IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NO.: 18-14687-A

KIMBERLIE MICHELLE DURHAM,

Plaintiff-Appellant,

v.

RURAL/METRO CORPORATION,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
DISTRICT COURT CIVIL ACTION NO.: 4:16-CV-01604-ACA

APPELLEE'S RESPONSE BRIEF

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In accordance with Eleventh Circuit Rule 26.1-1, the undersigned counsel of record for Appellee hereby certifies that the Appellant's Certificate of Interested Persons and Corporate Disclosure Statement is correct.

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STATEMENT REGARDING ORAL ARGUMENT

Appellee Rural/Metro Corporation does not request oral argument. Appellee does not believe that oral argument will materially assist the Court in the resolution of this appeal because the facts and legal arguments are adequately presented in the briefs and record.

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STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

On September 29, 2016, Appellant Kimberlie Durham ("Durham") filed a Complaint in the United States District Court for the Northern District of Alabama against her former employer Rural/Metro Corporation ("Rural/Metro").[1] (Aplt. App. Vol. 1, Doc. 1.)[2] Durham's Complaint alleged that Rural/Metro violated the Pregnancy Discrimination Act "by not allowing her to continue to work, denying her a modified/light duty assignment, denying her a transfer to dispatch, and terminating and/or constructively discharging her." (Aplt. App. Vol. 1, Doc. 1, at 8-9.) On October 9, 2018, the District Court granted summary judgment to Rural/Metro, dismissing Durham's claim in its entirety. (Aplt. App. Vol. 4, Docs. 55-56.) Durham filed the present appeal challenging the District Court's dismissal of her claim on summary judgment.

Statement of the Facts

Durham began working for Rural/Metro as an Emergency Medical Technician ("EMT") at the Pell City, Alabama location in March 2015. (Aplt. App. Vol. 2, Doc.

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[1] Rural/Metro was acquired by Envision Health Care in October 2015 and its Alabama operations were sold in October 2016. (Aplt. App. Vol. 1, Doc. 32-3, at 6; Aplt. App. Vol. 2, Doc. 42-2, at 10:12-20.)

[2] All citations to the record refer to the Corrected Appellant Appendix filed on February 11, 2019.

42-1, at 16:21-17:1; Aplt. App. Vol. 3, Doc. 42-3, at 15:12-21, 17:13-16.) At the time, Rural/Metro provided emergency medical services in Alabama, including transferring patients between facilities and responding to 911 calls. (Aplt. App. Vol. 2, Doc. 42-2, at 97:4-23.) As an EMT, Durham had to lift and move patients onto stretchers, and lift and move equipment, including 100-pound stretchers, all day long. (Aplt. App. Vol. 2, Doc. 42-1, at 17:7-21, 59:7-25.) Each truck was staffed with only two employees. (Aplt. App. Vol. 2, Doc. 42-1, at 18:13-15.)

Mike Crowell was the General Manager for Pell City and various other Rural/Metro locations in Alabama. (Aplt. App. Vol. 3, Doc. 42-3, at 11:16-12:8.) Crowell supervised approximately twenty-five EMTs and between eight to ten dispatchers. (Aplt. App. Vol. 3, Doc. 42-3, at 16:15-17:12, 18:8-16.) The Pell City location was staffed with three EMTs and three paramedics. (Aplt. App. Vol. 3, Doc. 42-3, at 16:19-17:9.) Jennifer Harmon was responsible for Human Resources in the territories supervised by Crowell. (Aplt. App. Vol. 3, Doc. 42-3, at 19:14-17.)

Rural/Metro had a policy of providing a reasonable accommodation to any employee who becomes unable to perform some or all of their job functions due to a medical condition. (Aplt. App. Vol. 2, Doc. 42-1, at Ex. 3 p. 8; Aplt. App. Vol. 2, Doc. 42-2, at 98:18-99:4.) Accordingly, Rural/Metro would first determine whether any reasonable accommodation was possible within the scope of the employee's job assignment. (*Id*.) If no accommodation was possible, Rural/Metro would encourage

the employee to transfer to any vacant positions for which the employee was qualified. (*Id.*) Rural/Metro considered pregnant individuals to be disabled and therefore eligible for reasonable accommodations under this policy. (Aplt. App. Vol. 2, Doc. 42-2, at 128:6-14; Aplt. App. Vol. 3, Doc. 42-4, at 41:12-43:16.)

Rural/Metro also had a distinct and separate program called the "Transitional Work Program," which was intended to assist individuals with work-related injuries in transitioning from injury to regular work. (Aplt. App. Vol. 3, Doc. 42-6.) Under this program, Rural/Metro would provide employees who suffered on-the-job injuries with a temporary light-duty assignment. (*Id.*; Aplt. App. Vol. 2, Doc. 42-2, at 48:19-50:14; Aplt. App. Vol. 3, Doc. 42-4, at 40:5-15.) Light-duty pursuant to this particular program was not provided to anyone who did not experience an on-the-job injury. (Aplt. App. Vol. 2, Doc. 42-2, at 132:7-21.) However, even for employees who had experienced a work-related injury, there was no guarantee that they would receive a light-duty assignment. (Aplt. App. Vol. 3, Doc. 42-6.) Furthermore, the assignments were limited to an initial three months, with the possibility for extending up to six months. (Aplt. App. Vol. 3, Doc. 43-15; Aplt. App. Vol. 3, Doc. 42-6.) Crowell testified that he recalled three or four employees who suffered on-the-job injuries and were accommodated through light-duty assignments, some which lasted only for a few days. (Aplt. App. Vol. 3, Doc. 42-3, at 29:9-22.)

At the end of August 2015, Durham learned that she was pregnant. (Aplt. App. Vol. 2, Doc. 42-1, at 18:16-19:1.) In September 2015, Durham's doctor advised her that she should not lift more than fifty pounds during her pregnancy. (Aplt. App. Vol. 2, Doc. 42-1, at 20:11-21:1.)

When Durham notified Crowell of her pregnancy and her fifty-pound lifting restriction, he told her she would not be able to work on the truck with such a restriction. (Aplt. App. Vol. 2, Doc. 42-1, at 19:10-21:9; Aplt. App. Vol. 3, Doc. 42-3, at 30:23-31:12.) Durham *agreed* and requested to be reassigned to a dispatcher position or assigned light-duty work at another office. (Aplt. App. Vol. 2, Doc. 42-1, at 21:8-22:9, 25:3-8.) Crowell advised Durham that light-duty was only an option for individuals who had suffered job-related injuries and who were participating in a workers' compensation program. However, he told Durham he would get back to her about the availability of a dispatch assignment. (Aplt. App. Vol. 2, Doc. 42-1, at 21:12-22:21; Aplt. App. Vol. 3, Doc. 42-3, at 39:10-15.)

Crowell subsequently called Harmon and explained that Durham was unable to work on an ambulance due to her lifting restriction and had requested a light-duty assignment. (Aplt. App. Vol. 3, Doc. 42-3, at 32:2-16.) Harmon asked Crowell if they had any open off-truck positions, such as dispatcher positions. (Aplt. App. Vol. 3, Doc. 42-3, at 33:5-34:9, 36:3-13.) Unfortunately, however, Crowell's region had

very few off-truck positions and all of them were fully staffed at the time. (Aplt. App. Vol. 3, Doc. 42-3, at 36:10-22; Aplt. App. Vol. 2, Doc. 42-2, at 45:18-46:14.)

Crowell advised Harmon that there were no vacant off-truck positions available. (Aplt. App. Vol. 3, Doc. 42-3, at 33:5-14; Aplt. App. Vol. 2, Doc. 42-2, at 45:18-46:14.) He asked if they could create a light-duty assignment for Durham, but Harmon advised that was not possible because Durham was not on workers' compensation. (Aplt. App. Vol. 3, Doc. 42-3, at 36:23-37:8.) Moreover, light-duty assignments were not actual positions, but were merely temporary assignments of office duties rather than a position for which someone could be hired. (Aplt. App. Vol. 3, Doc. 42-3, at 38:21-39:9.)

When Crowell called Durham back, he told her they did not have any available positions that would accommodate her restrictions. (Aplt. App. Vol. 3, Doc. 42-3, at 34:3-9, 62:2-16.) Durham then told Crowell he should disregard her restrictions and she would keep working on the truck. (Aplt. App. Vol. 3, Doc. 42-3, at 34:7-9.) After Crowell reported Durham's request to Harmon, Harmon explained that Durham would need to provide medical documentation showing she was cleared to return without the lifting restrictions. (Aplt. App. Vol. 3, Doc. 42-3, at 34:10-35:10.) Crowell relayed the request to Durham. (Aplt. App. Vol. 3, Doc. 42-3, at 35:2-13, 60:20-23; Aplt. App. Vol. 3, Doc. 43-10.) Because there were no vacant positions

available, Rural/Metro offered Durham the option of taking a personal leave of absence. (Aplt. App. Vol. 3, Doc. 42-3, at 33:5-34:1, 41:1-13.)

At various times, Crowell looked into the possibility of *creating* a dispatcher position for Durham, but because dispatch was fully staffed with no open positions, he was told by both his communications manager and Minda Corbeil/Reaves, Harmon's supervisor, that they would not be able to create a position for which there was no need. (Aplt. App. Vol. 3, Doc. 42-3, at 37:9-38:14, 63:8-64:7; Aplt. App. Vol. 3, Doc. 42-4, at 30:8-31:18; Aplt. App. Vol. 3, Doc. 43-10.) Rural/Metro did not create new positions, including dispatch positions, for light-duty assignments, even for individuals with workers' compensation injuries. (Aplt. App. Vol. 3, Doc. 42-3, at 38:15-39:9; Aplt. App. Vol. 3, Doc. 42-4, at 30:15-31:18.) There were no positions available at the time that would fit Durham's restrictions. (Aplt. App. Vol. 2, Doc. 42-2, at Ex. 19; Aplt. App. Vol. 3, Doc. 42-3, at 62:2-63:21; Aplt. App. Vol. 3, Doc. 43-10.)

Rural Metro's Unpaid Personal Leave Policy ("Leave Policy") allows employees to take unpaid personal leave for medical reasons, and is available to employees who have either exhausted their leave under the FMLA, or are not eligible for FMLA leave. (Aplt. App. Vol. 2, Doc. 42-1, at Ex. 1.) The Leave Policy provides employees with personal leave for up to ninety days with an option to extend the leave for as long as six months on a case-by-case basis. (*Id*.) Section

II.C. of the Leave Policy clarifies that personal leave will not be granted *for the purpose of* pursuing another position, temporarily trying out new work, or venturing into business, but there is no language in the Leave Policy which prohibits an employee who takes leave for a legitimate medical reason from working while on leave. (*Id*.; Aplt. App. Vol. 2, Doc. 42-2, at 147:2-10.)

On October 6, 2015, Harmon sent Durham a letter notifying her that she did not qualify for FMLA leave but was eligible to take a personal leave of absence, and enclosing a leave request form. (Aplt. App. Vol. 2, Doc. 42-1, at 23:4-24, 25:9-26:15; Aplt. App. Vol. 2, Doc. 42-1, at Ex. 1 & 2.) Durham called Harmon and asked her if she had any other options available. (Aplt. App. Vol. 2, Doc. 42-1, at 27:5-23.) Harmon told Durham that her only option was to take unpaid leave. (Aplt. App. Vol. 2, Doc. 42-1, at 27:19-23.)

Durham assumed, based solely on the language in Section II.C. of the Leave Policy, that she would not be able to work at all while on leave. (Aplt. App. Vol. 2, Doc. 42-1, at 23:20-26:15.) Durham never asked Harmon or anyone at Rural/Metro whether she would be allowed to look for another job or work while on unpaid leave. (Aplt. App. Vol. 2, Doc. 42-1, at 24:2-25:2, 27:25-28:20; Aplt. App. Vol. 3, Doc. 42-3, at 42:23-43:3.) Durham never returned the leave form or provided any medical documentation regarding her ability to return to work. (Aplt. App. Vol. 3, Doc. 42-3, at 47:3-13.) In fact, Durham does not recall having any further communications

with Rural/Metro about her employment. (Aplt. App. Vol. 2, Doc. 42-1, at 28:10-20, 60:25-61:3.) At her deposition, Durham stated she was not aware of any light duty positions available at the time she went on leave. (Aplt. App. Vol. 2, Doc. 42-1, at 60:1-5.)

Rural/Metro did not immediately fill Durham's position. (Aplt. App. Vol. 3, Doc. 42-3, at 44:13-46:2.) Instead, other employees worked overtime to cover her shift because Rural/Metro believed Durham would either provide medical documentation clearing her to return to work or go on leave. (*Id.*) At the end of December, Kenneth Simpson, Regional Director for Alabama, made the decision to terminate Durham's employment because she had not worked the minimum number of hours or returned her leave paperwork. (Aplt. App. Vol. 3, Doc. 42-3, at 68:3-20; Aplt. App. Vol. 3, Doc. 42-4, at 27:10-12; Aplt. App. Vol. 3, Doc. 43-11.)

Harmon was not deposed during the case, but provided an affidavit to Durham's counsel simply stating that she did not recall any of the circumstances pertaining to Durham. (Aplt. App. Vol. 3, Doc. 43-1.) Likewise, Reaves had very little recollection of her role with respect to Durham and did not recall making any decisions about light duty, transfers, or other accommodations. (Aplt. App. Vol. 3, Doc. 42-4, at 24:2-25:13, 26:23-30:10.) Nonetheless, she noted that Rural/Metro's operation was very small in Alabama and it was unlikely that any light-duty would have been available for Durham given her restrictions. (Aplt. App. Vol. 3, Doc. 42-

4, at 24:15-22.) After Rural/Metro filed its Motion for Summary Judgment, Durham submitted a Declaration vaguely alleging that she had seen "several dispatch positions open" on a "job board at work." (Aplt. App. Vol. 3, Doc. 43-2, at ¶ 3.)

SUMMARY OF THE ARGUMENT

The District Court for the Northern District of Alabama correctly granted summary judgment on Durham's claims that she was discriminated against due to her pregnancy in violation of Title VII, as amended by the Pregnancy Discrimination Act ("PDA"). In making its decision, the District Court carefully considered and applied the Supreme Court's ruling in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015), emphasizing that the PDA was not intended to grant pregnant workers a "most-favored-nation status." The District Court properly held that Durham could not establish her case of pregnancy discrimination because she did not provide evidence that Rural/Metro intentionally treated her less favorably than other persons not so affected but similar in their ability or inability to work. Even if, as Durham argues, the District Court conflated *Young*'s prima facie analysis with the pretext analysis, the District Court's decision should nevertheless be affirmed because Durham failed to offer sufficient evidence to give rise to an inference of intentional discrimination and to rebut Rural/Metro's legitimate, nondiscriminatory reasons for its employment actions.

ARGUMENT

I. STANDARD OF REVIEW

The Eleventh Circuit Court of Appeals reviews a district court's grant of summary judgment *de novo*, applying the same standards used by the district court. *Allen v. Tyson Foods, Inc.*, 121 F.3d 642, 646 (11th Cir. 1997). When a party files a motion for summary judgment, "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "The moving party bears the initial burden of demonstrating the absence of a genuine dispute of material fact." *FindWhat Inv'r Grp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011). Once the movant satisfies its burden, the burden shifts to the nonmovant to "come forward with 'specific facts showing that there is a genuine issue for trial.'" *Allen*, 121 F.3d at 646 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). "A mere 'scintilla' of evidence supporting the [nonmoving] party's position will not suffice; there must be enough of a showing that the jury could reasonably find for that party."[3] *Id*. (citing *Walker v. Darby*, 911 F.2d 1573,

[3] Durham argues that her burden is to produce "substantial evidence," which she alleges means "less than a preponderance." However, the case she cites to define "substantial evidence" uses a "substantial evidence review" to determine whether a Department's final decision is "arbitrary and capricious," which does not permit "deciding the facts anew." *Ga. Dep't of Educ. v. United States Dep't of Educ.*, 883 F.3d 1311, 1314 (11th Cir. 2018). Accordingly, it is not clear that this definition

1577 (11th Cir. 1990)). "Although all reasonable inferences are to be drawn in favor of the nonmoving party, 'an inference based on speculation and conjecture is not reasonable.'" *Hammett v. Paulding Cty., Ga.*, 875 F.3d 1036, 1049 (11th Cir. 2017). Further, "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of facts for purposes of ruling on a motion for summary judgment." *Id.* (citing *Scott v. Harris*, 550 U.S. 372, 380 (2007)).

Two amici curiae ("Amici") have also filed briefs in this appeal. Without "exceptional circumstances, *amici curiae* may not expand the scope of an appeal to implicate issues not presented by the parties to the district court." *Evans v. Georgia Reg'l Hosp.*, 850 F.3d 1248, 1257 (11th Cir. 2017); *see also Day v. Persels & Assocs., LLC*, 729 F.3d 1309, 1325 (11th Cir. 2013) (refusing to address an argument from an amicus curiae raised for the first time in an appeal).

II. THE DISTRICT COURT CORRECTLY HELD THAT RURAL/METRO DID NOT DISCRIMINATE AGAINST DURHAM BASED ON HER PREGNANCY

A. *Young v. UPS* Prohibits Intentional Discrimination Against Pregnant Workers, But Does Not Grant Them Most-Favored-Nation Status.

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would apply to the present motion. In any case, as described above, the correct standard is whether "the jury could reasonably find for Durham." *Allen*, 121 F.3d at 646.

The PDA clarifies that Title VII's prohibition against sex discrimination applies to discrimination "on the basis of pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000e(k). Under the PDA, employers are required to treat "women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." *Id*. Importantly, the courts have resoundingly agreed that this language was not "intended to grant pregnant workers an unconditional most-favored-nation status." *Young*, 135 S. Ct. at 1350. Indeed, in *Young*, the United States Supreme Court explicitly acknowledged that "disparate-treatment law normally permits an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual reason for doing so." *Id*. Durham and Amici, however, disregard the clear statements throughout the *Young* opinion affirming that an employer is still permitted to offer certain accommodations to subsets of employees so long as it does not amount to intentional discrimination against pregnant workers. Instead, they read into *Young*'s dicta rules and viewpoints that the Court not only does not express, but explicitly rejects.

B. The Disparate Treatment Analysis Under *Young v. UPS* Focuses on Intentional Discrimination.

Because the PDA was not an original part of Title VII, its purpose is best understood by examining why it was added to that statute. Delving into the legislative history of the PDA in *Young*, the Supreme Court explained that the PDA "reflect[s] no new legislative mandate" and was simply designed to "reestablis[h] the law as it was understood prior to" the Court's decision in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). *Id*. In *Gilbert*, the Court held that a disability plan which provided non-occupational sickness and accident benefits to all employees for all conditions and illnesses *except* for those related to pregnancy did not violate Title VII. *Gilbert*, 429 U.S. at 138-140; *Young*, 135 S. Ct. at 1353. In other words, Congress enacted the PDA to rebuke a decision which explicitly allowed employers to refuse benefits on the basis of pregnancy.

Similarly, *Young* involved an employer who was effectively providing accommodations to nearly all employees with physical restrictions, including those injured off-the-job, *except* for those who were pregnant. *Young*, 135 S. Ct. at 1347. The plaintiff, a driver for UPS, was placed on a lifting restriction during her pregnancy that made her unable to lift heavy packages, an essential function of her job. *Id*. at 1344. She stayed home without pay during most of her pregnancy. *Id*. UPS had several policies providing light-duty accommodations to other persons,

including: (1) drivers who had become disabled on the job; (2) drivers who lost their Department of Transportation (DOT) certifications; and (3) those who suffered from a disability covered by the Americans with Disabilities Act ("ADA"). *Id*. However, UPS argued that, because "Young did not fall within any of those categories, it had not discriminated against Young on the basis of pregnancy but had treated her just as it treated all 'other' relevant 'persons.'" *Id*.

In response to UPS's motion for summary judgment, Young provided evidence that UPS accommodated not only the people in the listed categories, but also numerous individuals who incurred injuries off-the-job as well as individuals who lost their DOT certification for driving under the influence. *Id*. at 1347. According to one witness, "the only light duty requested [due to physical] restrictions that became an issue" at UPS "were with women who were pregnant." *Id*. Therefore, *Young* was similar to *Gilbert* in that it involved a policy or set of policies that, either on its face or by its effect, singled out pregnant workers for different treatment.

When the Supreme Court decided *Young* in March 2015, it attempted to clarify the analysis for determining whether an employer's denial of an accommodation to a pregnant worker is evidence of disparate treatment under the PDA. The plaintiff in *Young* argued that the PDA requires employers to accommodate pregnant employees whenever an employer accommodates *any* other

workers with disabling conditions. *Id*. at 1349. In contrast, UPS argued that the PDA does nothing more than to prohibit discrimination *because* of pregnancy, suggesting that so long as there is any facially neutral reason for the disparate treatment, no discrimination exists. *Id*. at 1352.

The Supreme Court expressly rejected both of the antithetical interpretations proposed by the parties to the dispute, including the plaintiff's contention that courts should find a Title VII violation whenever pregnant workers are denied *any* accommodation provided to any other non-pregnant worker. *Id*. at 1350 ("We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status.") In doing so, the Court noted that the language of the PDA requires employers to treat pregnant employees the same as "other persons," but does not say that an employer must treat them the "same" as "*any* other persons," and does not specify "which other persons Congress had in mind." *Id*. at 1350.

Taking all of this into consideration, the Court offered a modified *McDonnell-Douglas* test which acknowledges that employers are still permitted to accommodate non-pregnant workers while denying accommodations to pregnant workers as long as there is no inference of intentional discrimination. *Id*. at 1354. Significantly, the Court explained that such an inference was present in *Young* because the plaintiff could show that UPS accommodates *most* nonpregnant employees with lifting restrictions while categorically failing to accommodate pregnant employees with

lifting instructions, and because UPS had so many policies to accommodate nonpregnant employees that it could not likely justify its reasons for refusing to accommodate pregnant employees. *Young*, 135 S. Ct. at 1354-1355. Therefore, under *Young*, a plaintiff cannot survive summary judgment simply by providing evidence that an employer accommodated employees with on-the-job injuries with a certain type of accommodations not provided to any other employees. Instead, the plaintiff must demonstrate that the defendant's actions and policies actually give rise to an inference of *intentional* discrimination against pregnant workers.

C. Durham and Amici Misstate and Misinterpret *Young*, Ignoring Key Parts of the Opinion.

Durham and Amici's briefs offer an overreaching and unsupported view of *Young* that would effectively eliminate an employer's ability to offer accommodations to any employees unless the same accommodations were offered to pregnant workers. Throughout their briefs they make assumptions about *Young*'s "letter and spirit" that are in stark contrast to the actual text of the opinion, crafting a completely alternate vision of what the case actually states. In doing so, Durham and Amici completely flip the burden of proof in a pregnancy discrimination case to the employer in contravention of *Young* and the entire history of discrimination law.

For example, Durham argues that under *Young*, the "focus" of any inquiry in a pregnancy accommodation case is "why the employer refuses to accommodate

pregnant workers while granting accommodations to others similar in their ability or inability to work." (Aplt. Brief, at 12.) This argument flatly contradicts the express language of *Young* and mistakenly suggests that the defendant now bears the more substantial burden of proof in a pregnancy discrimination case. Instead, *Young* suggests the following framework, a modified application of the *McDonnell Douglas* analysis:

> **Step 1:** "[A] plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act's second clause may make out a prima facie case by showing . . . that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'" *Young*, 135 S. Ct. at 1354.
>
> **Step 2:** The employer articulates its legitimate, nondiscriminatory reasons for denying her accommodation, which "normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates." *Id*.
>
> **Step 3:** The plaintiff may show the "employer's proffered reasons are in fact pretextual." *Id.* The Court further notes that one way the plaintiff can reach a jury on this point is with "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*.

As is evident from this analysis, the primary burden in a disparate treatment pregnancy discrimination case still rests with the plaintiff, who must not only establish a prima facie case, but also provide "sufficient evidence" that the

employer's reasons created such a significant burden on pregnant workers that it suggests that intentional discrimination occurred.

Additionally, *Young* explicitly states that the "focus" of a PDA disparate treatment analysis is the plaintiff's evidence of intentional discrimination – not the employer's justification. Justice Scalia authored a dissenting opinion in *Young* expressing concern that the Court's pretext test "bungle[d] the dichotomy between claims of disparate treatment and claims of disparate impact" by placing too much emphasis on the employer's justifications for not accommodating a pregnant worker. *Id*. at 1365. The Court responded to this concern by emphasizing that *Young*'s "continued focus on whether the plaintiff has introduced sufficient evidence to give rise to an inference of *intentional* discrimination avoids confusing the disparate-treatment and disparate-impact doctrines." *Id*. at 1355.

Durham and Amici try to bolster their contorted view of *Young* by stating that *Young* overruled a number of cases specifically because those courts "deferred to employers' own definitions of which non-pregnant employees are and are not 'similar in their ability or inability to work' to pregnant employees" and because those cases permitted employers to provide different accommodations to workers with occupational injuries than they provided to pregnant employees. (Aplt.'s Brief, at 13-14.) However, *Young* does not opine at all on whether it has overruled those cases, what aspects of those cases it has issue with (if any), or whether the policies

at issue in these cases would be permissible after *Young*. Indeed, *Young*'s only comment on any of the cited cases is to state that the Court granted certiorari "[i]n light of lower-court uncertainty about the interpretation of the [PDA]." *Id*. at 1348.

The cited cases involved not only a wide variety of allegations, policies, and comparative evidence, but also incorporated many different methods of analyzing a PDA claim. *See, e.g.*, *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 548-552 (7th Cir. 2011) (requiring comparators to be comparable "in all material respects"); *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 641-42 (6th Cir. 2006) (assuming without deciding that the prima facie case was established but holding that plaintiff failed to provide evidence that employer's reason for her termination, her inability to perform her truck-driving job, was a pretext for discrimination); *Spivey v. Beverly Enterprises, Inc.*, 196 F.3d 1309, 1312-13 (11th Cir. 1999) (holding that plaintiff failed to establish prima facie case of discrimination because she was not qualified for her position due to her restriction and did not suffer from a differential application of work rules); *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1225-26 (6th Cir. 1996) (holding that plaintiff established prima facie case of discrimination where she provided evidence that employees with occupational and non-occupational injuries were treated more favorably)[4]; *Urbano v. Continental*

[4] Although Durham and Amici cite *Ensley-Gaines* to support their argument that a plaintiff automatically establishes a prima facie case of pregnancy discrimination

Airlines, Inc., 138 F.3d 204, 206-08 (5th Cir. 1998) (distinguishing *Ensley-Gaines* and holding that Urbano did not establish prima facie case because she could not prove that she was qualified or treated differently than employees with non-occupational injuries). Given the wide variety of analyses and rationales deployed in the cited cases and the Court's statement regarding "uncertainty," the more reasonable conclusion is that *Young* does not overrule the outcome of these cases, but instead provides a modified framework of analysis.

D. *Young* Permits Employers to Provide Special Accommodations to Employees With Occupational Injuries.

Durham incorrectly argues that the District Court ignored *Young* and effectively created a *per se* rule that employees who receive accommodation for on-the-job injuries are dissimilar to pregnant employees. However, nothing in *Young* preempts a court from allowing an employer to maintain an accommodation policy for occupational injuries that does not apply to pregnant employees. In fact, both the concurring opinion in *Young* and the Second Circuit have explained that "compliance with a state workers' compensation scheme is a neutral reason for providing benefits to employees injured on the job but not pregnant employees." *Young*, 135 S. Ct. at 1360; *Legg v. Ulster Cty.*, 820 F.3d 67, 75 (2d Cir. 2016).

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where an employer limits its provision of light-duty assignments to employees with work-related injuries, the *Young* opinion does not specifically endorse *Ensley-Gaines*.

Although Durham chides the District Court for creating a *per se* rule, she simultaneously asserts that an opposite *per se* rule should have been applied.[5] Specifically, she argues that, once it had been established that Rural/Metro accommodated employees with lifting restrictions caused by an occupational injury, the District Court should have determined that the fourth prong of the prima facie case was satisfied. Nothing in *Young* mandates such a finding.

In *Young*, the Court only provided a limited analysis of Young's prima facie evidence. After generally describing the burden-shifting analysis for a pregnant employee who is denied an accommodation, the Court immediately launches into a discussion of facts in the *Young* case that might be relevant to the pretext analysis and later mentions that "Young created a genuine dispute of material fact as to the fourth prong of the *McDonnell Douglas* analysis." *Id*. at 1354-55. However, the Court prefaces the statement about the fourth prong by noting that there was a genuine dispute "as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from Young's." *Id*. at 1355. The Court's discussion of the comparator requirements was

[5] Durham and Amici cite *Legg*, a Second Circuit decision, to support their argument here. However, that case is distinguishable because it found significant inconsistencies in the employer's proffered reasons for its employment decisions, leading the court to conclude that a jury might find the explanation pretextual. *Legg*, 820 F.3d at 75.

also brief, simply stating that the test does not "require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways." *Id*. at 1354. Given that the plaintiff in *Young* provided evidence that UPS accommodated most nonpregnant employees, including employees with *non-occupational* injuries and illnesses, *Young*'s brisk treatment of the prima facie case can hardly be read as prohibiting courts from making any distinctions about similarity in addressing a prima facie case. The Court does not say whether a prima facie case could have been established if UPS had only been accommodating employees with occupational injuries.

Moreover, *Young* specifically rejects the EEOC's July 2014 guideline outlawing employers from denying light duty to a pregnant employee based on a light-duty policy exclusively reserved for employees with on-the-job injuries. *Id*. at 1351-1352. The Court also takes the position that the PDA does not prohibit employees from offering certain accommodations to subsets of employees so long as it does not amount to intentional discrimination against pregnant workers. *Id*. at 1349-1350. In doing so, the Court even asks:

> If Congress intended to allow differences in treatment arising out of special duties, special service, or special need, why would it not also have wanted courts to take account of differences arising out of special "causes" – for example, benefits for those who drive (and are injured) in extrahazardous conditions?

Id. at 1350. As all of these statements demonstrate, *Young* does not prohibit employers from providing special accommodations to workers with occupational injuries or finding that such workers are dissimilar to a particular plaintiff. As discussed below, the District Court properly applied and distinguished *Young* in its Order granting summary judgment.

E. The District Court Did Not Err When It Declined to Make Any Finding About Whether Durham Suffered an Adverse Action, But Presumed the Element Was Satisfied.

Durham argues that the District Court erred by "disputing" that Rural/Metro's denial of an accommodation was an "adverse employment action." This argument is inherently faulty, however, because the District Court never made such a finding. Instead, the District Court merely noted that the question was disputed, summarized the parties' positions, and stated that it could not "determine as a matter of law that Ms. Durham suffered an adverse employment action." (Aplt. App. Vol. 4, Doc. 55, at 8.) Then the District Court proceeded to assume that an adverse action had occurred as it moved onto the next part of its analysis. (*Id*.)

The District Court did not err by declining to make a ruling on the adverse action element and assuming the element was satisfied. It is well-settled that if the nonmoving party fails to make "a sufficient showing on an essential element of her case with respect to which she has the burden of proof," the moving party is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)); *see also*

Custom Mfg. and Eng'g, Inc. v. Midway Servs., Inc., 508 F.3d 641, 647 (11th Cir. 2007).

Here, the District Court determined that Durham failed to establish that Rural/Metro intentionally treated her less favorably than other persons not so affected but similar in their ability or inability to work. Because the District Court determined that Durham would be unable to establish the existence of at least one of the other elements essential to her case, it was not required to decide whether the adverse action element had been satisfied. As Durham acknowledges, "the District Court did not premise its ultimate ruling on this point." (Aplt. Brief, at 22.) Given that the District Court neither decided the adverse action issue nor based its decision on the lack of evidence of an adverse action, there is no error to be found in this part of the District Court's ruling.

III. DURHAM FAILED TO REBUT RURAL/METRO'S REASONS FOR DENYING HER THE ACCOMMODATION SHE REQUESTED

Even if the District Court incorrectly blurred *Young*'s prima facie test with the pretext analysis as Durham alleges, it nevertheless arrived at an outcome consistent with *Young* and therefore, the decision should be affirmed. *Kozak v. Hillsborough Cty., Fla.*, 644 F.3d 1347, 1349 (11th Cir. 2011) (affirming the district court's decision for reasons different than those stated by the district court). In a recent post-*Young* case in the Fifth Circuit, the plaintiff-appellant challenged a district court's

decision holding that she could not establish a prima facie case of pregnancy discrimination. *Luke v. CPlace Forest Park SNF, L.L.C.*, 747 F. Appx. 978, 979-80 (5th Cir. 2019). On appeal, the Fifth Circuit declined to decide whether the prima facie test had been satisfied but nonetheless reaffirmed the district court's decision to grant summary judgment to the employer because there was no evidence of pretext. *Id*. In the present case, even if this Court determines that Durham established a prima facie case, it should nonetheless affirm the District Court's decision to grant summary judgment because Durham has failed to provide evidence that would allow a jury to conclude that Rural/Metro engaged in intentional discrimination.

A. Rural/Metro Offered Admissible Evidence of its Legitimate, Nondiscriminatory Reasons.

Durham and Amici argue that Rural/Metro "could not produce any admissible evidence substantiating its adverse decisions." (Aplt. Brief, at 22.) This statement implores the court to ignore not only substantial evidence in the record showing otherwise, but also Durham's own representations of the facts.

In its Motion for Summary Judgment, Rural/Metro clearly articulated the legitimate, nondiscriminatory reasons why it was unable to accommodate Durham's lifting restrictions. First, Rural/Metro explained that it has a policy, the Transitional Work Program, which requires it to find "light duty" work opportunities for

employees who suffer work-related injuries. (Aplt. App. Vol. 1, Doc. 41, at 27.) Notably, Durham does not dispute the existence of this policy. (*See, e.g.*, Aplt. Brief, at 6; Aplt. App. Vol. 4, Doc. 44, at 12.) Rural/Metro included a copy of the policy as an exhibit to its Motion for Summary Judgment and Durham has not challenged its authenticity. (Aplt. App. Vol. 3, Doc. 42-6.) In fact, Durham's primary argument in this matter is based on this policy.

Second, in addition to the Transitional Work Program, Rural/Metro also explained that it has a separate ADA policy under which it will provide reasonable accommodations, including reassignment to a vacant position, to individuals with non-work-related limitations, including pregnancy restrictions.[6] (Aplt. App. Vol. 1, Doc. 41, at 27.) Durham's brief ignored substantial admissible testimony and documentary evidence (which distinguishes this case from *Young*) showing that Rural/Metro looked for available reassignment positions for Durham pursuant to this policy, but there were no vacant positions available to which Durham could be

[6] The EEOC's brief incorrectly attempts to paint Rural/Metro's ADA policy as a "second category of nonpregnant workers treated more favorably." EEOC's Brief, at 16. This argument fails for several reasons. First, the undisputed evidence shows that Rural/Metro considered Plaintiff to be *included* in the category of persons entitled to accommodations under the ADA policy. (Aplt. App. Vol. 2, Doc. 42-2, at 128:6-14; Aplt. App. Vol. 3, Doc. 42-4, at 41:12-42:3.) Second, Durham has failed to present *any* evidence of disabled workers with off-the-job injuries who were treated more favorably than Durham pursuant to the ADA policy. *See, e.g.*, *Adduci v. Fed. Express Corp.*, 298 F. Supp. 3d 1153, 1162-63 (W.D. Tenn. 2018) (granting summary judgment to employer where plaintiff failed to present proof that another employee with a similar lifting restriction was actually given temporary reassignment work pursuant to temporary reassignment policy). Finally, Durham did not raise this issue with the District Court and therefore, it is waived.

reassigned. (*See supra*, at 2, 4-7 (explaining that Crowell supervised between eight to ten dispatchers and determined on multiple occasions that all of the off-truck positions, including dispatch positions, were fully staffed).) Durham attempted to create a dispute on this issue by creating a declaration contradicting her earlier sworn deposition testimony in which she stated that she was not aware of any available positions when she went on leave. (Aplt. App. Vol. 2, Doc. 42-1, at 60:1-5.) However, Durham's vague declaration is blatantly contradicted by the record and cannot be used to defeat summary judgment. *See Hammett*, 875 F.3d at 1049. Significantly, Durham's declaration did not state the dates or locations of the alleged job postings, or any information that would demonstrate that she had sufficient personal knowledge about the availability of dispatch positions at Rural/Metro.

Additionally, it is undisputed that Durham was not provided with the specific type of light-duty assignment described in the Transitional Work Program *because* that policy only applied to individuals with on-the-job injuries.[7] Under the burden-shifting analysis described in *McDonnell-Douglas* and in *Young*, this articulation of a legitimate, non-discriminatory reason is all that is required to shift the burden back to Durham to provide evidence of pretext. *Young*, 135 S.Ct. at 1354 ("If the

[7] The fact that two high-level human resources employees did not personally recall the details of Durham's situation does not warrant a conclusion that Rural/Metro produced no admissible evidence of its decision. Durham's direct supervisor (Crowell) and the documentary evidence in the record provided ample admissible testimony about the reasons for the decision.

employer *offers* an apparently 'legitimate, nondiscriminatory' reason for its actions, the plaintiff may in turn show that the employer's proffered reasons are in fact pretextual.") (emphasis added).[8]

Durham, however, insists that Rural/Metro must meet a far more burdensome level of proof, which is not supported by any of the case law she cites in her brief. Instead of requiring Rural/Metro merely to articulate the reasons why it made the employment decisions at issue, Durham argues that Rural/Metro is required to provide admissible evidence as to the reasons why the underlying policy supporting the articulated reasons was created in the first place. This goes too far.

As explained in the *Burdine* case cited by Durham:

> The nature of the burden that shifts to the defendant should be understood in light of the plaintiff's ultimate and intermediate burdens. The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.
> …

[8] The present case is easily distinguishable from the *IMPACT* case cited by Durham, wherein the defendants "offered no evidence explaining any employment decision." *Increase Minority Participation by Affirmative Change of Today of Nw. Fla., Inc. (IMPACT) v. Firestone*, 893 F.2d 1189, 1194 (11th Cir. 1990). In that hiring discrimination case, the defendant merely produced personnel records and invited the court to figure out why it had made the employment decisions at issue. *Id.* Therefore, the defendant clearly failed to meet its burden of articulating a legitimate, nondiscriminatory reason for its action.

Likewise, in *Turnes v. AmSouth Bank*, it was undisputed that the employer had no knowledge of the plaintiff's credit history when it decided not to hire him, but the employer nonetheless relied on the plaintiff's poor credit, which it discovered after the plaintiff filed his EEOC charge, as its legitimate, non-discriminatory reason for its decision. 36 F.3d 1057, 1059, 1061 (11th Cir. 1994). In contrast, Rural Metro has not put forth any hypothetical reasons or post-hoc justifications for its employment decision with respect to Durham.

> The defendant need not persuade the court that it was actually motivated by the proffered reasons.

Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253-54, 259-60 (1981) (holding that court of appeals erred by requiring the defendant to prove by a preponderance of the evidence the existence of its nondiscriminatory reasons rather than just requiring a clear explanation of the nondiscriminatory reasons for its actions). In other pregnancy discrimination cases, evidence showing that a defendant did not provide a particular accommodation to a pregnant worker because of a policy or because the plaintiff could not perform her essential functions has been held to satisfy the defendant's light burden. *Everett v. Grady Mem'l Hosp. Corp.*, 703 Fed. Appx. 938, 948-949 (11th Cir. 2017) (holding plaintiff did not cast doubt on defendants' proffered explanation that plaintiff could not perform her essential functions with the requested accommodations); *Luke*, 747 Fed. Appx. at 979-80 (same).

B. The District Court Properly Analyzed *Young* and Concluded that Plaintiff Could Not Create an Inference of Intentional Discrimination.

The District Court determined that Durham could not establish her case of pregnancy discrimination because she did not provide substantial evidence that Rural/Metro intentionally treated her less favorably than other persons not so affected but similar in their ability or inability to work. (Aplt. App. Vol. 4, Doc. 55, at 8.) Durham's only evidence on this point was that three employees who had been

injured on the job were provided with temporary light/modified duty assignments pursuant to Rural/Metro's Transitional Work Program. (*Id*.) Distinguishing the case from *Young*, the District Court noted that Rural/Metro's policy only accommodated one discrete group of employees, whereas UPS's policy in *Young* accommodated many types of workers, including workers who were accommodated "despite the fact their disabilities had been incurred off the job." (*Id*. at 10.) The District Court concluded that "[i]n the absence of similar evidence, Ms. Durham cannot establish a genuine dispute as to whether Rural/Metro provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from hers." (*Id*. at 10-11 (citing *Young*, 135 S. Ct. at 1355).)

Unlike the plaintiff in *Young*, there is no evidence in this case that Durham was singled out by virtue of her pregnancy. She was entitled to the same accommodations as all disabled employees and employees with non-occupational injuries. However, there were no accommodations that would have allowed her to continue working as an EMT and there were no vacant positions available to which she could transfer. With regard to pretext, Durham has not provided any competent evidence casting doubt on Rural/Metro's explanation that: (1) Durham was unable to perform the essential functions of her job; (2) Rural/Metro was willing to reassign Durham to a vacant position for which she was qualified pursuant to its ADA policy; and (3) no vacant positions were available. Furthermore, there is no evidence that

Rural/Metro has ever created a new position (as opposed to a temporary work assignment) for an injured or disabled employee, regardless of how the injury occurred.

As a recent Eleventh Circuit decision stated, "[t]reating *different* cases differently is not discriminatory, let alone intentionally so." *Lewis v. City of Union City, Georgia*, 2019 WL 1285058, at *5-6, 11 (11th Cir. Mar. 21, 2019). Durham's evidence that Rural/Metro could not provide her with the specific type of accommodation it provided to three employees with work-related injuries who were subject to a different employment policy "pales in comparison" to the "overwhelming" evidence in *Young* that the employer accommodated "seven separate classes of non-pregnant employees." *Id.* at *9, n.14 (emphasizing that the plaintiff's evidence of two comparators who were subject to different leave policies was insufficient to show intentional discrimination and "pale[d] in comparison" to the evidence in *Young*). Consequently, the District Court correctly determined that Durham's proof falls far short of the "sufficient evidence" required to show that Rural/Metro imposed such a significant burden on pregnant employees that it amounted to intentional discrimination.

CONCLUSION

For the reasons stated above, this Court should affirm the District Court's Order granting Rural/Metro's Motion for Summary Judgment.

Dated: March 25, 2019

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 7597 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-counting feature of Microsoft Office 2013.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: March 25, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on March 25, 2019, I electronically filed the foregoing Appellee's Brief with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit through the Court's CM/ECF system.

I further certify that the participants in this case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

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