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LABOR AND EMPLOYMENT LAW-DISPARATE TREATMENT AND DISPARATE IMPACT-ASSESSING A PREGNANT EMPLOYEE'S ABILITY TO BRING SUIT UNDER THE SECOND CLAUSE OF THE PREGNANCY DISCRIMINATION ACT

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LABOR AND EMPLOYMENT LAW—DISPARATE TREATMENT AND DISPARATE IMPACT—ASSESSING A PREGNANT EMPLOYEE'S ABILITY TO BRING SUIT UNDER THE SECOND CLAUSE OF THE PREGNANCY DISCRIMINATION ACT

Young v. UPS, 135 S. Ct. 1338 (2015).

ALEX THOMASON*

INTRODUCTION

In 1999, United Parcel Service, Inc. ("Defendant") hired Penny Young ("Plaintiff"), and in 2002, she began working as a part-time delivery driver.[1] Thereafter, Plaintiff entered into a collective bargaining agreement ("CBA") with Defendant whereby Defendant had an obligation to accommodate Plaintiff with light-duty work if Plaintiff: (1) suffered an on-the-job injury; (2) suffered a disability covered by the Americans with Disabilities Act[2] ("ADA"); or (3) lost her Department of Transportation ("DOT") certification.[3]

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1. Young v. UPS, No. DKC 08-2586, 2011 U.S. Dist. LEXIS 14266, at *2 (D. Md. Feb. 14, 2011).

2. *Id.* at *6. In 2008, Congress amended the ADA and expanded the definition of "disability" such that physical impairments that "substantially limi[t] an individual's ability to lift, stand, or bend are ADA-covered disabilities." Young v. UPS, 135 S. Ct. 1338, 1348 (2015) (citing 42 U.S.C. §§ 12102(1)-(2) (2012)). However, the amendment occurred after Plaintiff's pregnancy; therefore, it did not apply to Plaintiff's case. *Young*, 135 S. Ct. at 1348.

3. *Young*, 2011 U.S. Dist. LEXIS 14266, at *5-8.

In July 2006, Plaintiff became pregnant after several failed attempts.[4] Following an extended medical leave,[5] Plaintiff submitted a note to Defendant indicating a recommendation that Plaintiff not lift more than twenty pounds.[6] However, Plaintiff's job description as a delivery driver included a seventy-pound lifting requirement.[7]

After submitting the recommendation, Plaintiff called Defendant's District Occupational Health Manager ("Manager") to determine "what [she] had to do" to return to work.[8] Manager explained to Plaintiff that the policy stated in the CBA did not provide light-duty work for pregnant employees.[9] Plaintiff then sought accommodation from Myron Williams ("Williams"), one of Defendant's higher-ranking employees.[10] However, Williams could not accommodate Plaintiff with light-duty work.[11] Thus, unable to receive accommodation, Plaintiff stayed home without pay throughout her pregnancy.[12]

In October 2008, Plaintiff filed an employment discrimination action,[13] alleging pregnancy-based sex discrimination under Title

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4. *Id.* at *10-12. Plaintiff sought in vitro fertilization on three occasions. *Id.* The first round resulted in pregnancy and a subsequent miscarriage. *Id.* at *10. The second round was unsuccessful. *Id.* at *11. The third round resulted in pregnancy. *Id.* at *12. Throughout the in vitro fertilization attempts, Plaintiff requested and received medical leave. *Id.* at *10-12.

5. *Id.* at *12. After the third fertilization attempt resulted in pregnancy, Plaintiff sought and received an extended medical leave. *Id.*

6. *Id.* Plaintiff submitted a note from her physician that "recommended that [Plaintiff] 'not be required to lift greater than 20 pounds for the first 20 weeks of pregnancy and no greater than 10 pounds thereafter.'" *Id.* Upon returning to work, Plaintiff submitted a second note written by her nurse midwife. *Id.* at *13. The second note stated: "'Due to her pregnancy, it is recommended that [plaintiff] not lift more than 20 pounds.'" *Id.* Plaintiff's midwife did not place restrictions on Plaintiff's ability to work because she felt she was merely making a recommendation. *Id.* at *14.

7. *Id.* at *3. Defendant required Plaintiff "to 'lift, lower, push, pull, leverage and manipulate'" packages "'weighing up to 70 pounds.'" *Id.*

8. *Id.* at *9, *15.

9. *Id.* at *15-16. Manager also explained that Plaintiff's lifting "restriction" was insufficient to constitute a short-term disability and that Plaintiff "had used up all of her medical leave." *Id.*

10. *Id.* at *17.

11. *Id.* Williams told Plaintiff that he did not have the authority to make a decision regarding her ability to work under the recommended restriction. *Id.* Moreover, Williams purportedly told Plaintiff "'not to come back in the building until [she] was no longer pregnant because [she] was too much of a liability.'" *Id.* at *18.

12. *Id.*; Young v. UPS, 135 S. Ct. 1338, 1344 (2015).

13. *Young*, 2011 U.S. Dist. LEXIS 14266, at *19-20. The original complaint sought relief under the Employee Retirement Income Security Act ("ERISA"), the

VII of the Civil Rights Act of 1964[14] ("Title VII") in the Maryland District Court ("District Court").[15] Plaintiff sought to prove intentional discrimination with direct and circumstantial evidence.[16] To prove intentional discrimination by way of circumstantial evidence, Plaintiff had to establish that Defendant treated her differently than similarly situated, non-pregnant, employees.[17] Defendant moved for summary judgment,[18] contending that Plaintiff could not prove that it treated Plaintiff differently from other employees similar in their inability to work, thereby defeating

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ADA, and alleged racial discrimination; however, Plaintiff dropped the ERISA claim, and the ADA and racial discrimination claims were dismissed on summary judgment. *Id.* at *19-20, *47, *61. Moreover, the original complaint named United Parcel Service of America, Inc. and United Parcel Service, Inc. as defendants; however, United Parcel Service of America, Inc. was dismissed as a party by stipulation. *Id.* at *20.

14. *Id.* at *19. Under Title VII, an employment practice is unlawful if the practice "discriminate[s] against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of . . . sex." 42 U.S.C. § 2000e-2(a) (2012). In 1978, the definitions section of Title VII was amended to state:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

42 U.S.C. § 2000e(k) (2012).

15. *Young*, 2011 U.S. Dist. LEXIS 14266, at *1.

16. *Id.* at *28. Plaintiff asserted that being called a "liability," Defendant's suggestion that Plaintiff provide a doctor's note stating that she could not work at all, and the fact that Defendant did not have a "light-duty-for-pregnancy" policy all directly showed intentional discrimination. *Id.* at *28-34. Alternatively, Plaintiff argued that she could establish a prima facie discrimination claim under the *McDonnell Douglas* burden-shifting framework. *Id.* at *35; *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1983).

17. *Young*, 2011 U.S. Dist. LEXIS 14266, at *37. For Plaintiff to prove intentional discrimination via circumstantial evidence, Plaintiff must first establish a prima facie case under the *McDonnell Douglas* burden-shifting framework by showing that: "(1) she is a member of a protected class; (2) she was qualified for the job and performed it satisfactorily; (3) she suffered an adverse employment action; and (4) she was treated differently than similarly situated employees outside the protected class." *Id.*; *See McDonnell Douglas*, 411 U.S. at 802-03.

18. *Young*, 2011 U.S. Dist. LEXIS 14266, at *20.

Plaintiff's ability to establish a prima facie pregnancy discrimination claim.[19]

The District Court granted Defendant's summary judgment motion, finding that Plaintiff's pregnancy was not similar to any of the conditions that received accommodation under Defendant's light-duty policy outlined in the CBA,[20] and that, therefore, Plaintiff received the same treatment as non-pregnant employees with non-occupational injuries.[21] The United States Court of Appeals for the Fourth Circuit ("Appellate Court") affirmed the District Court's summary judgment order.[22] On certiorari, the United States Supreme Court, *held*, vacated, and remanded the case.[23]

The Pregnancy Discrimination Act "requires courts to consider the *extent* to which an employer's policy treats pregnant workers less favorably than it treats non-pregnant workers similar in their ability or inability to work."[24] A pregnant employee may rely on

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19. *Id.* at *37-38; *see* 1 CHARLES R. RICHEY, *Pregnancy Discrimination Act—Prima Facie Case—Fourth Element*, *in* MANUAL ON EMPLOYMENT DISCRIMINATION § 1:228.40 (2015) (explaining that the final element of a prima facie pregnancy discrimination claim requires establishing "a nexus between the pregnancy and adverse employment decision," which demands the plaintiff establish that she was treated differently than other persons similar in their ability or inability to work).

20. *Id.* at *39-41.

21. *Id.* at *27. Moreover, the District Court granted summary judgment as to the first piece of direct evidence offered because Williams' derogatory remark did not relate to the employment decision, as Williams did not make the employment decision. *Id.* at *29-30. As to the second piece of direct evidence, the District Court held that linking the request for a doctor's note to discrimination necessitated making too many inferences, thereby making the note request too tenuously connected to intentional discrimination. *Id.* at *32-33. Lastly, as to the "no-light-duty-for-pregnancy" policy, the District Court found that defendant's accommodation policy was facially neutral and therefore "pregnancy-blind," meaning that the policy could not form the basis of a disparate-treatment claim. *Id.* at *34-35.

22. Young v. UPS, 135 S. Ct. 1338, 1347 (2015). Plaintiff appealed the District Court's opinion as to her pregnancy discrimination claim and ADA claim. Young v. UPS, 707 F.3d 437, 442 (4th Cir. 2013) ("[Plaintiff] challenges the district court's grant of summary judgment on her ADA and PDA claims."). The Appellate Court found that the light-duty policy outlined in the CBA was "pregnancy blind," and therefore non-discriminatory. *Id.* at 446. Moreover, the Appellate Court likened Plaintiff's pregnancy to that of an employee who suffered an off-the-job injury. *Id.* at 448. The Appellate Court reasoned that, since an off-the-job injury would not require light-duty accommodation, Plaintiff's pregnancy did not require accommodation, and therefore, Defendant had not intentionally discriminated against Plaintiff, as Plaintiff received the same treatment as other persons "similar in their ability or inability to work." *Id.*; *see also* 42 U.S.C. § 2000e(k) (2012).

23. *Young*, 135 S. Ct. at 1356.

24. *Id.* at 1343 (emphasis added).

circumstantial evidence to establish a prima facie pregnancy discrimination claim under a disparate-treatment theory 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.'"[25] If the employer offers a legitimate, nondiscriminatory reason for its alleged discriminatory conduct, the aggrieved employee may show that the employer's reason for its conduct is pretextual.[26] A pregnant employee may defeat summary judgment on the issue of pretext "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" imposed on the pregnant employee, thereby giving rise to an inference of intentional discrimination.[27] *Young v. UPS*, 135 S. Ct. 1338 (2015).

I. STATEMENT OF THE ISSUE

During the 2014 fiscal year, 26,027 sex discrimination charges were filed with the United States Equal Employment Opportunity Commission ("EEOC");[28] nearly 13% of these charges alleged pregnancy discrimination.[29] Thus, the Pregnancy Discrimination Act ("PDA")[30]—which is the vehicle by which aggrieved pregnant employees seek relief for pregnancy-based discrimination under Title VII—is a necessary fixture in Title VII jurisprudence.[31] However, the PDA's "same treatment"[32] clause has proved difficult to interpret, resulting in courts upholding facially neutral employment policies under Title VII, regardless of the burden or negative impact the policies place on pregnant women.[33] To resolve interpretational

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25. *Id.* at 1354 (quoting 42 U.S.C. § 2000e(k) (2012)).

26. *Id.* at 1354.

27. *Id.* at 1354.

28. *Charge Statistics*, EEOC.COM, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited November 5, 2015).

29. *Pregnancy Discrimination Charges*, EEOC.COM, http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy_new.cfm (last visited November 5, 2015).

30. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

31. *Id.*

32. *Id.* The "same treatment" clause states: "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . ." *Id.*

33. *See, e.g.*, Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 548-52 (7th

issues posed by the second clause, the United States Supreme Court ("Court") granted certiorari in *Young v. UPS*.[34]

II. DEVELOPMENT & APPLICATION OF THE PREGNANCY DISCRIMINATION ACT

A. Discrimination Under Title VII, Generally

Title VII asserts that an employment practice is unlawful if the practice discriminates against an individual "because of such individual's race, color, religion, sex, or national origin."[35] Since the codification of Title VII, the Court has decided that employees affected by discrimination may seek relief under two different theories.[36] One theory by which an aggrieved employee may seek relief is the disparate-impact theory.[37] Under this theory, the plaintiff must show that an employer's practice has a discriminatory effect, regardless of the employer's intent.[38] The second theory is the disparate-treatment theory, which occurs when an employee claims that an employer intentionally treated the protected employee less favorably than other employees with the same qualifications, but outside the protected class.[39]

When an aggrieved employee files a discrimination charge under a disparate-treatment theory, the employee may prove his or her claim with direct or circumstantial evidence of intentional discrimination.[40] If the employee relies on circumstantial evidence,

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Cir. 2011) (holding that the work policy complies with the Pregnancy Discrimination Act because both pregnant and non-pregnant employees are denied an accommodation of light duty work for non-related work injuries); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 206-07 (5th Cir. 1998) (defining "other persons" under the PDA as non-pregnant employees suffering non-occupational injuries and holding that a policy disallowing light-duty for non-occupational injury is valid under Title VII because pregnant and non-pregnant employees suffering non-occupational injuries are treated the same).

34. 135 S. Ct. 1338, 1348 (2015).

35. 42 U.S.C. § 2000e-2(a)(1) (2012).

36. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("[Title VII] proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation."); *see also* Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003) ("This Court has consistently recognized a distinction between claims of discrimination based on disparate treatment and claims of discrimination based on disparate impact.").

37. *Raytheon Co.*, 540 U.S. at 52.

38. *Id.* at 52-53.

39. *Id.*

40. Tex. Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981). *See*

the court uses the burden-shifting framework as set forth in *McDonnell Douglas Corp. v. Green*.[41] The framework indicates that the employee has the initial burden of establishing a prima facie discrimination claim.[42] If the employee establishes a prima facie discrimination claim, the employer can defeat the claim by articulating "some legitimate, nondiscriminatory reason," justifying its alleged discriminatory conduct.[43] If the employer satisfies its burden, the employee must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant . . . were a pretext for discrimination."[44]

Though the *McDonnell Douglas* framework applies to all protected classes seeking to show intentional discrimination through circumstantial evidence,[45] more subtle questions regarding how a particular protected class fits within the framework, or the scope of a protected class, occasionally surface. For instance, the addition of "sex" as a protected class came at the eleventh hour;[46] as such, there is little information regarding Congress's intent as to the addition, and courts have thus encountered difficulties in determining the scope[47] and application of sex-based discrimination.[48]

McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804-05 (1983). *See also* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 118 (1985) (recognizing that establishing discrimination with direct evidence is possible without using the burden-shifting framework set forth in *McDonnell Douglas*).

41. 411 U.S. 792, 802-03 (1983). If the employer satisfies its burden, the employee then has the opportunity to show that the non-discriminatory reason for the employer's conduct is pretext for discrimination. *Id.* at 798.

42. *Id.* at 802. In *McDonnell Douglas*, the Court stated that an employee may show intentional discrimination via circumstantial evidence. *Id.* at 797. However, the Court ruled that in order to establish intentional discrimination, the employee must establish a prima facie discrimination claim by showing that: (1) he belonged to a protected class; (2) he was qualified for the position he sought; (3) he did not receive the position sought; and (4) the employer continued to seek applicants after rejecting the claimant. *Id.* at 802.

43. *Id.* ("The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection.").

44. *Burdine*, 450 U.S. at 253 (1981) (citing *McDonnell Douglas*, 411 U.S. at 804).

45. *McDonnell Douglas*, 411 U.S. at 802.

46. CHARLES WHALEN & BARBARA WHALEN, THE LONGEST DEBATE: A LEGISLATIVE HISTORY OF THE 1964 CIVIL RIGHTS ACT 117-19 (1985). Adding "sex" to Title VII was "the result of a deliberate ploy by foes of the bill to scuttle" Title VII as a whole. *Id.* at 234.

47. *See, e.g.*, Dena Sokolow & Kelly Overstreet Johnson, *Baby Bump in the Road: The EEOC's Recently Published Guidelines on Pregnancy Discrimination Create More Confusion than Clarity*, *in* COMPLYING WITH EMPLOYMENT

B. The Origins of the PDA and Pre-PDA Cases

In the 1970s, the Court sought to define the scope of sex-based discrimination, at least as it related to pregnancy-based discrimination as a subcategory of sex-based discrimination. In doing so, the Court twice denied that pregnancy could form the basis of a sex-based discrimination charge,[49] despite EEOC guidelines to the contrary.[50] However, in one instance, the Court ruled that pregnancy-based discrimination could constitute discrimination on the basis of sex.[51] The holdings in these three cases, along with the dissenting opinions in the cases denying relief, prompted Congress to clarify that discrimination on the basis of pregnancy constitutes sex-based discrimination.[52]

In 1974, the Court decided *Geduldig v. Aiello*,[53] in which it found that a state insurance policy that denied coverage for expenses incurred as a result of normal pregnancy did not violate the Fourteenth Amendment's Equal Protection Clause.[54] The Court reasoned that a state's interest in maintaining cost-effective insurance outweighed the interest in providing insurance coverage for disabilities resulting from normal pregnancy.[55] The Court also explained that the state insurance plan did not discriminate against

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REGULATIONS, LEADING LAWYERS ON ANALYZING LEGISLATION AND ADAPTING TO THE CHANGING STATE OF EMPLOYMENT LAW 29 (2014) (explaining that courts did not interpret Title VII to extend protection to pregnant women because the statutory language was silent on the issue of pregnancy).

48. *See, e.g.*, Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 138-39 (1976).

49. *Id.*; Geduldig v. Aiello, 417 U.S. 484, 494 (1974).

50. *See* 29 C.F.R. § 1604.10(a) (1979) ("A written or unwritten employment policy or practice which excludes from employment applicants or employees because of pregnancy, childbirth or related medical conditions is in prima facie violation of Title VII."); *see also* Sokolow & Johnson, *supra* note 47, at 2-3.

51. *See* Nashville Gas Co. v. Satty, 434 U.S. 136, 139-40 (1977).

52. *See* Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

53. 417 U.S. 484 (1974).

54. *Id.* at 494 ("We cannot agree that the exclusion of [normal pregnancy expenses] from coverage amounts to invidious discrimination under the Equal Protection Clause.").

55. *Id.* at 495. The Court explained that an insurance program that covered disabilities related to normal pregnancy would be more expensive. *Id.* Thus, if pregnancy-related disabilities received coverage, the contribution rate required for each employee participating in the program would increase. *Id.* at 496. Since the state has an interest in maintaining coverage at its current rate, there is a "wholly non-invidious basis for the State's decision not to create a more comprehensive insurance program than it has." *Id.*

women because the policy included "no risk from which men [were] protected and women [were] not."[56] Furthermore, the Court stated: "While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . . ."[57] With this statement, the Court denied pregnancy as a valid ground on which sex discrimination may be found.

In 1976, the Court decided *General Electric Co. v. Gilbert*,[58] in which it employed *Geduldig* reasoning in the context of a claim brought under Title VII[59] and concluded that an employer's failure to provide insurance coverage for pregnancy-related disabilities did not amount to sex-based discrimination.[60] In *Gilbert*, the Court noted that although excluding pregnancy-related disabilities from the policy would affect women more than men, the insurance policy did not cover any risks for men that it denied to women and was therefore facially neutral.[61] The Court based its determination on the fact that there was "no proof that the [insurance] package [was] in fact worth more to men than to women . . . ."[62] Though the *Gilbert* Court's reasoning suggests that the policy is in fact worth less to women than men, the Court held that the policy did not violate Title VII because it provided no benefit to men that was not provided to women.[63] As a result of *Gilbert*, the Court again reasoned that pregnancy could not form the basis of sex discrimination.[64]

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56. *Id.* at 496-97.

57. *Id.* at 496 n.20.

58. 429 U.S. 125 (1976).

59. *Id.* at 133-34. The Court noted that no legislative history indicated Congressional intent to incorporate decisions regarding the Equal Protection Clause into Title VII jurisprudence, but nonetheless decided that a pregnancy-based discrimination claim in the context of the Equal Protection Clause would be "quite relevant in determining whether or not [a] pregnancy exclusion . . . discriminate[d] on the basis of sex" for the purposes of Title VII. *Id.*

60. *Id.* at 138-39. "[A]n exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all." *Id.* at 136.

61. *Id.* at 138.

62. *Id.*

63. *Id.* at 139 ("[T]he failure to compensate [pregnant employees] for [pregnancy-related risks] does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks.").

64. *Id.* at 139-40. The Court reasoned that recognizing pregnancy as a basis for sex-based discrimination "would endanger the commonsense notion that an employer who has no disability benefits program at all does not violate Title VII even though the under inclusion of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gender than upon the other." *Id.* (internal quotations

Justice Brennan and Justice Stevens both dissented in *Gilbert*.[65] In discussing the inclusion and exclusion of risks relative to men and women in the employer's policy, Justice Brennan contended that the majority analyzed the issue of pregnancy as a basis for sex-based discrimination too narrowly.[66] Justice Brennan explained that the majority merely focused on risks of disabilities that afflict both sexes, and, thus failed to consider male-specific coverage in relation to female-specific coverage.[67] Similarly, Justice Stevens' dissent explained that the policy at issue treated pregnancy-related absenteeism differently than all other types of absenteeism.[68] Thus, he stated, "the rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."[69]

In a surprising turn of events, the Court recognized discrimination on the basis of pregnancy as sex-based discrimination just one year after *Gilbert* in *Nashville Gas Co. v. Satty*.[70] In *Satty*, an employment policy provided sick pay for non-occupational injuries, but denied sick pay for pregnant employees when those employees took a leave of absence to give birth.[71] The policy also erased the pregnant employees' accumulated job seniority as soon as the pregnant employee began her leave of absence.[72] The Court found that the policy erasing accumulated job seniority violated Title VII because it did "not merely refuse[] to extend to women a benefit that men [could not] and [did] not receive, but . . . imposed on women a substantial burden that men need not suffer."[73] Thus, the Court recognized the validity of pregnancy-based discrimination under Title VII when a policy imposed a burden on pregnant women rather

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omitted).

65. *Id.* at 146 (Brennan, J., dissenting); *id.* at 160 (Stevens, J., dissenting).

66. *Id.* at 155.

67. *Id.*

68. *Id.* at 161 (Stevens, J., dissenting).

69. *Id.* at 161-62.

70. 434 U.S. 136, 139 (1977).

71. *Id.* at 138.

72. *Id.* at 138-39.

73. *Id.* at 142. The *Satty* Court reasoned that the holding in *Gilbert* does not "permit an employer to burden female employees in such a way as to deprive them of employment opportunities because of their different role." *Id.* However, consistent with *Gilbert*, the *Satty* Court ruled that the policy excluding sick pay for pregnant employees did not violate Title VII. *Id.* at 145.

than providing them a benefit.[74] In doing so, the Court recognized pregnancy as a basis for sex discrimination.[75]

C. The Enactment and Interpretation of the PDA

After the Court released conflicting majority opinions in *Gilbert* and *Satty*, Congress enacted the PDA to clarify that pregnancy-based discrimination falls within the scope of sex-based discrimination under Title VII.[76] In doing so, Congress relied significantly on the *Gilbert* dissents,[77] EEOC guidelines,[78] and the "burden vs. benefit" concept discussed in *Satty*,[79] all of which indicated that failing to treat pregnant employees the same as non-pregnant employees constituted Title VII discrimination. To clearly establish that pregnancy-based discrimination violated Title VII, the House Report explained that pregnancy discrimination was a per se violation of Title VII under the PDA.[80] The amended law, added to the "definitions" section of Title VII, states:

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74. *Id.* at 142.

75. H.R. REP. NO. 95-948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4749. The PDA's House Report stated that "Satty did indicate that, in some instances, policies singling out pregnancy and childbirth for special treatment [could] violate Title VII" prior to the adoption of the PDA. *Id.*

76. *Id.* at 1. The House of Representatives stated that the purpose of the PDA was "to amend Title VII of the Civil Rights Act of 1964 by adding [a new definition] which clarifies that the prohibitions against sex discrimination in the act include discrimination in employment based on pregnancy . . . ." *Id.*

77. *Id.* at 2. The Report states:

> [Justice Brennan] pointed out that since the plan included comprehensive coverage for males, and failed to provide comprehensive coverage for females, the majority erred in finding that the exclusion of pregnancy disability coverage was a nondiscriminatory policy. Furthermore, Justice Stevens, in his dissenting opinion, argued that "it is the capacity to become pregnant which primarily differentiates the female from the male." It is the committee's view that the dissenting Justices correctly interpreted the Act.

Id.

78. *Id.* The House Report stated: "The Equal Employment Opportunity Commission, charged with implementation of Title VII, interpreted the act to include discrimination based on pregnancy." *Id.*; *see also* 29 C.F.R. § 1604.10(a) (1972).

79. *Id.* at 3; Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977).

80. H.R. REP. NO. 95-948, at 3 (1978) *reprinted in* 1978 U.S.C.C.A.N. 4749, 4749. The House Report states that "distinctions based on pregnancy are *per se* violations of Title VII . . . ." *Id.* (emphasis in original).

> The terms "because of sex" or "on the basis of sex," [as used in Title VII] include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.[81]

Thus, the PDA indicates that pregnancy, or the ability to become pregnant, cannot be used as a means to terminate employment.[82] But because the Act contains two conjunctive clauses,[83] proving pregnancy-based discrimination under the PDA's second clause requires a showing that pregnant employees are treated differently from "other persons not so affected but similar in their ability or inability to work."[84] To explain this clause, the Senate Report stated: "Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers . . . ."[85]

Shortly after the PDA's enactment, the Court explained and applied the Act in two cases. First, the Court granted certiorari in *Newport News Shipbuilding & Dry Dock Co. v. EEOC*[86] to decide if an employer's insurance plan—which provided coverage for pregnancy-related disabilities to female employees, but not to the spouses of male employees—was proper under the PDA.[87] The Court held that the policy violated Title VII.[88] The Court stated that the PDA "makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions,"[89] and that, "for all Title VII purposes, discrimination based on a woman's pregnancy is, on its face, discrimination because of her sex."[90] Because the employer's policy did not allow fringe benefits for

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81. 42 U.S.C. § 2000e(k) (2012).

82. *Id.*; 42 U.S.C. § 2000e-2(a)(1) (2012).

83. 42 U.S.C.§ 2000e(k). The clause uses a semicolon and the word "and" to join two separate clauses, thereby indicating that discrimination on the basis of pregnancy does not occur unless pregnant employees are treated differently than non-pregnant "other persons," similar in their inability to work. *Id.*

84. 42 U.S.C. § 2000e(k) (2012).

85. S. REP. NO. 95-331, at 4 (1977).

86. 462 U.S. 669 (1983).

87. *Id.* at 675.

88. *Id.* at 685.

89. *Id.* at 684.

90. *Id.*

female spouses of male employees in the same way that it allowed fringe benefits for male spouses of female employees, the Court deemed the policy discriminatory against male employees, as male employees received fewer benefits than female employees.[91] Later, in *California Federal Saving & Loan Association v. Guerra*,[92] the Court explained, once more, that the legislative intent of the PDA was to include discrimination on the basis of pregnancy as sex-based discrimination: "[T]he Reports, debates and hearings make abundantly clear that Congress intended the PDA to provide relief for working women and to end discrimination against pregnant workers."[93]

However, the explanations provided in the Congressional Record and by the Court proved too vague, resulting in interpretational difficulties as to the PDA's "same treatment" clause, particularly as to how the clause fits within the *McDonnell Douglas* framework.[94] Though all circuit courts hold that showing different treatment in comparison to "other persons" is an element[95] of establishing a prima facie case for pregnancy discrimination, the circuit courts differ as to the identity of the "other persons."[96] Most circuits hold that disallowing light-duty accommodation for pregnant employees is not discriminatory when the policy disallows light-duty accommodation for non-pregnant employees suffering a non-occupational injury because in such a situation, the employment policy treats pregnant employees the same "as other persons not so affected but similar in their ability or inability to work."[97] Thus, employment policies refusing accommodations for pregnant employees treat pregnant

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91. *Id.*

92. 479 U.S. 272 (1987). In *Guerra*, the Court determined whether the PDA pre-empted a state statute that already provided favorable treatment to pregnant employees. *Id.* at 274-75. In a plurality opinion, Justice Marshall wrote: "Congress intended the PDA to be a floor beneath which pregnancy disability benefits may not drop – not a ceiling above which they may not rise." *Id.* at 285 (internal quotations omitted).

93. *Id.* at 285-86.

94. *Compare* Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996) ("[T]he PDA requires only that the employee be similar in his or her ability or inability to work.") (internal citations and quotations omitted), *with* Urbano v. Cont'l Airlines, 138 F.3d 204, 206 (5th Cir. 1998) (holding that a prima facie pregnancy-based discrimination claim requires a showing that the employer treated similarly situated, non-pregnant employees more favorably).

95. *See* RICHEY, *supra* note 19, § 1:228.40.

96. *See* case cited *supra* note 92.

97. *See, e.g.*, *Urbano*, 138 F.3d at 206 (internal citations omitted); Spivey v. Beverly Enters., 196 F.3d 1309, 1312 (11th Cir. 1999) (internal citations omitted).

employees the same as all other employees.[98] Therefore, in most circuit courts, pregnant employees are unable to establish a prima facie case of intentional discrimination with circumstantial evidence and as a result, employers are never required to provide a legitimate, non-discriminatory reason for their allegedly discriminatory conduct.

Though a minority of circuit courts[99] interpret the "same treatment" clause to mean that a pregnant employee may compare herself to any employee similar in his or her inability to work thereby simplifying a pregnant employee's ability to establish a prima facie pregnancy-based discrimination claim—claims in these circuits generally fail in the "pretext phase" because of the onerous burden that proving discriminatory intent places on pregnant employees.[100] Moreover, circuit courts have encountered issues in determining how a pregnant employee can establish a discrimination claim under a disparate-impact theory.[101] Thus, questions regarding: (1) uncertainty as to the identity of the "other

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98. *Spivey*, 196 F.3d at 1313. The court held:

> [A]n employer violates the PDA when it denies a pregnant employee a benefit generally available to temporarily disabled workers holding similar job positions. In this case, the benefit [the pregnant employee] seeks is not generally available to temporarily disabled workers. To the contrary, [the employer] offers modified duty only to a clearly identified sub-group of workers – those workers who are injured on the job.

Id. at 1313 (internal citations omitted). Thus, the *Spivey* Court ruled that the policy did not constitute pregnancy-based discrimination because the pregnant employee was treated the same as "other persons" similar in their inability to work. *Id.*

99. *See Ensley-Gaines*, 100 F.3d at 1226 (explaining that the relevant comparators under the "other persons" clause need not be "similarly-situated," but only similar in their inability to work) (internal citations and quotations omitted).

100. Reeves v. Swift Transp. Co., 446 F.3d 637, 642 (6th Cir. 2006). The court found that Plaintiff established a prima facie case under the first stage of the *McDonnell Douglas* burden-shifting framework. *Id.* at 641. Moreover, the court found that Defendant demonstrated a non-discriminatory reason for its conduct because it contended that Plaintiff "was terminated not on account of her pregnancy but because she could not perform the heavy lifting required" by her job. *Id.* Lastly, the Appellate Court affirmed that Plaintiff failed to show that Defendant's non-discriminatory reason was a pretext for pregnancy-based discrimination because she did not offer any evidence suggesting intentional discrimination. *Id.* at 642.

101. *See* Laura Schlichtmann, *Accommodation of Pregnancy-Related Disabilities on the Job*, 15 BERKELEY J. EMP. & LAB. L., 335, 388 (1994) (explaining that the PDA and disparate-impact doctrine "should help promote increased employer accommodation of temporary pregnancy-related disabilities," but have, thus far "been an unreliable means of seeking such accommodation").

persons," (2) how a pregnant employee might show that an employer's "legitimate, non-discriminatory" reason for its conduct was a pretext for discrimination, and (3) the role of the disparate-impact theory have created issues ripe for discussion.

III. ANALYSIS

In *Young v. UPS*, the Court held in a 6-3 decision that a facially neutral light-duty-for-occupational-injury policy could constitute intentional, pregnancy-based discrimination under Title VII.[102] To reach its decision, the Court first considered two competing views regarding the definition of "other persons" under the PDA's second clause.[103] The Court reached a compromise between the two views by: (1) recognizing that a literal interpretation of the "same treatment" clause provides preferential status to pregnant employees by always providing them with accommodation,[104] but that (2) interpreting the clause to deny light-duty work to pregnant employees because no employees receive light-duty work for non-occupational injuries means that pregnant employees can never receive accommodation.[105] Thus, in adhering to the legislative intent of the PDA, the Court interpreted the clause as granting pregnant employees a conditional "most-favored-nation" status.[106] Second, within the context of the *McDonnell Douglas* framework, the Court set forth an analysis to determine if an employer's non-discriminatory rationale for its allegedly discriminatory conduct constitutes a pretext for discrimination under the second clause of the PDA.[107] In applying the second clause of the PDA to the *McDonnell Douglas* framework, the Court seemingly focused less on the identity of the comparators and more on the extent of the unfavorable treatment.[108]

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102. Young v. UPS, 135 S. Ct. 1338, 1355 (2015).

103. *Id.* at 1354.

104. *Id.* at 1349.

105. *See, e.g.*, Urbano v. Cont'l Airlines, 138 F.3d 204, 206 (5th Cir. 1998); Spivey v. Beverly Enters., 196 F.3d 1309, 1312 (11th Cir. 1999).

106. *Young*, 135 S. Ct. at 1350. The Court stated: "We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status. The language of the statute does not require that unqualified reading." *Id.*

107. *Id.* at 1354-55.

108. *Id.* at 1344. ("In our view, the Act requires courts to consider the extent to which an employer's policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work.").

First, the Court considered Plaintiff's interpretation of the second clause.[109] Plaintiff argued that pregnant employees should be compared to any other employee similar in his or her inability to work.[110] Thus, Plaintiff asserted, if Defendant accommodated any employee under a lifting restriction, failing to accommodate her violated the second clause of the PDA.[111] Principally, the majority opined that Plaintiff's interpretation granted pregnant workers a "most-favored-nation status," which "could not have been Congress's intent in passing the Pregnancy Discrimination Act."[112]

Justice Alito's concurrence and Justice Scalia's dissent both agreed that Plaintiff's interpretation did not corroborate Congress's intent.[113] The concurring opinion expounded upon the majority's rejection of Plaintiff's interpretation, adding that the interpretation would lead to "wildly implausible results" because the interpretation implied that employers lacked the liberty to only provide light-duty work to certain individuals—a liberty that Congress did not intend to take from employers in enacting the PDA.[114] Similarly, Justice Scalia's dissent rejected Plaintiff's interpretation of the PDA, opining

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109. *Id.* at 1349.

110. *Id.*

111. *Id.* Thus, Plaintiff contended, since the record in her case contained evidence indicating different treatment as between pregnant employees and *some* other employees, she should receive a favorable judgment. *Id.*

112. *Id.* at 1349-50. The Court reasoned that, under Plaintiff's interpretation of the clause, "[a]s long as an employer provides *one* or *two* workers with an accommodation . . . then it must provide similar accommodations to *all* pregnant workers (with comparable physical limitations) . . . ." *Id.* at 1349-50 (emphasis added).

113. *Id.* at 1358 (Alito, J., concurring); *id.* at 1362 (Scalia, J., dissenting).

114. *Id.* at 1358 n.3 (Alito, J., concurring). Justice Alito stated:

> The "most favored employee" interpretation would also lead to wildly implausible results. Suppose, for example, that an employer had a policy of refusing to provide any accommodation for any employee who was unable to work due to any reason but that the employer wished to make an exception for several employees who were seriously injured while performing acts of extraordinary heroism on the job, for example, saving the lives of numerous fellow employees during a fire in the workplace. If the ability to perform job tasks was the only characteristic that could be considered, the employer would face the choice of either denying any special treatment for the heroic employees or providing all the same benefits to all pregnant employees. It is most unlikely that this is what Congress intended. Such a requirement would go beyond anything demanded by any other antidiscrimination law.

Id.

that "[r]eading the same-treatment clause to give pregnant women special protection unavailable to other women would clash with . . . the Act, because it would mean that pregnancy discrimination differs from sex discrimination after all."[115]

Moreover, the majority disagreed with Plaintiff's interpretation because it would change the analytical framework of disparate-treatment law.[116] The majority explained that Plaintiff's interpretation meant that a pregnant woman would win a favorable judgment under the *McDonnell Douglas* framework after setting forth a prima facie case for discrimination.[117] Thus, a pregnant plaintiff could win without the employer having the opportunity to offer a non-discriminatory reason for its allegedly discriminatory conduct.[118] Therefore, the majority reasoned, since the PDA "reflect[s] no new legislative mandate," an interpretation that restructured Plaintiff's ability to achieve relief under the *McDonnell Douglas* framework was inconsistent with Congress's intent.[119]

Second, the majority rejected the EEOC's interpretation of the clause.[120] The EEOC argued that a recent guideline—promulgated in July 2014—which stated that "[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee's limitations," should act as controlling authority in favor of Plaintiff.[121] The majority rejected the EEOC's interpretation of the clause because it posed difficulties in regard to "timing, 'consistency,' and 'thoroughness' of 'consideration.'"[122] The majority explained that the EEOC's guidelines were not promulgated until after the Court granted certiorari in the case at bar.[123] Moreover, the majority characterized

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115. *Id.* at 1362-63 (Scalia, J., dissenting).

116. *Id.* at 1350.

117. *Id.*

118. *Id.* ("[D]isparate-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.").

119. *Id.* (quoting H.R. Rep. No. 95-948, pp. 3-4 (1978), 1978 U.S.C.C.A.N. 4749, 4751 (alterations in original)).

120. *Id.* at 1352.

121. *Id.* at 1351 (quoting 2 EEOC COMPLIANCE MANUAL § 626–I(A)(5), 626:0009 (July 2014) (alterations in original) [hereinafter "EEOC Compliance Manual"]. The 2014 EEOC guidelines also stated that "an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job injuries." EEOC COMPLIANCE MANUAL at 626:0028.

122. *Young*, 135 S. Ct. at 1352.

123. *Id.*

the guidelines as taking "a position about which the EEOC's previous guidelines were silent."[124] Further, the majority pointed out that the recent promulgation as to the interpretation of the clause was inconsistent with the Government's prior interpretations,[125] and the guidelines provided no explanation for the EEOC's new point of view.[126] Thus, the majority accorded the EEOC guidelines little, if any, weight in ruling on the interpretation of the "same treatment" clause.[127]

Lastly, the Court considered Defendant's interpretation of the "same treatment" clause.[128] Defendant argued that the clause "simply defines sex discrimination to include pregnancy discrimination."[129] The majority rejected this contention because it was inconsistent with principles of statutory interpretation and contrary to Congress's intent in passing the PDA.[130] First, the majority noted that the first clause of the PDA unambiguously defines pregnancy discrimination as a form of sex-based discrimination.[131] Thus, arguing that the second clause performs the same function renders the second clause superfluous, which is inconsistent with the principle that all parts of a statute should be construed to prevent superfluity.[132] Second, the majority declared that Defendant's interpretation of the PDA would not fulfill Congress's objective in passing the PDA because it would not overrule the reasoning and holding in *Gilbert*.[133] Therefore, the

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124. *Id.*

125. *Id. See* Brief for Defendant–Appellee United States in Ensley–Gaines v. Runyon, (1996) (No. 95-1038), 1996 WL 34424011, at *26-27. The Court noted that the Government "has previously taken the position that pregnant employees with work limitations are not similarly situated to employees with similar limitations caused by on-the-job injuries." Brief for United States as Amicus Curiae 16, n. 2. *See also* Sokolow & Johnson, *supra* note 47, at 2 (describing the EEOC's PDA guidelines as ironic and inconsistent).

126. *Young*, 135 S. Ct. at 1352.

127. *Id.* The Court stated that "[w]ithout further explanation, [it] cannot rely significantly on the EEOC's determinations." *Id.*

128. *Id.*

129. *Id.* (citing Brief for Respondent at 25, Young v. UPS, 135 S. Ct. 1338 (2015) (No. 12-1226), 2014 WL 5464086).

130. *Young*, 135 S. Ct. at 1352-53.

131. *Id.* at 1352.

132. *Id.*

133. *Id.* at 1353 (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983)). As discussed, the *Gilbert* Court held that a facially neutral policy that results in less favorable treatment of pregnant women does not violate Title VII. *Id.* at 1353 (citing General Elec. Co. v. Gilbert, 429 U.S. 125, 138 (1976)). Thus, the first clause does not overrule this holding, as the first clause merely

Court reasoned, the second clause is necessary to overrule the holding, and does so by stating that pregnant women "shall be treated the same" as other persons.[134]

Justice Scalia's dissent agreed with Defendant's interpretation of the clause and explained that both reasons on which the majority relied in rejecting Defendant's interpretation were insufficient.[135] Justice Scalia argued that Defendant's interpretation did not render the second clause superfluous because the Court has "long acknowledged that a sufficient explanation for the inclusion of a clause can be found in the desire to remove all doubts about the meaning of the rest of the text."[136] Thus, Justice Scalia opined, because the second clause removed all doubt as to the first clause's scope, it is not superfluous.[137] Justice Scalia also reasoned that Defendant's interpretation did, in fact, overrule the holding in *Gilbert*, as Defendant's interpretation prevents an employer from singling out pregnancy as a characteristic for unfavorable treatment.[138] In sum, Justice Scalia stated that the clause did "not prohibit denying pregnant women accommodations, or any other benefit for that matter, on the basis of an evenhanded policy," but only "prohibits practices that discriminate against pregnant women relative to workers of similar ability or inability."[139]

However, like the majority, the concurrence rejected Defendant's interpretation of the "same treatment" clause on the belief that the clause served a greater purpose than clarifying the first clause.[140] As such, the concurrence held that the PDA imposed two restrictions on an employer in relation to treatment of pregnant employees.[141] First, under the first clause, the concurrence noted that "if . . . the employer's intent [was] to discriminate because of or on the basis of

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defines pregnancy discrimination as within the scope of sex-based discrimination. *Id.* at 1353.

134. *Id.* at 1353, 1356.

135. *Id.* at 1363-64 (Scalia, J., dissenting).

136. *Id.* (internal quotations omitted) (Scalia, J., dissenting) (citing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 420 (1819)).

137. *Id.* at 1363 (Scalia, J., dissenting).

138. *Id.* at 1364 (Scalia, J., dissenting). Justice Scalia contended that *Gilbert* did not exclude pregnancy on neutral grounds and that, therefore, the majority was mistaken in believing that the intent of the PDA was to prohibit an employer's ability to fashion a facially neutral employment policy that resulted in unfavorable treatment to pregnant women. *Id.*

139. *Id.* at 1363 (Scalia, J., dissenting).

140. *Id.* at 1357 (Alito, J., concurring). The concurring opinion stated that the second clause "begins with the word 'and,' which certainly suggests that what follows represents an addition to what came before." *Id.*

141. *Id.*

pregnancy," then the employer violated Title VII.[142] But if the employer failed to treat a pregnant employee the same as other persons, the employer violated Title VII under the second clause of the PDA.[143]

After rejecting the interpretations advocated for by Plaintiff, Defendant, and the EEOC, the majority set forth its interpretation. First, the majority declared that, like all other forms of Title VII discrimination, an aggrieved party could rely on the *McDonnell Douglas* burden-shifting framework to prove intentional discrimination via circumstantial evidence.[144] However, the majority modified the elements of the prima facie claim.[145] Notably, the majority modified the fourth element of the prima facie claim to require Plaintiff to show that "the employer did accommodate others similar in their ability or inability to work,"[146] instead of requiring Plaintiff to compare herself to a "similarly situated" employee.[147] Thus, the majority seemingly granted a conditional "most-favored-nation" status to pregnant employees for the purpose of establishing a prima facie claim. The condition of the "most-favored-nation" status is that, if the employer can set forth "legitimate, non-discriminatory reasons for denying her accommodation," the status is rendered useless.[148] However, the majority stated, the employer's non-discriminatory 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 . . . whom the employer accommodates."[149] Finally, the majority ruled that a plaintiff in a pregnancy-discrimination action could still win a judgment by showing that the employer's non-discriminatory justification for its conduct was pretext for discrimination.[150] Significantly, the majority

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142. *Id.* at 1356.

143. *Id.* at 1357-58.

144. *Id.* at 1345.

145. *Id.* at 1354. The majority explained that a pregnant employee could establish a prima facie pregnancy-based discrimination claim by establishing: "that she belongs to a protected class, which 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." *Id.* (internal quotations omitted).

146. *Id.*

147. Young v. UPS, No. 08-2586, 2011 U.S. Dist. LEXIS 14266, at *41-42 (D. Md. Feb. 14, 2011). The District Court required plaintiff to show that "she was treated differently than *similarly situated* employees outside of the protected class." *Id.* at *37 (emphasis added).

148. *See Young*, 135 S. Ct. at 1354 (internal quotations omitted).

149. *Id.*

150. *Id.*

provided a standard by which a pregnant employee could defeat summary judgment at the pretext phase:

> We believe that the plaintiff may reach a jury on [the issue of pretext] by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, non-discriminatory' 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.[151]

Moreover, the majority explained that an aggrieved employee might defeat summary judgment at the pretext phase as to the "significant burden" issue by showing that "the employer accommodate[d] a large percentage of non-pregnant workers while failing to accommodate a large percentage of pregnant workers."[152] In doing so, the majority ruled that a showing of disparate-impact precludes summary judgment in the pretext phase[153]—offering pregnant employees a means for relief under Title VII.

Justice Alito, only concurring in judgment, differed from the majority's analysis on two grounds. First, instead of granting pregnant employees a "most-favored-nation" status for the purposes of establishing a prima facie case, he opined that pregnant employees should be compared to other persons unable to work for the same reason, which, the concurrence stated, means that pregnant and non-pregnant workers are dissimilar "if the employer has a neutral business reason for treating them differently."[154] Second, Justice Alito departed from the majority's framework in the pretext phase.[155] The concurrence stated that the PDA does not "authorize[] courts to evaluate the justification for a truly neutral rule."[156] The concurrence took issue with evaluating the justification for the burden imposed on pregnant women because "[t]he language used in the second clause of the PDA is quite different from that used in other antidiscrimination provisions that require such an

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151. *Id.*

152. *Id.*

153. *Id.*; *Supreme Court Revives Pregnancy Accommodation Suit EEOC Announces Plans To Revives Its Guidance*, 26 ADA COMPLIANCE GUIDE NEWSL., no. 5, May 2015.

154. *Young*, 135 S. Ct. at 1359 (Alito, J., concurring) ("[P]regnant and non-pregnant employees are not similar in relation to the ability or inability to work if they are unable to work for different reasons.").

155. *Id.*

156. *Id.*

evaluation."[157] In rejecting the majority's position on how a pregnant employee navigates through the pretext phase of the *McDonnell Douglas* framework, and leaving no other framework as to how a pregnant employee can show pretext, the concurrence presumably leaves that issue undetermined.

In dissenting opinions, Justice Scalia—joined by Justice Kennedy and Justice Thomas—rejected the majority's "new law" as to how a pregnant employee may defeat summary judgment at the pretext phase of the *McDonnell Douglas* framework.[158] Justice Scalia explained that the clause could not be read to mean that courts should assess a burden imposed on pregnant employees in light of the strength of an employer's justification for that burden.[159] Moreover, Justice Scalia posited that the new test for defeating summary judgment in the pretext phase confuses disparate-treatment with disparate-impact, which is, in effect, inconsistent with "the traditional use of circumstantial evidence to show intent to discriminate in Title VII cases" under a disparate-treatment theory.[160] However, perhaps Justice Scalia overlooks the minor role that a showing of disparate-impact plays in the context of a disparate-treatment claim. The majority merely held that showing disparate-impact could create a genuine issue of material fact as to whether or not a policy imposes a significant burden on pregnant employees, which, at the most, could defeat an employer's summary judgment motion at the pretext phase. Thus, the majority has only listed disparate-impact as another vehicle for creating a jury question as to pretext and has not confused the two theories entirely.

As to the disposition, the majority and concurrence ultimately vacated the Appellate Court's judgment and remanded the case.[161] In regard to the claim under the "same treatment" clause of the

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157. *Id.*

158. *Id.* at 1361 (Scalia, J., dissenting). Justice Scalia explained: "To 'treat' pregnant workers 'the same . . . as other persons,' we are told, means refraining from adopting policies that impose 'significant burden[s]' upon pregnant women without 'sufficiently strong' justifications." *Id.* at 1361. Scalia deemed this rationale as providing an "interpretation that is as dubious in principle as it is senseless in practice." *Id.*

159. *Id.* at 1364. Further, Justice Scalia pointed out that the majority opinion did not explain how weighing a burden against a justification relates to the second clause. *Id.*

160. *Id.* at 1365. Justice Kennedy agreed with Justice Scalia, stating that the majority "injects unnecessary confusion into the accepted burden-shifting framework established in *McDonnell Douglas*" by allowing pregnant employees to establish pretext by showing that a policy disparately impacts pregnant women. *Id.* at 1368 (Kennedy, J., dissenting).

161. *Id.* at 1344, 1356, 1361 (Alito, J., concurring).

PDA, the majority vaguely stated: "UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from [Plaintiff's]."[162] Thus, though the Court's group of "other persons" encompassed more workers than the Appellate Court believed, the identity of the "other persons" is still a mystery under the majority's approach. The concurrence, however, held that the "other persons" who were "similar *in relation* to the ability or inability to work," are those who lost their DOT certifications.[163] The concurrence explained that a driver could lose his or her DOT certification because of an off-the-job injury and receive accommodation, whereas a pregnant employee, experiencing a condition that renders her abilities the same as an employee suffering an off-the-job injury, would not receive accommodation.[164] Thus, the concurrence held, the summary judgment order must be vacated so that the employer may present a neutral business reason as to why drivers who lost their DOT certifications received accommodation when pregnant employees did not.[165]

IV. CONSEQUENCES OF THE MAJORITY'S REASONING

The majority noted that the modified *McDonnell Douglas* framework whereby a plaintiff can defeat summary judgment in the pretext phase by showing that a policy results in a disparate-impact is "limited to the Pregnancy Discrimination Act context."[166] However, this manner of showing pretext should be available in all Title VII claims in which a plaintiff seeks to show intentional discrimination by way of circumstantial evidence. First, the purpose of the disparate-impact theory is to allow a plaintiff to show that a policy adversely affects a particular class when no evidence of intentional discrimination is available.[167] If a facially neutral policy

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162. *Id.* at 1355.

163. *Id.* at 1360 (Alito, J., concurring) (emphasis added).

164. *Id.*

165. *Id.* at 1361. The concurrence was unpersuaded by the Appellate Court's reasoning as to the dissimilarities between drivers who lost their DOT certifications and pregnant employees. *Id.* at 1360. The concurrence found that, though drivers who lose their DOT certifications faced a legal obstacle in their ability to perform their job requirements, this reasoning, relied on by the Appellate Court, "does not explain why [Defendant] went further and *provided such drivers with a work accommodation*." *Id.* (Alito, J., concurring).

166. *Young*, 135 S. Ct. at 1355.

167. *See* George Rutherglen, *Disparate Impact Under Title VII: An Objective Theory Of Discrimination*, 73 VA. L. REV. 1297, 1297-98 (1987) ("Compared to a theory of intentional discrimination, the theory of disparate impact puts a lighter

has an adverse effect on a particular class, courts classify the policy as pretext for discrimination. Thus, as a stand-alone theory for discrimination, showing an adverse effect establishes that a policy is pretext for discrimination.[168] Accordingly, though showing a disparate-impact does not, and cannot, demonstrate intentional discrimination, it can create an issue of fact as to whether or not a policy is pretext for intentional discrimination. This is because, if a policy consistently adversely affects a protected class, there is likely a high enough probability of intentional discrimination to create a jury question on that issue. Therefore, it is sensible to assign the disparate-impact theory a role in the pretext phase of the disparate-treatment analysis. Further, regardless of the type of discrimination alleged, it makes sense to allow a plaintiff to defeat summary judgment in the pretext phase by showing that a policy disparately impacts a protected class because this is consistent with the purpose of the *McDonnell Douglas* framework—which is to allow a plaintiff to present circumstantial evidence from which a reasonable jury can infer intentional discrimination. Therefore, it stands to reason that the majority's approach for defeating summary judgment at the pretext phase should apply in all claims brought under Title VII.

Nevertheless, the majority's approach is unlikely to stir many pots in the context of labor and employment law. In fact, the majority noted that its opinion may be of little significance because the ADA, as amended, expanded the definition of "disability" to include "physical . . . impairments that substantially limit an individual's ability to lift, stand, or bend . . . ."[169] Thus, pregnant employees are now able to seek relief under the ADA and may have little need to seek relief under Title VII moving forward. Moreover, the majority minimized the issue as to who the "other persons" are—the issue it sought to resolve—by essentially compromising the two views already in existence among the circuits and vaguely explaining who the appropriate comparators are for the purposes of satisfying the fourth element of the prima facie discrimination claim.[170] However, as stated, the identity of those employees, under the majority's opinion, is a mystery.

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burden of proof on the plaintiff—to prove adverse effects instead of discriminatory intent . . . .").

168. *Id.* at 1345 (explaining that the purpose of the disparate-impact theory is "to prevent pretextual discrimination by institutional defendants").

169. *Young*, 135 S. Ct. at 1348 (quoting ADA Amendments Act of 2008, 42 U.S.C. §§ 12102(1)-(2)) (internal quotations and alterations omitted).

170. *See id.* at 1355. As stated, to an extent, the majority revived the literal interpretation of the statute; however, the majority qualified that interpretation by merely stating it in the context of a prima facie discrimination claim and remanding

That being said, the majority opinion is somewhat significant, as it likely leaves pregnant employees in a better position than they were previously. As noted, some circuits have held that the appropriate comparators under the PDA's second clause were workers who generally did not receive accommodation under a facially neutral policy.[171] Now, however, it seems that a pregnant employee may compare herself to any other employee similar in his or her ability or inability to work and, therefore, more easily establish a prima facie discrimination in the first phase of the *McDonnell Douglas* framework. This means that more pregnancy discrimination claims will survive summary judgment at the prima facie stage.

In addition, more pregnancy-based discrimination claims will likely settle earlier. This is because the majority provided little guidance as to how significant a burden need be imposed on pregnant employees and as to how strong an employer's justification must be to sufficiently outweigh the burden imposed on pregnant employees. That being the case, at least initially, pregnant employees, with nothing to lose, will vigorously argue that a dispute exists as to the significance of the burden based on the percentage of pregnant employees accommodated in comparison to non-pregnant employees accommodated. Employers, however, will be less likely to test the waters of summary judgment in regard to the strength of their justifications for imposing the burden for fear that the court will deny the motion, thereby subjecting the employer to trial.

Furthermore, in light of the majority's holding and in the context of providing light-duty work, employers should be aware that the more accommodation it provides, the more likely it is to be charged with pregnancy discrimination if it denies accommodation to a pregnant employee. As the majority stated, "why, when the employer accommodated so many, could it not accommodate pregnant women as well?"[172] Presumably, without a non-discriminatory, non-pretextual answer to this question, policies denying light-duty work to pregnant employees will violate the second clause of the PDA. In effect, this means that employers that offer a wide-range of light-duty options and coverage for many types of injuries or restrictions will now need to include pregnant employees among those who may be accommodated by light-duty work. However, employers with

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Plaintiff's case because "at least some employees whose situation cannot reasonably be distinguish from [Plaintiff's]" received accommodation. *Id.*

171. *See, e.g.*, Urbano v. Cont'l Airlines, 138 F.3d 204, 206 (5th Cir. 1998); Spivey v. Beverly Enters., 196 F.3d 1309, 1312 (11th Cir. 1999).

172. *Young*, 135 S. Ct. at 1355.

policies that accommodate no one will still be able to deny a pregnant employee's request for accommodation.

CONCLUSION

The Court's decision in *Young* held that the second clause of the PDA is more focused on the extent to which an employment policy results in less favorable treatment to pregnant employees when compared to other employees, regardless of the comparator's identity. In theory, the Court's interpretation is the fairest way to assess whether a facially neutral policy intentionally discriminates against a pregnant employee on the basis of pregnancy. However, the Court's test will likely create confusion among lower courts and employers. For instance, lower courts will likely have trouble determining what constitutes a "significant burden" and what constitutes a strong enough justification for such a burden. Further, confusion will arise as to the amount of liberty an employer has in making neutral decisions regarding which employees should receive accommodation.

However, the largest effect the Court's opinion will have will likely occur outside of the specific realm of pregnancy discrimination and, instead, in the context of Title VII as a whole. Though the Court declared that the "burden vs. justification" inquiry is limited to the context of pregnancy discrimination claims brought under the second clause of the PDA, surely plaintiffs in all types of Title VII discrimination cases will begin arguing that an employer's non-discriminatory reason is pretext for intentional discrimination on the grounds that a policy disparately impacts a protected class. As plaintiffs argue for a jury question in the pretext phase based on the disparate-impact a policy creates, courts may slowly, over time, revive the doctrine of disparate-impact, not as a stand-alone theory for alleging discrimination, but as a vehicle by which a plaintiff can create a jury question in the pretext phase of the *McDonnell Douglas* framework.

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