IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NO.: 18-14687-A

KIMBERLIE MICHELLE DURHAM,

PLAINTIFF-APPELLANT,

v.

RURAL/METRO CORPORATION,

DEFENDANT-APPELLEE.

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

REPLY BRIEF OF APPELLANT

COUNSEL FOR APPELLANT:

Heather Newsom Leonard
HEATHER LEONARD, PC
2105 Devereux Circle, Ste. 111
Birmingham, AL 35243

Randall C. Marshall
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106-0179

Gillian Thomas*
Lenora M. Lapidus*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
WOMEN'S RIGHTS PROJECT
125 Broad Street
New York, NY 10004

**Appearing Pro Hac Vice*

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In its opposition brief, Rural/Metro asks this Court to ignore the Supreme Court's decision in *Young v. United Parcel Service, Inc.*, and hold that employees with occupational injuries are *per se* not "similar in their ability or inability to work" to pregnant employees. *Young* expressly rejected such bright-line rules.

Rural/Metro further asks the Court to conclude that the District Court correctly granted it summary judgment because Durham has not proven pretext, even though the court did not conduct a pretext analysis. And Rural/Metro supports this (unsupportable) contention by ignoring the pretext standard announced in *Young* – namely, is the employer's reason for denying accommodation to the pregnant worker "sufficiently strong" to justify the resulting burden on her?

Each of the legal standards urged by Rural/Metro are simply wrong. But even if they were not, Rural/Metro cannot argue away the fact that the factual record in this case is virtually devoid of the necessary proof to credit Rural/Metro's stated reasons for denying Durham an accommodation.

For all of these reasons, this Court should reverse the decision of the District Court and remand the case for trial.

I. THE DISTRICT COURT IGNORED *YOUNG* IN CONCLUDING THAT WORKERS INJURED ON THE JOB ARE *PER SE* NOT "SIMILAR IN THEIR ABILITY OR INABILITY TO WORK" TO PREGNANT WORKERS AND IN FAILING TO EXAMINE WHETHER RURAL/METRO HAD A "SUFFICIENTLY STRONG" REASON FOR NOT ACCOMMODATING PREGNANT WORKERS

A. After *Young*, the *prima facie* case is satisfied where an employer accommodates others "similar in their ability or inability to work."

It is undisputed that Rural/Metro grants accommodations to two categories of workers: those injured on the job and those who "become[ ] unable to perform some or all of their job functions due to a medical condition." (Appellee Br. at 2.) With that admission, the *prima facie* analysis of Durham's claim is complete. *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338, 1354 (2015) ("[A] plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act's second clause may make out a prima facie case by showing, as in *McDonnell Douglas*, that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'").

The District Court ignored that directive, and instead applied the same circular logic that *Young* expressly rejected – namely, that because pregnant

EMTs do not need light duty because of an occupational injury, they are not "similar" to those EMTs who do.[1]

Rural/Metro asks this Court to approve this categorical distinction, contending that the District Court was correct in finding that granting pregnant workers the same benefits accorded EMTs with on-the-job injuries amounts to granting preferential, "most-favored-nation" status among the universe of EMTs needing accommodation, a status that, it argues, *Young* rejected. (Appellee Br. at 15; Doc. 55 at 11.)

This is a straw man. The majority in *Young* described the "most-favored-nation" rule, which it ultimately disapproved, as follows:

> As long as an employer provides one or two workers with an accommodation – say, those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked at the company for many years, or those who are over the age of 55 – then it must provide similar accommodations to *all* pregnant workers (with comparable physical limitations), irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria.

135 S. Ct. at 1349-50. After finding that Congress did not intend the PDA to grant an "*unconditional* most-favored-nation" status, *id.* at 1350 (emphasis added), the Justices went on to find that the PDA itself *does* demand heightened analysis of an employer policy that disfavors pregnant workers.

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[1] The District Court compounded its error by failing to acknowledge Rural/Metro's policy of accommodating the second category of workers, which includes EMTs who have injuries and medical conditions incurred off the job.

It noted that Congress could have drafted a statute that consisted merely of the PDA's first clause – that is, that Title VII's prohibition on discrimination "because of sex" includes discrimination "because of pregnancy." *Id.* at 1352 (quoting 42 U.S.C. § 2000e(k)). But, the Court observed, Congress went further than that, adding the second clause mandating that employers treat pregnant workers, for all employment-related purposes (including fringe benefits), "the same as others . . . similar in their ability or inability to work." 42 U.S.C. § 2000e(k).[2]

Applying this directive, the *Young* majority went on to expressly disapprove the very logic urged here by Rural/Metro (the same logic, notably, that was urged by the dissenting Supreme Court justices in *Young*):

> The dissent says that "[i]f a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she *has* been 'treated the same' as everyone else." This logic would have found no problem with the employer plan in *Gilbert*, which "denied an accommodation" to pregnant women on the same basis as it denied accommodations to other employees – *i.e.*, it accommodated only sicknesses and accidents, and pregnancy was neither of those. In arguing to the contrary, the dissent's discussion of *Gilbert* relies exclusively on the opinions of the dissenting Justices in that case. But Congress' intent in passing the Act was to overrule the *Gilbert majority* opinion, which viewed the

[2] The *Young* Court reiterated that the second clause reflected Congress's "unambiguou[s]" intent to repudiate the holding a few years earlier in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), which had approved a temporary disability policy that covered workers unable to work due to a wide range of illnesses and injuries, but not pregnancy. *Young*, 135 S. Ct. at 1353 (quoting *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983)).

> employer's disability plan as denying coverage to pregnant employees on a neutral basis.

135 S. Ct. at 1355 (internal citations omitted) (emphasis in original).

Accordingly, the *Young* Court found that UPS's policy of accommodating three categories of workers – but not pregnant workers – satisfied the fourth prong of the new *prima facie* test it had outlined: "[T]he employer did accommodate others 'similar in their ability or inability to work.'" *Id.* at 1354.[3]

Rural/Metro attempts to distinguish *Young* because, it claims, UPS "effectively provid[ed] accommodations to nearly all employees with physical restrictions, including those injured off-the-job, *except* for those who were pregnant." (Appellee Br. at 13) (citation omitted) (emphasis in original). But that is evidence that the Supreme Court expressly relegated to the *pretext* phase of the analysis, not the *prima facie* phase. *Young*, 135 S. Ct. at 1354-55.[4] (And as discussed further below, the numerosity of the

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[3] The Court further emphasized that this showing is "not onerous" and that the favored workers need not be similar in "all but the protected ways" to warrant comparison. 135 S. Ct. at 1354.

[4] As the Court explained:

> The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. . . . [The plaintiff] might also add that the fact that [the employer] has multiple policies that accommodate nonpregnant employees with lifting restrictions

nonpregnant employees whom UPS's policy favored simply makes it an *extreme* example of a policy raising an inference of pretext, not the *only* example.) Indeed, this Court in *Hicks v. Tuscaloosa*, 870 F.3d 1253 (11th Cir. 2017) – which Rural/Metro conspicuously does not cite – had no difficulty concluding that a police officer denied "alternative duty" as an accommodation of her need to pump breast milk satisfied *Young* by showing that officers with temporary injuries received such assignments. *Id.* at 1261 ("[The plaintiff] was not asking for a *special* accommodation, or more than equal treatment – she was asking to be treated the same as 'other persons not so affected but similar in their ability or inability to work' as required by the PDA.") (internal citation omitted). *See also Legg v. Ulster Cty.*, 820 F.3d 67, 74 (2d Cir. 2016) (plaintiff jail guard satisfied *prima facie* case where employer had policy granting light duty to guards with occupational injuries)[5]; *Elease S., Complainant*, EEOC DOC 0120140731, 2017 WL

> suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong – to the point that a jury could find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.

135 S. Ct. at 1354-55.

[5] Rural/Metro mixes apples and oranges in discussing *Legg*, arguing that it "is distinguishable because it found significant inconsistencies in the employer's proffered reasons for its employment decisions, leading the court to conclude that a jury might find the explanation pretextual." (Appellee Br. at 21 n.5.) But Rural/Metro fails to distinguish *Legg* as to its holding *about the prima facie case* – nor can it:

6941010, at *5 (Dec. 27, 2017) (pregnant mail carrier at risk of miscarriage denied temporary reassignment to desk work satisfied fourth prong of *prima facie* case where she presented evidence that her employer accommodated letter carriers who had been injured on the job).[6]

> Legg has . . . established a *prima facie* case of discrimination under *Young.* She sought a light duty accommodation while pregnant. The County did not accommodate her. And, as a matter of policy, the County provided light duty accommodations to other employees who were similar in their ability or inability to work, namely, those who were unable to perform non-light-duty tasks as a result of injuries incurred on-duty. These facts are enough, if left unexplained, for a reasonable jury to conclude that it is more likely than not that the policy was motivated by a discriminatory intent.

820 F.3d at 74.

[6] Rural/Metro asks this Court to ignore the significance of *Young*'s statement that it granted *certiorari* to resolve "lower-court uncertainty about interpretation of the [PDA]," followed by a string cite of five appellate rulings. *Young*, 135 S. Ct. at 1348 (collecting cases). (Appellee Br. at 20 ("Given the wide variety of analyses and rationales deployed in the cited cases and the Court's statement regarding "uncertainty," the more reasonable conclusion is that *Young* does not overrule the outcome of these cases, but instead provides a modified framework of analysis.")).

Putting aside that Rural/Metro does not even advocate for a "modified framework of analysis" here – and instead, simply asks this Court to approve the pre-*Young* reasoning and precedent relied upon by the District Court – Rural/Metro's attempt to read *Young*'s string cite in this way is disingenuous in the extreme. *All* of the rulings cited by *Young* considered an employer's denial of accommodations to a pregnant worker because it reserved such benefits, like Rural/Metro does, for employees injured on the job, and further, all but one of those rulings *approved* the employer's refusal for precisely the reason that Rural/Metro urges here. *Compare Serednyj v. Beverly Healthcare LLC*, 656 F.3d 540, 548 (7th Cir. 2011) (employer's policy of accommodating only workers with on-the-job injuries and ADA-qualifying disabilities valid under the PDA because they are "pregnancy-blind"); *Reeves v. Swift Transp. Co., Inc.*, 446 F.3d 637, 641 (6th Cir. 2006) (after assuming without deciding that policy reserving light duty for workers injured on the job satisfied the *prima facie* test, affirming summary judgment where no circumstantial evidence of pregnancy bias because the policy was neutral and "pregnancy-blind"); *Spivey v. Beverly Enters., Inc.*, 196 F.3d 1309, 1313 (11th Cir. 1999)

For all of the foregoing reasons, it was clear error for the District Court to find that workers with on-the-job injuries are *per se* not "similar in their ability or inability to work" to pregnant employees.

B. After *Young*, the pretext analysis must examine whether an employer's stated reason for denying accommodation for a pregnant worker must be "sufficiently strong" to justify the burden on the pregnant worker.

In addition to announcing a revised *prima facie* test for pregnancy accommodation claims, the Supreme Court in *Young* outlined a modified pretext standard:

> [T]he plaintiff may reach a jury . . . by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" reasons are not sufficiently strong to justify the burden, but rather – when considered along

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(where employer reserved "modified duty" for workers injured on the job, plaintiff failed to satisfy *prima facie* case; "[The employer] . . . was under no obligation to extend this accommodation to pregnant employees. The PDA does not require that employers give preferential treatment to pregnant employees."); *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204, 208 (5th Cir. 1998) (plaintiff challenging policy reserving light duty for workers with occupational injuries failed to satisfy fourth prong of prima facie test; "There is no probative evidence that Continental's distinction between occupational and off-the-job injuries was a pretext for discrimination against pregnant women or that it had a disparate impact on them. Urbano's claim is thus not a request for relief from discrimination, but rather a demand for preferential treatment; it is a demand not satisfied by the PDA.") *with Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (where employer policy reserved full-time limited duty work for employees injured on the job, fourth prong of *prima facie* case satisfied).

The *Young* Court clearly rejected the reasoning of these cases. The Fifth Circuit recognized as much with respect to its decision in *Urbano*. *See Luke v. CPlace Forest Park SNF, LLC*, 608 Fed. App'x. 246 (5th Cir. 2015) (recognizing that *Urbano* was abrogated by *Young*). In sum, *Young* poses a direct rebuke to Rural/Metro's contention that Durham asks for "preferential treatment" of pregnancy, and that reasoning should be rejected.

> with the burden imposed – give rise to an inference of intentional discrimination.

135 S. Ct. at 1354. The Court emphasized that this was a high bar for the employer, and "normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those ('similar in their ability or inability to work') whom the employer accommodates." *Id.* at 1354.

The District Court in this case did not conduct any of this analysis. Instead, the court granted summary judgment to Rural/Metro solely on its (erroneous) conclusion that Durham "[could not] establish a genuine dispute as to whether [Rural/Metro] provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from hers." (Doc. 55 at 10-11 (citing *Young*, 135 S. Ct. at 1355).)[7] This reason alone warrants reversal.

Rural/Metro asks this Court to disregard this error and conduct the pretext analysis itself, and to conclude that Durham has failed to raise an inference of discrimination. Yet it asks for this outcome without even attempting to meet the "sufficiently strong" requirement of *Young*. Nowhere in its brief does it justify its failure to extend its Transitional Work Program

[7] It must be noted that the language cited here by the District Court is drawn from *Young*'s discussion about whether the employee there had satisfied the *prima facie case*, not whether she had created a question of fact as to *pretext*.

for workers with occupational injuries to cover pregnant employees, aside from repeating the logical fallacy that pregnant workers are not eligible for that program because they have not been injured at work. (Appellee Br. at 27 ("[I]t is undisputed that Durham was not provided with the specific type of light-duty assignment described in the Transitional Work Program *because* that policy only applied to individuals with on-the-job injuries.") (Emphasis in original.))[8]

Nevertheless, Rural/Metro insists that Durham cannot raise an inference of discrimination because "[her] evidence that [Rural/Metro] could not provide her with the specific type of accommodation it provided to three employees with work-related injuries who were subject to a different employment policy 'pales in comparison' to the 'overwhelming' evidence in *Young* that the employer accommodated 'seven separate classes of non-

[8] As to Rural/Metro's second policy of accommodating workers with temporary medical restrictions, it claims not to have been able to do so for Durham because there were no vacant positions into which it could transfer her. (Appellee Br. at 37.) As discussed in Durham's opening brief, Durham disputes these facts, making summary judgment on this question inappropriate. (Appellant Br. at 13 (and record evidence cited therein.)). Moreover, as outlined in Section II, *infra*, Rural/Metro can put forward virtually no admissible evidence supporting its representations about the availability of alternative work, given its lack of knowledgeable witnesses or surviving documentary proof. (*See also* Appellant Br. at 25-27.) Similarly, Rural/Metro states that it did not have a practice of creating "new position[s]" for any "injured or disabled employee, regardless of how the injury occurred." (Appellee Br. at 38.) This assertion also conflicts with the record evidence, however. (Appellant Br. at 25 n.11 & 25-26 (and record evidence cited therein).)

pregnant employees.'"[9] (Appellee Br. at 31, quoting *Lewis v. City of Union City, Georgia*, 2019 WL 1285058, at *5-6, 11 (11th Cir. Mar. 21, 2019).)[10]

But Durham has not merely put forward "three employees with work-related injuries." She has identified two formal policies affording accommodations, one of which categorically disqualifies pregnant workers. While the UPS policies at issue in *Young* covered an exceptionally large swath of the workforce, nothing in *Young* remotely suggests that only comparably broad policies will violate the PDA. That certainly was not the conclusion reached by this Court in *Hicks*, where it upheld a jury verdict finding sufficient basis for a constructive discharge verdict where "[the plaintiff] showed that other employees with temporary injuries were given 'alternative duty,' and she merely requested to be granted the same alternative duty." *Hicks*, 870 F.3d at 1261. *See also Legg*, 820 F.3d at 75-56 (under *Young*, jail policy limiting light duty to guards with occupational

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[9] The court calculated this number by reference to the formal accommodation policy – which covered employees injured on the job, employees protected by the Americans with Disabilities Act, and those who had lost their commercial drivers' licenses – and evidence of other categories of individuals to whom UPS had granted accommodations on an *ad hoc* basis. *Lewis v. City of Union City, Georgia*, 918 F.3d 1213, 1228 n.14 (11th Cir. 2019) (*en banc*).

[10] This dicta from *Lewis* does not compel a different conclusion in this case. *Lewis* concerned the question of appropriate comparators in a Title VII race and gender claim, not a PDA accommodation claim. Under the PDA, this Court acknowledged, "the comparator analysis . . . focuses on a single criterion – one's ability to do the job." *Lewis*, 918 F.3d at 1228 n.14.

injuries while "categorically" denying it to pregnant guards sufficient to create a question of pretext for the jury; "Although it is unclear from the record whether the County accommodated a large percentage of non-pregnant employees in practice, they at least were eligible. By contrast, as one would expect, the County failed to accommodate 100% of its pregnant employees. This disparity counsels in favor of a finding that the policy imposed a significant burden on pregnant employees.")[11]; *Elease S., Complainant*, 2017 WL 6941010, at *6 ("An employer's statement, policy, or practice that it will accommodate those injured on the job with light duty, but not those with medical restrictions arising from pregnancy, must be examined further as possible pretext for discrimination. Narrow accommodation policies that exclude employees who need accommodation because of pregnancy may constitute disparate impact discrimination, as well as disparate treatment discrimination.").

In sum, reversal is warranted because the District Court never even stated what it understood to be Rural/Metro's putative reason for refusing to extend its light duty policy to include pregnant EMTs, let alone analyzed

[11] As noted *supra*, Rural/Metro attempts to distinguish *Legg* on the grounds that the employer gave shifting reasons for refusing to accommodate the plaintiff. (Appellee Br. at 21 n.5. (citing *Legg*, 820 F.3d at 75).) But Rural/Metro misreads the decision. The Second Circuit found the employer's inconsistent explanations provided merely an *alternative* basis for finding summary judgment inappropriate, explaining that *Young*'s modified pretext analysis did not displace traditional methods of providing pretext. *Legg*, 820 F.3d at 75.

whether that reason was "sufficiently strong" to justify the burden on Durham, who was forced to forgo a paycheck for the duration of her pregnancy. Even if this Court decides to pursue that analysis *sua sponte*, however, Rural/Metro has not even come close to carrying its burden under *Young*.

As outlined below, Rural/Metro also has not put forward sufficient admissible evidence to allow this Court to credit Rural/Metro's stated reasons for denying Durham accommodation. This failure provides still further grounds for this Court to reverse and remand to the District Court.

II. THE DISTRICT COURT IGNORED RURAL/METRO'S FAILURE TO PUT FORWARD SUFFICIENT ADMISSIBLE EVIDENCE TO CREDIT ITS REASONS FOR DENYING DURHAM ACCOMMODATION

As outlined *supra*, the District Court ruled that Durham had not created a material question of fact for trial without conducting the correct post-*Young* pretext analysis. But it also failed in numerous respects to credit Durham's proffered evidence while ignoring the flimsy admissible evidence put forward by Rural/Metro. Should this Court decide to conduct its own pretext analysis, it should find that Durham has more than carried her burden of creating a material question of fact as to the legitimacy of Rural/Metro's stated reasons for denying her accommodation.

First, the District Court erred by deviating from the standard required by Rule 56 of the Federal Rules of Civil Procedure because it did not "draw all reasonable inferences in favor of the nonmoving party," and further, improperly made credibility determinations and weighed the evidence. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150 (2000) (citations omitted).

Accordingly, *Reeves* directs that in viewing the record as a whole, a district court "must disregard all evidence favorable to the moving party that the jury is not required to believe," and instead "should give credence to the evidence favoring the nonmovant as well as that 'evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that that evidence comes from disinterested witnesses.'" *Id.* at 151 (citations omitted). This language is critical because the District Court based its few factual determinations on evidence from witnesses whose interests were aligned with Rural/Metro and relied on their assertions, which a jury is not required to believe.

Furthermore, because Rural/Metro could put forward no virtually no first-hand evidence justifying its two stated reasons for denying Durham accommodation – *i.e.*, because it reserved light duty for EMTs with occupational injuries and because it had no other positions into which

Durham could move pursuant to its policy covering workers with medical limitations – the District Court erred in assuming Rural/Metro had carried its burden as required by *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254-56 (1981). *Accord Increase Minority Participation by Affirmative Change Today of Northwest Florida, Inc. (IMPACT) v. Firestone*, 893 F.2d 1189, 1192-94 (11th Cir. 1990).

In *IMPACT* this Court clarified that a statement by the employer's personnel director of its general practices in handling the type of decision being challenged would not satisfy *Burdine*. 893 F.2d at 1194. This Court observed the employer's shortcoming in carrying its burden, noting that the employer did not "offer proof by any person who made the employment decision" that the promotion decision was made on the basis of qualifications. *Id*. *See also Voudy v. Sheriff of Broward Cty. Fla*., 701 Fed. App'x. 865, 870-71 (11th Cir. 2017) (a court "cannot hypothesize the employer's reasons and then use that speculation to find that the employer carried its burden of articulating a 'clear and reasonably specific non-discriminatory basis for its actions'");[12] *Turnes v. AmSOUTH BANK, NA*, 36

[12] In *Voudy*, this Court examined a Title VII failure to promote claim. The decisionmaker for the promotions testified he could not recall the reasons why he made the decisions, "explaining that it is difficult to remember why any individual promotion decision was made because so many promotions . . . are determined around the same time." *Voudy*, 701 Fed. App'x at 867. This Court concluded that the employer failed to

F.3d 1057, 1061 (11th Cir. 1994) ("[A]lthough it is true that the employer need not *prove* it was actually motivated by the proffered reason. *Burdine* clearly does not relieve the employer from *producing* a reason that was available to it at the time of the decision's making. Moreover, this Court has squarely held that an employer may not satisfy its burden of production by offering a justification which the employer either did not know or did not consider at the time the decision was made.") (Emphasis in original).

Rural/Metro seeks to distinguish all of the foregoing precedent by claiming that, in contrast to the employers in those cases, its reasons for denying an accommodation to Durham are not "hypothetical." (Appellee Br. at 28 & n.8.). But just as in *IMPACT*, *Voudy*, and *Turnes*, Rural/Metro does not offer any testimony from anyone who was or could have been involved in the decisions affecting Durham – making its present arguments, and those to the District Court, the very definition of "hypothetical."

For instance, Rural/Metro's corporate representative could not explain why the company's accommodation policy made a distinction between lifting restrictions arising from a pregnancy as opposed to an on-the-job injury. (Doc. 42-2, at 53:25-54:08.) Requiring this Court to engage in pure

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carry its burden or rebutting the employee's *prima facie* case because no decisionmaker could identify a reason for the promotions. *Id.* at 870-81.

speculation about that reason is not sufficient under *Burdine* and its progeny, let alone sufficient to carry the burden under *Young* of providing a "sufficiently strong" reason for the policy distinction. Moreover, the testimony of Minda Corbeil, Mike Crowell, and Jennifer Harmon disclaiming any of the decisions challenged in this action (Doc. 42-3, at 37:19-38:14, 51:09-51:22; Doc. 42-4, at 24:2-12; Doc. 43-1 ¶ 3), leaves this Court with no admissible facts on which to determine that Rural/Metro's refusal to accommodate Durham was based on permissible factors, rather than impermissible motivations.

Rural/Metro further relies on conclusory assertions to maintain that it looked for open positions in which it could place Durham but found none.[13] This contention is disputed by Durham's testimony she saw vacant dispatch positions posted (Doc. 43-2 ¶ 3) and Crowell's testimony that irrespective of whether a dispatch position was vacant at the time of Durham's request, he could have created one for her, and that he informed Corbeil of that fact but Corbeil told him not to. (Doc. 42-3, at 37:19-39:15; Doc. 43-10.). Crowell further testified that Rural/Metro created job assignments to accommodate

[13] There is no evidence Rural/Metro made any effort to see if there were vacant positions which Durham could fill at the time she made her request. The only evidence of any inquiry into job vacancies came after Durham's lawyer wrote Rural/Metro, and Corbeil emailed Crowell in anticipation of litigation and inquired as to whether there were currently any vacancies.

EMTs with lifting restrictions arising from on-the-job injuries. (Doc. 42-3, 28:01-29:22.)

Under well-settled Rule 56 standards, a reasonable inference from these facts is that Rural/Metro could have accommodated Durham's lifting restrictions by opening the Transitional Work Program to her or by temporarily assigning her to a different job, but chose not to do so because the restrictions arose from her pregnancy.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and remanded for further proceedings.

Respectfully submitted,

/s/ Gillian Thomas
Gillian Thomas*
Lenora M. Lapidus*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
WOMEN'S RIGHTS PROJECT
125 Broad Street
New York, NY 10004

Heather Newsom Leonard
HEATHER LEONARD, P.C.
2105 Devereux Circle, Suite 111
Birmingham, AL 35243
(205) 977-5421 - voice
(205) 278-1400 - facsimile
Heather@HeatherLeonardPC.com

Randall C. Marshall
AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106-0179

Counsel for Plaintiff-Appellant

**Appearing Pro Hac Vice*

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

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 4,577 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-counting feature of Microsoft Office 2010.

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

Dated: April 15, 2019

/s/ Gillian Thomas
OF COUNSEL

CERTIFICATE OF SERVICE

I hereby certify that on **April 15, 2019,** I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

Tammy C. Woolley
CONSTANGY BROOKS SMITH & PROPHETE, LLP
Two Chase Corporate Drive
Suite 120
Birmingham, AL 35244

Kacy L. Coble
CONSTANGY BROOKS SMITH & PROPHETE, LLP
100 Peabody Place, Suite 1165
Memphis, TN 38103

Steven W. Moore
CONSTANGY BROOKS SMITH & PROPHETE, LLP
600 17th Street, Suite 2700-S
Denver, CO 80202

Heidi K. Wilbur
CONSTANGY BROOKS SMITH & PROPHETE, LLP
600 17th Street, Suite 2700-S
Denver, CO 80202

/s/ Gillian Thomas
OF COUNSEL