YALE LAW & POLICY REVIEW
vol. 32, no. 1 fall 2013

A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act

Joan C. Williams, Robin Devaux, Danielle Fuschetti, and Carolyn Salmon

Reprinted from the
YALE LAW & POLICY REVIEW
VOLUME 32, NUMBER 1

YALE LAW & POLICY REVIEW

A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act

*Joan C. Williams, Robin Devaux, Danielle Fuschetti, and Carolyn Salmon**

* The authors are the Director, Managing Director, Extern, and Interim Managing Director, respectively, with the Center for WorkLife Law, University of California, Hastings College of the Law. Director Joan C. Williams is also Hastings Foundation Chair and Distinguished Professor of Law. Prior to joining WorkLife Law, Managing Director Robin Devaux spent several years representing employers; Interim Managing Director Carolyn Salmon represents employees. Danielle Fuschetti is a 2013 graduate of University of Michigan Law School who worked on this Article during her semester-long externship at WorkLife Law. Many thanks to those who gave us comments and feedback on this Article, including the members of the Pregnancy Accommodation Working Group. Thanks also to Martha McCluskey, Gary Phelan, Ethan Leib, and Jodi Short, WorkLife Law research assistants Jessica Dummer and Nicole Witt, and intern Erika Rist. We are deeply indebted to Cynthia Thomas Calvert, whose very extensive comments immeasurably improved this piece.

INTRODUCTION

When April Roller began making repeated trips to the restroom because of morning sickness and pregnancy-related dizziness, her supervisor told her that her employer did not "pay [her] to pee."[1] Rather than accommodating her need for more frequent restroom visits, the supervisor offered to buy her a larger wastebasket "so that she could take care of vomiting without having to visit the bathroom or leave her seat."[2] Similarly, a sales associate was denied permission to carry a water bottle, which she needed for her pregnancy-related urinary tract and bladder infections.[3] A cashier was denied permission to use a stool, which

1. First Amended Complaint at 4, Roller v. Nat'l Processing of Am., Inc., No. 2:12-cv-02746 (D. Kan. Feb. 20, 2013).

2. *Id.*

3. Wiseman v. Wal-Mart Stores, Inc., No. 08-1244, 2009 U.S. Dist. LEXIS 48020, at *1-2 (D. Kan. June 9, 2009).

she needed because her doctor had forbidden her to stand for more than six hours at a time because of pregnancy-related circulation problems.[4] A nursing home activity director was denied accommodation when her doctor imposed lifting restrictions to prevent miscarriage, despite the fact that lifting was a minor part of her job with which her co-workers were willing to help.[5] All four women eventually lost their jobs.

It is remarkable that such scenarios persist a quarter century after pregnancy discrimination became illegal with the passage of the Pregnancy Discrimination Act (PDA), which amended Title VII to make clear that discrimination based on pregnancy is discrimination because of sex.[6] In spite of the PDA's express prohibition of pregnancy discrimination, many pregnant women in need of accommodation continue to be fired outright. Others are forced to take family leave much earlier than necessary. As a result, their leaves often run out before they are ready to return to work and they are terminated for job abandonment.[7]

This type of employer conduct is now often prohibited as a result of the Americans with Disabilities Act Amendments Act (ADAAA).[8] Enacted in 2008, the ADAAA's aim was to broaden coverage in accordance with the intention of the original ADA.[9] Many pregnancy-related impairments now are covered disabilities.[10] This statutory change effectively supersedes prior case law, which virtually never afforded pregnant women accommodations under the ADA.[11] Today, the basic principle is simple: The cause of an impairment—whether rooted in pregnancy or not—is irrelevant to the determination of whether that impairment constitutes a disability under the Act. The ADA makes no distinction between

4. Flores v. Home Depot, Inc., No. 01-6908, 2003 U.S. Dist. LEXIS 5510, at *2 (E.D. Pa. Apr. 4, 2003).

5. Serednyj v. Beverly Healthcare, 656 F.3d 540, 545-47 (7th Cir. 2011).

6. Pub. L. No. 95-555, § 1, 92 Stat. 2076, 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)).

7. *See* Deborah A. Widiss, Gilbert *Redux: The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 1005-06 (2013).

8. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. § 12101 (2012)).

9. *Id.* § 2(b)(1), 122 Stat. at 3554 (stating that the purpose of the ADAAA is to "carry out the ADA's objectives . . . by reinstating a broad scope of protection to be available under the ADA").

10. *See* 29 C.F.R. § 1630.2(h) app. (2011) (stating that pregnancy is not an impairment but that a substantially limiting pregnancy-related impairment is a disability).

11. *See* Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 444-46 (2012).

pregnancy-related conditions and conditions not related to pregnancy.[12] Indeed, to create such an artificial distinction would violate the legal mandate to treat pregnant workers the same as other workers "similar in their ability or inability to work."[13] To take but one example, carpal tunnel syndrome is common among pregnant women and also is widespread among nonpregnant individuals.[14] The ADA affords an accommodation right to individuals with carpal tunnel syndrome regardless of whether the condition stems from pregnancy or from a different medical condition.

This Article explains how the changes effected by the ADAAA entitle women to a broad range of accommodations for their pregnancy-related conditions under federal law.[15] Part I documents the historical obstacles faced by plaintiffs

12. *See* 29 C.F.R. § 1630.2(h) app (2011).

13. 42 U.S.C. § 2000e(k) (2012).

14. *See Carpal Tunnel Syndrome Fact Sheet*, NAT'L INST. NEUROLOGICAL DISORDERS & STROKE, http://www.ninds.nih.gov/disorders/carpal_tunnel/carpal_tunnel.htm (last visited Dec. 13, 2013).

15. Some state laws also give employees the right to pregnancy accommodations. *See* ALASKA STAT. § 39.20.520(a) (2013) (entitling public officers who are pregnant to request a transfer to a less hazardous position); CAL. GOV'T CODE § 12945(a)(1)-(3) (West 2013) (requiring employers to (1) provide reasonable temporary transfers to pregnant employees to a "less strenuous or hazardous position" with the advice of a physician; (2) provide reasonable unpaid leave for up to four months for a pregnancy-related disability; and (3) grant pregnant workers "reasonable accommodation" for a "condition related to pregnancy, childbirth, or a related medical condition"); CONN. GEN. STAT. § 46a-60(a)(7)(B)-(G) (2013) (obligating employers to (1) make a "reasonable effort to transfer a pregnant employee to any suitable temporary position" if the employee reasonably believes that continued employment in her position might cause injury to the employee or fetus; (2) provide notice of the right to transfer; and (3) provide reasonable unpaid leave for pregnancy-related disabilities); 775 ILL. COMP. STAT. ANN. 5/2-102(H) (2013) (applying only to peace officers and firefighters and requiring employers to provide pregnant employees with reasonable temporary transfers); LA. REV. STAT. ANN. § 23:342(4) (2012) (forbidding an employer from refusing "to temporarily transfer a pregnant female employee to a less strenuous or hazardous position for the duration of her pregnancy if she so requests, with the advice of her physician, where such transfer can be reasonably accommodated," and assuming the employee is otherwise qualified); MINN. STAT. § 363A.08 Subd. 5, 6 (West 2013) (requiring employers to "treat women affected by pregnancy, childbirth, or disabilities related to pregnancy or childbirth, the same as other persons who are not so affected but who are similar in their ability or inability to work, including a duty to make reasonable accommodations"); TEX. LOC. GOV'T CODE ANN. § 180.004(b)-(c) (West 2007) (entitling pregnant county and municipality employees to reasonable temporary transfers, and obligating employers of such employees to "make a reasonable effort to accommodate an employee" who is "partially physically restricted by a pregnancy"); HAW. CODE R. §§ 12-46-107(c)

claiming a right to accommodation for conditions caused by pregnancy. Part II begins by explaining the history and purpose of the ADAAA. It then illustrates two ways in which the ADAAA expands accommodation rights. First, it directly expands accommodation rights under the ADA by broadening the definition of impairment. We call this the "impairment theory." Second, it indirectly expands accommodation rights under the PDA by expanding the group of similarly situated workers to whom a plaintiff can point to prove discriminatory treatment. We call this the "comparator theory." Part III looks at several pregnancy cases decided under the ADAAA to date. These cases suggest that, despite an initial period of confusion, courts have begun to recognize that the ADA now offers accommodations for many pregnant women.[16] Part IV compares the relative benefits of filing a claim under either the PDA or the ADA, and explores which cause of action will offer the most protection. The Article concludes by providing some examples of pregnancy-related conditions and explaining how working women with these conditions are entitled to accommodation under the ADAAA. This Part highlights the parallels between common pregnancy-related conditions and non-pregnancy-related conditions, a theme upon which we elaborate in the Appendix to this Article.

I. Historical Obstacles to Pregnancy Accommodation

Before the enactment of the ADAAA, women had little success obtaining necessary workplace accommodations for pregnancy-related conditions. This was due in part to the prevalence of outdated perceptions of pregnancy and women in the workplace—and, in particular, the presumption that motherhood and a commitment to one's job are incompatible.

(Lexis 2013) (providing that "[a]n employer shall make every reasonable accommodation to the needs of the female affected by disability due to and resulting from pregnancy, childbirth, or related medical conditions").

16. *See, e.g.*, Heatherly v. Portillo's Hot Dogs, Inc., No. 11 C 8480, 2013 U.S. Dist. LEXIS 100965 (N.D. Ill. July 19, 2013) (holding that the short duration of plaintiff's pregnancy-related condition did not preclude it from being a disability under the ADAAA); Nayak v. St. Vincent Hosp. & Health Care Ctr., Inc., No. 1:12-cv-0817, 2013 U.S. Dist. LEXIS 3273 (S.D. Ind. Jan. 9, 2013) (finding plasuible a plaintiff's disability claim arising from pregnancy-related complications); Mayorga v. Alorica, Inc., No. 12-21578-CIV, 2012 U.S. Dist. LEXIS 103766 (S.D. Fla. July 25, 2012) (finding that pregnancy complications may fall within the ADA's definition of disability). *But see, e.g.*, Wanamaker v. Westport Bd. of Educ., 899 F. Supp. 2d 193 (D. Conn. 2012) (finding that complications from pregnancy rarely constitute a disability); Sam-Sekur v. Whitmore Grp., Ltd., No. 11-cv-4938, 2012 U.S. Dist. LEXIS 83586 (E.D.N.Y. June 15, 2012) (finding that pregnancy is covered only in "extremely rare" cases); Selkow v. 7-Eleven, Inc., No. 8:11-cv-456-T-33, 2012 U.S. Dist. LEXIS 79265 (M.D. Fla. June 7, 2012) (denying employee's claim that she was disabled due to pregnancy).

Neither the ADA nor the PDA has consistently provided pregnant women with adequate relief. Pregnant women often lose suits under the PDA because courts require them to prove discrimination because of sex by identifying a similarly situated person (a "comparator").[17] Frequently, no such person exists; even when one does, courts often reject the proffered "comparator" as insufficiently similar to the plaintiff unless the comparator is a "near twin" of the plaintiff.[18]

The ADA, meanwhile, had been interpreted so narrowly that pregnancy-related conditions were almost never deemed to be "disabilities." Pregnancy-related conditions were excluded for a variety of reasons. First, because pregnancy-related impairments are almost always temporary in duration, courts held that they were not covered disabilities.[19] Second, courts interpreted the ADA's definition of "disability" in an extremely narrow manner.[20] Third, pregnancy was deemed a "normal" physiological event and thus not a disability.[21] Collectively, the result was to prevent women from ever reaching the question of whether an accommodation was required.

A. Gender Bias and Pregnancy Discrimination

Although the presence of women in the workplace is no longer unusual, biased views of working mothers and pregnant women persist. Such "maternal-wall" bias includes both descriptive bias, which reflects assumptions about how mothers will behave,[22] and prescriptive bias, which reflects a belief that pregnant

17. *See, e.g.*, Urbano v. Cont'l Airlines, Inc., 138 F.3d 204 (5th Cir. 1998) (rejecting plaintiff's claim on the grounds that employees injured on the job are not similarly situated to pregnant employees); Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994) (ruling against plaintiff where she failed to identify a similarly situated male comparator).

18. *See* Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1661 (2011); *see also* Martinez v. N.B.C., Inc., 49 F. Supp. 2d 305, 306 (S.D.N.Y. 1999) (finding that "men are physiologically incapable of pumping breast milk, so plaintiff cannot show that she was treated less favorably than similarly situated men").

19. *See, e.g.*, Villarreal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D. Tex. 1995) (finding pregnancy is not a disability under the ADA because it is too short in duration).

20. *See* Amelia Michele Joiner, *The ADAAA: Opening the Floodgates*, 47 SAN DIEGO L. REV. 331, 334 (2010).

21. 29 C.F.R. § 1630.2(h) app. (1996) ("[C]onditions, such as pregnancy, that are not the result of a physiological disorder are not impairments.").

22. *See* Monica Biernat, Faye J. Crosby & Joan C. Williams, *The Maternal Wall: Research and Policy Perspectives on Discrimination Against Mothers*, 60 J. SOC. ISSUES 675, 679 (2004).

women and mothers do not belong in the workplace at all.[23] Social science studies show that motherhood triggers strong negative competence and commitment assumptions. The leading study found that mothers were seventy-nine percent less likely to be hired, were only half as likely to be promoted, were offered an average of $11,000 less in salary, and were held to higher performance and punctuality standards than identical women without children.[24] Other studies have documented discrimination against pregnant women specifically.[25] As a result, women who seek accommodations for a condition arising out of pregnancy frequently meet with hostility fueled by gender stereotyping. Often this hostility is driven by the conviction that it is not fair to require employers to hire pregnant women because to do so entails special or preferential treatment, a contention commonplace in ADA case law prior to the ADAAA.[26]

If uninterrupted, this sentiment will continue to impede courts' ability to decide pregnancy accommodation cases free of maternal-wall bias. Courts' intuition that pregnant women are asking for "special treatment" reflects the schema of an ideal worker who starts to work in early adulthood and works full time for forty continuous years, needing no accommodations for pregnancy or childbirth.[27] These characteristics describe a population consisting almost exclusively of men.

---

23. For a review of studies on bias triggered by pregnancy and maternity, see Stephen Benard, In Paik & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1369-72 (2008). Other related studies include Stephen Benard & Shelley J. Correll, *Normative Discrimination and the Motherhood Penalty*, 24 GENDER & SOC'Y 616 (2010), which attributed the motherhood penalty in part to the perception that mothers are less committed and competent than other workers; and Madeline E. Heilman & Tyler G. Okimoto, *Motherhood: A Potential Source of Bias in Employment Decisions*, 93 J. APPLIED PSYCHOL. 189 (2008), which found that mothers were perceived as less competent.

24. Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1316 (2007).

25. Benard, Paik & Correll, *supra* note 23, at 1369-72 (summarizing studies concluding that pregnant women were less likely to be hired, given lower performance ratings, and found to be poorer managers than otherwise identical nonpregnant counterparts).

26. *See, e.g.*, Serednyj v. Beverly Healthcare, 656 F.3d 540, 548 (7th Cir. 2011); Reeves v. Swift Transp. Co., 446 F.3d 637, 642 (6th Cir. 2006); Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 206 (5th Cir. 1998); Young v. United Parcel Serv., Inc., No. 08-2586, 2011 WL 665321 (D. Md. Feb. 14, 2011), *aff'd*, 707 F.3d 437 (4th Cir. 2013); Andrews-Filas v. Pier 1 Imports (U.S.), Inc., No. 06-6026, 2006 WL 3743709, at *1 (N.D. Ill. Dec. 19, 2006).

27. *See* JOAN C. WILLIAMS, UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT (2000).

Yet men too have accommodation needs that are particular to their sex, such as accommodations needed due to prostate and testicular cancer. These accommodations are not viewed as "special treatment" by employers. Nor do employers propose to charge men higher insurance rates due to a higher incidence of drunk driving and smoking among men.[28] If these costs, which are particular to men, are not seen as affording special treatment to men—why, then, is accommodation of pregnancy seen as giving special treatment to women? The reason is simple. The costs associated uniquely with men are seen as ordinary costs of doing business—facts of life an employer copes with as the part of hiring a workforce. Costs uniquely associated with women are, in sharp contrast, considered something extra that employers should not have to shoulder.[29]

Pregnant women who need workplace accommodations are not demanding "special treatment." Rather, they are simply demanding what men already have: the right to accommodations for the kinds of physical challenges that, Congress has decided, an employer can be expected to cope with as a cost of hiring a workforce.

B. Statutory Protections for Pregnant Women

The two primary federal laws that allow for workplace accommodations to women with pregnancy-related impairments are the Pregnancy Discrimination Act and the Americans with Disabilities Act.[30] The power of these statutes to provide pregnant women with accommodations has been vastly expanded by the ADAAA.

---

28. Ctrs. for Disease Control & Prevention, *Vital Signs: Alchohol-Impaired Driving Among Adults—United States, 2010*, 60 MORBIDITY & MORTALITY WKLY. REP. 1351, 1351 (2011); *Adult Cigarette Smoking in the United States: Current Estimate*, CTRS. FOR DISEASE CONTROL & PREVENTION (June 5, 2013), http://www.cdc.gov/tobacco/data_statistics/fact_sheets/adult_data/cig_smoking/; *cf.* City of Los Angeles v. Manhart, 345 U.S. 702 (1978) (holding that employers cannot charge women higher pension contributions than men, on the grounds that they cost more because they live longer).

29. See Troupe v. May Dep't Stores, 20 F.3d 734 (7th Cir. 1994); Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191.

30. Another relevant federal statute is the Family and Medical Leave Act (FMLA), which qualifying employees can use to take up to 12 weeks of job-guaranteed, unpaid leave for the birth of a child or to address a "serious health condition," among other things. 29 U.S.C. §§ 2601-2653 (2012). The statute only applies to workers who have worked for their employer for at least one year and at least 1,250 hours, and the employer must have at least 50 employees within a 75-mile radius. *Id.* The statute allows only for leave, which is always unpaid and which may be involuntary (i.e., an employer may obligate a pregnant woman to use her FMLA leave rather than accommodate her at work). Accordingly, it is often of little help to pregnant women needing accommodations, and may in fact result in women losing their jobs because they are forced to take leave early in their pregnancies and use up their

1. The Pregnancy Discrimination Act

The PDA was enacted in 1978 to make clear that pregnancy discrimination is a form of sex discrimination under Title VII of the Civil Rights Act of 1964.[31] However, the language of the PDA does not merely prohibit discrimination because of pregnancy. It also mandates that "women affected by pregnancy, childbirth, or related medical conditions *shall be treated the same* for all employment-related purposes . . . as other persons not so affected but *similar in their ability or inability to work*."[32] While not specifically requiring the accommodation of pregnancy-related conditions, the plain statutory language thus requires that employers place pregnant women with impairments on the same footing as nonpregnant workers with similar impairments.[33] That is, an employer must make an accommodation for pregnant employees if the employer has or would have done so for any of its nonpregnant employees.

2. The Americans with Disabilities Act

The ADA, passed in 1990, prohibits discrimination "against a qualified individual on the basis of disability."[34] Such discrimination is defined to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee,"[35] unless making accommodations would result in "undue hardship" to the employer.[36] To be entitled to accommodation under the ADA, a worker must demonstrate that she has a disability; that she can perform the essential functions of the job with a reasonable accommodation; and that the employer has been

---

12 weeks before their child is even born. For more on this topic, see Cox, *supra* note 11, at 454-59.

31. Pub. L. 95-555, 92 Stat. 2076 (1978) (codified at 42 U.S.C. § 2000e(k) (2012)). Title VII provides that employers may not "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's [sex]." 42 U.S.C. § 2000e-2(a)(1) (2012).

32. *Id.* § 2000e(k) (emphasis added).

33. Indeed, the PDA was enacted specifically in order to overturn a Supreme Court ruling that it was not sex discrimination to exclude pregnancy from a private employer's temporary disability policy. *See* Widiss, *supra* note 7, at 989-98.

34. 42 U.S.C. § 12112(a).

35. *Id.* § 12112(b)(5)(A).

36. *Id.*

given notice of the need for accommodation.[37] In order to satisfy the "disability" requirement, the worker must show that her condition qualifies as "a physical or mental impairment that substantially limits one or more of [her] major life activities."[38]

C. *Obstacles to Pregnancy Accommodation Under the PDA*

A major obstacle to accommodation under the PDA is that some circuits require plaintiffs to produce comparator evidence—that is, evidence that similarly situated employees who are not pregnant were treated more advantageously.[39] When courts assess whether comparators are "similar in their ability or inability to work,"[40] they often have excluded many coworkers who would seem to fit this description well.[41] Similarly, courts often fail to acknowledge that, while "Title VII generally requires that a plaintiff demonstrate that [a comparator] be similarly situated in all respects[,] . . . the PDA requires only that the [comparator] be similar in his or her 'ability or inability to work.'"[42] Many courts have conflated the PDA's requirement with Title VII's "similarly situated" comparator standards, requiring, for instance, that a pregnant woman find a comparator to be comparable in all respects.[43] Thus, in *Tysinger v. Police Department of Zanesville*, the court found that the plaintiff could not use as comparators two male

37. *See* Mzyk v. N.E. Indep. Sch. Dist., 397 Fed. App'x. 13, 16 n.3 (5th Cir. 2010) (per curiam) (unpublished); EEOC v. Sears, Roebuck & Co., 417 F.3d 789, 797 (7th Cir. 2005); Estades-Negroni v. Assocs. Corp. of N. Am., 377 F.3d 58, 63 (1st Cir. 2004); Lyons v. Legal Aid Soc'y, 68 F.3d 1512, 1515 (2d Cir. 1995).

38. 42 U.S.C. § 12102(1)(A).

39. Some courts insist that the plaintiff produce comparators. *See, e.g.*, Arizanovska v. Wal-Mart Stores, Inc., No. 90-1404, 2011 U.S. Dist. LEXIS 107405 (S.D. Ind. Sept. 22, 2011); Barton v. G.E.C., Inc., No. 09-1123, 2011 U.S. Dist. LEXIS 26863 (M.D. La. Mar. 16, 2011). A 2002 study found that six circuits generally hold that a plaintiff's failure to produce a comparator is fatal to a prima facie case. Ernest F. Lidge III, *The Courts' Misuse of the Similarly Situated Concept in Employment Discrimination Law*, 67 MO. L. REV. 831, 849 (2002). The Center for WorkLife Law has long argued that no comparator is necessary, an approach that has been adopted in some courts and in the EEOC's 2007 Enforcement Guidance. *See* Joan C. Williams, Dir., Ctr. for WorkLife Law, Written Testimony Before the EEOC (Feb. 15, 2012), http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm.

40. *See* Widiss, *supra* note 7, at 1015-17.

41. *See* Suzanne Goldberg, *Discrimination by Comparison*, 120 YALE L.J. 728 (2011); Charles A. Sullivan, *The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 193 n.1 (2009).

42. Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996) (citation and internal quotation marks omitted).

43. *See id.*

police officers who, although disabled, had not asked for a workplace accommodation.[44] "[E]ven though the temporarily disabled officers admitted that they could not fully perform their jobs, the fact that they did not request a temporary reassignment sufficiently distinguished their situation from that of the pregnant officer/plaintiff to defeat her pregnancy discrimination claim."[45]

Another challenge for plaintiffs making a claim under the PDA is the fact that courts frequently determine whether a comparator is similar in her ability or inability to work by looking to the *reason* for the underlying impairment. As a result, there is a split in the circuits as to whether a policy precluding workplace accommodations for any off-the-job "injury"—including pregnancy—is consistent with the PDA.[46] Some courts reason that a policy distinguishing between on-the-job and off-the-job injuries is "pregnancy blind" and, thus, not discriminatory.[47] Other courts and commentators have noted that this approach is inconsistent with the plain text of the PDA,[48] which requires simply that the proffered comparator be similar in his or her ability or inability to work.[49]

---

44. 463 F.3d 569 (6th Cir. 2006).

45. Thomas H. Barnard & Adrienne L. Rapp, *Pregnant Employees, Working Mothers and the Workplace—Legislation, Social Change and Where We Are Today*, 22 J.L. & HEALTH 197, 213 (2009).

46. *Compare* Urbano v. Cont'l Airlines, Inc., 138 F.3d 204 (5th Cir. 1998) (finding that an employer did not violate the PDA by granting light duty assignments only to employees injured on the job), *with Ensley-Gaines*, 100 F.3d 1220 (finding that a pregnant employee was similarly situated to limited-duty employees who were injured on the job).

47. *See* Young v. United Parcel Serv., Inc., 707 F.3d 437, 446 (4th Cir. 2013); Serednyj v. Beverly Healthcare, 656 F.3d 540, 548-49 (7th Cir. 2011); *Urbano*, 138 F.3d at 206.

48. *See, e.g.*, EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1195 n.7 (10th Cir. 2000) ("If a plaintiff is compared only to nonpregnant employees injured off the job, her case would be 'short circuited' at the prima facie stage . . . ."); *Ensley-Gaines*, 100 F.3d at 1226 ("While Title VII generally requires that a plaintiff demonstrate that the employee who received more favorable treatment be similarly situated 'in all respects,' the PDA requires only that the employee be similar in his or her 'ability or inability to work.'" (quoting Mitchell v. Toledo Hosp., 964 F.2d 577, 583 (6th Cir. 1992)); Germain v. Cnty. of Suffolk, No. 07-CV-2523, 2009 U.S. Dist. LEXIS 45434 (E.D.N.Y. May 29, 2009); Sumner v. Wayne Cnty., 94 F. Supp. 2d 822, 826 (E.D. Mich. 2000) ("The proper focus under the comparison prong is whether the employees are similar in their ability or inability to work, regardless of the source of the injury or illness."). *But see* Reeves v. Swift Transp. Co., 446 F.3d 637, 641 n.1 (6th Cir. 2006) (granting summary judgment for employer and distinguishing *Ensley-Gaines*).

49. *See* Widiss, *supra* note 7, at 1022 ("[The PDA] requires that employers' treatment of pregnant employees be compared to their treatment of all employees 'similar in their ability to work or not work,' not all employees similar in the *cause of* their ability to work or not work."); *see also* Emily Martin, Vice President and Gen.

It is important to recognize that comparator evidence is only one way of proving a PDA case. Title VII requires plaintiffs to prove that an adverse employment action is because of sex; the PDA requires plaintiffs to prove that they were not treated "the same" as others with a "similar ability or inability to work."[50] Nothing in the language of the PDA requires limiting probative evidence to comparator evidence. Appropriately, many courts allow plaintiffs to survive summary judgment even if they have not identified comparators.[51] A variety of methods permit proof of disparate treatment without comparators, including evidence that the adverse action was based on sex stereotyping[52] or occurred under circumstances giving rise to an inference of discrimination (such as temporal proximity[53] or remarks indicating pregnancy-related animus[54]). In addition, a plaintiff can be her own comparator by showing that she was treated one way when not pregnant and another way after announcing her pregnancy.[55] Nonetheless, when courts adhere (as they often have) to the "near-twin" comparator requirement, pregnant women needing accommodations frequently found themselves out of luck.[56]

D. Obstacles to Pregnancy Accommodation Under the Pre-Amendment ADA

Under the pre-amendment ADA, accommodations were occasionally available to pregnant women suffering very serious complications.[57] For the most part, however, pregnancy-related conditions were deemed insufficient to qualify as

---

Counsel, Nat'l Women's Law Ctr., Written Testimony Before the EEOC (February 15, 2012), http://www.eeoc.gov/eeoc/meetings/2-15-12/martin.cfm; Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Accommodation Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 36 (2009).

50. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(k), 2000e-2(a) (2012).

51. This can happen, for example, in cases where the adverse action violates company policy. *See* Chapter 7 Tr. v. Gate Gourmet, Inc., 683 F.3d 1249, 1255 (11th Cir. 2012). *See generally* CYNTHIA THOMAS CALVERT, JOAN C. WILLIAMS & GARY E. PHELAN, FAMILY RESPONSIBILITIES DISCRIMINATION ch. 2 (forthcoming 2014) (on file with authors) (discussing this phenomenon).

52. *See* CALVERT, WILLIAMS & PHELAN *supra* note 51, ch. 2.

53. *Id.*

54. *Id.*

55. *Id.*

56. *See* Widiss, *supra* note 7, at 1016 ("As a practical matter . . . courts often require comparators and will dismiss a case or grant summary judgment if a plaintiff lacks them.").

57. *See, e.g.*, Hernandez v. City of Hartford, 959 F. Supp. 125, 130 (D. Conn. 1997) (determining that premature labor could qualify as an impairment under the pre-amendment ADA).

disabilities. Courts found such conditions fell short of a covered disability for three primary reasons: (1) pregnancy and pregnancy-related conditions were considered too short in duration to qualify as impairments under the pre-amendment ADA; (2) the analysis of whether an impairment "substantially limited" a "major life activity" was given an overly restrictive interpretation which excluded pregnancy and pregnancy-related conditions; and (3) conditions related to a "normal pregnancy" were eliminated from consideration because they were not considered impairments.[58]

1. The Duration Requirement

Prior to the ADAAA, many courts held that pregnancy-related impairments that subsided shortly after the termination of pregnancy and left no lasting harm were not substantially limiting.[59] This reasoning was premised on the pre-ADAAA, judicially constructed standard that an impairment is only disabling when its impact is "permanent or long term."[60] In support of this view, courts often quoted a portion of the Equal Employment Opportunity Commission's then-current interpretive guidance, which stated that "temporary, non-chronic impairments of short duration, with little or no long term or permanent impact, are usually not disabilities."[61]

2. Restrictive Interpretation of "Major Life Activity" and "Substantially Limits"

Another obstacle to establishing disability based on a pregnancy-related condition was the severe set of requirements courts applied for a condition to qualify as "substantially limiting" a "major life activity" under the pre-amendment ADA. Pre-ADAAA courts limited "major life activities" to activities "of central importance to most people's daily lives."[62] Episodic or intermittent conditions were not typically considered impairments because they did not consistently interfere

58. Gorman v. Wells Mfg. Corp., 209 F. Supp. 2d 970, 974, 976 (S.D. Iowa 2002).

59. *See, e.g.*, Serednyj v. Beverly Healthcare, 656 F.3d 540, 554-55 (7th Cir. 2011); Payne v. Student Assistance Comm., No. 07-981, 2009 WL 1468610, at *3 (S.D. Ind. May 22, 2009); Leahr v. Metro. Pier & Exposition Auth., No. 96 C 1388, 1997 U.S. Dist. LEXIS 10601, at *4 (N.D. Ill. July 17, 1997).

60. Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 198 (2002).

61. 29 C.F.R. § 1630.2(j) app. (1991); *see, e.g.*, McDonald v. Pennsylvania, 62 F.3d 92, 95 (3d Cir. 1995).

62. *Toyota*, 534 U.S. at 198 ("We therefore hold that to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives.").

with major life activities.[63] Similarly, courts held that to be substantially limiting, a condition must "prevent[] or severely restrict[]" accomplishment of a major life activity.[64] Under these interpretations, serious limitations frequently caused by pregnancy-related conditions were deemed not substantially limiting.[65]

3. The "Normal-Pregnancy" Doctrine

EEOC regulations accompanying both the pre-amendment and amended ADA state that pregnancy is not per se a disability because it is considered a physiological condition, rather than a "disorder."[66] Citing this language, pre-ADAAA courts frequently held that pregnancy-related conditions were never covered by the ADA except in "extremely rare" cases.[67] Courts also commonly asserted that no condition related to pregnancy could ever constitute an impairment. Under this interpretation, a pregnant woman seeking ADA protection had to prove that her limitations stemmed from a medical condition that predated her pregnancy and was exacerbated by it.[68]

Taken together, these holdings sent the message that pregnancy contaminates a limitation that otherwise would qualify as a disability—a contention traditionally called the "normal-pregnancy doctrine." This doctrine is more aptly

63. *See, e.g.*, EEOC v. Sara Lee Corp., 237 F.3d 349, 353 (4th Cir. 2001) (finding that a plaintiff with epilepsy was not substantially limited in a major life activity by "relatively infrequent" seizures); Zirpei v. Toshiba Am. Info. Sys., Inc., 11 F.3d 80, 81 (8th Cir. 1997) (holding that a plaintiff suffering from intermittent panic attacks was not substantially limited in a major life activity).

64. *Toyota*, 534 U.S. at 198.

65. *See* Zahurance v. Valley Packaging Indus., Inc., 397 Fed. App'x. 246, 248 (7th Cir. 2010) (holding that a twenty-pound lifting restriction is not substantially limiting); Mays v. Principi, 301 F.3d 866, 869 (7th Cir. 2002) (expressing doubt as to whether a ten-pound lifting restriction is substantially limiting); Orr v. Wal-Mart Stores, Inc., 297 F.3d 720 (8th Cir. 2002) (determining a pharmacist with diabetes was not covered by the ADA, in part because of mitigating measures such as diet and insulin injections); Ray v. Glidden Co., 85 F.3d 227, 229 (5th Cir. 1996) (per curiam) (holding that the inability to perform "heavy lifting" does not substantially limit ability to lift); Kennebrew v. N.Y.C. Hous. Auth., No. 01 CIV 1654, 2002 WL 265120, at *18 n.32 (S.D.N.Y. Feb. 26, 2002) (finding no evidence that a plaintiff's gestational diabetes "was substantial enough to constitute a disability for ADA purposes"). *But see* Kapche v. Holder, 677 F.3d 454 (D.C. Cir. 2012) (interpreting pre-ADAAA law to support a verdict for the plaintiff relying on evidence that diabetes substantially limited the major life activity of eating).

66. 29 C.F.R. § 1630.2(h) app. (1996) ("[C]onditions, such as pregnancy, that are not the result of a physiological disorder are not impairments.").

67. *See, e.g.*, Conley v. United Parcel Serv., 88 F. Supp. 2d 16 (E.D.N.Y. 2000).

68. *See, e.g.*, Patterson *ex rel.* Patterson v. Xerox Corp., 901 F. Supp. 274 (N.D. Ill. 1995).

called the "pregnancy-contamination doctrine." Under the pregnancy-contamination doctrine, an impairment that would entitle the plaintiff to an ADA accommodation if it stemmed from any condition other than pregnancy would not entitle the same plaintiff to the same accommodation if the symptoms stemmed from pregnancy. This logic has never been applied to any physiological process other than pregnancy. Aging is a good example since it is a normal physiological process that commonly produces impairments. For example, more than forty percent of men over the age of sixty-five have overactive bladders.[69] But no court we are aware of has ever proposed to exclude impairments that stem from aging on the grounds that aging is a normal physiological process.

Thus, one court held that a plaintiff who suffered from "periodic nausea, vomiting, dizziness, severe headaches, and fatigue" was not protected by the ADA due to the "common knowledge that all of these symptoms, at some degree of severity, are part and parcel of a normal pregnancy."[70] Another court held that a plaintiff who experienced morning sickness, stress, nausea, back pain, swelling, and headaches was not impaired under the ADA because "[a]ll of the physiological conditions and changes related to a pregnancy also are not impairments unless they exceed normal ranges or are attributable to some disorder."[71] And yet another court found that ovarian cysts accompanying a pregnancy did not constitute an impairment because "pregnancy and related medical conditions do not, absent unusual circumstances, constitute a 'physical impairment' under the ADA."[72] As a result of these strict limitations, few plaintiffs won pre-amendment ADA claims.

These sharp limitations on ADA coverage were part of the courts' strained interpretation of the Act's purpose—an interpretation of the intent of Congress that the ADAAA was designed to correct. By 2006, defendants were winning ninety-seven percent of all ADA cases resolved in court, most of which turned on whether the plaintiff (whether pregnant or not) was entitled to protected status.[73] The passage of the ADAAA changed the statutory framework in important ways to give effect to the underlying goals of the ADA.

---

69. *See* Claus G. Roehrborn & John D. McConnell, *Etiology, Pathophysiology, Epidemiology and Natural History of Benign Prostatic Hyperplasia, in* CAMPBELL'S UROLOGY 1297 (Patrick C. Walsh et al., eds., 2002).

70. Gorman v. Wells Mfg. Corp., 209 F. Supp. 2d 970, 976 (S.D. Iowa 2002), *aff'd*, 340 F.3d 543 (8th Cir. 2003).

71. Gudenkauf v. Stauffer Commc'ns, Inc., 922 F. Supp. 465, 473 (D. Kan. 1996).

72. Tsetseranos v. Tech Prototype, Inc., 893 F. Supp. 109, 119 (D.N.H. 1995).

73. Kathryn Moss et al., *Prevalence and Outcomes of ADA Employment Discrimination Claims in the Federal Courts*, 29 MENTAL & PHYSICAL DISABILITY L. REP. 303, 303, 305 (2005).

II. The ADAAA and a New Entitlement to Pregnancy Accommodation

The 2008 amendments to the ADA brought new possibilities to women seeking accommodations for pregnancy-related conditions in the workplace. The clear language of the statute and its accompanying EEOC regulations unambiguously encompass pregnancy-related conditions. Moreover, with Congress' restoration of the intent of the original ADA to provide coverage that is inclusive, rather than exclusive, with respect to employees who are entitled to protection under the Act, the accommodation rights of pregnant women experiencing comparable impairments are also expanded.

A. Overview of the ADAAA

When the original ADA was enacted in 1990, it was intended to provide equality for individuals with disabilities in the workplace. In subsequent years, a series of Supreme Court decisions[74] so narrowed the scope of protection that a bipartisan coalition in Congress determined it was necessary to amend the statute.[75] The result was the Americans with Disabilities Act Amendments Act (ADAAA), which took effect on January 1, 2009.[76] The goal of the ADAAA was to "restore the proper balance and application of the ADA by clarifying and broadening the definition of disability, and to increase eligibility for the protections of the ADA."[77] The term "disability" was now to "be construed in favor of broad coverage of individuals under this chapter, to the maximum extent permitted by the terms of this chapter."[78] Congress hoped that this would provide a level of coverage that was "generous and inclusive"[79] in order to "afford people with disabilities the freedom to participate in our community, free from discrimination and its segregating effects."[80]

74. *See, e.g.*, Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184, 197 (2002) (creating arduous standards for the terms "substantially limits" and "major life activities"); Sutton v. United Air Lines, Inc., 527 U.S. 471, 483-84 (1999) (holding that mitigating measures could be taken into account in determining whether an individual is disabled).

75. *See* Americans with Disabilities Act Restoration Act of 2006, H.R. 6258, 109th Cong. (2006).

76. 42 U.S.C. § 12101 (2012).

77. 154 CONG. REC. S8840 (daily ed. Sept. 16, 2008) (statement of the managers).

78. 42 U.S.C. § 12102(4)(A) (2012).

79. 154 CONG. REC. H8288 (daily ed. Sept. 17, 2008) (statement of Rep. Miller).

80. 154 CONG. REC. H8294 (daily ed. Sept. 17, 2008) (joint statement of Reps. Hoyer and Sensenbrenner).

Both the statute and the ensuing EEOC regulations (issued in early 2011) make clear that courts should not focus on the issue of whether a plaintiff's impairment was sufficiently limiting to constitute an eligible disability.[81] One express purpose of the ADAAA is:

> [T]o convey that it is the intent of Congress that the primary object of attention in cases brought under the ADA should be whether entities covered under the ADA have complied with their obligations, and . . . that the question of whether an individual's impairment is a disability under the ADA should not demand extensive analysis.[82]

The EEOC similarly stated that "[t]he primary object of attention in cases brought under the ADA should be whether covered entities have complied with their obligations and whether discrimination has occurred, *not* whether the individual meets the definition of disability."[83] The EEOC regulations also state, "the Amendments Act and the amended regulations make plain that the emphasis in ADA cases now should be squarely on the merits and not on the initial coverage question."[84] Accordingly, the key issue in ADA cases—in pregnancy contexts as in every other context—is whether an employer can accommodate a disabled worker without undue hardship.

The ADAAA sought to accomplish its goal of expanding coverage through specific changes to the statute's language. These revisions included clarifying and expanding the definitions of "substantially limits" and "major life activities," as well as easing the duration requirement. Thus, as a result of the ADAAA, many conditions that would not have been covered under the pre-amendment ADA are now considered disabilities.[85] When one of the newly covered conditions arises in connection with a pregnancy, the pregnant woman who experiences the condition qualifies for protection under the ADA. This is the core of the impairment theory: Even though the statute is not pregnancy-specific, it broadens the base of conditions for which pregnant women can receive protection and accommodation. Under the comparator theory, the additional protections of the ADAAA are translated into additional protections under the PDA. This is true because the ADAAA expands the pool of comparators to whom a pregnant woman may point when seeking to use comparators as evidence of discrimination under the PDA.

---

81. ADA Amendments Act § 2, 122 Stat. AT 3554 (2008); 29 C.F.R. § 1630.1(c)(4) (2011).

82. ADA Amendments Act § 2, 122 Stat. at 3554.

83. 29 C.F.R. § 1630.1(c)(4) app.

84. *Id.* § 1630.2(j)(1)(iii).

85. *See, e.g.*, Lloyd v. Hous. Auth. of Montgomery, 857 F. Supp. 2d 1252 (M.D. Ala. 2012) (holding that a worker suffering from asthma and high blood pressure did not have a disability); Lowe v. Am. Eurocopter LLP, No. 10-24, 2010 U.S. Dist. LEXIS 133343, at *23 (N.D. Miss. Dec. 16, 2010) (finding that, although obesity was not a disability before the ADA Amendments Act of 2008, it may be under the current regime).

B. *The Impairment Theory*

The impairment theory holds that, just as the amended ADA now protects vast numbers of workers whose conditions would not have qualified as disabilities prior to the passage of the ADAAA, it also protects women affected by identical conditions that happen to be caused by pregnancy. Thus, plaintiffs experiencing a broad range of pregnancy-related conditions will be able to establish a right to accommodation since pregnancies can substantially limit the major bodily functions listed in the statute, including the digestive, bladder, brain, respiratory, circulatory, endocrine, and reproductive functions.[86] The amendments to the ADA address the four key obstacles pregnant women faced when bringing claims under the pre-amendment statute: duration, severity, undue limitations on the meaning of "major life activity," and the pregnancy-contamination doctrine.

1. Rejection of the Duration Requirement

The regulations accompanying the ADAAA eliminated the duration requirement from the definition of "disability."[87] No longer are impairments that last only a short time deemed ineligible to be considered a disability. The EEOC regulations now expressly state that "[t]he effects of an impairment lasting or expected to last fewer than six months can be substantially limiting."[88] This means that a condition likely to subside at or before the end of the pregnancy can be considered a disability. However, the interpretive guidance to the regulations nonetheless cautions that "[t]he duration of an impairment is one factor that is relevant in determining whether the impairment substantially limits a major life activity. Impairments that last only for a short period of time are typically not covered, although they may be covered if sufficiently severe."[89] The phrase "a short period of time" is not expressly defined, but, when viewed in conjunction with the regulations' language recognizing that conditions lasting less than six months may be disabilities, it seems that it must be a very short period indeed. Furthermore, the guidance makes clear that even very short-term conditions may be impairments if they are sufficiently severe. For example, this means that a

86. 42 U.S.C. § 12102(2)(B) (2012); *see* 29 C.F.R. § 1630.2(i)(1)(ii) (2013).

87. 29 C.F.R. § 1630.2(j)(1)(ix) app.; *see* 42 U.S.C. § 12102.

88. 29 C.F.R. § 1630.2(j)(1)(ix). For instance, "if an individual has a back impairment that results in a twenty-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability." *Id.* § 1630.2(j)(1)(ix) app.

89. *Id.* § 1630.2(j)(1)(ix) app.

woman experiencing debilitating nausea for just a few weeks (or even less) may be found to have an impairment.

2. Easing of the "Substantially Limits" Standard

In enacting the ADAAA, Congress noted that the term "substantially limits" had been narrowly interpreted by the courts. The findings and purposes located in the introductory note of the ADAAA state that the Supreme Court has "interpreted the term 'substantially limits' to require a greater degree of limitation than was intended by Congress" and that the EEOC's interpretation of "substantially limits" to mean "significantly restricts" created too high a burden.[90] In order to effect the intent of the ADA, the ADAAA states "that whether an impairment substantially limits a major life activity" should *not* "be interpreted strictly to create a demanding standard for qualifying as disabled" or to mean "prevents or severely restricts."[91]

The EEOC regulations of the amended ADA reinforce the reduced threshold.[92] First, they expressly recognize that the ADAAA's broadened definitions encompass pregnancy-related impairments. Indeed, the regulations state that "a pregnancy-related impairment that substantially limits a major life activity *is a disability* under the first prong of the definition."[93] Guidance issued by the EEOC cites gestational diabetes and preeclampsia as examples of pregnancy-related impairments that may be considered disabilities under the law.[94] Next, the regulations note that "[t]he term 'substantially limits' shall be construed broadly in favor of expansive coverage, to the maximum extent permitted by the terms of the ADA. 'Substantially limits' is not meant to be a demanding standard."[95] Moreover, the regulations state that the proper construction of "substantially limits" will "require a degree of functional limitation that is lower than the standard for

90. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(a), 122 Stat. 3553, 3553-54 (citing Toyota Motor Mfg., Ky. v. Williams, 534 U.S. 184 (2002)).

91. ADA Amendments Act § 2(b), 122 Stat. at 3554.

92. Note that these regulations should be granted significant *Chevron* deference, given that the ADAAA explicitly grants the agency the authority to interpret the law. 42 U.S.C. § 12117 (2006) (granting EEOC interpretive authority); *see* Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 844-45 (1984) (holding that agency regulations interpreting ambiguous statutory language are due judicial deference).

93. 29 C.F.R. § 1630.2(h) app. (emphasis added).

94. *Pregnancy Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/types/pregnancy.cfm (last visited June 20, 2013).

95. 29 C.F.R. § 1630.2(j)(1) (2011).

'substantially limits' applied prior to the ADAAA."[96] Finally, the regulations affirm that "[a]n impairment need not prevent, or significantly or severely restrict, the individual from performing a major life activity in order to be considered substantially limiting."[97] Thus, as a result of both revisions to the statutory language and the new EEOC regulations, many more individuals are considered "substantially limited" under the amended ADA.

The ADAAA further provides that "[t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures,"[98] allowing treatable impairments to qualify as disabilities. Thus, it would seem that a plaintiff who successfully controls her gestational diabetes but requires modifications to her work schedule to take meals and check her blood sugar has a protected disability, although she would not have under the pre-amendment ADA. And any condition that, left unmitigated, would result in miscarriage should be a disability on the grounds that it substantially limits the major life activity of reproduction. Courts should no longer penalize pregnant plaintiffs for the countless methods they use to work through pregnancy-related conditions. The ability to work through the symptoms of a condition is not an indication that the condition isn't substantially limiting.

The statute also requires that courts evaluate episodic impairments in their active states. The amended ADA states that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[99] For example, in the case where pregnancy has exacerbated hypertension or a vasovagal response resulting in occasional fainting episodes, courts should consider the impact of the condition during an episode.[100]

96. *Id.*

97. *Id.*

98. 42 U.S.C. § 12102(4)(E)(i) (2012); *see* 29 C.F.R. § 1630.2(j)(1) ("The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures.").

99. 42 U.S.C. § 12102(4)(D); *see* 29 C.F.R. § 1630.2(j)(1)(vii) (2013) ("An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active.").

100. Where denying an accommodation would likely result in an employee being unable to perform the essential functions of the job, the employer needs to provide the requested accommodation absent undue hardship. *See, e.g.*, Randolph v. Rodgers, 170 F.3d 850, 858 (8th Cir. 1999); Buckingham v. U.S. Postal Serv., 998 F.2d 735, 743 (9th Cir. 1993).

3. Expanding the "Major Life Activity" Standard

In addition to easing the "substantially limits" standard, the ADAAA clarified the definition of the "major life activities." Before the ADA was amended, the term "major life activities" was interpreted by courts to refer to "those activities that are of central importance to daily life."[101] The ADAAA replaced that interpretation with a non-exhaustive list of activities, which now includes, among other activities, "performing manual tasks . . . sleeping, eating, walking, standing, lifting, bending, . . . breathing, . . . concentrating, thinking, . . . and working."[102] The definition also now includes the operation of a "major bodily function, including but not limited to, functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[103]

As a result of this new definition, many pregnancy-related impairments fall under the ADA because they interfere with the operation of major bodily functions or with other major life activities.[104] For example, lumbar lordosis, the sway-backed posture caused by a growing belly and the fact that pregnancy hormones loosen up the joints, can cause back pain that interferes with lifting, bending, and standing. Similarly, pregnancy-related syncope, which is dizziness or fainting resulting from increased blood flow to the uterus and fetus, interferes with a woman's ability to deal with heat, stress, or exertion. These are just two examples of conditions that are now covered by the ADA (and that just happen to result from pregnancy).[105] More examples are detailed in the Appendix.

---

101. Toyota Motor Mfg., Ky., Inc.. v. Williams, 534 U.S. 184, 197 (2002).

102. 42 U.S.C. § 12102(2)(A); *see* 29 C.F.R. § 1630.2(i)(1)(i).

103. 42 U.S.C. § 12102(2)(B); *see* 29 C.F.R. § 1630.2(i)(1)(ii).

104. At a minimum, even pregnant women who fail to meet the definition of "disabled" under the ADA may have a viable ADA retaliation claim if they request an accommodation and believe their employers later retaliated against them for doing so. When an individual believes, in good faith, that she is entitled to an accommodation under the ADA, she is protected by the ADA's anti-retaliation provision even if the impairment in question does not rise to the level of a disability under the ADA. *See, e.g.*, Cassimy v. Bd. of Educ., 461 F.3d 932, 938 (7th Cir. 2006); Krouse v. Am. Sterilizer Co., 126 F.3d 494, 498 (3d Cir. 1997).

105. The Appendix describes more of the pregnancy-related disabilities women can experience. It is not an exhaustive list of such disabilities and it is important for employees, employers and litigators to consult with medical experts when determining whether an employee has a qualifying disability which requires accommodation absent undue hardship.

4. The Pregnancy-Contamination Doctrine Runs Contrary to the ADAAA's Mandate of Broad Coverage

In amending the ADA, Congress made explicit its intention to eliminate hurdles that had created a "demanding standard to qualify as disabled."[106] The pregnancy-contamination doctrine is precisely such a hurdle, and is inconsistent with the clear statutory language requiring that the definition of disability "be construed in favor of broad coverage of individuals."[107] The mandate that the post-amendment ADA's coverage be "broad," "inclusive," and "generous"[108] means that courts now should primarily focus not on whether a woman's pregnancy-related condition qualifies as a disability, but rather on whether her employer has engaged in an interactive process and can accommodate her without undue hardship.

Indeed, to continue to accept the pregnancy-contamination doctrine following the amendments to the ADA would create a far more demanding standard for pregnant women than for any other group of workers. For instance, carpal tunnel syndrome arises both in the general population and (far more frequently)[109] in pregnant women. Under the pregnancy-contamination doctrine, a nonpregnant worker with carpal tunnel syndrome would be covered by the ADA, but a pregnant worker with precisely the same medical condition would not be covered if her carpal tunnel syndrome arose as a result of pregnancy. Under such logic, pregnancy contaminates an otherwise covered disability, rendering that condition unprotected under the ADA.

The language and purpose of the ADAAA and its accompanying EEOC regulations make clear that a woman cannot be denied accommodations at work purely because her impairment stems from pregnancy (even a supposed "normal pregnancy"), because it is short-term, or because it does not qualify as an impairment in the first place on the grounds that it is not "substantially limiting." The amended ADA is broader and more encompassing. It emphasizes the particular condition, and not the *cause* of that condition, and thus plainly covers pregnancy-related conditions as well as numerous non-pregnancy-related conditions

106. ADA Amendments Act of 2008, Pub. L. No. 110-325, § 2(b), 122 Stat. 3553, 3553 (2008) ("[C]ourts have incorrectly found in individual cases that people with a range of substantially limiting impairments are not people with disabilities.").

107. *See* 42 U.S.C. § 12102(4)(A).

108. 154 CONG. REC. H8289 (daily ed. Sept. 17, 2008) (statement of Rep. Nadler); 154 CONG. REC. H8288 (daily ed. Sept. 17, 2008) (statement of Rep. Miller).

109. While up to sixty-two percent of pregnant women develop carpal tunnel syndrome due to swelling and fluid retention caused by pregnancy, only three percent of the general population suffers from the condition. *See* Robert H. Ablove & Tova S. Ablove, *Prevalence of Carpal Tunnel Syndrome in Pregnant Women*, 108 WISC. MED. J. 194, 194 (2009).

that were previously excluded. In addition to these statutory changes, which expand protection for pregnant women under the ADA, the ADAAA also allows for greater access under the PDA by creating a larger class of nonpregnant workers who are entitled to accommodations. This is addressed by our "comparator theory" in the following section.

C. *The Comparator Theory*

As observed by Professors Jeannette Cox and Deborah A. Widiss,[110] the ADAAA improves access to accommodations not just directly but also indirectly, by way of the PDA. Where an employer provides help with lifting for an employee limited by a cardiac condition, for example, the employer must also provide help with lifting for a pregnant employee whose healthcare provider has limited the amount of weight she should lift. This stems from the PDA's mandate that "women affected by pregnancy, childbirth, or related medical conditions *shall be treated the same* for all employment-related purposes . . . as other persons not so affected but *similar in their ability or inability to work.*"[111]

Employees who believe they are being discriminated against based on their pregnancies may bring disparate-treatment claims under the PDA. A common method of establishing a disparity in treatment using indirect evidence[112] is to use comparators. In such situations,[113] the fact that the ADAAA extends accommodations to more employees with disabilities expands the range of comparators available to pregnant workers. Under the comparator theory, a pregnant woman might well gain accommodation rights for conditions that are not "impairments" under the ADA.

---

110. *See* Cox, *supra* note 11, at 466-68; Widiss, *supra* note 7, at 1004-10, 1018-35.

111. 42 U.S.C. § 2000e(k) (2013) (emphasis added).

112. A PDA plaintiff may prove discrimination through either direct or indirect evidence. Direct evidence is "evidence that, if believed, proves the existence of a fact without inference or presumption." Chapter 7 Tr. v. Gate Gourmet, Inc., 683 F.3d 1249, 1255 (11th Cir. 2012) (citation and internal quotation marks omitted). Such evidence would include, for instance, an employer's blatant discriminatory remarks. Indirect evidence is circumstantial, and is typically provided via the burden-shifting framework set out in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981). Logically, where there is direct evidence of discrimination, presenting indirect evidence—and, thus, comparators—is not necessary.

113. To assert a prima facie right to accommodation using the commonly applied *McDonnell Douglas* test, a woman must show that her employer is aware that she is pregnant or "affected by pregnancy," has been performing her job satisfactorily, has been subject to an adverse employment action, and that she was treated differently from other similarly situated employees. Silverman v. Bd. of Educ. of Chi., 637 F.3d 729, 736 (7th Cir. 2011).

The use of such comparators from the plaintiff's workplace is standard and embodies what we call the "de facto comparator theory." However, this should not be the only way that plaintiffs may obtain accommodations under the PDA. Instead, under what we call the "de jure comparator theory," pregnant plaintiffs should have access to accommodations if they can prove that a nonpregnant worker with similar limitations would be entitled to reasonable accommodations under the ADA or other disability-accommodation laws, were he or she to exist in the workplace at that time.

1. The Prospective Impact of the ADAAA on PDA Claims: The "De Facto Comparator Theory"

The de facto comparator theory holds that, where a plaintiff chooses to prove her case through the use of comparators within her own workplace, the ADAAA's shift towards accommodation of a broader range of workers, including those who are temporarily disabled, dramatically expands the pool of potential comparators.

As discussed above, the ADAAA makes accommodation a more widespread practice. Early outcomes of cases proceeding under the amended ADA suggest that accommodations are now available for a range of conditions that can cause limitations similar to those experienced by pregnant women.[114] Some of these conditions cause the same symptoms suffered by nonpregnant workers as a result of a different disease. The sardonic comment that the PDA entitles pregnant women to be treated just as badly as everyone else[115] loses some of its sting as the standard of treatment for everyone else improves.

One potential impact of the ADAAA on the PDA involves employer policies that limit accommodations to workers who were injured on the job. Such policies

114. *See, e.g.*, Thomas v. Bala Nursing & Ret. Ctr., No. 11-5771, 2012 WL 2581057 (E.D. Pa. July 3, 2012) (allowing a plaintiff suffering from anemia and associated standing, walking, and sleeping problems to survive summary judgment); Gibbs v. ADS Alliance Data Sys., Inc., No. 10-2421, 2011 WL 3205779 (D. Kan. July 28, 2011) (denying employer's summary judgment motion on employee's ADA claim stemming from carpal tunnel syndrome); Cohen v. CHLN, Inc., No. 10-514, 2011 WL 2713737 (E.D. Pa. July 13, 2011) (holding that the ADAAA does not mandate strict durational requirements); Norton v. Assisted Living Concepts, Inc., No. 10-91, 2011 WL 1832952 (E.D. Tex. May 13, 2011) (denying a motion for partial summary judgment on grounds that renal cancer is capable of being classified as a disability despite plaintiff's remission).

115. Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) ("Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees, even to the point of conditioning the availability of an employment benefit on an employee's decision to return to work after the end of the medical disability that pregnancy causes." (citation and internal quotation marks omitted)).

have been regularly used to deny pregnant workers light duty and other accommodations.[116] Such policies were never enforceable when workers injured off the job were entitled to accommodation under the ADA.[117] But because of the highly constricted scope of the pre-amendment ADA, such situations were rare.[118] Now that many more people injured both on and off the job are eligible for ADA accommodation, however, the place of injury is moot for ADA purposes. An employer's ability to offer preferential treatment for on-the-job injuries applies only to the significantly smaller class of persons who cannot qualify as disabled under the ADA.[119]

One court has suggested that potential comparators are not sufficiently similar if one, but not the other, would be entitled to accommodation under the ADA.[120] In *Young v. United Parcel Service*, UPS declined to accommodate a pregnant woman's lifting restrictions on the grounds that such accommodations were available only to employees with "a permanent impairment cognizable under the ADA."[121] The Fourth Circuit determined that such a policy did not violate the PDA because it was "pregnancy-blind," and that to hold otherwise would constitute "preferential treatment" for pregnant women.[122] Professor Widiss points out that, if this interpretation were widely accepted, the protection of the PDA would dwindle to only those cases in which the comparator is not disabled—which, now that the ADA has been amended to allow more employees to qualify as disabled, is a very small number of cases.[123] This rule would eviscerate the PDA. As Widiss

116. *See, e.g.*, Young v. United Parcel Serv., Inc., 707 F.3d 437, 440 (4th Cir. 2013); Reeves v. Swift Transp. Co., Inc., 446 F.3d 637, 640 (6th Cir. 2006); Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1312 (11th Cir. 1999).

117. Widiss, *supra* note 7, at 1033.

118. *See id.*

119. However, it is still the case that employers have the right to choose which reasonable accommodation to offer. 29 C.F.R. § 1630.9 app. (2013). It is conceivable that courts would support an employer accommodating on-the-job injuries in one way, and other injuries in another.

120. Young v. United Parcel Serv., Inc., No. 08-2586, 2011 WL 665321 (D. Md. Feb. 14, 2011), *aff'd*, 707 F.3d 437 (4th Cir. 2013); Serednyj v. Beverly Healthcare, 656 F.3d 540, 548 (7th Cir. 2011).

121. 707 F.3d at 440.

122. *Id.* at 448. In *Serednyj*, a nursing home's modified work policy provided accommodations only to qualified individuals with a disability under the ADA or to employees with work-related injuries. 656 F.3d at 548. The court upheld the policy, but discussed only the work-related injury requirement. *Id.* at 548-49.

123. *See* Widiss, *supra* note 7, at 1023-25; *cf.* Cox, *supra* note 11, at 469-72 (contending that the ADA should cover pregnancy *per se* in part because "the ADAAA's dramatic

notes, "the fact that the ADA was amended to provide far more robust protections for disabilities generally would have the perverse effect of *decreasing* the support for pregnant employees."[124]

It is significant, however, that only one court has interpreted the comparator requirement this way, perhaps because the interpretation is clearly erroneous. As Professor Widiss explains, the plain language of the PDA's second clause obligates employers to treat pregnant women the same as others "similar in their ability or inability to work." No mention is made that individuals protected under other statutes should be excluded from the realm of possible comparators for PDA purposes.[125] To prevent ADA-accommodated employees from being comparators in a PDA claim would also result in an implied repeal of the PDA, which is both highly disfavored as a general interpretive principle[126] and expressly prohibited by the ADA, which states that no part of that law "shall be construed to invalidate or limit the remedies, rights, and procedures of any Federal law . . . that provides greater or equal protection for the rights of individuals with disabilities than are afforded by this chapter."[127] The only sensible interpretation is, as Widiss puts it, "the natural reading of the PDA's plain text and a reasonable means of harmonizing two statutes with a common purpose: increasing employment opportunities for employees with health conditions that impact their ability to work."[128]

2. The "De Jure Comparator Theory"

Professor Widiss discusses an alternative comparator theory in her Article.[129] She argues that making pregnancy accommodations depend on whether an individual workplace has another employee who has been granted an accommodation makes important civil rights hinge on serendipity. Widiss argues that pregnant plaintiffs should be entitled to accommodations if they can prove that a hypothetical nonpregnant worker with similar conditions would be entitled to reasonable accommodations under the ADA or other disability-accommodation laws. We call this the "de jure comparator theory."

---

increase of the number of persons entitled to workplace accommodations may inadvertently decrease the number of pregnant women who receive them via the PDA").

124. Widiss, *supra* note 7, at 1025.

125. *Id.* at 1025-26; *see* Grossman & Thomas, *supra* note 49, at 36, 41.

126. Widiss, *supra* note 7, at 1030.

127. 42 U.S.C. § 12201(b) (2012).

128. Widiss, *supra* note 7, at 1031.

129. *Id.* at 1033-34.

Under this theory, a court in a PDA case would be required to imagine a fictional ADA plaintiff with the same maladies as the pregnant plaintiff, and would try this fictional plaintiff's accommodation case under the ADA.[130] If the hypothetical plaintiff would receive an accommodation, the pregnant woman would be entitled to one as well.[131] Widiss argues that requiring plaintiffs to identify comparators from their own workplace results in an arbitrarily inconsistent distribution of accommodations, depending on such factors as the size of the workplace, the types of accommodations and disabilities common in certain lines of work, and the timing of the plaintiff's pregnancy relative to other workers requiring accommodations. If courts were to adopt this approach, pregnant women would gain much broader protections.

The de jure comparator theory would be particularly helpful to employees in smaller workplaces, who are likely to have a disproportionately difficult time locating a comparator, regardless of the expansion of coverage under the ADAAA.[132] As of yet, however, the de jure theory has not gained a foothold in the case law.

III. Pregnancy Accommodation Cases After the ADAAA

Following the passage of the ADAAA, courts have begun to recognize that conditions that are otherwise covered under the ADA are no longer disqualified merely because they are caused by pregnancy. As this Article has explained, whether or not a condition is related to pregnancy is irrelevant under the amended ADA. After an initial period of uncertainty in which courts' ability to assess the new legal environment was hampered by inadequate briefing, courts are now on track toward understanding how to assess pregnancy accommodation cases brought under the ADA. Because we know of no PDA cases in which plaintiffs have proven that an adverse employment action was because of sex by pointing to the broader range of potential comparators created by the ADAAA's expanded coverage, this Part focuses on the most significant post-ADAAA cases decided under the impairment theory.

---

130. *Id.*

131. It is not necessary for courts that adopt a hypothetical comparator approach to apply it to cases in which the amended ADA would not require accommodation. For example, a plaintiff would not be able to argue that, because all the other employers on the block allow workers to come in a few minutes late, her employer must do the same. The reason for the use of hypothetical comparators is the achievement of uniform application of the ADA over time and among workplaces, not the creation of a universal right of pregnancy accommodation.

132. Brian Headd, *The Characteristics of Small-Business Employees*, Monthly Lab. Rev., Apr. 2000, at 13.

A. Cases That Fail to Recognize the Implications of the ADAAA

Initial pregnancy-related decisions under the ADAAA were hampered by weak representation and by confusion on the part of some courts. The earliest decisions seemed not to grasp the way in which the ADAAA expanded the right to accommodation for pregnancy-related conditions.[133] Indeed, the first court applied pre-2008 law without even acknowledging that Congress had changed the statute.[134] Other courts acknowledged passage of the ADAAA but relied on pre-ADAAA precedent for propositions overruled by that statute.[135]

These early decisions misunderstood the new legal environment in three basic ways. First, they ignored the demise of the duration requirement—i.e., they asserted a condition must be permanent in order to qualify for ADA protection.[136] Second, the decisions continued to embrace the narrow definitions of "substantially limits" and "major life activity" that Congress (in the ADAAA) said were inappropriate.[137] Finally, the decisions invoked the pregnancy-contamination doctrine, ignoring the ADAAA's mandate that the term disability "shall be construed in favor of broad coverage."[138]

In *Selkow v. 7-Eleven*, the Middle District of Florida did not even mention the ADAAA in granting an employer's motion for summary judgment on the plaintiff's ADA claim.[139] The case involved a pregnant convenience store worker who sought assistance from a co-worker with heavy lifting due to her back pain.[140] She was later fired on the basis of video evidence indicating that she had stolen

133. *See* Wanamaker v. Westport Bd. of Educ., 899 F. Supp. 2d 193 (D. Conn. 2012); Mayorga v. Alorica, Inc., No. 12-21578-CIV, 2012 U.S. Dist. LEXIS 103766 (S.D. Fla. July 25, 2012); Sam-Sekur v. Whitmore Grp., Ltd., No. 11-cv-4938, 2012 U.S. Dist. LEXIS 83586 (E.D.N.Y. June 15, 2012); Selkow v. 7-Eleven, Inc., No. 8:11-cv-456-T-33, 2012 U.S. Dist. LEXIS 79265 (M.D. Fla. June 7, 2012).

134. *Selkow*, 2012 U.S. Dist. LEXIS 79265, at *37-42.

135. *Wanamaker*, 899 F. Supp. 2d at 210-12; *Sam-Sekur*, 2012 U.S. Dist. LEXIS 83586, at *18, 25.

136. *See Wanamaker*, 899 F. Supp. 2d at 211; *Mayorga*, 2012 U.S. Dist. LEXIS 103766, at *15; *Sam-Sekur*, 2012 U.S. Dist. LEXIS 83586, at *22; *Selkow*, 2012 U.S. Dist. LEXIS 79265, at *41-42.

137. *Wanamaker*, 899 F. Supp. 2d, at 210; *Sam-Sekur*, 2012 U.S. Dist. LEXIS 83586, at *17.

138. *Wanamaker*, 899 F. Supp. 2d at 211; *Mayorga*, 2012 U.S. Dist. LEXIS 103766, at *12; *Sam-Sekur*, 2012 U.S. Dist. LEXIS 83586, at *22; *Selkow*, 2012 U.S. Dist. LEXIS 79265, at *37; *see* 42 U.S.C. § 12102 (4)(A) (2012).

139. *Selkow*, 2012 U.S. Dist. LEXIS 79265, at *37-42.

140. *Id.* at *2-3.

$10.[141] She then sued, claiming she was terminated because of her pregnancy.[142] The plaintiff devoted only a small portion of her complaint to her disability claim.[143] Unfortunately, she ignored the ADAAA and effectively conceded that pregnancy was not a covered disability, absent unusual circumstances.[144] Because the plaintiff apparently overlooked the ADAAA, she also, in effect, conceded that temporary disabilities were not covered under the ADAAA.[145]

The court appears to have adopted the parties' erroneous statements of post-ADAAA law. Granting summary judgment to the defendant, the court held that the plaintiff's lifting restriction did not constitute an impairment of a major life activity, citing pre-amendment case law.[146] The court, like the plaintiff, ignored the statutory language providing that "lifting" is a major life activity,[147] as well as the ADAAA's mandate that "[t]he definition of disability . . . shall be construed in favor of broad coverage of individuals."[148] The court also embraced the pregnancy-contamination doctrine, citing pre-ADAAA cases and stating that pregnancy-related conditions are only covered by the ADA if the pregnant woman has "severe complications."[149]

Sam-Sekur v. Whitmore Group, Ltd. involved a pro se plaintiff who worked as an administrative assistant and experienced a series of medical problems following her return from maternity leave.[150] When she was eventually terminated, allegedly due to downsizing,[151] she brought pregnancy discrimination claims under the ADA and state law.[152]

Although the Eastern District of New York acknowledged the passage of the ADAAA, it acted as if the law did not exist. The court relied on pre-ADAAA authority and asserted that "courts generally hold that complications arising from

141. *Id.* at *3-5.

142. *Id.* at *7.

143. Complaint at 8-10, *Selkow*, 2012 U.S. Dist. LEXIS 79265 (No. 8:11-cv-456-T-33).

144. *Id.*

145. *Id.*

146. *Selkow*, 2012 U.S. Dist. LEXIS 79265, at *40.

147. 42 U.S.C. § 12102(2)(A) (2012).

148. *Id.* § 12102(4)(A).

149. *Selkow*, 2012 U.S. Dist. LEXIS 79265, at *38.

150. Sam-Sekur v. Whitmore Grp., Ltd., No. 11-cv-4938, 2012 U.S. Dist. LEXIS 83586, at *1-3 (E.D.N.Y. June 15, 2012).

151. *Id.* at *5.

152. *Id.* at *1.

pregnancy do not qualify as disabilities."[153] "Only in extremely rare cases," it continued, are conditions related to pregnancy complications covered by the ADA.[154] This highly restrictive version of the pregnancy-contamination doctrine sharply narrows the definition of "disability," ignoring the amended Act's mandate to construe "disability" broadly.[155] The court also ignored the ADAAA regulations' elimination of the duration requirement, stating that "temporary impairments . . . are not typically considered disabilities."[156] However, in view of the fact that the plaintiff had filed her suit pro se and had not alleged in her complaint that any of her medical problems were linked to her pregnancy and childbirth,[157] the court granted her leave to replead her ADA claim in order to set forth allegations indicating that hers was "one of the extremely rare cases in which courts have found that conditions that arise out of pregnancy qualify as a disability."[158]

The plaintiff filed an amended complaint that survived a motion to dismiss.[159] In her amended complaint, the plaintiff followed the court's direction, alleging that her disability, "chronic cholecystitis," was an illness that had been caused by her pregnancy.[160] The defendant's motion to dismiss the amended complaint again relied on the pre-amendment ADA's duration requirement and its heightened standards for "substantially limits" and "major life activity."[161] The court denied this motion for reasons not reflected in the docket report,[162] making it impossible to judge the quality of the court's analysis of the plaintiff's ADA claims. The case then settled.[163]

153. *Id.* at *22.

154. *Id.* at *24.

155. 42 U.S.C. § 12102(4)(A) (2012).

156. *Sam-Sekur*, 2012 U.S. Dist. LEXIS 83586, at *25.

157. *Id.* at *26.

158. *Id.* While the court's decision demonstrates a lack of familiarity with both the ADAAA and its implementing regulations, this confusion may have been a result of the pro se status of the plaintiff as well as the lack of any post-ADAAA precedent. Accordingly, this case is best considered an "outlier" in the jurisprudence.

159. Order at 1, *Sam-Sekur*, No. 11-CV-4938 (E.D.N.Y. Dec. 20, 2012).

160. Amended Complaint at 3, *Sam-Sekur*, No. 11-CV-4938 (E.D.N.Y. July 17, 2012).

161. Memorandum of Law in Support of Motion to Dismiss Amended Complaint at 10, *Sam-Sekur*, No. 11-CV-4938 (E.D.N.Y. Oct. 24, 2012).

162. Order at 1, *Sam-Sekur*, No. 11-CV-4938 (E.D.N.Y. Dec. 20, 2012).

163. Stipulation of Dismissal with Prejudice, *Sam-Sekur*, No. 11-CV-4983 (E.D.N.Y. May 24, 2013).

In *Wanamaker v. Westport Board of Education*, the plaintiff suffered serious complications during childbirth, including transverse myelitis and a spinal injury.[164] In addition, her daughter was born with a serious heart defect.[165] The plaintiff requested additional medical leave to address these issues, but her employer decided to replace her permanently. She sued, alleging violations of the FMLA[166] and the ADA, along with state law claims.[167] The District of Connecticut dismissed (with leave to amend) the ADA claim on the grounds that, although the plaintiff had described a pregnancy-related condition (transverse myelitis), she had not articulated how that condition substantially limited a major life activity.[168]

The court recognized that the ADAAA governed,[169] but cited pre-ADAAA precedent as if the ADAAA had never been passed and again embraced the pregnancy-contamination doctrine as articulated in *Sam-Sekur*.[170] Again following *Sam-Sekur*, the *Wanamaker* court cited pre-ADAAA cases for the proposition that the impairments alleged could not constitute disabilities because they lacked "proof of permanency,"[171] ignoring the fact that the ADAAA eliminated this requirement.[172]

The plaintiff amended her complaint, specifying that her pregnancy-related condition "substantially interfered with major life activities, including standing and walking, for extended periods of time, as well as bowel functions."[173] The employer responded by filing a motion for summary judgment, in which it abandoned its argument that the plaintiff did not have a covered disability.[174] Instead, the employer attacked the plaintiff's cause of action for disability discrimination by arguing that, because the plaintiff's medical impairment required her to miss work and regular attendance is an essential function of the job, the plaintiff could

164. Wanamaker v. Westport Bd. of Educ., 899 F. Supp. 2d 193, 197 (D. Conn. 2012).

165. *Id.*

166. *Id.*

167. *Id.* at 200, 209, 212.

168. *Id.* at 211-12.

169. *Id.* at 210.

170. *Id.* at 211.

171. *Id.*

172. 42 U.S.C. § 12102(4)(A) (2012).

173. Amended Complaint at 4, *Wanamaker*, 899 F. Supp. 2d 193 (D. Conn. 2012) (No. 3:11-cv-0791).

174. Motion for Summary Judgment, *Wanamaker*, 899 F. Supp. 2d 193 (D. Conn. 2012) (No. 3:11-cv-0791).

not perform the essential functions of the job.[175] In the alternative, the employer asserted that it had granted the plaintiff numerous leaves of absence and thus could not be faulted for failure to engage in the interactive process. Finally, the employer argued that the plaintiff had essentially asked for an indefinite leave of absence or, at the very least, that the employer allow her to work a partial week and hire another employee to cover the remaining days of the week.[176] These accommodations, the employer stated, constituted an undue hardship and the employer was thus under no obligation to provide them to the plaintiff.[177]

In her opposition to the defendant's motion for summary judgment, the plaintiff cited the ADAAA, emphasizing the legislature's intent that the term disability be construed broadly in favor of coverage.[178] The plaintiff further argued that she was replaced by a non-disabled person or was treated less favorably than non-disabled employees and that such comparator evidence created an inference of discrimination on the basis of disability.[179] With respect to the interactive process, the plaintiff asserted that it was the employer, not she, who was responsible for engaging in a dialogue regarding possible accommodations that would allow the plaintiff to perform the essential functions of her job.[180] Finally, the plaintiff called into question the employer's articulated reason for her termination, noting that the non-disabled person replacing the plaintiff lacked experience and, indeed, was relying on the teaching plans created by the plaintiff.[181] The plaintiff concluded that a trier of fact could easily find that the employer harbored an animus towards teachers who took leaves of absence.[182] Because the plaintiff had been on a leave because of her disability, the plaintiff opined, a reasonable trier of fact could find that the plaintiff was terminated because the employer believed that the plaintiff's disability would require additional leaves of absence.[183] This, the plaintiff concluded, constituted discrimination on the basis of disability.[184]

175. Reply Memorandum of Law in Further Support of the Defendant's Motion for Summary Judgment at 10, *Wanamaker*, 899 F. Supp. 2d 193 (D. Conn. 2012) (No. 3:11-cv-0791).

176. *Id.* at 9-10.

177. *Id.*

178. Memorandum in Opposition to Motion for Summary Judgment at 31, *Wanamaker*, 899 F. Supp. 2d 193 (D. Conn. 2012) (No. 3:11-cv-0791).

179. *Id.* at 37.

180. *Id.* at 33.

181. *Id.* at 35.

182. *Id.* at 36-37.

183. *Id.* at 38.

184. *Id.*

At the time of this writing, the defendant's motion was pending before the court. For our purposes, the important point is that, having started out on shaky legs, this case is now proceeding in precisely the direction called for by the ADAAA. That is, the focus is not on the threshold issue of whether a disability exists, but instead on the interactive process and whether or not the plaintiff's proposed accommodation constitutes an undue hardship. *Wanamaker* begins the trend that has taken the case law in the direction of a firmer command of the relevant law post-ADAAA.

This trend continued with *McKellips v. Franciscan Health System*,[185] which involved a plaintiff who experienced "immobilizing pain in her pelvis" as a complication of pregnancy.[186] The plaintiff's doctor recommended that she take maternity leave two months early and get accommodations at work. In response, the plaintiff asked her employer for a parking spot closer to her workplace in order to reduce her walking distance. Her supervisor denied this request, allegedly commenting that "pain is a part of every pregnancy" and advising plaintiff that if she had suggestions about changes at work, to "put them in the suggestion box."[187] The plaintiff was fired approximately five days before her maternity leave was scheduled to begin.[188]

Again, in this case, there are problems with the plaintiff's complaint, which initially failed to include an ADA claim.[189] When the plaintiff sought to add a claim for violation of the ADA, the defendant opposed her motion to amend, arguing that the ADA excludes pregnancy from its definition of disability and therefore amendment would be futile.[190] The plaintiff argued that her pregnancy-related pelvic pain substantially limited her in the major life activity of walking and thus potentially was an ADA disability.[191]

The court allowed the plaintiff to amend, holding that "defendant has failed to prove Plaintiff's claim under the ADA is futile."[192] The court's holding was consistent with the ADAAA. Yet the underlying reasoning of the court does not show a full command of post-ADAAA law. The court did not cite either to the language of the ADAAA or to the EEOC's implementing regulations. Instead, it cited pre-ADAAA case law, reciting the out-of-date proposition that pregnancy

185. No. 3:13-CV-05096, 2013 U.S. Dist. LEXIS 68069 (W.D. Wash. May 13, 2013).

186. *Id.* at *2.

187. Plaintiff's Second Amended Complaint for Damages at 5, *McKellips*, No. 3:13-CV-05096 (W.D. Wash. May 14, 2013).

188. *McKellips*, 2013 U.S. Dist. LEXIS 68069, at *2.

189. *Id.* at *8.

190. *Id.*

191. *Id.*

192. *Id.* at *10.

is not a disability "absent unusual circumstances."[193] Happily, in this particular case McKellips's condition *was* unusual, yet the court's language could be misleading in cases that involve pregnancy conditions more common than the one encountered by McKellips. Pregnancy-related conditions can qualify as impairments if they interfere with a major bodily system or life activity—regardless of whether or not the pregnancy condition is "unusual." Nonetheless, *McKellips* clearly signals that pregnancy-related conditions can be disabilities under the ADA. After the plaintiff was allowed to amend her complaint, it appears that the case settled.

B. Cases That Recognize the Relevant Revisions of the ADAAA

More recent decisions show that courts and plaintiffs are increasingly familiar with the expanded coverage of the ADAAA.[194] While these courts have not always been presented with well-pled complaints or good fact patterns, they have, to varying degrees, correctly interpreted the law. In each of the following five cases, the courts adopted a mode of reasoning consistent with the idea that the intent of the ADAAA was to make it easier for plaintiffs to establish their status as disabled. These courts did not use the pregnancy-contamination doctrine as a *per se* bar to establishing disability. Rather than relying on pre-ADAAA case law, the courts looked to the ADAAA and its implementing regulations, which make clear that the duration of a condition does not determine whether the Act applies. These five courts also rejected the defendants' argument that the pregnancy-related conditions at issue were not sufficiently severe or unusual enough to "substantially limit" a "major life activity." Instead, they relied on language in both the statute and the implementing regulations wherein lifting is explicitly referenced as an example of a major life activity.

In *Mayorga v. Alorica, Inc.*, the plaintiff had a high-risk pregnancy with complications including "premature uterine contractions, irritation of the uterus, increased heart rate, severe morning sickness, severe pelvic bone pains, severe back pain, severe lower abdominal pain, extreme headaches, and other pregnancy-related conditions."[195] The defendant filed a motion to dismiss the plaintiff's claims for disability discrimination and failure to accommodate under the ADA, asserting that the plaintiff did not have a disability within the meaning of the Act.[196] In

193. *Id.*

194. *See* Heatherly v. Portillo's Hot Dogs, Inc., No. 11 C 8480, 2013 U.S. Dist. LEXIS 100965 (N.D. Ill. July 19, 2013); Nayak v. St. Vincent Hosp. & Health Care Ctr., No. 1:12-cv-0817, 2013 U.S. Dist. LEXIS 3273 (S.D. Ind. Jan. 9, 2013); Mayorga v. Alorica, Inc., No. 12-21578-CIV, 2012 U.S. Dist. LEXIS 103766 (S.D. Fla. July 23, 2012).

195. *Mayorga*, 2012 U.S. Dist. LEXIS 103766, at *3.

196. *Id.* at *5.

support of this argument, the defendant relied on both the pregnancy-contamination doctrine and the pre-ADAAA duration requirement.[197]

In denying the defendant's motion to dismiss, the court liberally cited pre-ADAAA law. At the same time, the court acknowledged the impact of the "ADAAA's lenient standards to establish a disability" and purported to analyze the plaintiff's complaint with this principle in mind.[198] The court held that a pregnancy-related condition could qualify as a disability if the condition caused an impairment "separate from the symptoms associated with a healthy pregnancy" or if the condition "significantly" intensified the symptoms associated with a healthy pregnancy, eschewing language to the effect that such conditions are covered under the ADA only in "extremely rare" cases.[199] The court refused to dismiss the plaintiff's disability claim, finding that "whether the nature, duration, and severity of [the plaintiff's pregnancy-related conditions] are sufficient to constitute a disability under the ADA" required a factual inquiry.[200] The case ultimately settled.[201]

The court in *Nayak v. St. Vincent Hospital & Health Care Center, Inc.* appropriately distinguished pre-amendment case law. It relied instead on the interpreting regulations of the ADAAA, which state that "an impairment lasting or expected to last fewer than six months can be substantially limiting."[202] *Nayak* involved a plaintiff who had experienced morning sickness and required bed rest during her pregnancy with twins.[203] While on bed rest, one of her two unborn fetuses died.[204] Subsequent to the birth of her child, the plaintiff had postpartum difficulties including severe pelvic pain.[205] Her employer, by his own admission, terminated the plaintiff because of her "medically complicated pregnancy."[206]

The defendant brought a motion to dismiss the plaintiff's claim for disability discrimination, arguing that the plaintiff's pregnancy-related conditions did not, as a matter of law, constitute a protected disability because they were temporary.[207] The cases cited by the defendant included two pre-ADAAA cases and

197. *Id.* at *15.

198. *Id.*

199. *Id.* at *14.

200. *Id.* at *23.

201. Notice of Settlement, *Mayorga*, No. 1:12-cv-21578 (S.D. Fla. Nov. 29, 2012).

202. Nayak v. St. Vincent Hosp. & Health Care Ctr., No. 1:12-cv-0817, 2013 U.S. Dist. LEXIS 3273, at *6 (S.D. Ind. Jan. 9, 2013).

203. *Id.* at *2.

204. *Id.*

205. *Id.*

206. *Id.* at *3.

207. *Id.* at *5-6.

Sam-Sekur.[208] The court distinguished *Sam-Sekur*[209] and found the pre-ADAAA cases unpersuasive in light of the "more lenient" standards of the ADAAA and "the current change in the law stating that an impairment lasting less than six months can be substantially limiting."[210] The court also cited the interpreting regulations of the ADAAA providing that "[t]he term 'substantially limits' shall be construed broadly in favor of expansive coverage.'"[211] This case is ongoing.

In *Price v. UTi Integrated Logistics, LLC*,[212] the plaintiff had a blood disorder that resulted in a history of high-risk pregnancies and four miscarriages.[213] In the sixth month of her pregnancy, her doctor diagnosed her with an open cervix and advised immediate bed rest to ward off another miscarriage.[214] The plaintiff alleged that, upon learning of Price's need for a leave of absence, her supervisor told her, "Your job will be held."[215] Price nonetheless was fired after her employer ordered her back to work earlier than her doctor had authorized because, her employer alleged, Price's FMLA leave had expired.[216]

The court refused to grant summary judgment to the defendant, who cited pre-ADAAA case law to support the argument that the plaintiff did not have an ADA claim because pregnancy typically is not an impairment.[217] Even if the plaintiff's pregnancy was an impairment, the employer argued, the plaintiff's condition was temporary in that it would not continue past delivery.[218] Not surprisingly, the court did not accept this argument. Properly citing the ADAAA language that the definition of disability should be broadly construed in favor of expansive coverage, the court held that the "plaintiff was disabled within the meaning of the ADA because there is evidence that [she] suffered multiple physiological disorders and conditions that affected her reproductive system."[219] In

208. *Id.* at *6-7.

209. *Id.* at *7.

210. *Id.*

211. *Id.* at *6.

212. Price v. UTi Integrated Logistics, LLC, No. 4:11-cv-01428, 2013 U.S. Dist. LEXIS 142974 (E.D. Mo. Oct. 3, 2013); Complaint at 8, *Price*, 2013 U.S. Dist. LEXIS 142974 (No. 4:11-cv-01428).

213. Defendant's Memorandum in Support of Motion for Summary Judgment at 9, *Price*, 2013 U.S. Dist. LEXIS 142974 (No. 4:11-cv-01428).

214. Complaint at 4, *Price*, 2013 U.S. Dist. LEXIS 142974 (No. 4:11-cv-01428).

215. *Id.*

216. *Id.* at 5.

217. Defendant's Memorandum in Support of Motion for Summary Judgment at 9, *Price*, 2013 U.S. Dist. LEXIS 142974 (No. 4:11-cv-01428).

218. *Id.*

219. *Price*, 2013 U.S. Dist. LEXIS 142974, at *7.

reaching this conclusion, the court also refused to accept the defendant's duration argument, properly citing EEOC regulations that a condition that is episodic can be a disability if it substantially limits a major life activity when active.[220] After the defendant lost its motion for summary judgment, the plaintiff won a jury trial based on her state law gender, pregnancy and disability claim, but not her ADA claim.[221]

In *Heatherly v. Portillo's Hot Dogs, Inc.*, the plaintiff, who worked at a fast food restaurant, was placed on "light duty" by her doctor after she got pregnant.[222] Her doctor later restricted her to bed rest.[223] When the plaintiff exhausted her leave and failed to notify her employer that she needed additional leave, she was terminated for violating the employer's attendance policy.[224] Following her termination, she filed a complaint that included causes of action for disability discrimination and failure to accommodate.[225] She alleged that she was terminated due to a pregnancy-related condition,[226] and that her employer had failed to accommodate her by forcing her to work outside periodically.[227]

With respect to the plaintiff's claim for disability discrimination, the court assumed for the sake of argument that the plaintiff had made out a prima facie case.[228] Yet, because the plaintiff had failed to offer any factual or legal argument for why the defendant's non-discriminatory explanation for her termination (violation of its attendance policy) was pretextual, the court granted the defendant's motion for summary judgment.[229]

The court next considered the plaintiff's claim that Portillo's failed to provide her with a reasonable accommodation for her qualifying disability.[230] To establish that she had a disability, the plaintiff asserted that "her high-risk pregnancy and/or the complications she suffered related to her pregnancy" were impairments that substantially limited the major life activity of lifting.[231] In support

220. *Id.*

221. Judgment, *Price*, 2013 U.S. Dist. LEXIS 142974 (No. 4:11-cv-01428).

222. Heatherly v. Portillo's Hot Dogs, Inc., No. 11 C 8480, 2013 U.S. Dist. LEXIS 100965, at *2 (N.D. Ill. July 19, 2013).

223. *Id.*

224. *Id.* at *3.

225. *Id.* at *3-4, 10.

226. *Id.* at *10.

227. *Id.* at *18.

228. *Id.* at *12.

229. *Id.* at *12-13.

230. *Id.* at *13-14.

231. *Id.* at *14-15.

of this argument, the plaintiff pointed out that the ADAAA had "relaxed the duration and severity requirements" for qualified disabilities and that the ADAAA's implementing regulations expressly stated that an impairment lasting fewer than six months could be substantially limiting.[232] The defendant countered that temporary restrictions could not, as a matter of law, substantially limit a major life activity.[233]

The court summarily dismissed the defendant's argument in light of the ADAAA's elimination of the duration requirement.[234] Similarly, the court found unpersuasive the defendant's argument that lifting restrictions did not constitute a major life activity.[235] As the court correctly noted, the plain language of the ADAAA defines lifting as a major life activity.[236] Because the plaintiff's nurse had testified that limiting the plaintiff to light duty included lifting restrictions, the court concluded that the plaintiff had "presented evidence sufficient to create a triable issue of fact as to whether her high risk pregnancy rendered her disabled under the ADAAA."[237] Nonetheless, the court granted summary judgment on this claim as well, finding that the record was "replete with evidence" suggesting the plaintiff's condition did not affect her ability to work outside.[238] The most damning evidence came from the plaintiff's treating physician and nurse, who testified that there was no medical reason the plaintiff could not work outside.[239] In *Heatherly*, the court correctly applied the ADAAA to the facts before it. Ultimately the facts presented to the court simply did not support the plaintiff's claims.

While still in its infancy, the case law shows a trend towards a greater understanding of the fact that the ADA covers pregnancy-related conditions after the ADAAA.[240] However, given the misstatements of law in the first several ADAAA

232. *Id.*

233. *Id.* at *15.

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at *15-16.

238. *Id.* at *19-20.

239. *Id* at *19.

240. Some of the early confusion may have stemmed from the failure of LEXIS-NEXIS, Westlaw and other such services to warn lawyers that many ADA cases are no longer valid precedent after the ADAAA. Clerks inexperienced in employment law may well have cited pre-ADAAA cases without realizing that their validity had been severely undermined by statute. Happily, understanding of the post-amendments ADA appears to be increasing. Even so, Westlaw, LEXIS-NEXIS and other such services should consider flagging pre-ADAAA cases that rely on elements of the pre-2008 ADA that are no longer good law.

cases, practitioners and plaintiffs litigating this issue should carefully guide the courts through the meaning and intent of the ADAAA. In briefing pregnancy cases arguing the impairment theory, plaintiffs should include the arguments advanced in this Article, including: (1) the demise of the duration requirement following passage the ADAAA; (2) the more expansive definition of "major life activities" mandated by the ADAAA; (3) the easing of the "substantially limits" standard under the ADAAA; and (4) that the pregnancy-contamination doctrine is inconsistent with the ADAAA's mandate of broad coverage.[241]

Advocating the first three arguments should require little more than citing to the plain language of the ADAAA and its implementing regulations. The pregnancy-contamination doctrine is more complicated. The simple argument is that it constitutes precisely the kind of high hurdle that courts imposed before the ADAAA, and that the statute was designed to correct. To the extent that the pregnancy-contamination doctrine is rooted in unconscious bias and outmoded beliefs regarding women and pregnancy, plaintiffs should consider analogizing their pregnancy-related conditions to parallel conditions that are not the result of pregnancy.

The Appendix is designed to help in this process. It provides medical conditions that produce symptoms similar to those produced by pregnancy. Such information can help plaintiffs who seek to establish that what matters for ADA purposes is whether a condition constitutes an impairment, regardless of whether or not it was caused by pregnancy or by another medical condition. When framing their pregnancy-related impairments, plaintiffs should be sure to describe the condition using appropriate medical terminology. Referring to an impairment by its medical name deemphasizes the fact that the condition stems from pregnancy.

Finally, plaintiffs should be sure to distinguish pre-ADAAA case law, pointing out that the holdings in those cases now have been overruled by statute. Similarly, plaintiffs should liberally cite post-ADAAA cases (such as *Heatherly*) in which the court correctly applies current law.

IV. Scope of Coverage under the Impairment and Comparator Theories

A. *The Relative Benefits of Filing a Claim under the ADA and PDA*

While most women would prefer having a job over being a plaintiff in a disability or pregnancy discrimination lawsuit, a woman who is unable to work because her employer failed to accommodate her pregnancy-related impairments may have no other option but to pursue legal action. Her claim may be based on the ADA, in which case her argument will center on the impairment theory, or the PDA, in which case her argument may have to center on the comparator theory. This Part addresses the relative merits of each.

241. The mandate for broad coverage is in 42 U.S.C. § 12102(4)(A) (2012).

A PDA claim may require the plaintiff to produce nonpregnant comparators in order to prove pregnancy discrimination, either because the plaintiff has no other evidence or because she has filed her claim in one of the circuits requiring comparator evidence as a matter of law. In those courts that require a pregnant plaintiff to find a suitable nonpregnant comparator, plaintiffs often will be unable to do so if those courts insist on de facto rather than de jure comparators. Moreover, commentators have extensively documented that many courts make it extremely difficult for plaintiffs to prove their cases through comparators.[242] They do so by insisting on a comparator who is a "near twin"[243]: whose characteristics and circumstances are virtually identical to those of the plaintiff. Indeed, one commentator has argued that some courts' comparator analysis comes close to eviscerating Title VII by rejecting virtually all comparators except those who are identical to the plaintiff in essentially every way.[244] As discussed above, this challenge could be exacerbated by the possibility that the reasoning of cases like *Young* and *Serednyj* will be followed, and only workers who are not disabled under the ADA will be deemed proper comparators for women with pregnancy-related impairments.

An ADA claim applying the impairment theory avoids the comparator problem, but has its own limits. While the statute's scope of coverage is broad, it does not require accommodations for all situations in which pregnant women might want an accommodation. Some situations in which pregnant women commonly request workplace accommodations—such as when a policewoman wants to be taken off the beat and given desk work for fear that she might be hit hard in the womb during a scuffle or when a woman wants an accommodation to limit her fetus's exposure to toxics — involve not a current impairment to the mother but prospective injury to the fetus.[245] In these cases, the ADA does not apply because no impairment exists. At the same time, if the mother becomes extremely anxious about the potential for harm to the fetus due to toxics or another reason, her anxiety may be a disability under the ADA.[246]

242. *See* Goldberg, *supra* note 41, at 755; Lidge, *supra* note 39, at 849-50; Sullivan, *supra* note 41, at 204.

243. Sullivan, *supra* note 18, at 1661.

244. Goldberg, *supra* note 41, at 763-64.

245. *See* Int'l. Union v. Johnson Controls, 499 U.S. 187 (1991); Amerson v. Pinkerton Sec. & Servs., No. 05-70611, 2006 U.S. Dist. LEXIS 38671 (E.D. Mich. June 12, 2006); Patrice Sutton et al., *Toxic Environmental Chemicals: The Role of Reproductive Health Professionals in Preventing Harmful Exposures*, 207 AM. J. OBSTETRICS & GYNECOLOGY 164 (2012) (describing how fetuses are more susceptible to toxic exposure than are adults).

246. *See* Complaint at 5-6, EEOC v. Engineering Documentation Sys., Inc., No.3:11-cv-00707 (D. Nev. 2011). In that case, an administrative assistant with a government support services contractor requested to move her workstation closer to the restroom as an accommodation for her severe nausea. Her employer refused, and

These examples represent instances in which the PDA and the comparator theory may offer protection not available under the ADA. If the pregnant woman can point to a similarly situated coworker who has been voluntarily accommodated by her employer—for instance, where other police are regularly taken off the beat and given deskwork for a wide variety of reasons, or where a co-worker has been allowed to avoid toxics exposure because her skin breaks out in an unattractive but harmless rash—then she may have a viable claim for pregnancy discrimination if she is not granted the same right. That is, a pregnant woman who can point to a comparator who has been accommodated should be given similar treatment even where the ADA does not mandate such accommodations.

B. The Theories in Action: Specific Medical Conditions

Throughout this Article, we have sought to emphasize the similarities between medical conditions experienced during pregnancy and non-pregnancy-related conditions with comparable symptoms. This Section and the accompanying Appendix present concrete examples of some such conditions. While we cannot hope to cover every pregnancy-related condition, our goal is to further support the proposition that a particular condition's basis in pregnancy should be irrelevant to an accommodation analysis following the recent amendments to the ADA.

Gestational diabetes, for example, qualifies as a disability under the ADAAA because it is an impairment that substantially limits the operation of a major bodily function, i.e., the endocrine function.[247] The EEOC has explicitly stated that gestational diabetes may be a disability.[248] In terms of accommodation needs, there should be no difference between a woman with gestational diabetes and a coworker with type 2 diabetes, as both may need breaks for insulin and to test blood sugar, and both may need to eat small meals over the course of the day.

Hyperemesis gravidarum—the nausea and vomiting that often occurs in the first trimester and sometimes extends throughout the pregnancy—can substantially limit the operation of the digestive function.[249] Thus, just as a nonpregnant employee was found to be disabled where she has gastrointestinal problems—

---

allegedly later required her to become certified in handling explosives and ammunition, which caused her to become very anxious. The case, which also involved PDA claims, was settled for $70,000. Press Release, U.S. Equal Emp't Opportunity Comm'n, EDSI to Pay $70,000 to Settle EEOC Pregnancy & Disability Discrimination Suit (Apr. 15, 2013), http://www.eeoc.gov/eeoc/newsroom/release/4-15-13.cfm.

247. 42 U.S.C. § 12102(2)(b) (2012); 29 C.F.R. § 1630.2(i)(1)(ii) (2013).

248. *See Pregnancy Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, http://www.eeoc.gov/laws/types/pregnancy.cfm (last visited June 20, 2013).

249. 42 U.S.C. § 12102(2)(b).

causing pain, nausea, vomiting, and diarrhea that lasted for about a year[250] —so should a pregnant employee with morning sickness. Both may need more frequent bathroom breaks, the ability to eat small snacks during work hours, access to a cot for lying down, and a modified schedule.[251] These accommodations are also frequently required for diabetes.[252]

Perinatal depression, which includes both major and minor depressive disorders that occur during pregnancy or after giving birth,[253] should be accommodated just as is any other type of depression. Such accommodations may include time off for an initial meeting with a physician immediately after the onset of symptoms; schedule flexibility that allows the employee to participate in therapeutic sessions; temporary transfer to a less distracting environment; telecommuting; and leave.[254] All types of depression may substantially limit the operation of a major bodily function (the brain), or may substantially limit major life activities (thinking, sleeping, concentrating, caring for oneself, and interacting with others).[255] The EEOC lists major depression as a condition that virtually always qualifies as a disability.[256]

250. *See* Wells v. Cincinnati Children's Hosp. Med. Ctr., 860 F. Supp. 2d 469, 476, 478 (S.D. Ohio 2012).

251. *Cf.* Complaint at 3-4, Roller v. Nat'l Processing of Am., Inc., No. 2:12-cv-02746 (D. Kan. Nov. 28, 2012).

252. Interview with Rebecca Jackson, Dir., Dep't of Obstetrics, Gynecology and Reprod. Sci. at S.F. Gen. Hosp., in S.F., Cal. (Nov. 14, 2012) (on file with authors).

253. According to a 2007 study, "14.5 percent of pregnant women have a new episode of major or minor depression during pregnancy and 14.5 percent have a new episode during the first 3 months postpartum. Considering only major depression, 7.5 percent may have a new episode during pregnancy, with 6.5 percent having a new episode in the first 3 months postpartum." BRADLEY N. GAYNES ET AL., PERINATAL DEPRESSION: PREVALENCE, SCREENING ACCURACY, AND SCREENING OUTCOMES 4 (2005), *available at* http://archive.ahrq.gov/clinic/epcsums/peridepsum.pdf.

254. *Post-Partum Depression: Treatment and Drugs*, MAYO CLINIC, http://www.mayoclinic.com/health/postpartum-depression/DS00546/DSECTION=treatments-and-drugs (last visited Dec. 3, 2012); *see* Memorandum from the Att'y Gen. of the U.S. Dep't. of Justice to Heads of Dep'ts on Procedures for Providing Reasonable Accommodation (Oct. 2002), *available at* http://www.justice.gov/jmd/eeos/ddaccomprocfinal081502.htm; The HR Specialist, *The ADA Requirements for Accommodating Depression and Psychiatric Disabilities*, BUS. MGMT. DAILY (Jan. 7, 2008), http://www.businessmanagementdaily.com/4179/the-ada-requirements-for-accommodating-depression-and-psychiatric-disabilities.

255. The HR Specialist, *supra* note 254; *see also* 42 U.S.C. § 12102(2)(A)-(B) (2012); 29 C.F.R. § 1630.2(i)(1)(i)-(ii) (2011).

256. 29 C.F.R. § 1630.2(j)(3).

Conclusion

Pregnant women frequently lose their jobs when their employers fail to provide the kinds of accommodations that would allow them to continue working. The ADAAA has changed the law in ways that require employers to offer such (often modest) accommodations, a conclusion supported by important voices among employers' lawyers.[257] Given that the EEOC has cited pregnancy accommodation as an important emerging issue, employers' lawyers would be well advised to begin training clients to ensure that they understand the new legal environment.[258] Additional EEOC Guidance on pregnancy accommodation would help clarify any remaining confusion. In today's post-ADAAA legal environment, much has changed. Perhaps the clearest way to communicate this is to close with a discussion of the oft-cited case of *Troupe v. May Department Stores*, a Seventh Circuit decision written by Judge Richard Posner.[259] Kimberly Troupe, who worked at Lord & Taylor, had a satisfactory performance record until she got pregnant and began having repeated attendance problems as a result of severe morning sickness.[260] The store gave her an accommodation—it allowed her to start work later—that did not solve the problem.[261] Troupe continued to be late and was fired the day before her maternity leave was to begin because, her supervisor told her, Lord & Taylor did not believe that Troupe would return to work after having her baby.[262]

The key problem in *Troupe* was that Lord & Taylor presented no evidence whatsoever[263] at summary judgment to rebut Troupe's evidence of gender stereotyping—the stereotype that women lose their work commitment after they have children.[264] Yet in ruling on the defendant's motion for summary judgment, the district court refused to consider this evidence, believing it inapplicable to its analysis.[265] Judge Posner upheld the trial court's dismissal,[266] a ruling in keeping

257. *See* Margaret Hart Edwards & Joan C. Williams, Not for Women Only: Recognizing and Preventing Family Responsibilities Discrimination (Nov. 1, 2012)(ABA Labor & Employment Law Conference Paper).

258. *See* U.S. Equal Emp't Opportunity Comm'n, Strategic Enforcement Plan (2012), http://www.eeoc.gov/eeoc/plan/sep.cfm.

259. Troupe v. May Dep't Stores Co., 20 F.3d 734 (7th Cir. 1994).

260. *Id.* at 735.

261. *Id.*

262. *Id.* at 736.

263. We are assuming that if Lord & Taylor had presented this evidence, Judge Posner would have discussed it in his opinion.

264. *See* Correll, *supra* note 24, at 1305-07.

265. *See Troupe*, 20 F.3d at 736.

266. *Id.* at 739.

with his publicly stated view that it is unfair to require employers to "subsidize" women, who are more expensive to employ because they get pregnant.[267]

Troupe is a 1994 case, decided before social scientists had begun to document the gender bias triggered by pregnancy and motherhood.[268] Today, Troupe's testimony that her supervisor told Troupe "I . . . was going to be terminated because [my supervisor] didn't think I was coming back to work after I had my baby"[269] would be recognized as evidence of maternal-wall bias—the strongest form of workplace gender bias. Such evidence, if believed by a reasonable trier of fact, would be sufficient to support a conclusion that Troupe was fired because of sex.[270]

Moreover, Troupe's severe nausea would qualify as disability, since it is an impairment of a major bodily system (the gastrointestinal system).[271] If Troupe were litigating her case today, she would file a claim for disability discrimination under the ADA in addition to her claim under the PDA. Would Lord & Taylor's conduct, then, have been actionable disability discrimination?

It depends. The key issue today would not be whether Troupe could find a comparator[272] or whether she had a disability. Instead, the key issue would be whether reasonably accommodating Troupe would be an undue hardship for Lord & Taylor. A strong argument could be made that it would be undue hardship for an employer operating a department store to have a member of its sales staff arriving persistently late, but ultimately the answer to the question of whether this was an undue hardship would depend on facts we do not know. Given that Troupe's need for this accommodation was time-limited, transferring Troupe to a different position (if available) or providing Troupe with a finite leave of absence may have been reasonable.

---

267. *See* Posner, *supra* note 29, at 195.

268. The term "maternal wall" was coined in 2001, which is also when the first studies were published. *See* Faye J. Crosby, Joan C. Williams & Monica Biernat, *The Maternal Wall*, 60 J. SOC. ISSUES 675 (2004).

269. *Troupe*, 20 F.3d at 736.

270. 42 U.S.C. § 2000e(k) (2012); *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, U.S. EQUAL EMP. OPPORTUNITY COMMISSION (May 23, 2007), http://www.eeoc.gov/policy/docs/caregiving.html.

271. *See* 42 U.S.C. § 12102(2)(B).

272. Judge Posner upheld the grant of summary judgment on the grounds that Troupe had not identified "a hypothetical Mr. Troupe" to serve as a comparator. *Troupe*, 20 F.3d at 738. As noted in the text, there was other evidence of gender bias; a court cannot dismiss a plaintiff's case on the grounds that the plaintiff has not presented the particular type of evidence a judge prefers. The judge's job is to apply the legal test, which in this situation is whether the plaintiff has proved that a negative employment action is because of sex.

In short, in the current legal environment, pregnant workers will not always be entitled to accommodation. The fact that pregnant women are not, as a matter of law, entitled to accommodation for any and all impairments related to pregnancy is not the end of the analysis, however. While pregnancy is clearly not a disability *per se*, when a pregnant worker experiences a medical condition or disease that qualifies as a disability under the ADA, ADA protections are triggered—just as they would be if the etiology of the disease or condition was anything other than pregnancy. Pregnant workers should be treated like other workers with a similar ability or inability to work.[273] That means they share in the job protections offered to every worker by the Americans with Disabilities Act.

273. 42 U.S.C. § 2000e(k).

APPENDIX

Some Pregnancy Conditions That Commonly Give Rise to the Need for Workplace Accommodations*

UNDERLYING CONDITIONS	DESCRIPTION	OTHER MEDICAL CONDITIONS THAT CAN PRODUCE SIMILAR SYMPTOMS	BODILY FUNCTION AFFECTED[274]	REASONABLE ACCOMMODATIONS[275]
Sub-chorionic hematoma; placental abruption; placentia previa	Uterine or vaginal bleeding in pregnancy is a symptom usually caused by problems with placental attachment that can result in several pregnancy conditions that put women at risk for preterm delivery or miscarriage.	Menstrual dysfunction (endometrial hyperplasia; anovulation); uterine fibroid;, von Willebrand disease; liver, kidney, or thyroid disease; cancer[276]	Reproductive	Time off for medical appointments; bedrest; move workstation close to restrooms
Lumbar lordosis	Pregnant women experience back pain through a variety of mechanisms, including the sway-backed posture (lumbar lordosis) caused by a growing belly and the hormones of pregnancy loosening up the joints, muscle spasms and "Braxton-Hicks" contractions. Pregnancy may also exacerbate pre-existing	Back injury; degenerative joint disease; scoliosis; arthritis muscular dystrophy and kidney infection or stones	Musculoskeletal	Use of a heating pad; sitting instead of standing; lifting assistance or limitations; using assistive equipment to lift; modification of the duties of the job, such as temporary light duty

* Prepared with the assistance of Drs. Marya Zlatnik and Megan Huchko (University of California at San Francisco) of the Center for WorkLife Law's Pregnancy Accommodation Working Group.

274. Both the ADA and its implementing regulations provide a list of some major bodily functions that are major life activities. 42 U.S.C. § 12102(2)(B) (2012); 29 C.F.R. § 1630.2(i) (2013).

275. This section merely provides samples of possible accommodations; the appropriate accommodation in each case will vary depending upon the woman's condition and her job. Another excellent source of suggested accommodations is the Job Accommodation Network, http://www.askjan.org.

276. *Blood Disorders in Women—Heavy Menstrual Bleeding*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/ncbddd/blooddisorders/women/menorrhagia.html (last visited December 15, 2013).

	back problems. Back pain, if severe, can interfere with major life activities (standing, reaching, lifting, or bending).			
Deep vein thrombosis; pulmonary embolism; stroke	Pregnancy increases women's risk for blood clots, which can occur in the veins of the legs (deep vein thrombosis), lungs (pulmonary embolism) or brain (stroke).	Immobility; trauma including broken bones; severe muscle injury; paralysis; hormone replacement therapy; heart disease; cancer[277]	Cardiovascular	Modification of work station; breaks for exercise
Carpal Tunnel Syndrome	Tingling, pain, numbness and joint stiffness in hands and wrists is common in late pregnancy due to changes in fluid composition and increased amount of pressure on median nerve in wrist.[278] Carpal tunnel syndrome is an impairment that is much more prevalent in pregnant women than the population generally.[279]	Also common in nonpregnant people who do repetitive small motions with hands/wrists (i.e. typing) or after forearm/ wrist injury	Musculoskeletal; neurological	Occasional breaks from manual tasks or typing; specialized programs that allow for dictation instead of typing
Chronic migraines	A condition sometimes exacerbated by pregnancy that can be a disability when the headaches reach substantially limiting levels. Migraines can limit major life activities such as	Menstrual or idiopathic migraines; other forms of chronic headache including post-concussion syndrome; tension-type	Neurological	Changing lighting in the work area; limiting exposure to noise and fragrances; scheduling changes such as flexible

277. *Deep Vein Thrombosis (DVT)/Pulmonary Embolism (PE)*, CTRS. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/ncbddd/dvt/facts.html (last updated Sept. 25, 2012).

278. One court interpreting the ADAAA has already held that an employee's carpal tunnel syndrome, which impaired his ability to type for more than an hour, combined with several emotional disorders, including anxiety related to his slow typing, created a question of material fact as to his actual disability. Dentice v. Farmers Ins. Exch., No. 10-113, 2012 U.S. Dist. LEXIS 89609, at *7, *32-34 (E.D. Wis. June 28, 2012).

279. *See supra* note 109.

	seeing, hearing, eating, sleeping, walking, learning, reading, concentrating, thinking, communicating, and working.	headache;[280] acute headaches including acute glaucoma; encephalitis		schedules or telework (which may include a transfer to a position that provides this kind of flexibility)
Dependent edema	Swelling, especially of feet/ankles, is more common as pregnancy progresses, and becomes worse with standing. This is caused by an increase in the overall volume of fluid in the body, leading to a decrease in protein concentration or oncotic pressure within the circulatory system. This leads to fluid extravasation from blood vessels into the extravascular space.	Kidney disease/ failure; heart failure; cirrhosis of the liver	Cardiovascular	Stool or chair to sit on while working; more frequent rest breaks; modification of footwear requirements
Dyspnea	Shortness of breath is common due to the partially compensated respiratory alkalosis of pregnancy. A pregnant women breathes more deeply to allow gas exchange for herself, the placenta, and the fetus. Breathing more deeply (increasing "minute ventilation") increases the pH of her blood (makes it a little more basic). Her kidneys partially compensate by putting more bicarbonate into her urine. This physiology is what makes daily life difficult for pregnant women.	Hyperventilation syndrome/ panic attacks; asthma; emphysema; chronic bronchitis; cardiovascular disease; or pulmonary embolism	Respiratory	Stool or chair to sit on while working; more frequent rest breaks
Fatigue	A feeling of tiredness or exhaustion or a need to rest because of lack of energy or strength.	Anemia; congestive heart failure; lyme disease; cancer	Neurological; cardiovascular	Light duty to avoid strenuous activity; flexible or

280. Benjamin Gilmore & Magdalena Michael, *Treatment of Acute Migraine Headache*, 83 AM. FAM. PHYSICIAN 271, 273 tbl.2 (2011), http://www.aafp.org/afp/2011/0201/p271.pdf.

				reduced hours; exemption from mandatory overtime
Gastroesophageal reflux (GERD)	Mild to severe heartburn is common in pregnancy, caused by hormones loosening muscle that is supposed to hold stomach contents down.	Also seen in nonpregnant patients	Digestive	Allowing food breaks as needed; providing space for medications to be stored
Gestational diabetes	This is a condition in which the placenta interferes with the body's normal metabolism of glucose. Women with gestational diabetes need to monitor their blood glucose two to six times per day, and some may need to take insulin or oral medication to control blood glucose levels. The resulting high blood glucose levels can cause placental dysfunction, increased fetal growth and post-natal metabolic abnormalities. Complications of uncontrolled gestational diabetes include fetal macrosomia, shoulder dystocia, and increased need for cesarean section.	Diabetes	Endocrine	Permission to take more frequent bathroom breaks; permission to eat small snacks during work hours; a cot for lying down; modified schedules[281]
Hemorrhoids	Pregnancy can cause swelling of rectal veins due to hormonal changes, constipation (more common in pregnancy), and increased pelvic girth/pressure. Hemorrhoids can be painful or even bleed.	Also common in nonpregnant people	Cardiovascular	Allowing women to avoid being in a seated position all day or to use a special cushion
Hyperemesis gravidarum	Pregnant women can have nausea and/or vomiting that limits their ability to work in certain settings/certain times of day. Severe	Chemotherapy for cancer; hepatitis; vestibulitis; a variety of GI disorders	Digestive	Permission to take more frequent bathroom breaks; permission to

281. Interview with Rebecca Jackson, *supra* note 252.

	nausea and vomiting in pregnancy can result in weight loss, dehydration, and/or electrolyte imbalance. It occurs most commonly in the first trimester but can extend throughout the entire pregnancy and all day long.	(gastroparesis, dyspepsia, inflammatory bowel disease)		eat small snacks during work hours; a cot for lying down; modified schedules
Hypertension; preeclampsia	Chronic or pregnancy-induced high blood pressure may endanger both the health of the mother and the fetus. Pregnancy outcomes range from poor fetal growth, fetal distress and intrauterine demise. The mother may experience damage to her kidneys, liver, heart and brain (seizure or stroke). Major life activities impacted include performing manual tasks, walking, standing, lifting, bending, and working.[282]	Hypertension	Cardiovascular	Stool or chair for employee to sit on while working; limiting lifting and bending requirements; allowing work from home while on bedrest and leave
Intrauterine Growth Restriction	Condition in which the fetus is not growing appropriately inside the uterus. There are multiple causes for this, including congenital anomalies, infection in pregnancy, placental attachment disorders, multiple gestation and maternal medical conditions. A related condition is low amniotic fluid or oligohydramnios. Complications include fetal distress, need for early delivery and increased need for cesarean section.		Reproductive	Bedrest; time off for medical appointments
Intrauterine fetal growth restriction; oligohydra-mnios; risk of	Multiple gestation (twins, triplets, quadruplets or more) puts women at risk for many pregnancy	See sections pertaining to related conditions, *infra*.	Reproductive	See sections pertaining to related conditions, *infra*.

282. *See* 42 U.S.C. § 12102(2)(A)-(B) (2012); 29 C.F.R. § 1630.2 (i)(1)(i)-(ii) (2013).

preterm labor; preeclampsia; gestational diabetes	complications. Women may go into labor or have an indicated early delivery and have an increased risk for cesarean section. Providers may recommend fetal monitoring in the third trimester.			
Perinatal depression	Includes both major and minor depressive disorders that occur during pregnancy or after giving birth. Symptoms include inability to sleep, loss of focus, feelings of helplessness, and thoughts of suicide. Depression may substantially limit major life activities (thinking, sleeping, concentrating, caring for oneself, and interacting with others).[283]	Depression	Neurological	Time off to attend therapeutic sessions; temporary transfer to a less distracting environment; telecommuting and leave
Preterm labor risk	Pregnant women may develop symptoms that put them at risk for pre-term labor and delivery, including contractions, shortened cervix, advanced cervical dilation early in pregnancy, abnormal vaginal bleeding or preterm premature rupture of membranes. In addition to medical management, recommendations for women at risk range from modified or complete bedrest to inpatient management.	See sections pertaining to related conditions, *infra*.	Reproductive	See sections pertaining to related conditions, *infra*.
Symphyseal separation (i.e., pubic symphysis separation)	Loosening of the joint on the front of the pelvic bone (pubic symphysis) in preparation for childbirth is caused by pregnancy hormones.	Bladder extrophy; injury (pelvic fracture)	Musculoskeletal	Limits on lifting requirements; providing a stool or chair to sit on; more

283. 42 U.S.C. § 12102(2)(A)-(B); 29 C.F.R. § 1630.2 (i)(1)(i)-(ii).

	This condition can result in severe pelvic pain and limited mobility like with some back problems.			frequent breaks
Syncope or near-syncope	Feeling lightheaded or dizzy (or fainting) is common in pregnancy due to the increase in proportion of blood volume going to the uterus and fetus. Symptoms can be caused by heat, stress or unusual exertion. The patient may also experience palpitations or a racing heart beat.	Cardiac arrhythmias; low blood pressure; seizure disorders; neurocardiogenic or vasovagal syncope, also known as "the vapors"	Cardiovascular	Providing a stool or chair to sit on; more frequent breaks
Urinary tract or bladder infection	Pregnant women have to urinate frequently. Although this is nearly universal in pregnancy, it can also be a symptom of a bladder infection—which is more common in pregnancy. Urinary frequency can result in poor quality sleep as well.	Benign prostatic hypertrophy (causing overactive bladder symptoms in more than 40 percent of men over the age of 60); prostatitis or bladder infections; diabetes insipidus; nonpregnant urinary tract infections	Genitourinary	More frequent bathroom breaks; carrying a bottle of water
Varicose veins	Hormonal changes, increased blood flow, and increased resistance in the pelvis can cause swelling and back-filling of veins in the legs. This can be painful and worsen as pregnancy advances, and is exacerbated by standing or sedentary positions.	Also common in nonpregnant people (risk factors include family history, obesity and liver disease)	Cardiovascular	More frequent breaks; ability to sit or stand as needed