



March 8, 2012

SENT VIA EMAIL: Commissionmeetingcomments@eoc.gov

Ms. Jacqueline Berrien, Chair
Mr. Stuart Ishimaru, Commissioner
Ms. Constance Barker, Commissioner
Ms. Chai Feldblum, Commissioner
Ms. Victoria Lipnic, Commissioner

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**Re: Comments on Unlawful Discrimination Against Pregnant
Workers and Workers with Caregiving Responsibilities**

Dear Chair Berrien and Commissioners Ishimaru, Barker, Feldblum, and
Lipnic:

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On behalf of the American Civil Liberties Union (“ACLU”), more than half a million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write to thank the Equal Employment Opportunity Commission (“Commission”) for holding a public meeting to address the important issues of pregnancy and caregiver discrimination. In light of this hearing, we are pleased to submit comments today to encourage the Commission to issue updated Guidance on the proper interpretation and application of Title VII of the Civil Rights Act of 1964 (“Title VII”)¹, as amended by the Pregnancy Discrimination Act of 1978 (“PDA”)², to workers who are pregnant, have pregnancy-related conditions, and have caregiving responsibilities.

The ACLU has long been a leader in advocating for the rights of pregnant and caregiving workers, both through litigation and legislation. Through our Women’s Rights Project, co-founded in 1972 by Ruth Bader Ginsburg, we have participated, either as direct counsel or as *amicus curiae*, in major women’s rights cases in the Supreme Court on these issues,³ and in many cases at the appellate and trial level as well. Through our Washington

¹ 42 U.S.C. §§ 2000e *et seq.*

² 42 U.S.C. § 2000e(k).

³ These include, but are not limited to *Struck v. Sec’y of Defense*, 409 U.S. 1071 (1972) (No. 72-178), *vacating case and remanding as moot* (ACLU submitted Brief for Petitioner, 1972 WL 135840, challenging Air Force regulations requiring discharge of pregnant officers); *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (ACLU represented Appellee challenging Social Security Act classification authorizing benefits for widows but not widowers); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (ACLU submitted *amicus* brief and participated in oral argument on behalf of the appellant challenging discrimination in benefits for military servicemembers); *Nevada Dep’t of Human Resources v. Hibbs*, 538 U.S. 721 (2003) (ACLU participated as *amicus* defending Family and Medical Leave Act of 1993 as a constitutional response to sex discrimination).

Legislative Office, we have played leadership roles in advocating for major legislation to protect women’s rights in areas ranging from pregnancy discrimination to pay equity. In the 1970s, we were among the leaders of a coalition of women’s groups that advocated for passage of the PDA. Since that time, we have litigated groundbreaking cases on pregnancy discrimination, including *Lochren v. Suffolk County Police Department*⁴ (a case involving light duty, discussed further below), *Knussman v. Maryland*⁵ (a case concerning a father’s right to take caretaking leave under the Family and Medical Leave Act of 1993 (“FMLA”)⁶), and many others. Currently, the ACLU is lead counsel on an *amicus* brief to the Court of Appeals for the Fourth Circuit in a pregnancy discrimination case concerning light duty assignments, *Young v. UPS*.⁷

Below, we address a number of issues relating to unlawful discrimination against pregnant workers, mothers, and workers with caregiving responsibilities. These include employers’ obligations to treat pregnant workers equally in the assignment of light duty, the proper application of the PDA in light of the Americans with Disabilities Act of 1990, as amended (“ADA”)⁸, the rights of lactating workers under Title VII and the PDA, and the need for courts and employers to abide by the anti-penalization principles of the FMLA when evaluating pregnant or maternity leave-taking workers.

I. THE COMMISSION SHOULD CLARIFY EMPLOYERS’ OBLIGATIONS UNDER THE PDA WITH RESPECT TO LIGHT DUTY AND OTHER WORKPLACE ADJUSTMENTS.

A pressing problem concerns pregnant workers who are forced onto unpaid leave or fired when their employers refuse to make even modest, temporary modifications to physical job requirements that exclude many pregnant workers.⁹ This problem is particularly urgent for low-wage and blue-collar women workers, whose jobs are more likely to entail physical labor.¹⁰ Employers sometimes respond to minor restrictions on pregnant workers’ physical activities – such as a restriction on how much weight they can lift, or an instruction to drink water frequently – by terminating them or placing them on involuntary leave, even though the employer may accommodate other, similarly restricted workers by providing them with modified job assignments – such as a desk job, sometimes called “light duty” – for the duration of their temporary disability. Being placed on involuntary leave or fired upon announcing one’s pregnancy is a particular hazard for low-wage women workers.¹¹ Sometimes, employers justify

⁴ No. 01-CV-3925 (ARL), 2008 WL 2039458 (E.D.N.Y. May 9, 2008), *subsequent history omitted*.

⁵ 272 F.3d 625 (4th Cir. 2001), *prior and subsequent history omitted*.

⁶ 29 U.S.C. §§ 2601 *et seq.*

⁷ No. DKC 08-2586, 2011 WL 665321 (D. Md. Feb. 14, 2011), *appeal filed*, No. 11-2078 (4th Cir. Oct. 6, 2011).

⁸ 42 U.S.C. §§ 12101 *et seq.*

⁹ See Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. Times, Jan. 30, 2012; Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 Geo. J. on Poverty L. & Pol’y 1 (Winter 2012)

¹⁰ Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act’s Capacity-Based Model*, 21 Yale J. L. & Feminism 15, 22 (2009).

¹¹ See generally Stephanie Bornstein, Center for WorkLife Law, *Poor, Pregnant, and Fired: Caregiver Discrimination Against Low-Wage Workers* (2011), <http://worklifelaw.org/pubs/PoorPregnantAndFired.pdf> (finding that low-wage pregnant workers are fired on the spot, “banned from certain positions no matter what their individual capacities to do the job,” are “refused even small, cost-effective adjustments that would allow them to continue to work throughout their pregnancies” (such as carrying a water bottle on doctors’ orders) and encounter “extreme hostility to pregnancy” and motherhood); Ann O’Leary, *How Family Leave Laws Left Out Low-Income*

treating pregnant workers worse than other temporarily restricted workers by distinguishing employees who were injured “on the job” as worthy of accommodation, and by distinguishing employees who are entitled to reasonable accommodations under the ADA. Relying on such distinctions to the detriment of pregnant workers violates the PDA.

The ACLU has successfully litigated this issue. In 2000, the Suffolk County Police Department decided that “light duty” assignments were only available to officers injured while they were on duty. As a result, pregnant officers who needed job modifications were forced to take unpaid leave and lose benefits and seniority.¹² The ACLU Women’s Rights Project and the New York Civil Liberties Union challenged this policy on behalf of women officers, alleging that the policy had a discriminatory impact, was motivated by discriminatory intent, and was applied in a discriminatory manner. After the Commission found cause, the case was litigated and a jury found for the plaintiffs on both a disparate impact and a disparate treatment theory in 2006.¹³ In a similar case, the ACLU of Michigan sued the Detroit Police Department on behalf of five officers who were forced to go on unpaid leave when pregnant, even though the Department gave “desk duty” assignments to male officers.¹⁴ In 2010, the case settled, and the DPD agreed to assign pregnant officers to restricted duty jobs upon request, and to refrain from placing them on unpaid leave.¹⁵

Other courts, however, have ruled against pregnant women who sought equal access to light duty assignments,¹⁶ permitting employers to treat pregnant employees worse than other employees by denying light duty assignments, as long as they do so for “pregnancy blind”¹⁷ or

Workers, 28 Berkeley J. Emp. & Lab. L. 1, 35 (2007) (explaining that “most low-wage working women remain without protection under the PDA”); *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities: Meeting of the U.S. Equal Employment Opportunity Commission* (Feb. 15, 2012) (written Testimony of Sharon Terman, Legal Aid Society-Employment Law Center), available at <http://www.eeoc.gov/eeoc/meetings/2-15-12/terman.cfm>.

This inequity is compounded by the fact that women make up more than their fair share of low-wage workers to begin with. See U.S. Gov’t Accountability Office, GAO-12-10, *Gender Pay Differences: Progress Made, but Women Remain Overrepresented Among Low-Wage Workers* (2011).

¹² The facts of the case, which was decided by jury trial, are recounted in court decisions addressing plaintiffs’ entitlement to attorneys’ fees, including *Lochren v. County of Suffolk*, 344 Fed. Appx. 706 (2d Cir. 2009). The facts in the above paragraph come from the Plaintiffs’ Memorandum of Law in Support of Plaintiffs’ Motion for Summary Judgment, *Lochren v. County of Suffolk*, 2004 WL 5517509, (E.D.N.Y. filed July 6, 2004) (No. 01-CV-3925 (LDW) (ARL)).

¹³ *Id.*; *Lochren*, 344 Fed. Appx. at 707-08. Subsequently, another officer, represented by Legal Momentum and the Law Offices of Janice Goodman, brought a similar and related suit against her employer the Suffolk County Park Department challenging a policy of excluding pregnant officers from light duty assignments. In an unreported decision, the court denied the employer’s motions for summary judgment, *Germain v. County of Suffolk*, No. 07-CV-2523(ADS) (ARL), 2009 WL 1514513 (E.D.N.Y. May 29, 2009). After a trial, a jury found for the plaintiff on the Title VII claim. *Germain v. County of Suffolk*, 672 F. Supp. 2d 319 (E.D.N.Y. 2009).

¹⁴ *Prater v. Detroit Police Dep’t*, No. 08-CV-14339 (SFC) (DAS) (E.D. Mich. filed Oct. 13, 2008).

¹⁵ Press release, ACLU of Michigan, *ACLU, Detroit Police Settle Pregnancy Discrimination Lawsuit: DPD Agrees To Implement New Policy With Strong Protections Against Pregnancy Discrimination* (July 28, 2010), available at <http://aclumich.org/issues/womens-rights/2010-07/1459>.

¹⁶ The general problem is described well in Grossman & Thomas, *Making Pregnancy Work*, *supra* note 10, at 31-41.

¹⁷ This term was used by both the Sixth Circuit in *Reeves v. Swift Transp. Co.*, 446 F.3d 637, 638 (6th Cir. 2006) (finding that the pregnant employee was terminated “pursuant to a pregnancy-blind policy denying light-duty work to employees who could not perform heavy lifting and also were not injured on the job”), and the Seventh Circuit in *Serednyj v. Beverly Healthcare LLC*, 656 F.3d 540, 548-9 (7th Cir. 2011) (finding employer’s policy to be

“gender neutral”¹⁸ reasons, such as whether the better-treated employees were injured while on duty, or are eligible for reasonable accommodations under the ADA.¹⁹ According to these courts, it is enough that granting light-duty assignments only to people with “job-related” injuries is a legitimate, non-pregnancy based reason for denying such assignments to pregnant workers.²⁰ Such courts have rejected the argument that the PDA requires employers to give similarly-abled pregnant workers the accommodations given to those injured “on the job,” arguing that to do so would amount to “preferential treatment,” rather than equal treatment, for pregnant workers.²¹

The 2008 amendments to the ADA, and the Commission’s 2011 regulations and Guidance on those amendments, provide the Commission with a timely opportunity to explain in updated Guidance how these amendments interact with the PDA.

Recommendation:

The Commission should issue updated Guidance making clear that the PDA requires employers to extend the same treatment to pregnant workers – including modified duty and light duty assignments – as the employer extends to any other temporarily disabled workers, including those injured “on the job,” those eligible for workers’ compensation, those covered by the ADA, and any other worker “similar in their ability or inability to work.”²² The Commission should clarify in its Guidance that employers may not treat pregnant workers worse than any of these other workers, even if the employers proffer “pregnancy-blind” or “gender-neutral” reasons for doing so, because the PDA limits the basis on which pregnant workers can be compared to others to their capacity to do the job in question.

The Commission should explain that the PDA requires employers to treat pregnant workers as well as they are required to treat similarly-(dis)abled workers under the ADA as amended. The Commission should use illustrative examples to explain that employers must extend the types of reasonable remedial measures – such as light duty assignments, permission to use stools, additional water, snack, or bathroom breaks, and opportunities to sit down or stretch – to pregnant workers that they are required to extend to temporarily disabled workers under the amended ADA’s reasonable accommodation requirements. In this regard, the Commission should clarify that individual pregnant workers need not identify a specific, non-pregnant comparator in order to show that she is entitled to such treatment.

“pregnancy blind,” and therefore lawful, because it “treat[s] nonpregnant employees the same as pregnant employees—both are denied an accommodation of light duty work for non-work-related injuries”).

¹⁸ *Young*, 2011 WL 665321, at *11.

¹⁹ For example, the Seventh Circuit recently upheld an employer policy that excluded pregnant workers from light duty based on its interpretation of the PDA as requiring “an employer [to] ignore a female employee’s pregnancy and treat that employee the same as it would have if she were not pregnant.” *Serednyj*, 656 F.3d at 548.

²⁰ *See Reeves*, 446 F.3d at 641-42; *accord Urbano v. Cont’l Airlines*, 138 F.3d 204 (5th Cir. 1998) (“Continental treated Urbano the same as it treats any other worker who suffered an injury off-duty.”)

²¹ *Spivey v. Beverly Enters.*, 196 F.3d 1309 (11th Cir. 1999).

²² 42 U.S.C. § 2000e(k).

A. The Commission should issue Guidance clarifying that the PDA forbids employers from treating pregnant workers worse, for light-duty or other purposes, than other temporarily disabled workers, including workers injured “on the job.”

The purpose, history, and plain language of the PDA all demonstrate that the statute requires employers to treat pregnant women as well as any other temporarily disabled worker, as long as they are similar in their ability or inability to work, and regardless of any other distinction – even “pregnancy blind” distinctions, such as whether an injury occurred on the job or off the job. We outline these arguments below, which are more fully discussed in our *amicus* brief in the Fourth Circuit appeal of *Young v. UPS*.²³ The *Young* case illustrates the problem the Commission should address. The employer had a policy of granting light duty and other alternative assignments (not requiring employees to lift heavy loads) to a host of categories of workers – those injured “in the job,” those with qualifying disabilities under the ADA, those who lost their commercial driving licenses, and so on. However, the employer refused to grant similar accommodations to a pregnant worker with a temporary lifting restriction. The trial court upheld the employer’s treatment of pregnant workers, because the employer’s policy was based on “pregnancy blind” reasons.²⁴

The problem in cases, including *Young*, where courts have ruled against pregnant women who sought equal access to light duty assignments is that courts ignore or give short shrift to the PDA’s second clause, as well as its underlying purpose of providing a remedy for workplace policies that exclude pregnant workers. The PDA amends Title VII in two ways. First, it redefines Title VII’s prohibition on discrimination “because of . . . sex” to include discrimination on the basis of “pregnancy, childbirth, or related medical conditions.”²⁵ Second, it requires employers to treat pregnant employees “the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.”²⁶ The statute thereby codifies Congress’s view that *failing* to extend to pregnant employees the treatment accorded other groups of similarly-able workers constitutes unlawful discrimination on the basis of sex.

This second clause limits the basis on which employers, as well as courts, may compare pregnant workers with other workers who receive treatment such as light duty assignments to the workers’ capacity to perform the job. No other basis of comparison, not even a “pregnancy-blind” one, is permitted. As the Supreme Court put it in *International Union, United Auto., Aerospace, & Agricultural Implement Workers of America v. Johnson Controls, Inc.*, the “ability or inability to work” limitation imposed by the PDA is “a BFOQ standard of its own.”²⁷ In an unpublished decision, the district court in the *Germain v. County of Suffolk* case, discussed *supra*

²³ See *Young*, *supra* note 7. A copy of our *amicus* brief can be found at http://www.aclu.org/files/assets/2012.3.5_aclu_et_al_amicus_brief.pdf.

²⁴ 2011 WL 665321.

²⁵ 42 U.S.C. §§ 2000e-2(a)(1); 2000e(k).

²⁶ *Id.* § 2000e(k).

²⁷ 499 U.S. 187, 204 (1991); accord Grossman & Thomas, *Making Pregnancy Work*, *supra* note 10, at 33-36 (explaining that the PDA’s second clause “augments the basic anti-discrimination prohibition in the first clause by dictating the appropriate comparison group”).

note 13, explained how this statutory limitation should work in the context of employer light duty policies:

The County would have the Court compare the Park Department’s treatment of the Plaintiff to that of other non-pregnant officers who requested light-duty because of a non-occupational injury. However, the Supreme Court has recognized that the “[t]he second clause [of the PDA] could not be clearer: it mandates that pregnant employees ‘shall be treated the same for all employment-related purposes’ as nonpregnant employees similarly situated with respect to their ability to work.” [citing *Johnson Controls*, 499 U.S. at 204-05]. Thus, “[w]hile 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.’”²⁸

This straightforward reading of the statute’s plain text is consonant with its history as a remedial response to many decades during which employers, lawmakers, and courts forced pregnant women out of the workplace based on the stereotype that pregnancy is incompatible with work.²⁹ Congress recognized that stereotypes about pregnant women animated the discriminatory practices and laws that kept women at the bottom of the labor market. Responding to these practices, and to court decisions upholding them, Congress enacted a remedy aimed at making it possible for women to remain in the labor force during pregnancy and childbirth.³⁰ The PDA accomplished this by requiring that pregnancy be treated the same as any other short-term disability, rather than being treated as a fragile state requiring protection and separation from work. Congress specified that the only permissible point of comparison between pregnant workers and others is “their actual ability to perform work.”³¹

The function of light-duty or modified duty reassignment for workers who are temporarily prevented from performing some physical labor is to enable them to continue working through the period of their disability. Denying this option to pregnant workers shuts pregnant women in fields involving physically demanding or risky work – frequently male-dominated sectors – out of the workplace during pregnancy, thus reinforcing the outmoded view that pregnancy is incompatible with work.³² The effect of denying light duty to pregnant workers *while offering it to other workers*, such as workers injured on the job, is to bolster the stereotype that, while men must work to support their families (and therefore must be accommodated with alternative assignments when they are temporarily prevented from

²⁸ 2009 WL 1514513, at *4 (quoting *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir.1996) (quoting 42 U.S.C. § 2000e(k)) (internal citation and quotation marks omitted)).

²⁹ See, e.g., *California Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 285-86 (1987) (explaining the need for the PDA to “remed[y]” a long history of “discrimination against pregnant workers”). The Supreme Court described the history of the systemic exclusion of pregnant women and mothers from the workplace in more detail in *Hibbs*, 538 U.S. at 729 (explaining that these exclusionary laws and policies were based on the stereotype that women are “and should remain, ‘the center of home and family life’”) (quoting *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)).

³⁰ Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 Harv. C.R.-C.L. L. Rev. 415, 484 (2011) (describing the “legal reforms that would enable women to maintain labor-force attachments throughout pregnancy and childbirth”).

³¹ H.R. Rep. No. 95-948, at 5 (1978), reprinted in 1978 U.S.C.C.A.N. 4749, 4753.

³² See Grossman & Thomas, *supra* note 10 at 22 (explaining that “pregnancy conflicts are particularly acute for women in so-called “blue collar” or “non-traditional” occupations”).

performing their usual tasks), women’s workforce participation is subordinate to their reproductive role.³³ This is the very stereotype Congress sought to uproot when it passed the PDA.³⁴

Recommendation:

The Commission should clarify that Title VII, as amended by the PDA, requires employers to treat pregnant workers as well as they treat other groups of employees who are temporarily physically restricted from performing aspects of their job. This result is compelled by the plain text and purpose of the statute. The Commission should explain that employers may not come up with other reasons – even “pregnancy blind” ones – to treat other groups of temporarily disabled workers better than pregnant workers. The Commission should specify that the fact that a worker was injured “on the job” does not relieve employers of their statutory duty to treat pregnant workers the same as that worker, if they are both rendered temporarily unable to perform aspects of the job.

In making this clarification, the Commission may wish to explain that it is simply restating and clarifying its position as set forth in 1978, in “Questions and Answers on the Pregnancy Discrimination Act.”³⁵ In that document, the Commission explained: “An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments,” and so forth. “If other employees temporarily unable to lift are relieved of these [machine-operation] functions, pregnant employees also unable to lift must be temporarily relieved of the function.” In updating the Guidance provided in 1978, the Commission should simply explain that employers cannot avoid this statutory responsibility by manufacturing separate axes of distinction among workers, such as those injured “on” and “off” the job.

Employers have been ingenious in devising ways to distinguish the accommodations they offer non-pregnant employees from their refusal to accommodate pregnant employees.

³³ Reva Siegel has explained that when an employer “adopts ‘neutral’ policies that exclude on the basis of pregnancy,” the “foreseeable impact” is to reinforce what she calls the employer’s “implicit sexual premise: that women’s labor force participation is, by virtue of her reproductive role, short term, occasional,” with implications that redound to the detriment of women as a class, whether they are pregnant or not. Reva Siegel, Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929, 952 (1985).

The stereotype that men’s employment represents essential breadwinning while women’s is less critical to their families support persists in the twenty-first century workplace. See, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2564 (2011) (Ginsburg, J., conc. in part & dissenting in part) (noting evidence that retail managers espoused the view that “[m]en are here to make a career and women aren’t,” a stereotype that employees alleged infected decisions about pay and promotions); accord Brief for American Civil Liberties Union & National Women’s Law Center as *Amici Curiae* Supporting Respondents, *Wal-Mart, Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) (No. 10-277), 2011 WL 805231, at *18-20 (recounting additional record evidence of managers embracing the stereotype that men “are working as the heads of their households, while women are just working for the sake of working” and that women employees “should raise a family and stay in the kitchen,” rather than advance their careers).

³⁴ See H.R. Rep. No. 95-948, at 6-7.

³⁵ 29 C.F.R. app. pt. 1604 (1978).

Courts have upheld distinctions based on the length of requested accommodation (one month versus six),³⁶ the fact that some of the other, better-treated employees were also pregnant,³⁷ the fact that other, better-treated employees were eligible for workers' compensation,³⁸ and the fact that some of the better-treated employees also lost their commercial driving licenses.³⁹ The Commission should clarify that such hair-splitting, when it has the effect of excluding pregnant employees from the benefit of adjustments and job modifications offered to other temporarily disabled employees, flies in the face of the statute's text, its purpose of enabling pregnant employees to retain workforce attachments, and its overall remedial purpose.

B. The Commission should explain that employers must treat pregnant workers as well as they are required to treat ADA-eligible employees, whether or not the pregnant worker has identified a specific comparator.

Some courts have accepted employers' arguments that ADA-eligible employees do not provide a basis of comparison with pregnant employees for purposes of determining whether pregnant workers have been treated equally as required by the PDA. For example, in *Young*, *supra* note 7, the district court agreed with the employer that several of the plaintiff's proffered comparators were accommodated under the ADA, and it concluded without much discussion that the employer therefore was not remiss in failing to extend the same accommodations to a pregnant worker.⁴⁰ Similarly, in *Serednyj v. Beverly Healthcare*, the Court of Appeals upheld the employer's light-duty policy as compliant with the PDA, over the plaintiff's argument that it did not treat pregnant workers equally because it provided "accommodations to qualified individuals with a disability under the ADA."⁴¹

Recommendation:

The Commission should clarify that there is no reason to discount ADA-eligible coworkers as valid comparators. On the contrary, the PDA's second clause *requires* employers to offer pregnant employees the same kinds of accommodations – whether extra drinking breaks, bathroom breaks, a stool, or a light duty or desk duty assignment – that they offer any other employee (including an employee who is covered by the ADA) who is similar in his ability or inability to do the job. This statutory requirement effectuates Congress's purpose of recalibrating the treatment of pregnant workers to the treatment of other employees temporarily disabled from doing their jobs, with a sole focus on the workers' "actual ability to perform work."⁴²

³⁶ See *McQueen v. AirTran Airways, Inc.*, No. 3:04-CV-00180-RS-EMT, 2005 WL 3591100, at *8 (N.D. Fla. Dec. 30, 2005).

³⁷ See *id.*

³⁸ See *Daugherty v. Genesis Health Ventures of Salisbury, Inc.*, 316 F. Supp. 2d 262, 263-64 (D. Md. 2004).

³⁹ *Young v. UPS, Inc.*, 2011 WL 665321, at *13.

⁴⁰ 2011 WL 665321, at *13.

⁴¹ 656 F.3d at 548.

⁴² H.R. Rep. 95-948, at 3-5; *accord* statement of Sen. Birch Bayh, a co-sponsor of the PDA, describing the bill as "require[ing] that disability based on pregnancy, childbirth or related medical conditions ... be treated as any other

A correct understanding of the relationship between the PDA and ADA is even more important now that Congress has brought more temporarily disabled workers within the ADA's ambit, by amending the ADA in 2008.⁴³ The amended ADA requires employers to provide reasonable accommodations to workers whose temporary physical restrictions are similar to those experienced by many pregnant women with "normal" pregnancies. New implementing regulations issued by the Commission last year explain that "major life activities" triggering the ADA's protection now include lifting, bending, standing, sitting, walking, and working. They also include the operations of the bowel, bladder, and digestive systems.⁴⁴

Importantly, in the Commission's 2011 interpretive Guidance implementing the 2008 amendments to the ADA, the Commission gave the following example in explaining the statute's expanded coverage: "someone with an impairment resulting in a 20-pound lifting restriction that lasts or is expected to last for several months is substantially limited in the major life activity of lifting."⁴⁵ And the Commission deleted from the Guidance its former statement that temporary conditions, such as broken bones, concussions, and the flu, cannot qualify.⁴⁶

Recommendation:

Following up on its recent Guidance and regulations explaining the expanded reach of the amended ADA, the Commission should issue updated Guidance explaining that the PDA requires employers to treat a pregnant worker with a 20-pound lifting restriction that lasts or is expected to last for several months *as well as* the employer would (now) be required to treat a person with an ADA-eligible impairment resulting in a similar lifting restriction. We suggest that the Commission simply do this by quoting and referring to the example above in its ADA Guidance, and explaining that, if a pregnant worker is similar in her ability or inability to work – that is, if she has a temporary 20-pound lifting restriction – then the employer must accord her the same measures, including a reasonable job modification, that it would be required to accord the person in the ADA Guidance's example.

The Commission should further explain that pregnant workers with physical restrictions need not identify specific individuals at their work sites whom the employer has accommodated under the ADA. As long as the employer is covered by the ADA, the employer would be required to provide reasonable accommodations to a person with a lifting restriction that lasts for several months, as the Commission explained.⁴⁷ Thus, the PDA categorically requires similar treatment to be accorded to a pregnant woman with similar restrictions on her ability to work. The Commission should explain that the PDA

disability." 123 Cong. Rec. S15035 (daily ed. Sept. 16, 1977), *reprinted in* S. Comm. On Labor & Human Res., 96th Cong., Legislative History of the Pregnancy Discrimination Act of 1978, at 75 (1980).

⁴³ ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553.

⁴⁴ 29 C.F.R. § 1630.2(i)(1)(i), (ii) (2011).

⁴⁵ 29 C.F.R. app. § 1630.2(j)(1)(viii) (2011).

⁴⁶ *See generally* Jeannette Cox, *Pregnancy as 'Disability' and the Amended Americans with Disabilities Act*, 53 B.C. L. Rev. (forthcoming March 2012, draft on file with ACLU and available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961644).

⁴⁷ 29 C.F.R. pt. 1630 app. § 1630.2(j)(1)(viii).

thereby creates a presumption that a pregnant worker with such restrictions is entitled to ADA-type measures (in addition to any other measures the employer offers any temporarily disabled worker), whether or not she can identify a particular ADA-qualified comparator at her place of employ. Setting forth such a *per se* rule will simplify matters for both employers and employees, reduce litigation, and make clear to employers what the PDA requires of them in the post-ADA amendments legal landscape.

C. The Commission should make clear that pregnant workers need not provide a comparator where employers have acted based on stereotypes about pregnant women and new mothers.

Courts all too often overlook evidence that employers have acted based on stereotypes about the capacity, reliability, or dedication of pregnant workers and mothers, and instead focus on pregnant workers' frequent inability to identify a comparator who is similarly situated in all respects. This approach has the effect of gutting the PDA's protections and legitimating the use of a "male norm as the baseline for benefits."⁴⁸ Professor Joan C. Williams recounted numerous examples of this misapplication of Title VII in her testimony to the Commission,⁴⁹ including the well-known case of *Troupe v. May Dept. Stores Co.*, in which the employer indicated that the pregnant employee would be terminated based in part on the stereotype that the supervisor did not think she would come back to work after having the baby.⁵⁰ In that case, the court ignored this evidence of stereotyping because the plaintiff was unable to produce "a hypothetical [or actual] Mr. Troupe, who is as tardy as Ms. Troupe was, also because of health problems, and who is about to take a protracted sick leave growing out of those problems at an expense to Lord & Taylor equal to that of Ms. Troupe's maternity leave."⁵¹ In other words, the court focused on the lack of a comparator, rather than analyzing the effect of the employer's reliance on the stereotype that women will not be committed to work after having a baby. Cases like *Troupe* undermine not only the specific protections of the PDA, but Title VII's broader protections against employment decisions based on gender stereotypes, as reflected in, among other forms of evidence, supervisors' comments.⁵²

⁴⁸ Grossman & Thomas, *supra* note 10, at 34-35 (discussing the "'Similarly Situated' Trap" that confronts pregnant workers seeking light duty treatment or other adjustments).

⁴⁹ *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities: U.S. Equal Opportunity Commission Meeting* (Feb. 15, 2012) (Written Testimony of Joan C. Williams), available at <http://www.eeoc.gov/eeoc/meetings/2-15-12/williams.cfm>.

⁵⁰ 20 F.3d 734, 735-36 (7th Cir. 1994).

⁵¹ *Id.* at 738. Professor Joanna L. Grossman has also examined the *Troupe* case as an example of the "limited" nature, "in practice," of pregnant workers' "comparative right of accommodation," because the "search for a comparator is often elusive." Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 *Geo. L.J.* 567, 614-15 (2010).

⁵² See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250-551 (1989). The Constitution likewise forbids state actors from curtailing women's employment opportunities based upon a "presumption of [pregnant workers'] incapacity." *Turner v. Dep't of Emp. Sec. & Bd. of Review of Indus. Comm'n of Utah*, 423 U.S. 44, 46 (1975) (*per curiam*) (invalidating a statute making pregnant women ineligible for unemployment benefits beginning twelve weeks before her due date based upon a "presumption of incapacity and unavailability for employment); *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 641 n. 9, 645 (1974) (invalidating a mandatory pregnancy leave rule for teachers on constitutional grounds and noting that the invalid regulations "may have originally been inspired by . . . outmoded taboos" about pregnancy, such as the view that pregnancy is "embarrass[ing]" when "conspicuously" visible).

Recommendation:

The Commission should explain that courts should look at whether the employer has acted based on impermissible stereotypes about pregnant workers and mothers, regardless of whether the plaintiff can identify a similarly situated comparator.

D. The Commission should clarify that employers may not treat women who take pregnancy leave or parents who take statutorily protected leave worse, for purposes of Title VII, than workers who do not take such leave.

The FMLA was enacted to “balance the demands of the workplace with the needs of families” and to “promote the goal of equal employment opportunity for women and men.”⁵³ The FMLA entitles eligible employees to up to twelve workweeks per year of leave to care for a new baby, to care for certain relatives with a serious health condition, or to care for her own serious health condition.⁵⁴ In some circumstances, employees may take intermittent leave to care for their own serious health conditions where medically necessary.⁵⁵ Incapacity due to pregnancy or for prenatal care is recognized to be a serious health condition.⁵⁶ Employers are barred from interfering with these rights, and from discriminating against employees who exercise them.⁵⁷

Unfortunately, the post-FMLA landscape is littered with cases of employers discriminating against both men and women for taking self-care or caregiver leave, in violation not only of the FMLA, but of Title VII.⁵⁸ Courts continue to use the “no preferential treatment” rationale to validate employers who penalize pregnant employees for missing work for self-care reasons.⁵⁹ Courts miss the boat when they allow employers to treat workers who take FMLA-protected leave any differently than they treat workers who do not take such leave.⁶⁰ The Commission, perhaps in conjunction with the Department of Labor, should clarify that, read in

⁵³ *Id.* § 2601(b)(1), (5).

⁵⁴ *Id.* § 2612(a)(1).

⁵⁵ *Id.* § 2612(b).

⁵⁶ 29 C.F.R. § 825.115(b) (2009); *Ryl-Kuchar v. Care Centers, Inc.*, 565 F.3d 1027, 1030 (7th Cir. 2009).

⁵⁷ 29 U.S.C. § 2615(a).

⁵⁸ *See, e.g., Velez v. Novartis Pharm. Corp.*, 244 F.R.D. 243, 267 (S.D.N.Y. 2007) (employee penalized in pay for not working during her maternity leave).

⁵⁹ *See, e.g., Elam v. Regions Financial Corp.*, 601 F.3d 873, 879 (8th Cir. 2010) (citing *Troupe* and the no-preferential-treatment rationale to find no discrimination against an employee who was penalized for leaving her bank teller station when she had morning sickness).

⁶⁰ *See, e.g., EEOC v. Bloomberg, LP*, 778 F. Supp. 2d 458, 462 (S.D.N.Y. 2011), and related opinions (comparing employer’s treatment of women who took maternity leave only with its treatment of other workers who took “similarly lengthy leaves,” and not with its treatment of all other workers). The court in *Bloomberg* relied on statements from pre-FMLA cases to the effect that, *e.g.*, “Title VII and the Pregnancy Discrimination Act do not protect a pregnant employee from being discharged for absenteeism even if her absence was due to pregnancy or complications of pregnancy, unless other employees are not held to the same attendance standards.” *Id.* at 473 (quoting *Minott v. Port Auth. of N.Y. & N.J.*, 116 F.Supp.2d 513, 521 (S.D.N.Y.2000)). The FMLA, however, *does* protect many pregnant employees from being discharged for “absenteeism . . . due to pregnancy or complications of pregnancy,” a legal development that the court nonetheless ignored in its Title VII comparator analysis.

conjunction with the FMLA, Title VII bars employers from treating employees worse for having taken protected leave in conjunction with their pregnancy or caretaking responsibilities.⁶¹

Recommendation:

The Commission should clarify that employers and courts are prevented from penalizing or retaliating against workers who take statutorily protected leave, including intermittent self-care leave during pregnancy or post-partum, under the FMLA.⁶²

II. THE COMMISSION SHOULD CLARIFY THAT TITLE VII, AS AMENDED BY THE PDA, PROHIBITS DISCRIMINATION AGAINST WORKERS WHO BREASTFEED, AND THAT EMPLOYERS MUST TAKE REASONABLE MEASURES TO PROVIDE BREAKS AND AN APPROPRIATE SETTING TO PUMP BREAST MILK.

A broad consensus exists among medical and public health experts that breastfeeding is not only optimal for infants a year (or longer) following birth, but also that it has broader developmental, psychological, social, economic and environmental benefits.⁶³ Promotion of breastfeeding has thus emerged over the last quarter of a century as a “key public health issue in the United States,”⁶⁴ and the federal government has adopted a strong, multi-pronged policy of supporting breastfeeding, including women’s ability to continue breastfeeding upon return to the paid workforce following childbirth.⁶⁵

⁶¹ The foregoing suggestions all ask the Commission to explain the proper workings of the PDA’s prohibition of disparate treatment. As a number of witnesses testified to the Commission, the PDA and Title VII also prohibit practices that have a *disparate impact* on pregnant workers and workers with caregiving responsibilities when those practices are not justified by a business necessity. 42 U.S.C. §§ 2000e-2(k)(1), 2000e-(k).

⁶² 29 U.S.C. § 2601 *et seq.*

⁶³ See American Academy of Pediatrics, *Policy Statement: Breastfeeding and the Use of Human Milk*, 115 (2) 129 Pediatrics 827-841 (March 2012), available at <http://pediatrics.aappublications.org/content/129/3/e827.full.pdf>; Am. Public Health Ass’n, *Policy Statement: A Call to Action on Breastfeeding: A Fundamental Public Health Issue* (Nov. 6, 2007), www.apha.org/advocacy/policy/policysearch/default.htm?id=1360; United States Breastfeeding Committee, *Issue Paper: Economic Benefits of Breastfeeding* (2002), <http://www.usbreastfeeding.org/LinkClick.aspx?link=Publications%2fEconomic-Benefits-2002-USBC.pdf&tabid=70&mid=388>; Jon Weimer, U.S. Dep’t of Agric., *The Economic Benefits of Breastfeeding: A Review and Analysis* (Mar. 2001), <http://www.ers.usda.gov/Publications/FANRR13/>. See also United Nations Children’s Fund, World Health Organization, *Innocenti Declaration on the Protection, Promotion and Support of Breastfeeding* (1990) [hereinafter *Innocenti Declaration*], <http://www.unicef.org/programme/breastfeeding/innocenti.htm> (Adopted by U.S. at WHO/UNICEF policymakers’ meeting *Breastfeeding in the 1990s: A Global Initiative*, co-sponsored by the United States Agency for International Development and the Swedish International Development Authority (SIDA), in Florence, Italy) (detailing the extensive benefits breast-feeding has on new mothers).

⁶⁴ United States Department of Health and Human Services, Office of the Surgeon General, *The Surgeon General’s Call to Action to Support Breastfeeding*, v (2011) [hereinafter *Surgeon General’s Call to Action*], [http://www.google.com/search?q=surgeon+general%27s+call+to+action+on+breastfeeding&sourceid=ie7&rls=com.microsoft:en-us:IE-SearchBox&ie=&oe=](http://www.google.com/search?q=surgeon+general%27s+call+to+action+on+breastfeeding&sourceid=ie7&rls=com.microsoft:en-us:IE-SearchBox&ie=&oe=;); see also Am. Public Health Ass’n, *A Call to Action on Breastfeeding*, *supra* note 66 (noting medical and scientific consensus on strong public health justifications for promotion of breastfeeding).

⁶⁵ *Surgeon General’s Call to Action*, *supra* note 66, at 5 (discussing “Federal Policy on Breastfeeding”); Department of Health and Human Services, Office of Women’s Health, *HHS Blueprint for Action on Breastfeeding* (2000);

Yet many women who return to work after having a child and wish to continue breastfeeding are faced with significant barriers, including refusal of requests to pump breast milk on the job or retaliation for making such requests or for using break time to pump. Although such barriers are experienced at all levels of the economic spectrum, they can be particularly difficult to surmount for low-income women, who typically work on an hourly basis, with less flexibility, less privacy, and fewer benefits (such as paid parental/maternity leave) than their counterparts in the professions.⁶⁶

Existing protections against sex discrimination in employment, and specifically Title VII as amended by the PDA, should provide recourse for women who have suffered from adverse employment action on the basis of breastfeeding or lactation. Indeed, the EEOC has rightly adopted this position in its own determinations and its litigation.⁶⁷ Unfortunately, a few courts have erroneously reached the conclusion that lactation discrimination is not covered under Title VII, and have done so with little discussion or analysis.

A. The PDA covers sex-linked conditions, including lactation. The few courts that have reached this issue have adopted an erroneous and unduly narrow interpretation of Title VII that fails to take into account the impact of the PDA.

The PDA, properly understood, plainly prohibits discrimination on the basis of lactation, for two reasons. First, as explained further below, lactation is a “medical condition” that is directly “related” to “pregnancy [and] childbirth” under the clear terms of the PDA. Second, and more fundamentally, the PDA’s clarification of the definition of sex discrimination *by its terms* is “not limited to” pregnancy or childbirth and related medical conditions. This explicitly inclusive language indicates that pregnancy, childbirth, or related medical conditions are not the *sole* conditions that might constitute prohibited sex discrimination, but rather, constitute a non-exhaustive list of examples of sex discrimination that, like pregnancy and childbirth, are sex-

Child Nutrition Amendment of 1992, Pub. L. No. 102-342, 106 Stat. 911 (1992) (requiring Secretary of Agriculture establish a national breastfeeding promotion program to promote breastfeeding as “an ideal form of infant nutrition”); UN-WHO, *Innocenti Declaration*, *supra* note 63.

⁶⁶ See, e.g., Bornstein, *Poor, Pregnant, and Fired*, *supra* note 11, at 8, 15 (providing examples of adverse action by employers against low-wage workers on the basis of lactation); Margaret M. McDowell et al., National Center for Health Statistics, *Breastfeeding in the United States: Findings from the National Health and Nutrition Examination Surveys, 1999–2006*, at 3 (2008), <http://www.cdc.gov/nchs/data/databriefs/db05.pdf> (noting disparity in breastfeeding rates by income level); Melvyn L. Sterling, MD, Chair, Council on Scientific Affairs, Am. Med. Ass’n, *Factors that Influence Differences in Breastfeeding Rates* (CSA Report 2, A-05, 3) (Adopted 2005), <http://www.ama-assn.org/resources/doc/csaph/a05csa2-fulltext.pdf> (discussing employment barriers to breastfeeding).

⁶⁷ See Complaint, Response of Plaintiff to Defendants’ Motion for Summary Judgment, *EEOC v. Houston Funding II, Ltd.*, No. 11-02442 (S.D. Tex. Feb. 2, 2012); *also c.f.* EEOC Decision (Dec. 14, 2000), <http://www.eeoc.gov/policy/docs/decision-contraception.html> (finding that denial of prescription coverage for contraceptives drugs and devices in employer plan constituted violation of Title VII as amended by the PDA, following *Johnson Controls, Inc.*, 499 U.S. at 206, and noting that in enacting the PDA, Congress “prohibited discrimination against women based on ‘the whole range of matters concerning the childbearing process’” (citing H.R. Rep. No. 948, 95th Cong., 2d Sess. 5 (1978)).

linked.⁶⁸ This evinces Congress' intent that discrimination because of "sex" should be interpreted broadly to encompass discrimination based on other sex-linked conditions, such as lactation.⁶⁹ For both of these reasons, discrimination on the basis of lactation (including the refusal to accommodate lactating women to the same extent as other employees similar in their ability to work) should be considered prohibited sex discrimination under Title VII.

This interpretation is supported by the legislative history of the PDA, as well as its text. As the Commission is aware, the immediate impetus for the PDA's amendments to Title VII was the Supreme Court's decision in *General Electric Co. v. Gilbert*,⁷⁰ which held that discrimination on the basis of pregnancy did not violate Title VII, because it did not constitute discrimination on the basis of sex. The Supreme Court in *Gilbert* relied heavily on its earlier decision under the Fourteenth Amendment in *Geduldig v. Aiello*,⁷¹ and quoted the *Aiello* Court's statement that treating "pregnant women" worse – in that case, for purposes of exclusion from disability benefits coverage – than "nonpregnant persons" did not amount to sex discrimination, because "[w]hile the first group is exclusively female, the second includes members of both sexes."⁷²

Congress responded swiftly to this decision by enacting the PDA, which specifies that "[t]he terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions."⁷³ As the Supreme Court has recognized, this enactment represented Congress's "deci[sion] to overrule . . . *Gilbert*."⁷⁴ Moreover, "[w]hen Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding *and the reasoning* of the Court in the *Gilbert* decision."⁷⁵ Thus, in enacting the PDA, Congress definitively rejected the view that discrimination on the basis of a sex-linked condition like pregnancy does not constitute sex discrimination simply because it is a "voluntarily undertaken and desired" condition, or because not all women are currently in that condition.⁷⁶

Recognizing that lactation is covered by Title VII is also consistent with the PDA's core purpose of "prohibit[ing] discrimination against women based on 'the whole range of matters concerning the childbearing process,' and [giving] women 'the right ... to be financially and

⁶⁸ See, e.g., *Johnson Controls*, 499 U.S. at 206, 211 (holding that prohibition on sex discrimination included discrimination based on "capacity to become pregnant," and remarking that its ruling "do[es] no more than hold that the PDA means what it says").

⁶⁹ For a compelling argument that the legislative history and language of the PDA indicate that breastfeeding *should* be considered a form of sex discrimination under Title VII see Diana Kasdan, Note, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. Rev. 309 (2001).

⁷⁰ 429 U.S. 125 (1976).

⁷¹ 417 U.S. 484 (1974).

⁷² *Gilbert*, 429 U.S. at 135 (quoting *Aiello*, 417 U.S. at 496-97 n.20).

⁷³ 42 U.S.C. § 2000e(k).

⁷⁴ *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 670 (1983); see also *AT&T Corp. v. Hulteen*, 556 U.S. 701, 129 S.Ct. 1962, 1967 (2009) ("In 1978, Congress amended Title VII by passing the PDA, 92 Stat. 2076, 42 U.S.C. § 2000e(k), which superseded *Gilbert*..."); *California Fed. Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 277 n.6 (1987) ("The legislative history of the PDA reflects Congress' approval of the views of the dissenters in *Gilbert*.").

⁷⁵ *Newport News*, 462 U.S. at 678 (emphasis added); see also *Guerra*, 479 U.S. at 284-85 ("By adding pregnancy to the definition of sex discrimination prohibited by Title VII, the first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert*.").

⁷⁶ See *Hulteen*, 556 U.S. at 1979 (Ginsburg, J., dissenting) (observing the "strange notion" advanced in *Gilbert* "that a benefits classification excluding some women ('pregnant women') is not sex-based because other women are among the favored class ('nonpregnant persons')" and noting its repudiation by Congress).

legally protected before, during, and after [their] pregnancies.”⁷⁷ Discrimination against women on the basis of breastfeeding reflects precisely the type of stereotypes that the PDA aimed to address—namely, the view that women who become pregnant and have children will (or should) prioritize family over work, that women’s proper role is that of homemaker rather than breadwinner, and that being a new mother is incompatible with full workplace participation. This was the view that was for decades codified in laws, court decisions, and employer policies such as forced maternity leave,⁷⁸ and it was precisely this view that Congress invalidated by passing the PDA. Refusing to recognize that discrimination against a woman on the basis of breastfeeding *is* sex discrimination, thus frustrating Congress’ intent, because it allows employers to construct the self-fulfilling prophecy that the workplace is incompatible with motherhood.

For all of these reasons, the reasoning of *Gilbert* is no longer a valid analytical method of assessing workplace policies that discriminate against women on the basis of physical conditions that only women experience, including lactation.

Unfortunately, courts that have examined whether breastfeeding and lactation are covered under Title VII have erroneously revived the logic of *Gilbert*, despite its legislative overruling in the PDA. In the most egregious example, *Martinez v. NBC*,⁷⁹ the plaintiff had claimed she had been retaliated against and ultimately demoted after she requested accommodation to pump breast milk. Expressly relying on *Gilbert*, and without addressing or even citing the PDA, the New York district court found that lactation discrimination was not *per se* sex discrimination.⁸⁰ The court further reasoned that because men are unable to lactate, the plaintiff could not succeed on a “sex plus” theory of discrimination because there was no comparable subclass of men with whom to compare her treatment⁸¹—an analysis that the Supreme Court has recognized was repudiated by the PDA.⁸² A Kentucky district court in *Wallace v. Pyro Mining* had previously adopted similar reasoning, holding that breastfeeding was not covered under Title VII under the reasoning of *Gilbert*, and ignoring the impact of the PDA, despite acknowledgement that, like pregnancy, breastfeeding is “a uniquely female attribute.”⁸³

Moreover, these courts have based their findings on the erroneous conclusion that lactation does not constitute a “medical condition” for purposes of the PDA. In *Wallace*, for example, the district court found, without citation to the factual record, that breastfeeding was not covered by the PDA because “[n]either breast-feeding and weaning, nor difficulties arising

⁷⁷ EEOC Decision (Dec. 14, 2000), <http://www.eeoc.gov/policy/docs/decision-contraception.html> (finding that denial of prescription coverage for contraceptives drugs and devices in employer plan constituted violation of Title VII as amended by the PDA, following *Johnson Controls*, 499 U.S. at 206, 211 (citing H.R. Rep. No. 948, 95th Cong., 2d Sess. 5 (1978) and 124 Cong. Rec. H38,574 (daily ed. October 14, 1978) (statement of Rep. Sarasin, a manager of the House version of the PDA)).

⁷⁸ See, e.g., *LaFleur*, 414 U.S. at 641 n. 9, 645 (invalidating a mandatory pregnancy leave rule for teachers on constitutional grounds and noting that the invalid regulations “may have originally been inspired by . . . outmoded taboos” about pregnancy”).

⁷⁹ 49 F. Supp. 2d 305, 309-10 (S.D.N.Y. 1999).

⁸⁰ *Id.* at 310.

⁸¹ *Id.*

⁸² See *Newport News*, 462 U.S. at 684 (“Although *Gilbert* concluded that an otherwise inclusive plan that singled out pregnancy-related benefits for exclusion was nondiscriminatory on its face, because only women can become pregnant, Congress has unequivocally rejected that reasoning.”).

⁸³ See *Wallace v. Pyro Mining Co.*, 789 F. Supp. 867, 869-70 (W.D. Ky. 1990), *aff’d*, 951 F.2d 351 (table), 1991 WL 270823 (6th Cir. 1991) (*per curiam*).

therefrom” constituted conditions for which medical care and treatment is “usual or normal.”⁸⁴ The Sixth Circuit, in upholding that decision, based its ruling on the fact that the plaintiff had “failed to produce evidence supporting her contention that breastfeeding her child was a medical necessity.”⁸⁵ And a Texas court went further, holding, without citation or discussion, that “lactation is not pregnancy, childbirth, or a related medical condition [because after the plaintiff gave birth], she was no longer pregnant and her pregnancy-related conditions ended.”⁸⁶

These decisions are wrong on both the law and the facts. As a legal matter, these courts have completely ignored Congress’ rejection of the reasoning in *Gilbert* and the necessary conclusion that lactation, like pregnancy, should be considered a sex-linked condition encompassed by the inclusive definition of “sex” in the PDA. The fact that some women, but no men, breastfeed infants, has contributed to precisely the stereotypes about women workers that underlies the legacy of laws and practices keeping pregnant women and young mothers out of the workplace; namely, the view that women are “and should remain, ‘the center of home and family life.’”⁸⁷ It is precisely the kind of sex-linked condition that Congress intended to bar as a basis for employment discrimination when it amended Title VII in 1978 to abrogate the *Gilbert* decision.

Furthermore, in focusing exclusively on whether lactation constitutes a medical condition related to pregnancy and childbirth, these courts have adopted an unduly cramped, and even tortured, reading of the term “medical condition” that flies in the face of Congress’ intent in enacting the PDA. This restrictive understanding of the physiological process breastfeeding and its medical significance is flatly contrary to current medical understanding.

As a threshold matter, it cannot seriously be disputed that lactation is “related” to pregnancy and childbirth, whether or not a woman chooses or is able to continue breastfeeding/lactation following the immediate postpartum period. Lactation is the result of physiological changes that occur in a woman’s body as a natural, eventual result of implantation

⁸⁴ *Id.* The district court in *Wallace* relied on dicta in a Fourth Circuit case, *Barrash v. Bowen*, 846 F.2d 927, 931-32 (4th Cir. 1988), which had opined without citation that the PDA only covered medical conditions that were “incapacitating” and therefore did not cover an employee’s request for extended leave in order to breastfeed. That dictum was later rejected by the Fourth Circuit itself. See *Notter v. North Hand Protection*, No. 95-1087, 1996 WL 342008 (4th Cir. June 21, 1996). *Barrash* and *Wallace* can be further distinguished because they both concerned claims that the plaintiffs had been subjected to discrimination when their requests for extended medical leave in order to breastfeed their children following childbirth were denied. Many such requests would now be covered, at least for eligible employees, under the FMLA, which was enacted subsequent to the rulings in these cases. See 29 U.S.C. § 2612; see also *Hibbs*, 538 U.S. at 730-31 (upholding family leave provision of FMLA as congruent and proportional response to pervasive sex-role stereotypes regarding women’s caregiving responsibilities). Moreover, as discussed further below, to the extent such requests for medical leave prior to or following childbirth would not be covered by FMLA or the ADA, such requests should, like other job modifications for pregnant or lactating women, be determined based on a comparison of how requests for leave for others “similar in their ability or inability to work” would be treated by the employer.

⁸⁵ *Wallace*, 951 F.2d 351 (table), 1991 WL 270823, at *1.

⁸⁶ Opinion on Summary Judgment, *Houston Funding II, Ltd.*, No. 11-02442 (S.D. TX Feb. 2, 2012).

⁸⁷ *Hibbs*, 538 U.S. at 729 (quoting *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)); see also EEOC, *Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiving Responsibilities*, No. 915.002 (2007), <http://www.eeoc.gov/policy/docs/caregiving.html#male> (providing examples of impermissible sex-role stereotyping of women as caregivers under Title VII).

of a fertilized egg and the process of carrying a pregnancy to term, through the point of childbirth.⁸⁸ Lactation's relation to pregnancy and childbirth is both direct and plain.

That not all women choose (or are able) to continue breastfeeding following childbirth, or that it is not, strictly speaking, “a medical necessity,”⁸⁹ is irrelevant to the determination as to whether discrimination based on lactation constitutes prohibited sex discrimination. It is true that continuation of breastfeeding (like pregnancy) is optional, and not all women do it. But that cannot disqualify it from being covered under Title VII. In enacting the PDA, Congress flatly rejected the theory that employers were permitted to deny employment opportunities to pregnant women based on the view that pregnancy was a “voluntarily undertaken and desired condition,” or because some women, along with men, were included within the category of “non-pregnant persons.”⁹⁰

Moreover, lactation results in a diagnosable, changed “medical condition,” requiring specific medical treatment, support, and intervention, just as pregnancy itself constitutes a diagnosable “medical condition.” The assumption that it is not is firmly rebutted by the unanimous position statements of the Nation's leading medical associations on the issue of breastfeeding – including the American Medical Association, the American Academy of Pediatricians, the American College of Obstetricians and Gynecologists, the American Association of Family Physicians, the American Public Health Association, and the Academy of Breastfeeding Medicine.⁹¹ These statements make clear that the provision of medical advice,

⁸⁸ See, e.g., Miriam Webster Online Dictionary, <http://www.merriam-webster.com/medlineplus/lactation> (last visited March 1, 2012) (defining lactation as “the secretion and yielding of milk by the mammary gland [or] one complete period of lactation extending from about the time of parturition to weaning”); *Webster's New World Medical Dictionary* 238 (3rd ed. 2008) (defining lactation as “[t]he process of milk production” and explaining that “[t]he hormone oxytocin is produced in response to the birth of a new baby, and it both stimulates uterine contractions and begins the lactation process”); *Stedman's Medical Dictionary* 221170 (27th ed. 2000) (defining lactation as the “[p]roduction of milk [or] the “[p]eriod following birth during which milk is secreted in the breasts”).

⁸⁹ *Wallace*, 951 F.2d 351(table), 1991 WL 270823, at *1.

⁹⁰ *Gilbert*, 429 U.S. at 136; see also *Hulteen*, 556 U.S. at ___, 129 S.Ct. at 1979 (Ginsburg, J., dissenting) (observing the “strange notion” advanced in *Gilbert* “that a benefits classification excluding some women (‘pregnant women’) is not sex-based because other women are among the favored class (‘nonpregnant persons’)” and noting its repudiation by Congress).

⁹¹ American Medical Association, Policy Position H.245.982 AMA Support for Breastfeeding, <https://ssl3.ama-assn.org/apps/ecommm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=%2fresources%2fdoc%2fPolicyFinder%2fpolicyfiles%2fHnE%2fH-245.982.HTM>; Am. Acad. of Pediatricians, *Breastfeeding and the Use of Human Milk*, *supra* note 66 (setting forth “principles to guide pediatricians and other health care professionals in assisting women and children in the initiation and maintenance of breastfeeding” and noting the “central role of the pediatrician in coordinating breastfeeding management”); Am. Coll. of Obstetricians and Gynecologists, Committee Opinion, *Breastfeeding, Maternal and Infant Aspects* (2003), <http://www.acog.org/~media/Committee%20Opinions/Committee%20on%20Health%20Care%20for%20Underserved%20Women/co361.pdf?dmc=1&ts=20120222T1344094073> (“The advice and encouragement of the obstetrician–gynecologist during preconception, prenatal, postpartum, and interconception care are critical in making the decision to breastfeed.”); Acad. of Breastfeeding Medicine, *Position on Breastfeeding* 267 (2008), http://www.bfmed.org/Media/Files/Documents/pdf/Statements/ABM_Position_on_Breastfeeding%20bfm.2008.998.8.pdf (2008) (emphasizing “the extent to which physicians play a central role in the promotion, protection, and support of breastfeeding” and that “breastfeeding and human lactation warrant serious, increased, and significant attention in medical training, practice, and research, given the substantial and longitudinal impact of breastfeeding on maternal, child, and societal health, as well as the influence healthcare policies and practices have on women's breastfeeding decisions and success in achieving their goals”); Am. Acad. of Family Physicians, *Policy Statement: Breastfeeding* (2007), <http://www.aafp.org/online/en/home/policy/policies/b/breastfeedingpolicy.html> (“Breastmilk offers medical and psychological benefits not available from human milk substitutes . . . Family physicians should

support, and treatment surrounding breastfeeding is a recommended and routine part of pre- and post-partum medical care. Breastfeeding is widely recognized as offering significant medical benefits to infants and their mothers, and is thus considered “an important preventative health measure.”⁹² Furthermore, breastfeeding may involve ancillary medical conditions requiring treatment, such as low breast milk supply, infection of the breast tissue (mastitis), pain, engorgement (swelling of the breasts), cracked nipples, decreased milk supply, and other sequelae—conditions that may be caused or exacerbated by being unable to fully empty the breasts or express breast milk on a regular schedule.⁹³

Cases relying on the reasoning of *Gilbert* were thus incorrectly decided, and should not control future decisions regarding the applicability of Title VII to breastfeeding.

Recommendation:

The Commission should issue Guidance clarifying that discrimination on the basis of lactation constitutes prohibited sex discrimination under Title VII as amended by the PDA.

B. The PDA Requires Employers to Honor Women’s Requests for Reasonable Job Modifications Needed to Express Breast Milk.

Workplace policies that subject employees to disadvantageous treatment based on a physiological, sex-linked condition such as pregnancy or lactation constitute prohibited sex discrimination.⁹⁴ Failure to extend job modifications related to pregnancy or childbirth, including lactation, would accordingly be prohibited if such modifications are extended to other employees that are similar in their ability or inability to work. Under the ADA, particularly following the 2008 amendments, a person with a restriction occasioned by an issue such as a temporary back injury or an episodic illness will now qualify for reasonable accommodation, which may include the need for additional break time or privacy. A failure to afford similar job modifications to lactating women would violate the terms of the Title VII, as amended by the PDA.

have the knowledge to promote, protect, and support breastfeeding.”); Am. Public Health Ass’n, *Call to Action on Breastfeeding*, *supra* note 65 (“[M]aintaining breastfeeding as the norm is seen as an important preventative health measure.”).

⁹² See Am. Pub. Health Ass’n, *Call to Action on Breastfeeding*, *supra* note 65; United States Department of Health and Human Services, Human Resources and Services Administration, Women’s Preventive Services: Required Health Plan Coverage Guidelines, <http://www.hrsa.gov/womensguidelines/> (noting that under Affordable Care Act, coverage will be provided for preventive healthcare services, including “[c]omprehensive lactation support and counseling, by a trained provider during pregnancy and/or in the postpartum period, and costs for renting breastfeeding equipment”).

⁹³ See Christine M. Betzold, *An Update on the Recognition and Management of Lactational Breast Inflammation*, 52 J. Midwifery Womens Health 595-605 (2007), available at http://www.medscape.com/viewarticle/565616_print.

⁹⁴ See *Newport News*, 462 U.S. at 670 (employer health insurance plan, which provided less extensive benefits for pregnancy-related conditions to spouses of male employees than to female employees discriminated against male employees in violation of Title VII, as amended by the Pregnancy Discrimination Act); *Johnson Controls*, 499 U.S. at 206, 211 (excluding women from certain factory jobs based on their “capacity to become pregnant” constituted prohibited sex discrimination and did not fall within BFOQ defense).

In order to address the continued barriers for women returning to paid employment following childbirth, Congress recently amended the FLSA to place an affirmative obligation on employers to provide reasonable break time and a private location (other than a bathroom) for eligible employees who need to use breast pumps on the job.⁹⁵ This provision, which represents yet another example of the U.S.'s strong public policy in the area of breastfeeding promotion, reflects Congress' view of what a reasonable job modification for lactation would look like. The Department of Labor recently elaborated on the meaning of this requirement for employers and workers.⁹⁶ Although the provision has already prompted some employers to adopt policies providing for lactation facilities and unpaid break time, it is limited in its scope: it does not cover employees who are exempt under FLSA, only applies for one year after the child's birth, and may limit the remedies available for private enforcement.⁹⁷ Guidance from the EEOC would therefore help ensure that employers understand their obligations under Title VII to afford reasonable requested job modifications for lactating women who need to express breast milk on the job.

Recommendation:

The Commission should clarify that failure to accommodate requests by a lactating employee for reasonable job modifications would constitute impermissible sex discrimination under Title VII.

Conclusion

Although Congress enacted the Pregnancy Discrimination Act's amendments to Title VII more than thirty years ago, workers continue to experience unequal job treatment because of pregnancy, childbirth, and other sex-linked conditions, such as breastfeeding, that were traditionally used to justify women's exclusion from equal employment opportunity. The PDA was intended to break the link between childbirth and exclusion from workforce opportunity, by requiring employers to treat those conditions like any other short-term disabling condition. Instead, however, many employers, with court approval, treat pregnant and lactating workers worse than other workers who require temporary job adjustments in order to stay on the job.

The Commission should issue updated Guidance closing any perceived loopholes in the PDA's equal treatment mandate. It should remind employers and courts that, after congressional repudiation of the *Gilbert* decision, workplaces must grant pregnant and breastfeeding workers the same kinds of accommodations that employers have become accustomed to granting, with minimal disruption to business, to disabled employees and those injured on the job. Moreover, the Commission should ensure that employer policies do not discriminate against workers who exercise their rights under the FMLA.

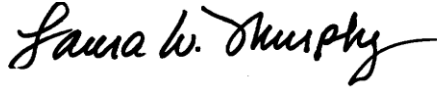
⁹⁵ See Patient Protection and Affordable Care Act, Public Law 111-148 (2010) (codified as amended at 29 U.S.C. 207(r)).

⁹⁶ See United States Department of Labor, Wage and Hour Division, Request for Information from the Public, *Reasonable Break Time for Nursing Mothers*, 75 Fed. Reg. 80073 (Dec. 21, 2010).

⁹⁷ See 29 U.S.C. § 216(b).

The ACLU appreciates this opportunity to give the Commission input on these important issues. Please contact Sarah Lipton-Lubet, slipton-lubet@dcaclu.org (202-675-2334) with any questions.

Sincerely,



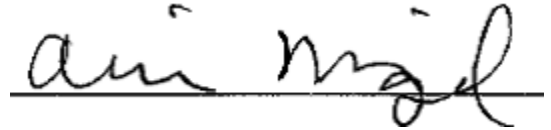
Laura W. Murphy
Director
Washington Legislative Office



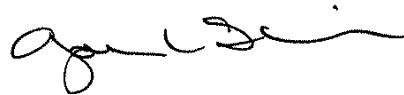
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