). Crowell testified that, in addition to these three, "[t]here may have been more." *Id.* The record also shows that Rural/Metro accommodated employees who were disabled under the ADA, as reflected in its employee

handbook and the testimony of its senior human resources manager. R.43-7 at 8 (Accommodations for Qualified Individuals with Disabilities); R.42-4 at 42 (Reaves Dep.).

After requesting and receiving a right-to-sue notice, Durham filed suit alleging pregnancy discrimination under Title VII. R.1 (Complaint). Rural/Metro filed a motion for summary judgment. R.40-41.

B. District Court's Decision

The district court held that Durham failed to establish the fourth prong of her prima facie case and granted summary judgment. R.55 at 8-11. According to the court, Durham did not "provide substantial evidence that Rural/Metro intentionally treated Ms. Durham less favorably than other persons not so affected but similar in their ability or inability to work." *Id.* at 8 (citing *Young*, 135 S. Ct. at 1345).

The court acknowledged that Durham had identified three employees with lifting restrictions who were accommodated. *Id.* at 8-9. But the court ruled these comparators invalid because they were injured on the job, entitling them to accommodation under the "Light Duty Policy." *Id.* at

9. Relying on Eleventh Circuit cases predating *Young*, the court concluded that the PDA requires only that pregnant employees be treated the same as nonpregnant employees with similar work limitations, not that they be treated "any differently." *Id.* at 9-10 (citing and quoting *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1312 (11th Cir. 1999), and *Armindo v. Padlocker, Inc.*, 209 F.3d 1319, 1320 (11th Cir. 2000)).

The court purported to distinguish *Young*, on the basis that Durham "does not tender *any* evidence of non-pregnant employees with lifting restrictions assigned to light duty when they were injured outside of work or [were] otherwise unable to perform their job functions." *Id.* at 10. Without such evidence, the court said, Durham's case failed. *Id.* To hold otherwise would "afford Durham 'an unconditional most-favored-nation status,'" which *Young* rejected. *Id.* at 11.

## SUMMARY OF ARGUMENT

The Pregnancy Discrimination Act dictates 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." 42 U.S.C.

§ 2000e(k). In *Young*, the Supreme Court held that pregnancy discrimination cases alleging failure to accommodate may be analyzed under a modified *McDonnell Douglas* burden-shifting framework. 135 S. Ct. at 1353 (discussing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). A prima facie case under the standard articulated in *Young* includes a showing that "the employer did accommodate others 'similar in their ability or inability to work.'" *Id.* at 1354. *Young* makes clear that that employees accommodated pursuant to pregnancy-blind policies—such as those reserving light duty positions only to those injured on the job—may be used as valid comparators in this analysis, and functionally overruled decisions holding that employees provided light duty for on-the-job injuries could not be used as comparators. 135 U.S. at 1354 (establishing a prima facie case does not require a plaintiff "to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways").

The district court relied upon abrogated precedent in granting summary judgment to Rural/Metro, erroneously holding that Durham

failed to establish the fourth prong of her prima facie case because she failed to offer nonpregnant comparators who were injured *off* the job. This holding should be reversed. Durham offered evidence that only those injured on the job were eligible for light duty and provided the names of three employees with on-the-job injuries whose lifting restrictions were accommodated. Additionally, Rural/Metro had a written policy of providing accommodations on a case-by-case basis to disabled workers under the Americans with Disabilities Act, some of whom potentially had or would have impairments that necessitated lifting restrictions requiring light duty accommodations. This evidence is more than sufficient to meet the "not onerous" burden of establishing a prima facie case under *Young* and *McDonnell Douglas*.

Additionally, although the court did not rule on Durham's pretext evidence, this Court should not affirm the grant of summary judgment on alternative grounds because Durham offered sufficient evidence of pregnancy discrimination to reach a jury. Not only did Durham establish a prima facie case, but Rural/Metro failed to meet its burden under *Young* of

articulating a legitimate, nondiscriminatory reason for why it provided light duty only to those employees with on-the-job injuries. In fact, the company has yet to provide any justification.

Moreover, even if the Court were to assume that Rural/Metro somehow met its burden, a reasonable jury could find that Rural/Metro's policy imposed a "significant burden" on pregnant employees like Durham, who lost her job because of its failure to accommodate her. It could also find that the company's reasons for the policy, whatever they are, "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." 135 S. Ct. at 1354.

## ARGUMENT

### I. Durham established a prima facie case of pregnancy discrimination under *Young*, and the district court erred in ruling otherwise.

Title VII forbids an employer from discriminating "because of . . . sex." 42 U.S.C. § 2000e-2(a)(1). In 1978, Congress enacted the Pregnancy Discrimination Act (PDA), 92 Stat. 2076, which amended Title VII. The first clause of the PDA clarifies that Title VII's prohibition on sex discrimination

includes "because of or on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). The next clause states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." *Id.*

In *Young v. United Parcel Service, Inc.*, the Supreme Court addressed the meaning of the PDA's second clause in the context of "an employer policy that accommodates many, but not all, workers with nonpregnancy-related disabilities." 135 S. Ct. 1338, 1344 (2015). Specifically, UPS's policies accommodated three categories of nonpregnant workers: (1) employees injured on the job; (2) drivers who lost their Department of Transportation certifications; and (3) employees disabled under the ADA. *Id*. Relying on its policies, UPS denied accommodation to Young when she became pregnant and her doctor imposed a lifting restriction. UPS argued that it treated Young the same as it did anyone else who did not fall into the three categories of employees entitled to light duty and therefore it had not violated the PDA. The district court ruled, *inter alia*, that Young had failed

to establish a prima facie case because she was not similar to employees in UPS's three designated categories, and the Fourth Circuit affirmed. *Id*.

The Supreme Court reversed. The Court held that a plaintiff alleging intentional discrimination under the PDA may utilize the *McDonnell Douglas* burden-shifting framework to prove her claim. 135 S. Ct. at 1353. The Court emphasized that the plaintiff's burden at the prima facie stage "is 'not onerous.'" *Id*. at 1354 (citation omitted). A plaintiff can establish a prima facie case by showing that (1) she belongs to the protected class, (2) she sought accommodation, (3) the employer denied her accommodation, and (4) "the employer did accommodate others 'similar in their ability or inability to work.'" *Id*. The plaintiff is not required, the Court said, "to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways." *Id*.

If the plaintiff establishes a prima facie case, the employer bears the burden of articulating a legitimate, nondiscriminatory reason for its actions. *Id*. The plaintiff may then establish a jury question as to pretext

with evidence that "the employer's policies impose a significant burden on pregnant workers," and that the nondiscriminatory reasons are not sufficiently strong to justify the burden imposed but instead, when considered with the burden imposed, "give rise to an inference of intentional discrimination." *Id*.

Applying its ruling to the case before it, the Court held that Young "created a genuine dispute of material fact as to the fourth prong of the *McDonnell Douglas* analysis." *Id*. at 1355. The Court pointed to evidence that "UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young's." *Id*. Although it declined to determine for itself whether the evidence established a jury question as to pretext, the Court noted that Young had offered evidence of UPS's "separate accommodation policies (on-the-job, ADA, DOT)" and had argued that they significantly burdened pregnant women. *Id*. at 1355-56 (remanding to the Fourth Circuit for pretext determination).

Like Young, Durham also adduced sufficient evidence to create a genuine dispute of material fact as to whether Rural/Metro "accommodate[d] others 'similar in their ability or inability to work.'" It is undisputed that Rural/Metro's Light Duty Policy accommodated only those workers with on-the-job injuries. R.42-1 at 22-23; R.42-6 at III.A; R.42-3 at 36-37; R.42-2 at 48-49; R.43-1 ¶11. Additionally, Durham identified three employees with on-the-job injuries who were accommodated. R.43-15; R.43-3 at 29. *See also* R.43-3 at 29 ("There may have been more."). And because Rural/Metro accommodates at least some disabled employees with lifting restrictions under the ADA, pursuant to its written policy (R.43-7), those individuals constitute a second category of nonpregnant workers treated more favorably.

This evidence suffices under *Young*, where the Supreme Court held that the fourth prong is satisfied by showing that the employer accommodated "others 'similar in their ability or inability to work.'" *Id*. at 1354. *See also Legg v. Ulster Cty.*, 820 F.3d 67, 74 (2d Cir. 2016) (plaintiff established a prima facie case under *Young* by showing that she was denied

light duty while pregnant but that the employer provided light duty to employees with on-the-job injuries); *Hicks v. City of Tuscaloosa*, 870 F.3d 1253, 1261 (11th Cir. 2017) (applying *Young* to uphold claim of pregnancy discrimination where plaintiff sought workplace accommodation to permit her to breastfeed; "Hicks was not asking for a *special* accommodation, or more than equal treatment—she was asking to be treated the same as 'other persons not so affected but similar in their ability or inability to work' as required by the PDA. . . . Hicks showed that other employees with temporary injuries were given 'alternative duty,' and she merely requested to be granted the same alternative duty.") (internal citation omitted).

The district court erred in ruling otherwise. It read *Young* as requiring Durham to provide evidence of nonpregnant workers injured off the job who were accommodated. R.55 at 10. The Supreme Court, however, specifically rejected this argument, stating that a plaintiff is *not* required "to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways." *Young*, 135 S. Ct. at 1354. In other words, *Young* holds that a plaintiff can establish

a prima facie case simply by pointing to nonpregnant employees who were accommodated. *See Legg*, 820 F.3d at 74 (employees with on-the-job injuries were "similar in their ability or inability to work" as to the plaintiff, who requested accommodation due to pregnancy); *Hicks*, 870 F.3d at 1261 (same, with respect to comparators with temporary injuries).

The district court's reliance on pre-*Young* precedent was also misplaced. The court cited *Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1309 (11th Cir. 1999), for the proposition that the PDA does not require that pregnant employees be given special accommodations. R.55 at 9. *Spivey* held that an employer's policy of accommodating only those employees with on-the-job injuries did not violate the PDA. 196 F.3d at 1313. The problem with *Spivey*, however, is that *Young* expressly abrogated it. *See Young*, 135 S. Ct. at 1348 (citing *Spivey*).

To be sure, *Young*—like *Spivey*—rejected the notion that the PDA confers a "most-favored-nation status" on pregnant workers that requires an employer to accommodate them if the employer accommodates any subset of employees. *Id*. at 1350. But *Young* also rejected *Spivey*'s holding

that an employer's policy of accommodating only those with on-the-job injuries can *never* violate the PDA. Rather, *Young* adopted a middle ground (*see infra* § II.B), holding that such policies may be challenged under a modified *McDonnell Douglas* framework. *See id*. at 1353-54 (adopting framework), 1356 (remanding for determination of whether UPS's accommodation policies violated the PDA). And *Young* held that the plaintiff had established a prima facie case by identifying nonpregnant employees who were accommodated, *id*. at 1355, compelling the conclusion that Durham likewise satisfied her burden here.

The district court also relied on *Armindo v. Padlocker, Inc.*, 209 F.3d 1319, 1321 (11th Cir. 2000). That case merely held that the PDA does not require an employer to excuse excessive absences, even those caused by an employee's pregnancy. *Id*. at 321. As with *Spivey*, this decision does not support the district court's ruling. While *Young* confirmed that pregnant employees are not entitled to special benefits, it also confirmed that an employer's policy of accommodating only subsets of employees, to the

detriment of pregnant employees, may be challenged under *McDonnell Douglas*.

Finally, we note that, although the district court based its grant of summary judgment only on Durham's purported failure to satisfy the fourth prong of her prima facie case, there also appears to have been significant confusion about the third prong. First, the court cited *Young* for the proposition that Durham was required to adduce evidence that she was "subjected to an adverse employment action"—language that appears nowhere in *Young* and is not part of the *Young* prima facie case. R.55 at 7. Rather, as explained above, the *Young* Court held that the third prong is met by a showing that "the employer did not accommodate [the pregnant worker's request]." 135 S. Ct. at 1354.

The district court then stated that it "cannot determine as a matter of law that Ms. Durham suffered an adverse employment action."[1] R.55 at 8.

[1] The court's citation to *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1361 (11th Cir. 1999), in this context is puzzling. *Damon* was an age discrimination case where there was no legal dispute over the existence of an adverse employment action. It is of no discernible relevance here.

Even apart from the absence of an "adverse employment action" component from the *Young* prima facie case, there are several problems with this statement. First, to defeat summary judgment, Durham need not establish *any* component of her factual case "as a matter of law"; rather, she must simply adduce sufficient evidence to create a genuine dispute of material fact. *See Young*, 135 S. Ct. at 1355 (noting that summary judgment is inappropriate because, inter alia, "Young created a genuine dispute of material fact as to the fourth prong of the *McDonnell Douglas* analysis"); *cf. Dixon v. Hallmark Cos.*, 627 F.3d 849, 855 (11th Cir. 2010) (in Title VII religious accommodation case, vacating district court's grant of summary judgment where, inter alia, "[d]espite the court's contrary conclusion, the parties' conflicting testimony raises a genuine issue of material fact as to the first prong of the failure-to-accommodate analysis").

Second, viewed under the proper standard from *Young*, Durham did more than enough to create a genuine dispute of material fact as to the third prong—i.e., that she was denied an accommodation she had requested. *See supra* pp. 3-5. Furthermore, she offered evidence that the

company's failure to accommodate her pregnancy-related lifting limitation resulted in her discharge or constructive discharge. *See supra* pp. 5-7 (citing record). If, as the district court observed (R.55 at 8), Rural/Metro's theory of the case is that Durham abandoned her job, and other facts are in dispute, a jury may properly determine which evidence to credit, but this does not militate in favor of summary judgment for the company.

## II. Summary judgment should not be affirmed on any alternative ground because a reasonable jury could find that Rural/Metro discriminated against Durham on the basis of sex and pregnancy.

Under *Young*, courts must look carefully at employers' justifications for policies that accommodate some categories of workers while excluding pregnant workers who are similar in their ability or inability to work. The burden-shifting analysis of *Young*'s adaptation of *McDonnell Douglas* weighs the employer's reason for its accommodation policies and practices against the burden placed on pregnant workers.

A. A reasonable jury could find that Rural/Metro failed to satisfy its burden of articulating a legitimate, nondiscriminatory reason for denying Durham an accommodation.

As the Supreme Court explained in *Young*, once the employee adduces sufficient evidence to support a prima facie case, "[t]he employer may then seek to justify its refusal to accommodate the plaintiff by relying on 'legitimate, nondiscriminatory' reasons for denying her accommodation." 135 S. Ct. at 1354. "But, consistent with the Act's basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates." *Id*. Nor, the Court held, is mere compliance with other statutory mandates a sufficient explanation. *See id.* at 1355 ("[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?").

Here, Rural/Metro gave *no* reason for its policy of providing light duty only for those employees injured on the job. In its brief supporting its motion for summary judgment, Rural/Metro merely asserted that it met its

burden by showing it "has a policy that requires it to find 'light duty' work . . . for employees who suffer work-related injuries." R.41 at 27 (citing R.42-3 at 39) (Crowell Dep.). And, as described *supra* p. 4, Rural/Metro's corporate representative had only this explanation to offer at his deposition: "I don't think I can answer why the company would have made that decision." R.42-2 at 53-54. Rural/Metro thus has failed to meet its burden of offering a legitimate, nondiscriminatory reason for its policy of accommodating only on-the-job injuries. This precludes the availability of summary judgment for Rural/Metro and should end any further analysis.[2]

[2] While we recognize that Durham has not advanced the following argument, we note that, as a matter of law, if the defendant fails entirely to adduce a legitimate nondiscriminatory reason for its policy, the plaintiff is entitled to summary judgment in her favor. *See Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981) ("Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.").

B. Even if this Court should find that Rural/Metro satisfied its burden under *Young* and *McDonnell Douglas*, summary judgment would still be unwarranted because a jury could find the company's reasoning to be a pretext for pregnancy discrimination.

The PDA does not categorically bar employers from maintaining a policy of accommodating only a subset of employees, including those employees with on-the-job injuries. *See Young*, 135 S. Ct. at 1349-51. However, *Young* allows that a jury may find that an employer's policy of accommodating only some employees is a pretext for pregnancy discrimination. The "plaintiff may reach a jury . . . by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination." *Id*. at 1354.

*Young* provides that a "significant burden" can be established with evidence that an employer "accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of

pregnant workers." *Id*. For instance, the Court said, "if the facts are as Young says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations." *Id*. She might, the Court added, also rely on evidence that UPS maintained multiple policies that accommodate nonpregnant employees. *Id*. at 1354-55.

Here, a jury could find that Rural/Metro's light duty policy imposed a "significant burden" on pregnant workers. Durham offered evidence that Rural/Metro accommodated the lifting restrictions of three nonpregnant employees working for Crowell but failed to accommodate Durham, the only pregnant worker with a lifting restriction who requested accommodation. The record would further permit the reasonable inference that more than three employees with on-the-job injuries were accommodated, as Crowell testified that "there may have been more" than three but he could recall only three names. R.42-3 at 29. In any event, Rural/Metro offered no evidence that any nonpregnant employee requested accommodation but was denied. *Cf. Legg*, 820 F.3d at 77-78

(opining that if "the evidence showed that the County accommodated very few injured workers under the light duty policy and that many non-pregnant workers were among those denied accommodation, the jury might reasonably refuse to infer a discriminatory intent").

In terms of percentages, one way to analyze the burden on pregnant workers under *Young*, of the four employees working for Crowell in 2015 who requested accommodation of their lifting restrictions, the three employees with on-the-job injuries were accommodated (100% accommodation rate), while the only pregnant employee was not (100% denial rate).[3] *See generally Legg*, 820 F.3d at 76 (finding a jury question as to significant burden where the employer failed to accommodate its one pregnant employee, who was one of 176 corrections officers).

[3] As explained *supra* p. 7, according to Crowell, Gewalt went out on either FMLA or personal leave when she became pregnant and had a lifting restriction. The current record appears thin on the circumstances of Gewalt's decision to take leave, but it could well be that she, too, was denied accommodation—particularly given Rural/Metro's explicit policy against accommodating pregnant workers not injured on the job. Further discovery on remand could provide clarification.

A jury would thus be entitled to conclude that Rural/Metro imposed a significant burden on pregnant women because it "accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting restrictions." *Young*, 135 S. Ct. at 1354; *see also Legg*, 820 F.3d at 76 ("[I]f an employer has just one pregnant employee and she has been adversely affected, then it has undoubtedly imposed a significant burden on its pregnant employees—it has burdened the only one it has.").

Additionally, the record contains evidence allowing a jury to infer that Rural/Metro accommodated a second category of employees: those disabled under the ADA, some of whom presumably had lifting restrictions. Although Durham did not offer evidence of any specific employee who qualified for light duty on that basis, a jury could conclude that Rural/Metro's policy of accommodating two categories of employees while categorically excluding pregnant employees imposed a "significant burden" on pregnant workers. *See Young*, 135 S. Ct. at 1355-56 (remanding

for pretext determination where UPS "had three separate accommodation policies (on-the-job, ADA, [and] DOT)").

Finally, Durham offered evidence permitting a jury to find that Rural/Metro's reason for denying her accommodation was "not sufficiently strong to justify" the burden imposed, thereby giving "rise to an inference of intentional discrimination" when considered along with the burden. *Id*. at 1354. Because Rural/Metro gave *no* justification for its light duty policy, a jury could readily conclude that Rural/Metro's reasons—or absence thereof—failed to justify the significant burden the policy imposed on pregnant women. The jury could therefore infer that the real reason underlying the policy was pregnancy discrimination. *See Legg*, 820 F.3d at 77 (jury could find that "compliance with a state law requiring accommodation of certain employees was an insufficient reason for denying accommodation to pregnant employees"). Consequently, summary judgment cannot be affirmed on this record.

## CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed and the case remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because it contains 5,189 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: February 11, 2019

CERTIFICATE OF SERVICE

I, Julie L. Gantz, hereby certify that I filed the foregoing brief electronically in PDF format with the Court via the ECF system, and filed one original and six copies of the brief with the Court by next business day delivery, postage pre-paid, on February 11, 2019. I further certify that I served the foregoing brief electronically in PDF format through the ECF system and by paper copy on February 11, 2019, to counsel of record.

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