MEDICAL CONDITION OR CHILDCARE CHOICE? BREASTFEEDING AND LACTATION DISCRIMINATION AFTER YOUNG V. UPS

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ABSTRACT

Women returning to work after giving birth, and who wish to breastfeed their child often need modest adjustments to their job or workplace that allow them to pump breast milk at work, such as break time and a clean, private room. But what if an employer denies this request or fires a woman for asking? The federal Pregnancy Discrimination Act ("PDA") prohibits employers from discriminating against workers based on their pregnancy, childbirth, or "related medical conditions." Under the PDA, as interpreted by the Supreme Court in Young v. UPS*, employers must grant pregnant workers accommodations only if they grant similar accommodations to non-pregnant workers, such as workers suffering from off-the-job injuries. This means a pregnant worker who is unable to prove that her employer accommodates non-pregnant or non-pumping workers is not entitled to an accommodation under the PDA. In addition, many courts have found that breastfeeding and lactation are not "medical conditions" related to pregnancy and thus not protected under the PDA at all. This narrow view of the PDA has resulted in continued barriers to fair and equal treatment of women in the workplace, forcing mothers to choose between breastfeeding and keeping their job.*

In recent years, some federal courts have rejected the limited reading of the PDA that excludes lactation claims, indicating a movement toward a more inclusive and progressive judicial standard. In addition, a patchwork of local, state, and federal laws has sprung up to fill the gaps in protections for pumping workers. But these laws do not go far enough. Federal law, in the form of the 2010 ACA amendment to the Fair Labor Standards Act, is a step in the right direction but lacks a clear enforcement mechanism. Local and state accommodation laws provide useful frameworks for how a clear federal standard might look but leave out workers in nearly two-thirds of states. This Article argues and proposes suggestions for a robust federal Pregnant Worker's Fairness Act that would require all employers to grant workers reasonable accommodations related to pregnancy, childbirth, lactation, and other related conditions.

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I. INTRODUCTION

If an employee who has recently given birth wishes to pump breast milk at work, does her employer have to accommodate her request? Legally speaking, the answer is far from clear. A bevy of federal and state statutes, federal courts, and legal scholars have offered widely variant answers. The enactment of the Pregnancy Discrimination Act ("PDA") forty years ago did not resolve the question either.[1] The PDA defines one form of sex discrimination as discrimination "because of or on the basis of pregnancy, childbirth, or related medical conditions."[2] Whether lactation and breastfeeding are "related medical conditions" of pregnancy is undefined by the statute, and courts have taken divergent stances when answering this question.[3]

Scientifically speaking, lactation is a byproduct of biological pregnancy and the choice to breastfeed stimulates the continued production of milk.[4] Despite this straightforward biological explanation, the relationship between this process and pregnancy has boggled courts for some time. While some courts have treated the connection as too obvious to state, others have dismissed claims of lactation discrimination as outside the purview of the PDA's protections.[5] This has resulted in inconsistent federal circuit court decisions, conflicting lower federal court decisions, and a patchwork of state and federal standards attempting to bridge the gap.[6]

This inconsistency places working mothers in a precarious position. While federal antidiscrimination law decries the unequal treatment of women in the workplace, the lack of clear guidelines on lactation discrimination sends a contradictory message. Unsure whether they will be supported by employers or courts, women may be hesitant to ask for space and time to express milk when they return to work, or in legal terms, an "accommodation."[7] Those who ask for

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

2. 42 U.S.C. § 2000e(k).

3. *See* discussion *infra* Part III.B

4. *See* Carol L. Wagner, *Human Milk and Lactation*, WEBMD MEDSCAPE (Feb. 2, 2015), http://emedicine.medscape.com/article/1835675-overview#a6 [https://perma.cc/R4NW-RT4T] (explaining that the ability to secrete milk, or lactogenesis, begins during pregnancy); WORLD HEALTH ORG., INFANT AND YOUNG CHILD FEEDING: MODEL CHAPTER FOR TEXTBOOKS FOR MEDICAL STUDENTS AND ALLIED HEALTH PROFESSIONALS 11 (2009) https://www.ncbi.nlm.nih.gov/books/NBK148965/pdf/Bookshelf_NBK148965.pdf [https://perma.cc/PX9U-XZB4] (noting that during the first few weeks after birth, the more a baby breastfeeds, the more breast milk is produced, and if the mother stops breastfeeding, milk secretion may stop).

5. See *infra* Parts III.B.1–2 for a discussion of court opinions finding lactation and breastfeeding to be outside the PDA's scope.

6. *See* discussion *infra* Parts III–V.

7. An accommodation, legally speaking, is an adjustment to a job or workplace that allows a qualified individual to perform the essential functions of their job. *See Accommodations*, OFFICE OF DISABILITY EMP'T. POLICY, U.S. DEP'T OF LABOR, https://www.dol.gov/odep/topics/Accommodations.htm [https://perma.cc/6FV4-CSS2]. For example, an accommodation for someone

and are denied accommodations to pump in the workplace, and who do not want or cannot afford to take extended time off work to breastfeed, may be forced to forego breastfeeding altogether.[8] On the other hand, women who persist in pumping at work may be forced to do so in unsafe and unsanitary conditions.[9] Women who are fired for expressing milk at work may be unable to seek a legal remedy, as they face a patchwork of state laws and a divided federal court system with different notions of what constitutes sex discrimination under the PDA.[10]

Given the lack of clarity on workplace pumping protections, new moms might prefer to avoid this dilemma altogether by taking time off from work to breastfeed at home. However, this option is out of reach for many American workers: while a majority of U.S. mothers work outside the home, and moms are the primary breadwinner for 40 percent of American families,[11] the United States remains one of only two countries in the world with no national paid maternity leave.[12] As a

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who is reliant on a wheelchair might be the installation of a ramp; for someone who is hearing-impaired, an accommodation might involve providing sign language interpreters. *Id*.

Throughout this Article, I use the terms "lactation accommodation" and "pumping accommodation" interchangeably to refer to changes on the job that allow workers to pump breast milk at work in order to continue the production of breast milk. This is distinct from "breastfeeding accommodations" which I use to refer to accommodations for workers to breastfeed their child at home—typically consisting of an extended period of absence from work. This distinction was blurred by courts first addressing discrimination claims, leading to a body of case law that often grouped breastfeeding and lactation claims together and failed to differentiate between the types of accommodations sought. *See infra* Part III.B.1.

8. In medical studies of breastfeeding rates and duration, working women attribute early cessation of breastfeeding to unsupportive work environments, lack of privacy, and inadequate time to express breast milk at work. *See* Lindsey Murtagh & Anthony D. Moulton, *Working Mothers, Breastfeeding, and the Law*, 101, AM. J. PUB. HEALTH 217, 218 (2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3020209/pdf/217.pdf [https://perma.cc/RBM3-GDWH].

For a discussion of the medical benefits of breastfeeding, see *infra* note 102 and accompanying text. I want to emphasize that it is not my intention to disparage those who choose *not* to breastfeed, and I do not mean to encourage breastfeeding as the only legitimate choice. Rather, this Article aims to explore the legal recourse for those who wish to breastfeed and pump in the workplace but are prevented from or fired for doing so.

9. *See* Dave Jamieson, *Dirty Bathrooms, No Privacy: The Horrifying Struggles of Breastfeeding Moms Who Need to Pump at Work*, HUFFINGTON POST (July 29, 2014, 7:35 AM), http://www.huffingtonpost.com/2014/07/24/breastfeeding-pumping-at-work_n_5610554.html [https://perma.cc/84LK-QMS5] (finding, through a FOIA request for investigations into nursing-mother complaints, that many women were forced to pump milk in bathrooms or in unlocked, non-private spaces).

10. *See* discussion *infra* Part III & IV.

11. *See* Gretchen Livingston & Kristen Bialik, *7 Facts About U.S. Moms*, PEW RESEARCH CTR. (May 10, 2018), http://www.pewresearch.org/fact-tank/2017/05/11/6-facts-about-u-s-mothers [https://perma.cc/7AJU-W6C9]. In 2015, 70% of mothers of children under age 18 were in the labor force in 2014. *Id*.; *see also* Mark DeWolf, *12 Stats About Working Women*, U.S. DEP'T OF LABOR BLOG (Mar. 1, 2017), https://blog.dol.gov/2017/03/01/12-stats-about-working-women [https://perma.cc/UXL7-MFDV] (noting that mothers today are the primary or sole earners for 40% of households with children under 18, compared with 11% in 1960).

12. *See* INT'L LABOUR ORG., MATERNITY AND PATERNITY AT WORK: LAW AND PRACTICE ACROSS THE WORLD 16 (2014), http://www.ilo.org/wcmsp5/groups/public/—-dgreports/—-dcomm/—-publ/documents/publication/wcms_242615.pdf [https://perma.cc/3KNJ-QCT7] (noting that of the 185 countries and territories with available information, only the United States and Papua New

result, aside from a handful of states that have passed paid family leave laws of their own[13], the vast majority of American workers have no access to paid time off when they are pregnant or after they welcome a new child.[14] The only federal law in this area is the Family and Medical Leave Act ("FMLA"), passed a quarter-century ago, which guarantees covered workers the right to unpaid, job-protected time away from work when they welcome a new child.[15] Due to the law's strict eligibility requirements, over 40% of American workers are not covered.[16] Even among FMLA-eligible workers, many forego needed time off because they cannot afford to forego a paycheck for twelve weeks.[17] For many American workers, taking time away from work after having a new child is a luxury they cannot afford, particularly during a time when they are most in need of a paycheck.[18] This

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Guinea provide no national paid maternity leave).

13. California, New Jersey, New York, and Rhode Island have all passed family leave laws. CAL. UNEMP. INS. CODE § 2601 (West 2014); N.J. STAT. ANN. § 43-21-27(o); N.Y. WORKERS' COMP. LAW § 204 (LexisNexis 2018); 28 R.I. GEN. LAWS § 28-39-1 (2003). Washington State and Washington, D.C. have also passed paid family leave laws, both set to take effect in 2020. D.C. CODE ANN. §§ 32-541.01 to .06 (West 2018); S. 5975, 65th Leg., 3d Spec. Sess. (Wash. 2017). Massachusetts is the most recent state to pass a paid family and medical leave law; benefits will be available starting in 2021. *Massachusetts Passes Groundbreaking Paid Family and Medical Leave Law*, A BETTER BALANCE (June 28, 2018), https://www.abetterbalance.org/massachusetts-passes-groundbreaking-paid-family-and-medical-leave-law [https://perma.cc/4EWY-EPGD]. For more information on these laws, see *Comparative Chart of Paid Family & Medical Leave Laws in the United States*, A BETTER BALANCE, https://www.abetterbalance.org/resources/paid-family-leave-laws-chart [https://perma.cc/WRF4-NTDZ] (last updated Oct. 30, 2018).

14. Only 16% of private sector workers receive paid family leave through their employers to bond with a new child or care for a seriously ill family member. *Employee Benefits Survey*, U.S. BUREAU OF LABOR STATISTICS, https://www.bls.gov/ncs/ebs/benefits/2018/ownership/private/table32a.htm [https://perma.cc/7L7J-8PEQ]. Among low-income workers, this number drops to 7%. *Id*.

15. The FMLA was signed into law on February 5, 1993 by President Bill Clinton. A BETTER BALANCE, A FOUNDATION AND A BLUEPRINT: BUILDING THE WORKPLACE LEAVE LAWS WE NEED AFTER TWENTY-FIVE YEARS OF THE FAMILY & MEDICAL LEAVE ACT 6 (Feb. 2018), https://www.abetterbalance.org/resources/a-foundation-and-a-blueprint [https://perma.cc/4PEX-VSF5]. In addition to providing covered workers leave to bond with a new child, the FMLA also covers leave to care for one's own serious health condition, leave to provide care to a seriously ill family member, and leave to address the impact of a family member's military deployment. *See id*. at 6–7.

16. HELEN JORGENSON & EILEEN APPELBAUM, CTR. FOR ECON. & POLICY RESEARCH, EXPANDING FEDERAL FAMILY AND MEDICAL LEAVE COVERAGE: WHO BENEFITS FROM CHANGES IN ELIGIBILITY REQUIREMENTS? 3 (2014), http://cepr.net/documents/fmlaeligibility-2014-01.pdf [https://perma.cc/LU6F-9BLY].

17. *See* NAT'L P'SHIP FOR WOMEN & FAMILIES, A LOOK AT THE U.S. DEPARTMENT OF LABOR'S 2012 FAMILY AND MEDICAL LEAVE ACT EMPLOYEE AND WORKSITE SURVEYS 2 (2013), http://www.nationalpartnership.org/research-library/work-family/fmla/dol-fmla-survey- key-findings-2012.pdf [https://perma.cc/K5SJ-SYJG] (finding that nearly half of surveyed FMLA-eligible workers that did not take needed time off attributed their decision to lack of pay, and among workers who did take some FMLA leave, nearly one-third reported they cut leave short for financial reasons).

18. *See* A BETTER BALANCE, INVESTING IN OUR FAMILIES: THE CASE FOR PAID FAMILY LEAVE IN NEW YORK AND THE NATION 3–4 (2015), https://www.abetterbalance.org/wp-content/uploads/2016/11/PFL2015.pdf [https://perma.cc/MR9X-UKV7] ("Lack of paid family leave is a serious financial burden on many families experiencing a family illness or having a new child, especially

underscores the importance of legal protections for pumping workers—if our laws don't afford working moms time off to breastfeed a new child, it is even more critical that they protect their ability to pump in the workplace.

This Article will advocate for a clear federal standard for pumping workers. Part II provides a historical review of pregnancy discrimination law, detailing the origins of the PDA, and discussing the recent doctrinal developments since the Supreme Court's 2015 decision in *Young v. United Parcel Service, Inc.*[19] Part III discusses the doctrinal evolution of breastfeeding and lactation discrimination claims under the PDA, addressing the circuit split on whether breastfeeding and lactation qualify as "related medical conditions" of pregnancy under the PDA. Part IV examines the post-*Young* federal circuit decisions on lactation discrimination from the D.C. and Eleventh Circuits and addresses how future judicial interpretation of the PDA can build and improve upon those decisions.[20] Finally, Part V details the statutory responses to the continuing problem of lactation discrimination in the workplace since the passage of the PDA. In doing so, this Part analyzes other federal, state, and local laws that address lactation discrimination and accommodation, and identifies what a new comprehensive federal law should look like.

II.
HISTORY OF PREGNANCY DISCRIMINATION LAW

No federal law, on its face, explicitly bars employment discrimination on the basis of a worker's breastfeeding or lactation status.[21] Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the basis of sex for employers with at least fifteen employees,[22] and in 1978, Congress passed the

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among low-income families and single parents, who often face greater challenges when juggling the responsibilities of work and family. The need to sacrifice pay or a job in order to care for a loved one can have long-lasting economic consequences on working families.").

19. 135 S. Ct. 1338 (2015).

20. *See generally* Hicks v. City of Tuscaloosa, 870 F.3d 1253 (11th Cir. 2017); Allen-Brown v. District of Columbia, 174 F. Supp. 3d 463 (D.D.C. 2016).

21. In other words, there is no federal "Breastfeeding Discrimination Act" that explicitly prohibits employers from discriminating against a worker because she is lactating or breastfeeding. The Pregnancy Discrimination Act, discussed in detail below, prohibits employers from discriminating on the basis of a worker's pregnancy, childbirth, or related medical conditions. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2012); *see infra* Part II.C. Whether "related medical conditions" include lactation and breastfeeding has been the subject of much federal litigation. *See infra* Part III.B. The Fair Labor Standards Act, as amended by the Affordable Care Act, requires certain employers to accommodate the needs of pumping employees, but lacks a clear prohibition against discrimination or a reliable enforcement mechanism. 29 U.S.C. § 207(r) (2012); *see infra* Part V.A. The Americans with Disabilities Act prohibits employment discrimination on the basis of a physical or mental impairment that substantially limits one or more major life activities, but does not protect pregnancy absent attenuating complications that result in a qualifying impairment. 42 U.S.C. §§ 12102, 12112 (2012). *See also Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm [https://perma.cc/YDN6-R5NW].

22. 42 U.S.C. § 2000e(b).

Pregnancy Discrimination Act, which expanded the definition of "sex" under Title VII to include "pregnancy, childbirth, or related medical conditions."[23] Whether this definition encompasses discrimination on the basis of lactation and breastfeeding has been the subject of much judicial exposition.[24] This section presents a brief history of the PDA—the federal law at issue in those cases.

A. Title VII of the Civil Rights Act of 1964

Title VII prohibits an employer from firing, refusing to hire, or otherwise discriminating against any individual based on race, color, religion, sex, or national origin.[25] The prohibition on sex discrimination has been interpreted to mean that gender must be irrelevant to employment decisions.[26] While Title VII did not explicitly protect employees from discrimination on the basis of pregnancy before passage of the PDA, several cases asked the question of whether pregnancy discrimination was sex discrimination, first under the Fourteenth Amendment's equal protection clause, and then under Title VII.[27]

There are two typical forms that sex discrimination claims take under Title VII: disparate treatment and disparate impact.[28] Workers can bring a disparate treatment claim when they are treated differently because of their gender,[29] and can bring a disparate impact claim when they suffer a disproportionate impact from a facially neutral policy.[30] Courts have been mostly unwilling to accept disparate impact claims in pregnancy discrimination cases,[31] therefore most

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23. *Id*. § 2000e(k).

24. *See* discussion *infra* Parts III & IV.

25. *Id*. § 2000e-2(a)(1).

26. *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 240 (1989).

27. *See, e.g*., Gen. Elec. Co. v. Gilbert 429 U.S. 125 (1976) (raising pregnancy discrimination under Title VII); Geduldig v. Aiello, 417 U.S. 484 (1974) (raising pregnancy discrimination claims under the Equal Protection Clause of the Fourteenth Amendment).

28. *See* Lara Grow, *Pregnancy Discrimination in the Wake of* Young v. UPS, 19 U. PA. J.L. & SOC. CHANGE 133, 140 (2016); Diana Kasdan, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. REV. 309, 317–18 (2001).

29. *See, e.g*., *Price Waterhouse*, 490 U.S. at 230 (1989) ("Thus, in order to justify shifting the burden on the causation issue to the defendant, a disparate treatment plaintiff must show by direct evidence that decisionmakers placed substantial negative reliance on an illegitimate criterion in reaching their decision.").

30. *See, e.g*., Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1314 (11th Cir. 1999), *abrogated by* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015) (laying out how to establish a prima facie case of disparate impact discrimination); *see also Sex-Based Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/types/sex.cfm [https://perma.cc/PQD2-39UZ]. To make out a prima facie disparate impact claim, a plaintiff must identify the specific employment practice at issue, often using statistical data to demonstrate its unequal impact on women. Employers can defeat such claims by showing that the practice at issue is job-related and represents a business necessity. *See* 42 U.S.C. § 2000e–2(k) (2012).

31. *See* Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA's Pregnancy Exclusion*, 27 WIS. J.L. GENDER & SOC'Y 1, 7 (2012) (noting that "courts have been historically reluctant to apply disparate impact analysis to workplace policies that disproportionately affect pregnant women because they have viewed such challenges as a 'backdoor' route to preferential treatment for pregnant women"). Additionally, disparate impact claims are

plaintiffs who bring pregnancy discrimination claims do so under a disparate treatment theory.[32]

A plaintiff alleging disparate treatment based on sex must demonstrate that an employer intentionally discriminated against her because of her gender.[33] She can prove this directly, for example through discriminatory statements made by her boss during her hiring,[34] or indirectly, using the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*.[35] Under the *McDonnell Douglas* test, a plaintiff can produce enough evidence to initially support her discrimination claim (also known as a "prima facie case") by showing (i) that she belongs to a protected class; (ii) that she is qualified for the position; (iii) that, despite her qualifications, she suffered an adverse employment action; and (iv) that others similarly situated but outside the protected class were more favorably treated.[36] If the employer demonstrates a legitimate, non-discriminatory reason for the action, the employee can prevail by showing the proffered reasons are a false excuse or "pretext" for behavior actually motivated by discrimination.[37]

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already difficult to prove, requiring that plaintiffs meet a high burden of gathering statistical evidence to prove that a neutral employment policy is being applied in a discriminatory way. *See* Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 478 (2011) ("Lawsuits, especially when they require the statistical expertise necessary to prove an unlawful disparate impact, are expensive, difficult to win, and place the burden of reform on individual litigants.").

32. *See* Dinner, *supra* note 31, at 485 ("While courts are skeptical of disparate-impact claims generally, they are particularly reluctant to recognize disparate-impact claims challenging employment terms and conditions that disproportionately exclude pregnant women from employment opportunity."); Grow, *supra* note 28, at 143 ("[G]iven the difficulty in establishing the requisite statistical evidence in support of a disparate impact claim, most pregnant workers whose employers failed to provide accommodations have sought redress under a disparate treatment theory of liability.").

33. *See* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) ("'Disparate treatment'…is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.").

34. *See* Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act*, 38 AM. BUS. L.J. 819, 845–48 (2001) (discussing what can constitute direct evidence in a pregnancy discrimination case). Direct evidence is "that which, if believed by the trier of fact, proves discrimination without relying on inference or presumption." *See id*. at 845.

35. 411 U.S. 792, 802 (1973) (setting out the four-part test for establishing a prima facie case of discrimination under a disparate treatment Title VII claim).

36. *See id*.; Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981); Hicks v. City of Tuscaloosa, No. 7:13-CV-02063-TMP, 2015 WL 6123209, at *13 (N.D. Ala. Oct. 19, 2015).

37. *See McDonnell Douglas*, 411 U.S. at 804 (1973); Price Waterhouse v. Hopkins, 490 U.S. 228, 244–45 (1989) ("[O]nce a plaintiff in a Title VII case shows that gender played a motivating part in an employment decision, the defendant may avoid a finding of liability only by proving that it would have made the same decision even if it had not allowed gender to play such a role. This balance of burdens is the direct result of Title VII's balance of rights.").

B. Interpreting Title VII & the Equal Protection Clause: Pre-PDA Case Law

1. Geduldig v. Aiello

In the 1970s, two Supreme Court cases posed the question of whether discrimination on the basis of a woman's pregnancy constituted sex discrimination.[38] In *Geduldig v. Aiello*, plaintiffs challenged California's disability insurance system because it excluded from coverage certain disabilities resulting from pregnancy.[39] They claimed that the program violated the Equal Protection Clause of the Fourteenth Amendment by unfairly excluding pregnant women, and the U.S. District Court for the Northern District of California, by a divided vote, ruled in favor of the plaintiffs.[40] However, the Supreme Court reversed on appeal, holding that although only women would be affected by the exclusion, the plan's exclusion of pregnancy was not a sex-based classification, since it did not deprive *all* women of a benefit available to all men.[41] The court created an arbitrary categorical distinction between pregnant women and "nonpregnant persons," a group made up of both men and women, resolving therefore that the plan did not differentiate between sexes and did not amount to gender-based discrimination.[42] As a result, the Court upheld the insurance program as consistent with the Equal Protection Clause.[43]

2. General Elec. Co. v. Gilbert

Two years later, the Supreme Court espoused a similarly narrow view of sex discrimination in *General Elec. Co. v. Gilbert*.[44] In this case, the plaintiffs brought a class action suit under Title VII of the Civil Rights Act to challenge their private employer's disability plan.[45] The plan provided sickness and accident benefits to all employees but excluded disabilities arising from pregnancy.[46] Echoing (and citing to) *Geduldig*, the Gilbert Court ruled 6–3 to reject the plaintiff's claim under

38. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976); Geduldig v. Aiello, 417 U.S. 484 (1974).

39. 417 U.S. at 486–87.

40. *Id*. at 487; *see also* Aiello v. Hansen, 359 F. Supp. 792, 801 (N.D. Cal. 1973), *rev'd sub nom*., 417 U.S. 484 (1974).

41. *Geduldig*, 417 U.S. at 496 n.20.

42. *Id*. ("The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes. The fiscal and actuarial benefits of the program thus accrue to members of both sexes.").

43. *Id*. at 494–95. Because the Court found the classification was not sex-based, it did not analyze the plan under the intermediate scrutiny standard of review used for sex-based classifications. Instead, it applied the highly-deferential rational basis standard, under which laws are nearly always upheld. *See* Suzanne A. Kim, Suzette Richards & Rachel L. Jensen, *Equal Protection*, 1 GEO. J. GENDER & L. 213, 218–19 (2000) (discussing how the level of scrutiny applied often determines the judicial outcome).

44. Gen. Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

45. *Id*. at 127–28

46. *Id*.

Title VII.[47] The Court found that the benefits plan was not discriminatory because it did not exclude women from a benefit granted to men—the plan's lack of coverage for pregnancy applied to men as well as women.[48] "[I]t is impossible to find any gender-based discriminatory effect in this scheme simply because women disabled as a result of pregnancy do not receive benefits," Justice William H. Rehnquist wrote for the majority, concluding that "gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all-inclusive."[49] The Gilbert Court thus read Title VII's protections against sex discrimination so narrowly that employment benefits allocated on the basis of pregnancy did not, on their own, trigger a Title VII violation.

In an influential dissenting opinion, Justice Brennan, joined by Justice Marshall, questioned the majority's conceptual framework and reliance on *Geduldig*.[50] "Surely it offends common sense," Brennan asserted, to suggest "that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'"[51] In a separate dissent, Justice Stevens argued that the plan did not protect against risks equally between men and women: while men were offered "total protection" against the risk of unemployment caused by physical disability, women were offered only partial protection—one that excluded pregnancy-related disabilities.[52] "By definition," he concluded, "such a rule discriminates on account of sex."[53]

C. Congressional Response: The PDA

Congress acted quickly in rejecting the Supreme Court's narrow characterization of Title VII's sex discrimination provision. Just three months after *Gilbert* was decided, the Senate introduced the Pregnancy Discrimination Act,[54] which amended Title VII to add the following language:

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47. *Id*. at 136–38; *see also id*. at 135–36 ("The quoted language from *Geduldig* leaves no doubt that our reason for rejecting appellee's equal protection claim in that case was that the exclusion of pregnancy from coverage under California's disability-benefits plan was not in itself discrimination based on sex. . . . *Geduldig* is precisely in point in its holding that an exclusion of pregnancy from a disability-benefits plan providing general coverage is not a gender-based discrimination at all.").

48. *See id*. at 138–39 (noting that although pregnancy-related disabilities constitute a risk unique to women, the benefits plan is not discriminatory because it protects against the same risks for men and woman alike).

49. *Id*.

50. *Id*. at 148–49 (Brennan, J., dissenting).

51. *Id*. at 149 (Brennan, J., dissenting). Justice Stevens filed a separate dissent to emphasize the irrationality of ascribing the Court's *Geduldig* reasoning to a Title VII analysis, since the statute predated the Court's development of sex discrimination jurisprudence. *Id*. at 161 n.3 (Stevens, J., dissenting).

52. *Id*. at 161–62 & 161, n.5 (Stevens, J., dissenting).

53. *Id*. at 161–62 (Stevens, J., dissenting).

54. The PDA was introduced in the Senate on March 15, 1977. A Bill to Amend Title VII of The Civil Rights Act Of 1964 to Prohibit Sex Discrimination On The Basis Of Pregnancy, S. 995, 95th Cong. (1977) (enacted); *see* Kasdan, *supra* note 28, at 321.

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.[55]

In expanding the explicit reach of the "because of sex" provision, Congress made clear that it was not altering Title VII, but rather clarifying it in light of the Court's misinterpretation.[56] The Senate Report stated that the *Gilbert* reasoning threatened to "undermine the central purpose of the sex discrimination prohibitions of [T]itle VII."[57] The House report warned that *Gilbert* "would yield to an intolerable potential trend in employment practices" if left uncorrected.[58] Both houses of Congress explicitly endorsed the dissenting opinions of Justices Brennan and Stevens,[59] emphasizing that the PDA was intended "to reflect the 'commonsense' view and to insure that working women are protected against all forms of employment discrimination based on sex."[60]

Notably, the text of the PDA did not merely add the term "pregnancy" to the existing list of prohibited bases of employment decisions under Title VII.[61] Rather, it elucidated what the term "sex" meant—a comprehensive set of characteristics and behaviors that were tied to pregnancy, including the pregnancy itself and conditions resulting from that pregnancy. The objective of the PDA, as with Title VII, was to equalize the playing field such that neither pregnancy nor any related condition could be used to disadvantage women in the workplace.[62] This goal is further evident in the House Committee Report's explanation of the statute's wording: "In using the broad phrase 'women affected by pregnancy,

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55. Pregnancy Discrimination Act (PDA), Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2012)).

56. H.R. REP. NO. 95-948, at 2 (1978) ("H.R. 6075 will amend Title VII *to clarify Congress' intent* to include discrimination based on pregnancy, childbirth or related medical conditions in the prohibition against sex discrimination in employment.") (emphasis added).

57. S. REP. NO. 95-331, at 3 (1977).

58. H.R. REP. NO. 95-948, at 4.

59. *Id*. at 2 ("It is the committee's view that the dissenting Justices correctly interpreted the Act."); S. REP. NO. 95-331, at 2 (noting that the committee found that the two dissenting opinions "correctly express both the principle and the meaning of title VII").

60. S. REP. NO. 95-331, at 3 (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 149 (1976) (Brennan, J., dissenting)); *see* H.R. REP. NO. 95-948, at 3 (repeating this language).

61. 42 U.S.C. § 2000e-2(a)(1).

62. *See* S. REP. NO. 95-331, at 3 ("A failure to address discrimination based on pregnancy, in fringe benefits or in any other employment practice, would prevent the elimination of sex discrimination in employment."); H.R. REP. NO. 95-948, at 4 ("The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.").

childbirth and related medical conditions,' the bill makes clear that *its protection extends to the whole range of matters concerning the childbearing process*."[63]

D. Putting the PDA into Practice: The Comparator Problem

Despite the clear intentions of Congress in passing the PDA, putting the law into practice proved far from straightforward. The PDA is a discrimination law, not an accommodation law—the statute does not explicitly require accommodation of women's needs related to pregnancy.[64] This distinguishes the PDA from laws that require employers to provide accommodations to certain workers, such as the Americans with Disabilities Act ("ADA").[65] Under the ADA, employees with certain disabilities have an *affirmative* right to accommodations, such as a modification of equipment or devices, the provision of interpreters, or a modified work schedule.[66]

Pregnancy alone is not considered a disability under the theory that pregnancy is not a physiological disorder and, therefore, not an "impairment" as contemplated by the ADA.[67] However, a worker may have a pregnancy-related impairment that qualifies for ADA protection, such as preeclampsia, gestational diabetes, or severe nausea.[68] Thus, a pregnant worker without an ADA-qualifying disability who needs changes to her job duties or schedule in order to stay healthy, such as no heavy lifting, adjustment of her start time, or extra bathroom breaks, is in a bind. The ADA does not protect her, and the PDA does not mandate that her employer grant her request. Instead, the PDA mandates that women affected by

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63. H.R. REP. NO. 95-948, at 5 (emphasis added).

64. *See id.* at 4 ("It must be emphasized that this legislation, operating as part of Title VII, prohibits only discriminatory treatment. Therefore, it *does not require employers to treat pregnant employees in any particular manner* with respect to hiring, permitting them to continue working, providing sick leave, furnishing medical and hospital benefits, providing disability benefits, or any other matter. H.R. 6075 *in no way requires the institution of any new programs* where none currently exist.") (emphasis added).

65. 42 U.S.C. § 12112(b)(5)(A) (2012).

66. *Id.* § 12111(9).

67. *Id.* § 12102(1) (defining "disability" as an impairment that substantially limits one or more major life activities); Equal Employment Opportunity for Individuals with Disabilities, 56 Fed. Reg. 35726-01 (July 26, 1991) (noting that "conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments"). The characterization of pregnancy as a disability exists in direct tension with the theory underlying the PDA—that pregnancy does not render women incapable of doing their job and employers should treat them just like everyone else. Moreover, many women's advocates did not want pregnancy classified as a disability because they wanted pregnancy to be viewed as a healthy and natural physiological process. *See* Wendy W. Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325, 329–33 (1984). For a discussion of the exclusion of pregnancy from ADA protection, subsequent case law, and the conflicting theories of pregnancy, see Alemzadeh, *supra* note 31, at 5–9.

68. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, NO. 915.003, EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES 39–43 (2015), https://www.eeoc.gov/laws/guidance/upload/pregnancy_guidance.pdf [https://perma.cc/D6EH-BW4H] (noting that while pregnancy alone does not constitute a disability under the ADA, courts have found various pregnancy-related impairments to be disabilities within the meaning of the ADA).

pregnancy, childbirth, or related medical conditions "be treated the same for all employment-related purposes . . . *as other persons* not so affected but similar in their ability or inability to work. . . ."[69] The PDA asks her to look around her workplace and observe whether other workers who are not pregnant but who also need changes to their jobs are being granted similar requests.[70] If other workers' requests are being denied, then the pregnant worker's request can also be denied.[71]

As a result, the only way for courts to determine whether a pregnant worker is entitled to the accommodation she seeks is to find a group of similarly situated non-pregnant workers against which to measure her employer's response. This begs the question of who comprises this group of "other persons."[72] For example, if a pregnant retail worker requests a chair for taking sitting breaks throughout the day, and her employer refuses to grant her request, to whom should a court look in determining whether this treatment is discriminatory: Workers who request similar accommodations after breaking their leg in a skiing accident while on vacation? Workers who twisted their ankle after tripping over a construction site at work? Workers with scoliosis for whom standing for prolonged periods of time is painful? In other words, should courts look at *all* other workers who may have a need for a workplace accommodation, or a discrete subset of workers, such as those whose injuries occurred outside their workplace? Lower courts struggled to answer this question in the years following the PDA's passage, with much of the litigation contingent on who was held up to the pregnant worker as a comparator.[73]

In the thirty years following the PDA, most circuits considering the question limited the comparator group to workers injured off the job.[74] Only the Sixth

69. 42 U.S.C. § 2000e(k) (emphasis added).

70. *Id*.

71. *See* Urbano v. Cont'l Airlines, Inc., 138 F.3d 204, 207 (5th Cir. 1998), *abrogated by* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015) ("[M]ost courts have held that the PDA does not impose an affirmative obligation on employers to grant preferential treatment to pregnant women."); Falk v. City of Glendale, No. 12-CV-00925-JLK, 2012 WL 2390556, at *4 (D. Colo. June 25, 2012) ("The Pregnancy Discrimination Act does not require any affirmative accommodations. . . ."). *See also Pregnancy Discrimination*, U.S. EQUAL EMP'T OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/types/pregnancy.cfm [https://perma.cc/6WXJ-FH3W].

72. *See* Young v. United Parcel Serv. Inc., 135 S. Ct. 1338, 1350 (2015) (conceding that the phrase "other persons" remains undefined in the PDA and it is not obvious to which other persons Congress referred).

73. *See* Grow, *supra* note 28, at 143 ("[M]uch of the disparate treatment litigation arising in a pregnancy discrimination context has centered on the employee's and employer's differing visions for who is similarly situated to the plaintiff—or, in other words, who is an accurate comparator—in order to determine whether that person or group is receiving more favorable treatment than the pregnant employee, as required under the fourth prong of *McDonnell Douglas*.").

74. *See* Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 548, 552 (7th Cir. 2011) (considering only workers with non-ADA-qualifying disabilities or off-the-job injuries as comparators); Spivey v. Beverly Enters., Inc., 196 F.3d 1309, 1313 (11th Cir. 1999) (stating that only workers who suffered off-the-job injuries should be considered as comparators); *Urbano*, 138 F.3d at 206 (5th Cir. 1998) (stating that only workers who suffered non-occupational injuries and not accommodated were similarly-situated); *see also* Grow, *supra* note 28, at 145 ("In other words, a pregnant worker was only entitled to be treated as well (or as poorly) as those injured off the job.").

Circuit held that the cause of the injury was irrelevant to a PDA analysis, and that the only relevant guideline for a comparator group was whether the non-pregnant worker suffered a similar work limitation.[75] In 2014, this disagreement among circuits prompted the Supreme Court to weigh in on the question in *Young v. United Parcel Service, Inc.*[76]

E. Young v. UPS: A New Standard?

In *Young v. United Parcel Service, Inc.*, the Supreme Court had the opportunity to address the question of the proper comparator group under the PDA.[77] Peggy Young was a part-time driver for United Parcel Service ("UPS") when she became pregnant.[78] After previously suffering several miscarriages, her doctor advised that she should not lift more than twenty pounds, but UPS told Young that she could not continue to work if she needed a lifting restriction.[79] As a result, Young stayed home without pay during most of her pregnancy and eventually lost her employee medical coverage.[80]

Young sued under the PDA, alleging disparate treatment—that her employer intentionally discriminated against her based on pregnancy.[81] The case hinged on which workers should be compared to pregnant employees that are denied accommodations, a question the Court conceded the PDA did not answer.[82] According to Young, the PDA required her to show that UPS accommodated *any other workers* with similarly disabling conditions, while denying her such treatment.[83] UPS argued that the law instead required her to show that they had withheld accommodations from her while providing similar accommodations to a "facially neutral category," i.e. those with off-the-job injuries.[84] The difference between these two interpretations had substantial implications for plaintiffs alleging pregnancy discrimination. Under Young's interpretation, a plaintiff might only have to show that one other employee was accommodated where she was

75. Ensley-Gaines v. Runyon, 100 F.3d 1220, 1226 (6th Cir. 1996) ("[U]nder the PDA, an individual employee alleging discrimination based upon pregnancy . . . need only demonstrate that another employee who was similar in her or his ability or inability to work received the employment benefits denied to her."); *see also* Grow, *supra* note 28, at 144 (discussing the Sixth Circuit's departure from various other circuits' interpretation of the comparator question).

76. *Young*, 135 S. Ct. at 1348.

77. *Id*.

78. *Id*. at 1344.

79. *Id*.

80. *Id*.

81. *Id*. at 1344–45.

82. *Id*. at 1350 ("The second clause, when referring to nonpregnant persons with similar disabilities, uses the open-ended term 'other persons.' It does not say that the employer must treat pregnant employees the 'same' as '*any* other persons' (who are similar in their ability or inability to work), nor does it otherwise specify *which* other persons Congress had in mind.").

83. *Id*. at 1349.

84. *Id*.; *see also* Allen-Brown v. District of Columbia, 174 F. Supp. 3d 463, 472–73 (D.D.C. 2016) (discussing the two arguments animating *Young* and the Court's avoidance of settling on either one).

not; under UPS's interpretation, a plaintiff would have to show that *all* employees of a given category were accommodated.

To reach its conclusion, the Court reformulated the *McDonnell Douglas* burden-shifting test while taking account of the PDA's language:

> [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."[85]

Once the plaintiff makes out a prima facie case, the burden then shifts to the employer to justify its refusal to accommodate the plaintiff.[86] The employer must articulate a legitimate, nondiscriminatory reason for the denial, which "normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women" to the category of accommodated workers.[87] To prevail, the plaintiff must subsequently show that the employer's proffered reasons are, in fact, pretextual.[88]

In addition to traditional methods of asserting pretext,[89] litigants bringing a disparate treatment claim for pregnancy discrimination, the Court stated, can show pretext "by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers" and that the employer's reasons "are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination."[90] The Court explained that one way a plaintiff can demonstrate that a significant burden exists is "by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers."[91]

Thus, the test for assessing a disparate treatment claim under the PDA remains largely identical to that for any Title VII discrimination claim, with additional avenues of recourse for pregnancy discrimination plaintiffs during the pretext phase of the *McDonnell Douglas* burden-shifting test.[92] Scholars and advocates

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85. *Young*, 135 S. Ct. at 1354.

86. *Id*.

87. *Id*.

88. *Id*.

89. For example, by showing that "the employer's justification was not plausible, that it was contradicted by other evidence, or that the employer offered shifting rationales." *Allen-Brown*, 174 F. Supp. 3d at 473–74.

90. *Young*, 135 S. Ct. at 1354.

91. *Id*.

92. *See Allen-Brown*, 174 F. Supp. 3d at 473–74 (explaining *Young's* holding as providing additional methods of asserting pretext).

have argued that the *Young* decision complicated the standard for bringing a PDA claim, further obscuring an already opaque analytical framework. Under the PDA, pregnant workers must discern their employers' accommodation rules for non-pregnant workers and ascertain whether their non-pregnant coworkers are being accommodated—tasks which can be burdensome in workplaces that have no official policy or relatively few employees.[93] Such critiques have led to state-level efforts to supplement the PDA's burdensome standard through Pregnant Workers' Fairness Acts ("PWFAs"), which explicitly require employers to grant accommodations to pregnant workers regardless of how they treat non-pregnant workers.[94]

III.
BREASTFEEDING DISCRIMINATION AS PREGNANCY DISCRIMINATION UNDER THE PDA

Before the question of comparators even arises, courts are divided as to the threshold question of whether breastfeeding and lactation constitute a "medical condition" related to pregnancy and childbirth covered by the PDA. This question comes before a court when a worker returns to work after giving birth, requests breaks, space, or other accommodations to pump breast milk in the workplace, and subsequently suffers an adverse employment action.[95] Alternatively, claims can arise after an employer makes derogatory comments about an employee's pumping or breastfeeding and then subsequently fires her.[96] Litigants have

93. *See, e.g.*, Lynn Ridgeway Zehrt, *A Special Delivery: Litigating Pregnancy Accommodation Claims After the Supreme Court's Decision in* Young v. United Parcel Service, Inc., 68 RUTGERS U.L. REV. 683, 706–07 (2016) (discussing how *Young* created a new and confusing framework for pregnancy discrimination cases and did little to clarify how courts should analyze these cases going forward); Dina Bakst, *Peggy Young's Victory Is Not Enough*, U.S. NEWS (Mar. 26, 2015, 1:00 PM), https://www.usnews.com/opinion/economic-intelligence/2015/03/26/peggy-young-supreme-court-victory-is-not-enough-for-pregnant-workers [https://perma.cc/6D5V-79PN] ("Under the framework established by the court's majority, a pregnant worker who wants to prove unlawful treatment based on her employer's failure to accommodate her pregnancy must go through a multi-step process. Not only are pregnant workers expected to produce enough evidence to prove their employer's intention was discriminatory, they must do so, in many cases, under challenging circumstances where employers have no official policies or have obscured them for their own benefit."); Alemzadeh, *supra* note 31, at 7 (noting that finding similarly situated comparators can be extremely challenging for workers bringing claims under the PDA, particularly those who work in small workplaces, and if plaintiffs cannot find a comparator, their claim will likely be viewed as a request for preferential treatment, which is not mandated by the PDA).

94. *See Pregnancy Protections for Workers in States and Localities Across the U.S.*, A BETTER BALANCE, https://www.abetterbalance.org/resources/fact-sheet-state-and-local-pregnant-worker-fairness-laws [https://perma.cc/8ABN-4MER] (last updated July 19, 2018); *see also* Dina Bakst, *Pregnant, and Pushed Out of a Job*, N.Y. TIMES (Jan. 30, 2012), https://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html [https://perma.cc/HSV2-XL48] (explaining the concept of pregnancy accommodation laws); discussion *infra* Part V.B.

95. *See, e.g.*, Jacobson v. Regent Assisted Living, Inc., No. CV-98-564-ST, 1999 WL 373790 (D. Or. Apr. 9, 1999) (involving an employer who denied plaintiff's request for breaks to pump, causing her to leak breast milk at work, and then fired her).

96. *See, e.g.*, Donaldson v. Am. Banco Corp., 945 F. Supp. 1456 (D. Colo. 1996) (involving

brought such claims under the theory that breastfeeding and lactation are encompassed within the PDA's language, which bars discrimination based on "pregnancy, childbirth, or related medical conditions."[97]

A. Breastfeeding and Lactation Defined

Pregnant women typically begin developing the capacity to produce breast milk during their second trimester.[98] At the time of delivery, the breast cells have become more specialized, and the sharp decrease in pregnancy hormones, namely progesterone, initiates milk production.[99] This physiological process occurs whether or not a woman decides to breastfeed her infant.[100] If a woman chooses to breastfeed, the process of lactation will typically continue until she weans her child.[101]

The health benefits of breastfeeding one's infant have been well documented.[102] Recognizing these benefits, the American Academy of Pediatrics recommends that new mothers exclusively breastfeed infants for the first six months after birth with continuation of breastfeeding for one year or longer as desired.[103] The American Medical Association, the American College of

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an employer who made demeaning comments to employees regarding their pregnancies and breastfeeding, and later fired them).

97. 42 U.S.C. § 2000e(k) (2012).

98. Madelyne Dolandolan, *When Does Breast Milk Form?*, THE BUMP, https://www.thebump.com/a/when-does-breast-milk-form [https://perma.cc/7DWR-AU54].

99. Wagner, *supra* note 4.

100. *Id*.

101. *See Breastfeeding Overview*, WEBMD (Dec. 5, 2017), https://www.webmd.com/parenting/baby/nursing-basics#2 [https://perma.cc/ZH7V-XNEA] ("As your baby needs more milk and nurses more, your breasts respond by making more milk."); Lisa Milbrand, *How to Stop Breastfeeding (and Keep Baby Happy)*, THE BUMP (Aug. 2017), https://www.thebump.com/a/how-to-stop-breastfeeding [https://perma.cc/K5MH-E4WG] ("Once a mother completely stops breastfeeding, her milk supply will dry up within 7 to 10 days . . . .") (quoting Rachel Borton, Director of the Family Nurse Practitioner program at Bradley University).

102. *See AAP Reaffirms Breastfeeding Guidelines*, AM. ACAD. OF PEDIATRICS (Feb. 27, 2012), https://www.aap.org/en-us/about-the-aap/aap-press-room/pages/aap-reaffirms-breastfeeding-guidelines.aspx [https://perma.cc/PM96-KXTK] ("Breastfeeding provides a protective effect against respiratory illnesses, ear infections, gastrointestinal diseases, and allergies including asthma, eczema and atopic dermatitis. The rate of sudden infant death syndrome (SIDS) is reduced by over a third in breastfed babies, and there is a 15 percent to 30 percent reduction in adolescent and adult obesity in breastfed vs. non-breastfed infants."); *Nutrition: Exclusive Breastfeeding*, WORLD HEALTH ORG., http://www.who.int/nutrition/topics/exclusive_breastfeeding/en [https://perma.cc/433L-PRGX] ("Breast milk promotes sensory and cognitive development, and protects the infant against infectious and chronic diseases. Exclusive breastfeeding reduces infant mortality due to common childhood illnesses such as diarrhea or pneumonia, and helps for a quicker recovery during illness."); Anthony Lake, UNICEF Executive Director & Dr. Margaret Chan, WHO Director General, *Joint Statement: Better Workplace Policies Needed for Breastfeeding*, UNICEF (Aug. 1, 2015), https://www.unicef.org/media/media_82715.html [https://perma.cc/6Y5B-AG5Q] ("We know that breastfeeding helps children to survive and thrive—enabling infants to withstand infections, providing critical nutrients for the early development of their brains and bodies, and strengthening the bond between mothers and their babies.").

103. Arthur I. Eidelman & Richard J. Schanler, *Policy Statement: Breastfeeding and the*

Obstetricians and Gynecologists, and the World Health Organization have echoed this recommendation.[104] The economic benefits that would accrue domestically from mothers following the six-month exclusive breastfeeding recommendation are estimated at 13 billion dollars per year.[105] Internationally, the United Nations has treated the global support and protection of breastfeeding as a human rights issue, urging governments around the world to take more affirmative action through comprehensive legislation that provides adequate maternity protection and protection from discrimination linked to breastfeeding.[106]

Notwithstanding the health benefits of breastfeeding for women and infants, breastfeeding and lactation engender various physiological responses in the body that can cause significant discomfort and pain.[107] Physical responses to lactation include: engorgement, where a woman's breasts become too full with milk and become painful, leakage, which results from failure to express breast milk that has collected in the breasts, and mastitis, a painful bacterial infection of the breast that results from blocked milk ducts.[108] The E.E.O.C. provides in its 2015 pregnancy discrimination guidance: "To continue producing an adequate milk supply and to avoid painful complications associated with delays in expressing milk, a nursing mother will typically need to breastfeed or express breast milk using a pump two or three times over the duration of an eight-hour workday."[109] Lacking access to a sanitary and private lactation room, or denial of breaks altogether, can compound these physical consequences for women who return to work after giving birth and wish to express breast milk to later feed their infant at home.[110] Additionally, as

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Use of Human Milk, 129 Am. Acad. of PEDIATRICS e827, e827 (Mar. 2012), http://pediatrics.aappublications.org/content/129/3/e827 [https://perma.cc/78JE-DCH9].

104. AM. MED. ASS'N HOUSE OF DELEGATES, RESOLUTION 302: PROTECTING THE RIGHTS OF BREASTFEEDING RESIDENT AND FELLOWS (2016), https://assets.ama-assn.org/sub/meeting/documents/i16-resolution-302.pdf [https://perma.cc/8YNF-6T62]; *FAQ: Breastfeeding Your Baby*, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS (Nov. 2016), http://www.acog.org/Patients/FAQs/Breastfeeding-Your-Baby [https://perma.cc/RX2W-QFL7]; *Breastfeeding*, WORLD HEALTH ORG., http://www.who.int/topics/breastfeeding/en [https://perma.cc/2CES-YE6J].

105. Eidelman & Schanler, *supra* note 103, at e832.

106. *See UN Human Rights Experts Urge Countries to Increase Efforts to Protect, Promote and Support Breastfeeding, and End Inappropriate Marketing of Breast-Milk Substitutes*, WORLD HEALTH ORG. (Nov. 22, 2016), http://www.who.int/nutrition/topics/UNhumanrights-statement-breastfeeding-rights/en [https://perma.cc/NVE8-KUWU] (reporting on a joint statement issued by the UN Special Rapporteurs on the Right to Food and the Right to Health, the UN Working Group on Discrimination against Women in Law and in Practice, and the UN Committee on the Rights of the Child, urging countries to take a more active stance on breastfeeding rights).

107. *See* Brian Pace, Cassio Lynm, & Richard M. Glass, *Patient Page: Breastfeeding*, 285 J. AM. MED. ASS'N 490 (2001) (detailing the various difficulties women may encounter with breastfeeding).

108. *See id.*; *see also* Kasdan, *supra* note 28, at 313.

109. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 68, at 16.

110. *See* Stephanie N. Wyatt, *Challenges of the Working Breastfeeding Mother: Workplace Solutions*, 50 AM. ASS'N OCCUPATIONAL HEALTH NURSES J. 61, 63 (2002) ("The most significant problem encountered by breastfeeding mothers is lack of an adequate facility in which to pump. Many women do not have their own offices, and corporate breakrooms are very public. This forces women to use public rest rooms.") (citation omitted).

with many other workplace fairness issues, lack of protection for breastfeeding and lactation discrimination falls most harshly on low-income workers, who are more likely to be women of color.[111]

B. Pre-Young Case Law: Breastfeeding Claims Stymied by Unsympathetic Courts

Lactation discrimination claims generally arise when a female employee encounters hostility or animus due to her need or request to express breast milk at work and is subsequently fired or suffers other adverse employment actions.[112] Examples of such animus from case law include the following allegations: an employer telling his employee she smelled like curdled milk;[113] an employer ignoring an employee's request for a clean place to pump, offering instead unsanitary city locker rooms frequented by city employees and civilians;[114] an employer barring trained officers from relieving a pumping employee and providing only untrained officers who frequently interrupted the employee with questions such that she could not effectively express milk;[115] and an employer mooing at an employee after she requested breaks to pump.[116]

Employees who have brought breastfeeding and pumping claims under the PDA have faced extreme judicial resistance to their claims for two distinct but related reasons. First, many courts have rejected the premise that lactation and breastfeeding fall under the PDA's scope at all, believing that lactation is not encompassed by the language "pregnancy, childbirth, or related medical conditions."[117] Second, courts have assessed such claims using the outdated

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111. *See* U.S. DEP'T OF HEALTH & HUMAN SERVS., STRATEGIES TO PREVENT OBESITY AND OTHER CHRONIC DISEASES: THE CDC GUIDE TO STRATEGIES TO SUPPORT BREASTFEEDING MOTHERS AND BABIES 23 (2013) https://www.cdc.gov/breastfeeding/pdf/BF-Guide-508.PDF [https://perma.cc/87GD-7CHS] ("Low-income women, among whom African American and Hispanic women are overrepresented, are more likely than their higher income counterparts to return to work earlier and to have jobs that make it challenging for them to continue breastfeeding."); WOMEN'S BUREAU, U.S. DEP'T OF LABOR, WORKING MOTHERS ISSUE BRIEF 3 (2016), https://www.dol.gov/wb/resources/WB_WorkingMothers_508_FinalJune13.pdf [https://perma.cc/SFA6-8MZ5] ("Historically, Black mothers have had the highest labor force participation rates. In March 2015, the labor force participation rates of mothers with children under age 18 were: 76.3 percent for Black mothers.").

112. *See, e.g.*, Falk v. City of Glendale, No. 12-CV-00925-JLK, 2012 WL 2390556, at *1 (D. Colo. June 25, 2012) (involving an employer who made "mooing" sounds at an employee after denying her breaks to pump breast milk and subsequently refused to schedule her for any hours until she weaned her daughter).

113. Donaldson v. Am. Banco Corp., 945 F. Supp. 1456, 1462 (D. Colo. 1996).

114. Hicks v. City of Tuscaloosa, No. 7:13-CV-02063-TMP, 2015 WL 6123209, at *12 (N.D. Ala. Oct. 19, 2015).

115. Falk v. City of Glendale, No. 12-CV-00925-JLK, 2012 WL 2390556, at *1 (D. Colo. June 25, 2012).

116. *Id.*

117. *See, e.g.*, Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1491 (D. Colo. 1997) ("Based on the language of the PDA, its legislative history, and decisions from other courts interpreting the Act, I hold that breast-feeding or childrearing are not conditions within the scope of the PDA.").

methodology of *Gilbert* and *Geduldig*, a framework flatly rejected by Congress in passing the PDA.[118]

These two trends are related because if lactation is not encompassed in the language of the PDA, courts will apply the analytic methodology used for sex discrimination claims more broadly, forcing litigants into the same impossible catch-22 that *Gilbert* and *Geduldig* established.[119] The PDA clarified that pregnant women should be treated the same as other workers who were similarly able (or unable) to perform their job,[120] rather than a hypothetical group of pregnant male workers.[121] If courts hold that lactation does not fall under the PDA's protective umbrella, they will revert to pre-PDA methodology for sex discrimination claims, which demands a group of lactating men in order to determine whether discrimination has occurred.[122]

The first part of this section will examine how federal case law excluded lactation claims from PDA protection based on the false premise that lactation is not a medical condition related to pregnancy or childbirth. The second part will discuss how courts erroneously applied the defunct *Gilbert* framework to require an improbable comparator group. Finally, the third part will discuss the positive case law on the issue and where there is room for improvement.

1. Courts Find Breastfeeding Is Not a "Related Medical Condition" of Pregnancy

The PDA redefined discrimination "because of sex" to include "because of or on the basis of pregnancy, childbirth, or *related medical conditions.*"[123] As Maureen Eldredge commented in her 2005 article on sex discrimination, "If lactation is not a 'medical condition related to pregnancy,' it is hard to imagine

118. *See* discussion *supra* Parts II.B–C.

119. In *Gilbert* and *Geduldig*, the Court rejected the plaintiffs' sex discrimination claim because they could not demonstrate that they were treated less well than a group of similarly situated (i.e. pregnant) men. *See id*.

120. 42 U.S.C.§ 2000e(k).

121. *See* Maureen E. Eldredge, *The Quest for A Lactating Male: Biology, Gender, and Discrimination*, 80 CHI.-KENT L. REV. 875, 882–83 (2005) ("[I]n enacting the PDA … Congress 'unequivocally' rejected the reasoning that a plan, which singled out pregnancy-related benefits, was facially neutral and nondiscriminatory because only women are capable of becoming pregnant.") (citation omitted).

122. *See, e.g.*, Derungs v. Wal-Mart Stores, Inc., 141 F. Supp. 2d 884, 891–93 (S.D. Ohio 2000); *id*. at 894 ("A prohibition against breast-feeding merely divides people into two groups: (1) women who breast-feed and infants who are breast-fed; and (2) individuals who do not breast-feed and individuals who are not breast-fed . . . although the first group includes exclusive women and infants, the second group includes members of both sexes and persons of all ages. If anything such classifications establish 'breast-feeding discrimination, which, as demonstrated herein, is not discrimination on the basis of sex or age under the law."), *aff'd*, Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 438 (6th Cir. 2004); Martinez v. N.B.C., Inc., 49 F. Supp. 2d 305, 309–10 (S.D.N.Y. 1999) (dismissing plaintiff sex-plus discrimination claim because men are "physiologically incapable of pumping breast milk" so plaintiff could not demonstrate that she was treated less favorably than them).

123. 42 U.S.C. § 2000e(k) (emphasis added).

what is."[124] The Equal Employment Opportunity Commission ("EEOC") has firmly taken the stance that lactation falls under the ambit of the PDA: "Because lactation is a pregnancy-related medical condition, less favorable treatment of a lactating employee may raise an inference of unlawful discrimination."[125] Nevertheless, in the years following the PDA's passage, federal courts have been unwilling to recognize breastfeeding and lactation claims as falling within the scope of the PDA.[126]

Two cases in the 1980s and 1990s involved workers who requested extended time off from work to breastfeed at home. The Fourth and Sixth Circuits rejected these claims, resisting any interpretation of the PDA that would compel employers to grant new mothers time off to breastfeed. These decisions characterized breastfeeding as a childcare issue outside the PDA's purview, creating rhetoric that had lasting consequences for workers. In later cases, workers seeking accommodations that would have enabled them to remain in the workplace and pump breast milk were stymied by the Fourth and Sixth Circuit precedent. Courts addressing these claims failed to distinguish between requests for several months off to breastfeed at home versus requests for time and space to pump breast milk at work.

i. The Fourth and Sixth Circuits

Two early decisions out of the Fourth and Sixth Circuits illustrate how courts initially conceptualized breastfeeding as a childcare-related choice instead of a "related medical condition" under the PDA. In *Barrash v. Bowen*, the Fourth Circuit reversed a Maryland district court's judgment for a public employee denied unpaid leave to breastfeed her infant.[127] The plaintiff sought an extended leave of absence in order to breastfeed her child at home, but her request was denied.[128] Under a disparate impact claim, she had shown that the number of male employees on extended unpaid leave had increased in the previous three years, while the number of female employees granted extended maternity leave had dwindled to zero—the Fourth Circuit rejected the two groups as incomparable.[129] The men were incapacitated, the court concluded, while the women were merely desirous of remaining at home.[130] "One can draw no valid comparison," it

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124. Eldredge, *supra* note 121, at 896.

125. U.S. EQUAL EMP'T OPPORTUNITY COMM'N, *supra* note 68, at 15.

126. *See, e.g.*, Falk v. City of Glendale, No. 12-CV-00925-JLK, 2012 WL 2390556, at *4 (D. Colo. June 25, 2012) (finding that "Title VII does not extend to breast-feeding as a child care concern" because the PDA covers only conditions related to the mother, not the child, but leaving open the possibility that lactation might be included in PDA coverage "[i]f lactation is a natural consequence of pregnancy"); Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990), *aff'd*, No. 90-6259, 1991 WL 270823 (6th Cir. Dec. 19, 1991) (finding that breastfeeding was not a medical necessity and thus not covered by the PDA).

127. Barrash v. Bowen, 846 F.2d 927, 932 (4th Cir. 1988).

128. *Id.* at 928–29.

129. *Id.* at 931.

130. *Id.*

asserted, "between people, male and female, suffering extended incapacity from illness or injury and young mothers wishing to nurse little babies."[131] The PDA, the court concluded without citation or explanation, applied only to pregnancy and related conditions when those conditions were "incapacitating."[132]

Two years after the Fourth Circuit's decision in *Barrash*, the Sixth Circuit addressed a similar fact pattern in *Wallace v. Pyro Mining Co*. As with *Barrash*, the plaintiff in *Wallace* was denied extended maternity leave to breastfeed her baby, and then fired when she did not return to work from maternity leave when expected.[133] The Western District of Kentucky granted her employer's summary judgment motion because "the reason she sought the additional leave was unrelated to any disability or medical condition associated with pregnancy or childbirth."[134] Instead, the Kentucky court reasoned, "her request was for personal leave, based on her inability to wean her child from breast-feeding."[135]

Further echoing *Barrash*, the court narrowly construed the PDA to encompass only incapacitating conditions that required medical care or treatment, even while admitting that the PDA left "related medical conditions" undefined.[136] Because breastfeeding and weaning are natural consequences of pregnancy and childbirth, and not debilitating disabilities, the court held that they did not fall within the PDA's purview.[137] On appeal, the Sixth Circuit affirmed without much

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131. *Id*. at 931–32 (emphasis added).

132. *Id*. at 931 ("Under the Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k), pregnancy and related conditions must be treated as illnesses only when incapacitating."); *see* Notter v. N. Hand Prot., No. 95-1087, 1996 WL 342008, at *5 (4th Cir. June 21, 1996) (referring to this statement in *Barrash* as "said in *dicta* without any citation of authority"). The Fourth Circuit modified their position eight years later in *Notter v. North Hand Prot*., but affirmed the central holding of *Barrash* that breastfeeding and lactation did not fall under the PDA. *Id*. The court repudiated its assertion in *Barrash* that medical conditions relating to pregnancy or childbirth must be incapacitating in order to fall within the PDA, calling it "*dicta* without any citation of authority," but affirmed that *Barrash* stood "for the narrow proposition that breastfeeding is not a *medical* condition related to pregnancy or to childbirth." *Id*. For a discussion of the inadequacy of *Notter* in correcting the court's erroneous construction of the PDA in *Barrash*, see Kasdan, *supra* note 28, at 325 (claiming that *Notter* had minimal impact because it was an unpublished decision handed down eight years after *Barrash* and after other jurisdictions had already adopted the faulty *Barrash* reasoning). *See also* Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 439 (6th Cir. 2004) (citing to *Barrash* for the proposition that pregnancy and related conditions are covered by the PDA only when incapacitating, with no mention of *Notter*).

133. Wallace v. Pyro Mining Co., 789 F. Supp. 867, 868 (W.D. Ky. 1990).

134. *Id*.

135. *Id*. (emphasis added).

136. *Id*. at 869 ("Such a conclusion is mandated by the plain language of the act, and by its legislative history. While it may be that breast-feeding and weaning are natural concomitants of pregnancy and childbirth, they are not 'medical conditions' related thereto. Admittedly, the act does not define what constitute 'related medical conditions.'").

137. *Id*.; *see also* Nicole Kennedy Orozco, *Pumping at Work: Protection from Lactation Discrimination in the Workplace*, 71 OHIO ST. L.J. 1281, 1304 (2010) ("Even when breastfeeding is not a choice by the mother, but instead is the only way that the child will accept nourishment, the plaintiff's claim has been rejected out of failure to show medical necessity.") (citing Wallace *v. Pyro Mining Co*., No. 90-6259, 1991 WL 270823, at *1–2 (6th Cir. Dec. 19, 1991), *aff'g* 789 F. Supp. 867 (W.D. Ky. 1990)).

discussion, refusing to entertain the plaintiff's challenge under the PDA because she had failed to demonstrate that breastfeeding her child was medically necessary.[138]

Critically, these early circuit opinions arose out of cases concerning breastfeeding accommodations—requests by workers to take time off from work in order to breastfeed their new child at home. This type of accommodation is conceptually distinct from a pumping accommodation that would have allowed the worker to go back to work and pump. Although later cases primarily dealt with workers requesting pumping, and not breastfeeding accommodations, courts took their cue from these early holdings and did not distinguish between the two types of accommodations.

ii. Lower Federal Court Decisions

In the 1990s, several federal district courts followed the lead of the Fourth and Sixth Circuits, casting breastfeeding as a childcare concern outside the PDA's scope. For example, in *McNill v. New York City Dept. of Correction*, the U.S. District Court for the Southern District of New York rejected the claim of a plaintiff who was demoted after taking leave to breastfeed her newborn.[139] The plaintiff's baby was born with a cleft palate and was unable to bottle feed, but the employer did not consider the plaintiff's absence to be pregnancy-related since it concerned the health of her child.[140] Although this case involved "a medical necessity that the child be breast-fed, a function which can only be performed by a newborn's mother," the district court held that the employee's absence was not due to her pregnancy or a related condition.[141] Rather, her absence was caused by her child's condition and "[t]he PDA only provides protection based on the condition of the mother—not the condition of the child."[142]

Similarly, in *Fejes v. Gilpin Ventures, Inc.,* the plaintiff alleged that she asked for a part-time schedule to accommodate her breastfeeding needs, was denied the request, and then fired for not returning to work when expected.[143] The U.S. District Court for the District of Colorado relied on *Wallace v. Pyro Mining Co.*[144] and *Barrash v. Bowen*[145] to reject the plaintiff's claim, characterizing

138. *Wallace*, 1991 WL 270823, at *1 ("Wallace argues that the Pregnancy Discrimination Act, which states that discrimination based on 'pregnancy, childbirth, or related medical conditions' is discrimination based on sex under Title VII, applies to this situation. Wallace has failed to produce evidence supporting her contention that breastfeeding her child was a medical necessity. Thus, this Court does not need to reach the issue of the Pregnancy Discrimination Act's applicability.").

139. 950 F. Supp. 564, 566 (S.D.N.Y. 1996).

140. *Id*. at 566–67.

141. *Id*. at 571.

142. *Id*.

143. 960 F. Supp. 1487, 1490–91 (D. Colo. 1997).

144. No. 90-6259, 1991 WL 270823 (6th Cir. Dec. 19, 1991).

145. 846 F.2d 927 (4th Cir. 1988).

breastfeeding as a childcare issue outside the scope of the PDA.[146] As in *McNill*, the court held that PDA protections are based on the condition of the mother and not the child and further concluded that "breast-feeding and child rearing concerns after pregnancy are not medical conditions related to pregnancy or childbirth within the meaning of the PDA."[147]

In *Jacobson v. Regent Assisted Living, Inc.,* the U.S. District Court for the District of Oregon applied the same reasoning to a *pumping* accommodations claim.[148] The plaintiff alleged that her boss made disparaging comments about her pregnancy and did not grant her breaks to pump, resulting in her leaking breast milk at work on at least two occasions, and causing her humiliation and pain.[149] She was fired soon after.[150] Despite the difference between this plaintiff's request (to stay at work) and the requests of prior plaintiffs (to take time off work), the court flatly rejected the argument that her claim fell within the PDA. Drawing explicitly on *Fejes* and *Wallace*, the court concluded that "to the extent that Jacobson bases her discrimination claim on her assertion that [her employer] would not allow her to pump her breast milk, she fails to state a claim. Title VII and the PDA do not cover breast feeding or childrearing concerns."[151]

Jacobson presented an opportunity for the court to go in a new direction in defining the scope of the PDA. The accommodation at issue differed from prior cases in that the plaintiff was not requesting an extended absence in order to breastfeed at home. Instead, she was requesting adjustments in her workplace that would have allowed her to continue working while being able to pump at work.[152] The court failed to acknowledge the distinction between prior cases and Jacobsen's request for pumping accommodations, and applied the reasoning and rhetoric of the prior cases to the facts before it, casting the plaintiff's pumping accommodations requests as personal childcare concerns.[153]

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146. *Fejes*, 960 F. Supp. at 1491–92.

147. *Id*. at 1492.

148. Jacobson v. Regent Assisted Living, Inc., No. CV-98-564-ST, 1999 WL 373790, at *11 (D. Or. Apr. 9, 1999).

149. *Id*. at *4–5.

150. *Id*. at *5.

151. *Id*. at *11; *Fejes*, 960 F. Supp. at 1491–92; Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869–70 (W.D. Ky. 1990); *see also Jacobson*, 1999 WL 373790, at *15 ("As stated above, failure to pump breast milk cannot be the basis of a claim for pregnancy or sex discrimination but may be used only as evidence of Gish's intent to discriminate. If anything, this evidence proves only that Gish treated a breast feeding woman the same as a man, and was insensitive to Jacobson's personal needs.").

152. *Jacobson*, 1999 WL 373790, at *4 (noting that on one occasion, Jacobson had come in to the office to work for a few hours and her boss insisted that she stay longer, even though she requested to return home to breastfeed, and on another occasion, Jacobson had requested not to be required to fly to a meeting in another state in order to have time to pump).

153. *Id*. at *11; *see also* Orozco, *supra* note 137, at 1306 (discussing how the *Jacobson* court did not consider the ways in which lactation and the need to pump breast milk were different from the facts of previous cases in which plaintiffs had sought extended leave to breastfeed, and stating that the court dismissed the claim without consideration).

The U.S. District Court for the District of Colorado utilized this personal childcare framework as recently as 2012 in *Falk v. City of Glendale*.[154] The plaintiff, a 9-1-1 dispatcher, repeatedly asked for breaks to pump but was met with hostility and effectively denied, leading to three separate breast infections, and culminating in her firing.[155] The court dismissed her pregnancy discrimination claim because "the PDA focuses solely on the conditions experienced by the mother. While lactation is not *per se* excluded, Title VII does not extend to breast-feeding as a child care concern."[156]

Thus, early circuit court decisions holding that long absences to breastfeed were not PDA-protected engendered a body of case law that excluded any and all lactation or pumping related claims from PDA protection.

2. Courts Demand Comparator Group of Breastfeeding Men

Once courts found that breastfeeding and lactation did not fall under the PDA, they effectively ignored Congress's mandate in passing the PDA and demanded that plaintiffs uncover a group of lactating men who were treated better in the workplace.[157] In passing the PDA, Congress aimed to change the Supreme Court's restrictive approach to pregnancy discrimination and abolish the *Gilbert* methodology, which essentially demanded that plaintiffs point to a group of pregnant men who receive a benefit that women do not.[158] However, if breastfeeding and lactation are not covered by the PDA, then courts can analyze the claims using the pre-PDA rationale of *Gilbert* and *Geduldig*.[159] Rather than looking to non-pregnant employees similar in their ability or inability to work, courts assessing breastfeeding and lactation discrimination claims looked for an improbable comparator group comprised of male breastfeeding employees. Courts

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154. No. 12-CV-00925-JLK, 2012 WL 2390556 (D. Colo. June 25, 2012).

155. *Id.* at *1–2. While Jacobson's employer did not outright deny her accommodation requests, his hostile actions prevented her from pumping on multiple occasions. *Id.* at *4.

156. *Id.* at *3. The court noted somewhat contradictorily that it might be possible to show discrimination based on lactation under the PDA, since it is "a natural consequence of pregnancy . . . equivalent to any other involuntary bodily function," if the plaintiff were able to show that other workers were permitted restroom breaks that she was denied. *Id.* at *4.

157. *See* Derungs v. Wal-Mart Stores, Inc., 141 F. Supp. 2d 884, 893–94 (S.D. Ohio 2000), *aff'd*, 374 F.3d 428 (6th Cir. 2004); Martinez v. N.B.C., Inc., 49 F. Supp. 2d 305, 310 (S.D.N.Y. 1999).

158. *See* S. REP. NO. 95-331, at 2–3 (1977) (endorsing the *Gilbert* dissents as the correct interpretation of Title VII's sex discrimination protections); H.R. REP. NO. 95-948, at 2 (1978) (rejecting the *Gilbert* majority's reasoning and conclusions and endorsing the *Gilbert* dissents); *see also* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 139 (1976) ("For all that appears, pregnancy-related disabilities constitute an additional risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded inclusion of risks.").

159. Courts have continued to cling to the defunct *Gilbert* methodology despite the language of the PDA and a comprehensive legislative history supporting its broad application. *See* H.R. REP. NO. 95-948, at 2–3; S. REP. NO. 95-331, at 2–3; *see* discussion *supra* Part II.C.

utilizing this approach dismissed plaintiffs' discrimination claims as non-cognizable under Title VII, just as the *Gilbert* court did in 1976.[160]

In *Martinez v. NBC, Inc.*, for example, the U.S. District Court for the Southern District of New York dismissed the plaintiff's lactation discrimination claim because there was no comparative group of breastfeeding men against which to measure her treatment.[161] The court cited *Gilbert* as precedent on which to base its holding, despite Congress's explicit rejection of that reasoning in passing the PDA.[162] According to the Southern District, gender discrimination under Title VII consists of "favoring men while disadvantaging women or vice versa."[163] The plaintiff's claim failed for "the quite simple reason that men are physiologically incapable of pumping breast milk, so plaintiff cannot show that she was treated less favorably than similarly situated men."[164]

In *Derungs v. Wal-Mart Stores, Inc.*, the U.S. District Court for the Southern District of Ohio upheld Wal-Mart's ban on breastfeeding in its stores under state public accommodations law, using federal Title VII case law to assess the plaintiffs' claims.[165] The *Wal-Mart* court relied heavily on *Martinez*,[166] emphasizing that the company's ban did not distinguish between men and women, but between "women who breast-feed and women who do not."[167] The decision relied on *Gilbert* and abstained from any discussion of the PDA.[168] The court's holding, in line with *Martinez* and *Gilbert*, twists the court into something of a logical knot, as it admits the plaintiffs established that "Wal-Mart treated them poorly because of a characteristic, breast-feeding, that is unique to women and

160. *See Derungs*, 141 F. Supp. 2d at 889, 893; Eldredge, *supra* note 121, at 889 ("[I]n *Derungs*…[t]he court determined that the comparative group was non-breastfeeding women. Without the requisite comparison to the *opposite* gender, the claim failed.").

161. *Martinez*, 49 F. Supp. 2d at 306, 309–10.

162. *Id*. at 309.

163. *Id*.

164. *See id*. at 310. The court mentions the PDA only once, in a footnote summarizing another case that disregarded it. *Id*. at 309 n.16 (citing Fejes v. Gilpin Ventures, Inc., 960 F. Supp. 1487, 1491–92 (D. Colo. 1997), as standing for the proposition that breastfeeding and child rearing concerns are not covered by the PDA); *see also* Coleman v. B-G Maint. Mgmt. of Colo., Inc., 108 F.3d 1199, 1203–05 (10th Cir. 1997) (rejecting plaintiff's sex discrimination claim because "gender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender," thus eliminating the possibility of recovery under a sex-plus theory for any plaintiff alleging sex discrimination based on a trait unique to one sex).

165. *Derungs*, 141 F. Supp. 2d at 891–93 ("Admittedly, the foregoing case law involves Title VII, whereas the present case involves the application of Ohio Revised Code § 4112.02(G). . . . [T]he Court finds the federal case law cited above to be instructive, insofar as both Title VII and the Ohio Revised Code prohibit discrimination on the basis of sex. Finally, the *logic* of the foregoing analysis applies with equal force, regardless of the statutory context in which it is applied. . . . [T]he Court discerns no principled basis for distinguishing Ohio's prohibition against discrimination on the basis of sex or age by places of public accommodation from the Title VII analysis set forth above.").

166. *Id*. at 890–91.

167. *Id*. at 889.

168. *Id*. ("In *General Elec. Co. v. Gilbert* . . . , the Supreme Court recognized that dividing individuals into two groups, pregnant women and non-pregnant persons, does not constitute sex discrimination.") (citations omitted).

infants," but insists that no sex discrimination occurred "because men do not produce breast milk."[169] If anything, the court concluded, such classifications demonstrate "breast-feeding discrimination," which the court viewed as plainly not sex discrimination.[170]

On appeal, the Sixth Circuit affirmed the Ohio District Court's judgment, relying on their precedential holding in *Wallace* for support.[171] In upholding the decision, the Sixth Circuit reasoned that "despite the application of the expansive PDA language, none of the district or appellate courts found that breast-feeding fell within the scope of gender discrimination because of the absence of a comparable class."[172] Indeed, the court notes, "both *Wallace* and *Martinez* directly cite to *Gilbert* as controlling authority for their decisions even though they deal with employment cases after the passage of the PDA."[173]

This reliance of courts on *Gilbert* is perplexing, particularly in light of the explicit rejection of *Gilbert*—and hearty endorsement of the *Gilbert* dissents—by both Houses of Congress in passing the PDA.[174] Scholars have criticized the reliance of federal courts on the logic of *Gilbert*, arguing that such reasoning ignores the explicit Congressional intent embodied in the PDA, as well as the biological reality of women's experiences.[175] One such scholar, Maureen Eldredge, has argued that housing the PDA within Title VII rather than in disability legislation demonstrates Congress's intent to expand and update the legal conception of discrimination against women: "The PDA changed the definition of gender discrimination; it did not just add pregnancy to a list of disabilities."[176]

169. *Id*. at 894.

170. *Id*. at 892.

171. Derungs v. Wal-Mart Stores, Inc., 374 F.3d 428, 438 (6th Cir. 2004).

172. *Id*. at 439 (summarizing Wallace v. Pyro Mining Co., 789 F. Supp. 867 (W.D. Ky. 1990), aff'd, 951 F.2d 351, 1991 WL 270823 (6th Cir. 1991), Martinez v. N.B.C., Inc., 49 F.Supp.2d 305 (S.D.N.Y. 1999), Coleman v. B–G Maint. Mgmt., 108 F.3d 1199, 1204 (10th Cir. 1997), Barrash v. Bowen, 846 F.2d 927 (4th Cir.1988), and McNill v. N.Y.C. Dep't of Corr., 950 F. Supp. 564 (S.D.N.Y. 1996)).

173. *Derungs*, 374 F.3d at 439.

174. *See* H.R. REP. NO. 95-948, at 2 (1978) ("It is the Committee's view that the dissenting Justices [in *Gilbert*] correctly interpreted the Act."); S. REP. NO. 95-331, at 2–3 (1977) (quoting language from the *Gilbert* dissents and stating that they correctly express "both the principle and the meaning" of Title VII); *see also* Kasdan, *supra* note 28, at 321 (noting that Congress moved swiftly to correct the *Gilbert* decision, introducing legislation to invalidate its holding only three months later).

175. *See* Eldredge, *supra* note 121, at 882 ("Failing to recognize and provide remedies for women facing discrimination perpetuates an unequal work situation, which is a result of courts attempting to ignore biological truths in favor of a supposed gender-blind justice and serves only to perpetuate the status quo."); Kasdan, *supra* note 28, at 310 (arguing that by reviving the defunct analysis of *Gilbert*, courts are obstructing "the legislative mandate to eliminate all forms of sex discrimination in the workplace").

176. Eldredge, *supra* note 121, at 896–97.

The Supreme Court itself has repeatedly acknowledged that the PDA overruled *Gilbert*.[177] In *Young v. United Parcel Service*, the Court emphasized that "Congress' intent in passing the [Pregnancy Discrimination] Act was to overrule the *Gilbert* majority opinion."[178] Indeed, it is difficult to see how the goals of Title VII are realized if the PDA exempts from protection any employment policy that burdens women but, by definition, does not burden men.[179]

3. The Fifth Circuit Recognizes Lactation As a "Related Medical Condition"

In *EEOC v. Houston Funding II, Ltd.*, the EEOC on behalf of plaintiff Donnica Venters alleged she was fired for asking whether she would be able to pump breast milk when she returned to her job after giving birth.[180] Citing *Wallace* and *Martinez*, the U.S. District Court for the Southern District of Texas granted her employer's summary judgment motion, holding as a matter of law that firing a female employee because she is lactating does not constitute sex discrimination, and that lactation is not a medical condition of pregnancy.[181] The Texas district court somewhat absurdly implied (without citation) that pregnancy-related medical conditions, by definition, could not exist past the day of a child's birth.[182]

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177. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678, 685 (1983) ("When 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"); Cal. Fed. Sav. and Loan Ass'n v. Guerra, 479 U.S. 272, 284–85 (1987) ("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*. . . . [W]e believe that the second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied.") (citations omitted); Young v. United Parcel Serv., Inc., 135 S.Ct. 1338, 1353–55 (2015) (reiterating the Court's holding in *Guerra*, 479 U.S. 272, that the PDA overruled *Gilbert*).

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

179. *See* H.R. REP. NO. 95-948, at 3 (emphasizing that the PDA aimed "to ensure that working women are protected against all forms of employment discrimination based on sex"); S. REP. NO. 95-331, at 3 (noting that a failure to address pregnancy discrimination would prevent the elimination of sex discrimination in employment); Eldredge, *supra* note 121, at 890.

180. EEOC v. Hous. Funding II, Ltd., 2012 WL 739494, *1 (S.D. Tex. 2012), *rev'd*, 717 F.3d 425 (5th Cir. 2013).

181. *Id*. at *1 (citing Martinez v. NBC Inc. 49 F. Supp. 2d 305, 309–10 (S.D.N.Y. 1999) and Wallace v. Pyro Mining Co., 951 F.2d 351 (W.D. Ky. 1990)) (providing support for the conclusion that "[f]iring someone because of lactation or breast-pumping is not sex discrimination").

182. *Hous. Funding II*, 2012 WL 739494, at *1 ("Even if the company's claim that she was fired for abandonment is meant to hide the real reason—she wanted to pump breast-milk—lactation is not pregnancy, childbirth, or a related medical condition. She gave birth on December 11, 2009. *After that day, she was no longer pregnant and her pregnancy-related conditions ended*.") (emphasis added). *But see* H.R. REP. NO. 95-948, at 2 (showing Congress's stated purpose in passing the PDA was to make "these guidelines require employers to treat disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth *and recovery therefrom* as all other temporary disabilities.") (emphasis added); *see also* Jacobson v. Regent Assisted Living, Inc., No. CV-98-564-ST, 1999 WL 373790, at *10 (D. Or. Apr. 9, 1999) ("If an employer is allowed to terminate an

Following that decision, the EEOC appealed to the Fifth Circuit, which vacated and remanded the court's holding.[183] The Fifth Circuit held that lactation was a related medical condition of pregnancy under the PDA because "[l]actation is the physiological process of secreting milk from mammary glands and is directly caused by hormonal changes associated with pregnancy and childbirth."[184] In light of the absence of a statutory definition for the phrase, the court reviewed medical dictionary definitions of "medical condition," which they found to include general physiological conditions.[185] The Fifth Circuit also relied on *Harper v. Thiokol Chemical Corp.*,[186] which invalidated a policy requiring women on pregnancy leave to have sustained a normal menstrual cycle before returning to work.[187] If menstruation could be considered sufficiently related to pregnancy to trigger the PDA, the Fifth Circuit reasoned, so could lactation.[188]

Notably, the court distinguished *Martinez v. NBC Inc.* on the grounds that *Martinez* concerned pumping accommodations, not discrimination.[189] The Fifth Circuit attempted to parse this distinction in its brief opinion, explaining, "The issue here is not whether Venters was entitled to special accommodations—at the time, she was not entitled to special accommodations under Title VII—but, rather, whether Houston Funding took an adverse employment action against her, namely, discharging her, because she was lactating and expressing breast milk."[190] The Court also emphasized that nothing in its opinion should be interpreted as "precluding an employer's defense that it fired an employee because that employee demanded accommodations."[191] One judge on the panel filed a separate concurrence in part to highlight this distinction and underscore the fact that special accommodations remained unprotected by the PDA.[192]

In light of these qualifiers, the Fifth Circuit's decision appears to draw a line in the sand between cases where an employee suffers an adverse employment action because she is lactating or needs to express breast milk (cognizable under

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employee soon after she gives birth because Title VII would not cover her as a new parent, then the PDA would have no meaning.").

183. EEOC v. Hous. Funding II, Ltd., 717 F.3d 425, 426 (5th Cir. 2013).

184. *Id*. at 428.

185. *Id*. at 428–29.

186. 619 F.2d 489 (5th Cir. 1980).

187. *Hous. Funding*, 717 F.3d at 427–28.

188. *Id*. at 429 ("[L]actation is a normal aspect of female physiology that is initiated by pregnancy and concludes sometime thereafter. If an employer commits unlawful sex-based discrimination by instituting a policy revolving around a woman's post-pregnancy menstrual cycle, as in *Harper*, it is difficult to see how an employer who makes an employment decision based upon whether a woman is lactating can avoid such unlawful sex discrimination.").

189. *Id*. at 429 n.6 (citing Martinez v. N.B.C., Inc., 49 F. Supp. 2d 305, 308–10 (S.D.N.Y. 1999)).

190. *Hous. Funding*, 717 F.3d at 429 n.6.

191. *Id*. at 430 n.7.

192. *Id*. at 430 (Jones, J., concurring) ("It follows that if Venters intended to request special facilities or down time during work to pump or 'express' breast milk, she would not have a claim under Title VII or the PDA as of the date of her lawsuit.").

Title VII), and cases where an employee suffers an adverse employment action because she requested an accommodation due to lactation (not cognizable under Title VII). Although the EEOC celebrated the Fifth Circuit's holding, it did not address how courts should navigate this blurry distinction in the future.[193]

IV.
THE D.C. AND ELEVENTH CIRCUITS INTERPRET YOUNG

While the Supreme Court has not yet ruled on the question of whether breastfeeding and lactation fall within the scope of the PDA, some circuit courts have. As detailed above, in the 1980s and 90s, the Fourth and Sixth Circuits declined to interpret the PDA to cover lactation or breastfeeding,[194] while in 2013, the Fifth Circuit endorsed a broader reading of the law to include lactation.[195] Since the Supreme Court's decision in *Young v. United Parcel Service*[196] in 2015, both the District of Columbia and the Eleventh Circuit courts have followed the Fifth Circuit in classifying lactation-based discrimination claims as within the scope of the PDA's protection.[197] Both of the post-*Young* cases that emerged from these courts dealt with police officers returning to work after giving birth and seeking accommodations to pump breast milk.[198]

A. D.C. Circuit: Allen-Brown v. District of Columbia

In *Allen-Brown v. District of Columbia*, decided in 2016, the plaintiff, a police officer with the D.C. Metropolitan Police Department, requested a limited duty assignment upon her return from maternity leave because she was lactating.[199] Allen-Brown's request stemmed from the fact that she was temporarily unable to

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193. Press Release, U.S. Equal Emp't Opportunity Comm'n, Fifth Circuit Holds Lactation Discrimination is Unlawful Sex Discrimination (May 31, 2013), https://www.eeoc.gov/eeoc/newsroom/release/5-31-13a.cfm [https://perma.cc/G7EW-VLXP] (quoting Claudia Molina-Antanaitis, trial attorney in the EEOC's Houston District Office which brought the initial litigation) ("Now that the Fifth Circuit has reaffirmed the EEOC's longstanding position about the broad coverage of the Pregnancy Discrimination Act, we look forward to trying the underlying case. . . . We hope this litigation sends a message to other women that discrimination based on pregnancy, childbirth and related conditions is against the law and that the EEOC is here to help."); *see also infra* Part IV.D.2.

194. *See supra* Part III.B.1.i.

195. *Hous. Funding*, 717 F.3d at 428; *see also supra* Part III.B.3.

196. Young v. United Parcel Serv. Inc., 135 S. Ct. 1338 (2015)

197. *See* Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1259–60 (11th Cir. 2017); Allen-Brown v. District of Columbia, 174 F. Supp. 3d 463, 477 (D.D.C. 2016).

198. *Hicks*, 870 F.3d at 1255–57; *Allen-Brown*, 174 F. Supp. 3d at 465. As of this Article's publication, a NYC police offer has filed a lawsuit against the city, alleging that the NYC Police Department failed to give her proper break time to pump breast milk and retaliated against her for pumping at work. *See* Jason Grant, *NYPD Officer's Suit over Pumping Breast Milk Could Be First of Several*, N.Y. L. J. (Oct. 12, 2018, 6:33 PM), https://www.law.com/newyorklawjournal/2018/10/12/nypd-officers-suit-over-pumping-breast-milk-could-be-first-of-several [https://perma.cc/256V-KFNZ].

199. *Allen-Brown*, 174 F. Supp. 3d at 465.

wear the required uniform for patrol duty, a bulletproof vest, as it interfered with the production of breast milk and caused her severe physical pain.[200] The Police Department denied Allen-Brown's request and placed her on extended leave, eight months of which were unpaid.[201] She sued the Department for gender and pregnancy discrimination in violation of Title VII, among other claims.[202]

In assessing the plaintiff's claim, the D.C. Circuit, applying the *McDonnell Douglas* burden-shifting test, found that Allen-Brown successfully countered the District's proffered reasons for denying the accommodation with evidence that such justifications were pretextual.[203] In so finding, the court fleshed out the Supreme Court's holding in *Young*, explaining the ways in which it altered (and maintained) the standard for demonstrating pretext in a pregnancy discrimination case.[204] The court then applied its interpretation of the pretext standard as articulated in *Young* to the facts of *Allen-Brown*, finding that the plaintiff succeeded in using traditional means to demonstrate evidence of pretext.[205] In applying *Young*'s modified standard for disparate treatment claims to *Allen-Brown*, the court implicitly placed the plaintiff's lactation-based claims within the PDA's scope.

The court confirmed the plaintiff's claim fell within the scope of the PDA's protections, particularly in its discussion of who should be regarded as the proper comparator group against which to measure the District's treatment of her.[206] The court held that "Allen-Brown certainly does not need to establish that the MPD accommodated similarly disabled *men*, as the District suggests," because this "was precisely the line drawn in *Gilbert*, which Congress displaced by adopting the PDA."[207] Rather, Allen-Brown could point to the District's own evidence that eleven other MPD officers who sustained injuries or disabilities off the job were accommodated, while she was not.[208]

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200. *Id*. at 467. The police department's physician corroborated this restriction, noting in her certification form after examining the plaintiff that the plaintiff was capable of working full time but with accommodations such that she did not have to wear the vest. *Id*.

201. *Id*. at 470.

202. *Id*. (noting the plaintiff also brought a Title VII retaliation claim, a First Amendment claim, a claim under D.C. Code § 2–1401.01 et seq. for discrimination based on gender and family responsibilities, a claim under D.C. Code § 2–1402.82 for failure to provide accommodations for breastfeeding mothers and for retaliation, and claims for civil rights violations under 42 U.S.C. §§ 1981 and 1983).

203. *Id*. at 474–75.

204. *Id*. at 472–75.

205. *Id*. at 475–77.

206. *Id*. at 467–77 ("Although the District's argument appears to channel *Young*, as an initial matter, it is far from clear that the District has identified the correct comparators in making such a claim. In *Young*. . . . the Supreme court rejected [a similar] approach, explaining that it would render the second clause added by the PDA irrelevant.").

207. *Id*. at 477.

208. *See id*.

The District argued in its brief to the D.C. Circuit that breastfeeding and lactation were not covered by the PDA.[209] Noting that the D.C. Circuit had not yet addressed the question, the court relied heavily on the Fifth Circuit's opinion in *EEOC v. Houston Funding II, Ltd.*[210] The court favorably cited the Fifth Circuit's construction of "medical condition" in the language of the PDA to mean "any physiological condition," per medical dictionary definitions.[211] Because lactation is the undisputed "physiological result of being pregnant and bearing a child,"[212] the D.C. Circuit concluded, "as a matter of plain language, the PDA applies to lactation."[213]

In an effort to distinguish prior unfavorable case law, the D.C. Circuit characterized earlier cases as involving women's breastfeeding choices, while emphasizing that Allen-Brown's case concerned the physiological aspects of lactation that limited her ability to work.[214] According to the court, the early case law demonstrated that breastfeeding needs are childcare choices that concern the condition of the baby, and not the mother.[215] Lactation, on the other hand, is "the postpartum production of milk . . . a physiological process triggered by hormones," which requires that a nursing mother express breast milk several times over the course of a workday in order to "continue producing an adequate milk supply and to avoid painful complications associated with delays in expressing milk."[216] The D.C. Circuit declared that lactation is "undeniably a 'condition of the mother,'" rendering the earlier cases unpersuasive.[217]

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209. *Id*. The circuit court considered dismissing this argument because the District failed to timely raise the issue but chose instead to dispose of the argument on its merits. *Id*. ("[T]he District argued for the first time in its reply brief that breastfeeding and lactation are not covered by the PDA and Title VII. As an initial matter, the Court notes that the District's failure to raise this issue until its reply brief would, standing alone, provide a sufficient basis for the Court to reject the argument.") (citations omitted).

210. *Id*. at 478 ("Although the D.C. Circuit has yet to address this question, the Court finds the Fifth Circuit's analysis in *EEOC v. Houston Funding II, Ltd*., 717 F.3d 425 (5th Cir. 2013), persuasive.").

211. *Allen-Brown*, 174 F. Supp. 3d at 478 (quoting *Hous. Funding*, 717 F.3d at 428–29 & n. 4); *see* 42 U.S.C. § 2000e(k) (2012) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.").

212. *Allen-Brown*, 174 F. Supp. 3d at 478 (quoting *Hous. Funding*, 717 F.3d at 428).

213. 174 F. Supp. 3d at 478.

214. *Id*. at 479–80. The distinction the court draws is between the physiological effects of lactation and the resultant need to express breast milk, as opposed to the desire to take breaks, absences, or extended maternity leaves from work in order to breastfeed.

215. *Id*.

216. *Id*. at 479 (quoting U.S. Equal Emp't Opportunity Comm'n, No. 915.003, EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (2015)).

217. *Allen-Brown*, 174 F. Supp. 3d at 479.

B. Eleventh Circuit: Hicks v. City of Tuscaloosa

In *Hicks v. City of Tuscaloosa*, plaintiff Stephanie Hicks was a police officer who was denied a desk assignment after she returned from maternity leave while lactating.[218] Hicks was assigned to patrol duty instead, which required her to wear a bulletproof vest that interfered with milk production and posed risks of infection.[219] Because she was not accommodated in a way that allowed her to do her job safely, Hicks was forced to resign.[220] She brought a breastfeeding discrimination claim under the PDA, and the City of Tuscaloosa moved to dismiss on summary judgment.[221]

In denying the defendant's motion, the Alabama district court acknowledged that whether breastfeeding and lactation constituted a "related medical condition" under the PDA was a fraught and nuanced question.[222] Like the D.C. Circuit in *Allen-Brown*, the court took its cue from the Fifth Circuit's decision in *EEOC v. Houston Funding II, Ltd.* and held that the PDA did indeed cover breastfeeding and lactation.[223] The court found that a reasonable jury could conclude that the choices offered to plaintiff by her employer of patrolling without a bulletproof vest, patrolling with an unsafe, ill-fitting one, or wearing a vest that caused extreme physical pain left her with no real choice but to resign.[224] A jury trial was then held in 2016, with Hicks awarded over $160,000 in damages.[225] The city moved for a new trial and for judgment as a matter of law; when the court denied both motions, the city appealed the denial to the Eleventh Circuit.[226]

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218. Hicks v. City of Tuscaloosa, No. 7:13-CV-02063-TMP, 2015 WL 6123209, at *8, *20 (N.D. Ala. Oct. 19, 2015). Upon her return from leave her supervisors' comments included: "get rid of that little b-tch," and "c-nt" and complaints about her taking full FMLA leave and breaks to express breast milk. *Id*. at *6-7.

219. *Hicks*, 2015 WL 6123209, at *7–8.

220. *Id*. at *9; *see also* Stephanie Hicks, *My Police Department Vowed to 'Get Rid' of Me After I Had My Son, So I Fought Back for Other Female Officers*, ACLU: BLOG (Sept. 14, 2017, 11:45 PM), https://www.aclu.org/blog/womens-rights/womens-rights-workplace/my-police-department-vowed-get-rid-me-after-i-had-my-son [https://perma.cc/ZVD4-XMDZ] ("The chief suggested that I either not wear the vest on patrol or wear it more loosely. Both of those options would have been unsafe, and I wasn't willing to put my life at risk. I also wasn't ready to quit breastfeeding altogether.").

221. *Hicks*, 2015 WL 6123209, at *1.

222. *Id*. at *17, *19.

223. *Id*. at *19 ("The court agrees [with the Fifth Circuit] that lactating is a medical condition related to pregnancy and childbirth, and that a lactating employee may not be treated differently in the workplace from other employees with similar abilities to work. Thus, a female employee may not be discharged or otherwise disciplined simply because she is lactating.").

224. *Hicks*, 2015 WL 6123209, at *21 (concluding that Hicks was, in effect, constructively discharged); *id*. at *32 (denying employer's summary judgment motion as to the plaintiff's claim of pregnancy discrimination under Title VII).

225. Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1257 (11th Cir. 2017); *see also Hicks v. City of Tuscaloosa, Alabama*, ACLU ALABAMA, https://www.aclualabama.org/en/cases/hicks-v-city-tuscaloosa-alabama [https://perma.cc/JN6Q-UQ2N].

226. *Hicks*, 870 F.3d at 1255; *see* ACLU ALABAMA, *supra* note 225 ("The case is one of the first recent cases to reach an appellate court addressing pregnancy and lactation accommodation post-*Young v. United Parcel Service, Inc*.").

The Eleventh Circuit relied heavily on *Houston Funding II, Ltd.* to affirm the Alabama district court's determination that breastfeeding and lactation were encompassed in the PDA's language.[227] However, the court also independently analyzed the question, looking first to the text of the statute and then to the PDA's legislative history.[228] The court reasoned, "Given that Congress included pregnancy and childbirth and explicitly used the words 'not limited to,' it is a common-sense conclusion that breastfeeding is a sufficiently similar gender-specific condition covered by the broad catchall phrase included in the PDA."[229] The legislative history of the PDA confirms such an interpretation, the court continued, because "[t]he PDA would be rendered a nullity if women were protected during a pregnancy but then could be readily terminated for breastfeeding—an important pregnancy-related 'physiological process.'"[230]

Because the court concluded breastfeeding and lactation fell within the PDA's protection, it applied the standard for pregnancy discrimination refined in *Young v. United Parcel Service,* explaining that, "[w]hile the plaintiff in *Young* was not seeking a breastfeeding accommodation, but rather a pregnancy accommodation when she could not lift weight, the Supreme Court's logic applies equally to this case, *given that breastfeeding is a similar gender-specific condition covered by the PDA*."[231] Under this framework, the Eleventh Circuit upheld the lower court's denial of summary judgment.[232]

C. The D.C. and Eleventh Circuits Offer a Departure from Prior Decisions

The D.C. and Eleventh Circuit decisions offer a welcome departure from the approach taken by the Fourth and Sixth Circuits in analyzing breastfeeding and lactation-based claims of sex discrimination.[233] Classifying breastfeeding

227. 870 F.3d at 1258–59 ("The Fifth Circuit Court of Appeals has held that lactation is a related medical condition to pregnancy and thus terminations based on a woman's need to breastfeed violate the PDA. . . . We agree with the Fifth Circuit's determination that lactation is a related medical condition and therefore covered under the PDA.") (citation omitted). In making this determination, the court cites to the early Fourth and Sixth Circuit decisions as contrary precedent, but does not further comment on them. *Id*. at 1258 n.4.

228. *Id*. at 1259–60.

229. *Id*. at 1259 ("A plain reading of the PDA supports the finding that the breastfeeding likewise is covered under the PDA. The explicit language of the PDA says that it covers discrimination 'because of' or 'on the basis of sex' and is 'not limited to [discrimination] because of or on the basis of pregnancy, childbirth, or related medical conditions.' The frequently used statutory interpretation canon *ejusdem generis* states that, 'when a drafter has tacked on a catchall phrase' to 'an enumeration of specifics,' additional inclusions would be appropriate if they are sufficiently similar.") (citing ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 199 (2012)).

230. *Hicks*, 870 F.3d at 1260 (citing EEOC v. Hous. Funding II, Ltd., 717 F.3d 425, 428 (5th Cir. 2013)).

231. *Hicks*, 870 F.3d at 1261 (emphasis added); Young v. United Parcel Serv. Inc., 135 S. Ct. 1338 (2015).

232. *Hicks*, 870 F.3d at 1262.

233. *See supra* Parts III.B.1.i–ii.

discrimination as falling within the PDA's scope is a necessary first step toward protecting working mothers from employment discrimination. With the Fifth, Eleventh, and D.C. Circuits weighing in on the side of such litigants, there is hope that federal courts to consider the issue in the future will follow the example of these circuits, and not the earlier holdings of the Fourth and Sixth Circuits. That the Fifth, Eleventh, and D.C. Circuits have considered the issue more recently indicates a progressive movement toward a more inclusive PDA. Furthermore, the D.C. and Eleventh Circuit decisions were handed down in 2016 and 2017, respectively, *after* the Supreme Court's landmark pregnancy discrimination case, *Young v. United Parcel Service*, suggesting a hopeful trend in judicial interpretation of the PDA's scope.

D. Critiques & Recommendations

1. The Erroneous Lactation/Breastfeeding Divide

One potential problematic aspect of the D.C. Circuit's opinion is its rigid differentiation between lactation and breastfeeding. Although the opinion purports to draw a clear line between the physiological process of lactation and the childcare decision to breastfeed, the distinction is not so obvious in practice, and may embolden unsympathetic courts to discard breastfeeding claims.[234] The process of lactation is what allows new mothers to breastfeed—the choice to breastfeed is what stimulates the continued production of breast milk.[235] Characterizing breastfeeding as purely a childcare decision divorces it from its physiological origins and fails to acknowledge it as a concomitant consequence of choosing to nurse one's child.[236]

While the trend toward differentiating lactation and breastfeeding suggests that future litigants should mold breastfeeding discrimination claims into lactation-based claims,[237] this strategy risks granting judges the corresponding power to determine the outcome of the claim based on which linguistic frame they choose—lactation or breastfeeding. If we instruct plaintiffs to style their claim as "lactation discrimination" to increase the likelihood that a court will hear them, what is to stop that court from characterizing it as "breastfeeding discrimination" in order to reject it? Calling a claim a "lactation" claim versus a "breastfeeding"

234. *See supra* Part III.B.

235. *See* Kelly Bonyata, *How Does Milk Production Work?*, KELLYMOM https://kellymom.com/hot-topics/milkproduction [https://perma.cc/832B-ES75] (last updated Mar. 8, 2018); WEBMD, *supra* note 101.

236. *See* Kasdan, *supra* note 28, at 313 ("Despite the assumptions of some courts, breastfeeding is not simply a childcare choice independent of gender or pregnancy. . . . The ability to breastfeed follows from lactation, a process triggered by pregnancy and childbirth.").

237. In 2010, law student Nicole Kennedy Orozco recommended this litigation strategy for countering arguments that lactation is a condition arising out of breastfeeding, not pregnancy. She determined that lactation, as a physiological response to pregnancy and childbirth, was plainly within the purview of the PDA, while breastfeeding, "a care-giving choice made by the child's mother," was not. Orozco, *supra* note 137, at 1312.

claim casts no magic spell that compels the court to discuss the claim in a particular way. And, as has happened before, it is not difficult to imagine a court rejecting a lactation claim by characterizing it as concerning a new mother's decision to breastfeed, rather than a workplace pumping accommodation.[238]

The Eleventh Circuit recognized and rejected this conceptual division in a footnote, stating, "Any argument that lactation and breastfeeding should be treated differently is misplaced. Such a distinction between such intertwined acts would be unworkable for courts."[239] That breastfeeding is a choice should not impact this analysis, the court continued, as "[p]regnancy is also a 'choice,' but Congress has made it clear that to discriminate against women for choosing to become pregnant is indisputably a violation of the PDA."[240]

Courts addressing breastfeeding discrimination claims should follow the Eleventh Circuit's rejection of this dichotomy, rather than the D.C. Circuit's endorsement. Stripping breastfeeding-related claims of protected status under the PDA is antithetical to the statute's stated objectives, and risks providing courts with the ability to dismiss discrimination claims merely by characterizing them as concerning breastfeeding, as opposed to lactation.[241]

2. *The Accommodation/Discrimination Dichotomy*

Another potential problem with the current judicial landscape concerns the blurry line between discrimination and accommodation.[242] Because the PDA demands equal, and not special treatment, the characterization of a claim as discrimination is determinative.[243] The Fifth Circuit in *EEOC v. Houston Funding II, Ltd* explicitly endorsed this distinction.[244] Noting that the plaintiff was *not* entitled to special accommodations, the court held in her favor on qualified grounds, cautioning that nothing in its opinion should be read as preventing an employer from countering a discrimination claim with the argument that the employee demanded accommodations to which she was not entitled.[245] Justice

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238. *See* Jacobson v. Regent Assisted Living, Inc., No. CV-98-564-ST, 1999 WL 373790, at *11 (D. Or. Apr. 9, 1999) (rejecting plaintiff's lactation discrimination claim and instead casting her claims as breastfeeding and childrearing concerns); *see* discussion *supra* Part III.B.1.ii.

239. Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1259 n.6 (11th Cir. 2017) (emphasis added).

240. *Id*.

241. *See, e.g*., Martinez v. N.B.C., Inc., 49 F. Supp. 2d 305, 307, 310–11 (S.D.N.Y. 1999) (characterizing plaintiff's requests to pump breast milk at the office as "child care needs" and rejecting her discrimination claim).

242. *See supra* Part II.D (noting that the PDA is a discrimination law, unlike the ADA, which is an accommodation law, and discussing the implication of this distinction for pregnant workers).

243. *See* EEOC v. Hous. Funding II, Ltd., 717 F.3d 425, 429 n.6. (5th Cir. 2013).

244. *Id*.

245. *Id*. at 430 n.7 ("In its motion for summary judgment, Houston Funding contended Venters was fired because she inquired about whether she would be allowed to use a breast pump. Simply posing this question is not alleged to be a terminable offense. But nothing in this opinion should be interpreted as precluding an employer's defense that it fired an employee because that employee demanded accommodations."); *see supra* Part III.B.1.ii.

Edith Jones wrote a separate concurring opinion to emphasize the point: "if [Plaintiff] intended to request special facilities or down time during work to pump or 'express' breast milk, she would not have a claim under Title VII or the PDA as of the date of her lawsuit."[246]

This distinction was also taken up by the Alabama district court in *Hicks*.[247] Citing heavily to *Houston Funding*, the court concluded, "under the PDA, an employer is not required to treat breastfeeding or lactating employees *better* than it would treat non-lactating employees under similar circumstances, as long as it does not treat them worse."[248] On review, the Eleventh Circuit affirmed this distinction, noting that "[t]he line between discrimination and accommodation is a fine one,"[249] and parsed their language on the distinction carefully,[250] concluding:

> [P]hrasing Hicks's claim as merely a request for special accommodation is misleading. Hicks 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.[251]

The discrimination/accommodation dichotomy creates a precarious conceptual divide: courts may hold it impermissible for an employer to fire an employee because they are lactating or breastfeeding, but maintain it is perfectly acceptable to fire that same employee for *asking* for an accommodation on account of it. The Eleventh Circuit opinion in *Hicks* clarifies that firing an employee for requesting an accommodation afforded to other workers constitutes discrimination under the PDA.[252] This represents an improvement over the Fifth Circuit's decision in *Houston Funding*, which simply distinguished between adverse employment actions based on an employee's lactation (cognizable), versus actions based on the employee's request (not cognizable).[253]

Yet the Eleventh Circuit's justification for why Hicks's request was protected by the PDA relies on the success of her discrimination claim: Hicks successfully made a showing that other similarly situated employees were accommodated, and she was, therefore, found to be asking for "equal treatment" and not a "special

246. 717 F.3d at 430 (Jones, J., concurring).

247. Hicks v. City of Tuscaloosa, No. 7:13-CV-02063-TMP, 2015 WL 6123209, at *20 (N.D. Ala. Oct. 19, 2015).

248. *Id.*; *see also id.* at *21 ("The refusal to provide a special accommodation not made available to other employees is not actionable under the PDA, and there is no evidence that plaintiff was denied any facility or opportunity available to other [West Alabama Narcotics Squad] employees.").

249. Hicks v. City of Tuscaloosa, 870 F.3d 1253, 1260 (11th Cir. 2017).

250. *See id.* ("Taking adverse actions based on woman's breastfeeding is prohibited by the PDA but employers are not required to give special accommodations to breastfeeding mothers.").

251. *Id.* at 1261.

252. *Id.* at 1260–61.

253. *See* EEOC v. Hous. Funding II, Ltd., 717 F.3d 425, 429–30 (5th Cir. 2013).

accommodation" and could not be punished for her request.[254] This begs the question of what a court would do in a scenario where a worker is punished for requesting pumping accommodations to which she is later found not to have been entitled: would a court adhering to Eleventh Circuit precedent find that such a plaintiff's claim falls outside the protection of the PDA?[255]

If an employee's request for pumping accommodations is protected under the PDA only when the employee would otherwise be entitled to accommodation under a PDA analysis, workers seeking accommodations would need to be certain that they are entitled to the accommodation before even approaching their employer. Such a standard places an unrealistic burden on working mothers seeking accommodations to determine the probable outcome of a complex legal analysis, and would likely discourage them from asking for accommodations in the first place.

Despite these ambiguities, the upward progression of federal judicial interpretations of the PDA's protective scope[256] offer a promising route to improved protections for breastfeeding workers. Future courts to consider breastfeeding and lactation discrimination claims under the PDA should adopt a broad interpretation of the law's language to encompass discrimination on the basis of breastfeeding, lactation, and pumping. Courts should reject the needlessly cabined view of pregnancy-related conditions that relegates breastfeeding-related claims to unprotected status—as compared to lactation-based claims—and embrace a more nuanced and contextual understanding of the connection between these two natural phenomena.

Finally, courts should apply the PDA's anti-discrimination protections to workers who request accommodations related to their breastfeeding needs, irrespective of whether the employer is required to provide the accommodation. Even if the PDA does not on its face require employers to grant the accommodation requests of nursing workers, its anti-discrimination protections should protect them from being fired for asking.

V.
STATUTORY RESPONSES TO BREASTFEEDING DISCRIMINATION

The lack of judicial consensus on whether lactation and breastfeeding fall within the PDA's protections has inspired legislative action. Just as the PDA expanded the Supreme Court's narrow interpretation of Title VII to include

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254. *Hicks*, 870 F.3d at 1261.

255. In other words: a worker asks for pumping accommodations and is denied; she is subsequently fired for requesting accommodations and brings a PDA discrimination claim; her employer successfully shows that other workers similarly situated are not accommodated. If a court finds that she was not entitled to an accommodation at the time of her request, would the request, as well as the accommodation, lie outside the PDA's purview?

256. See *supra* Part IV.C.

discrimination on the basis of pregnancy, local, state, and federal laws have sought to codify protections for breastfeeding and pumping workers.

A. Federal Law: The ACA Amendment to the Fair Labor Standards Act

The Obama administration's landmark health care bill, the Patient Protection and Affordable Care Act ("ACA"), included an amendment to the Fair Labor Standards Act of 1938 ("FLSA"), requiring certain employers to provide reasonable break time for employees to pump breast milk at work for at least one year after their child's birth.[257] The law also requires employers of fifty or more people to provide a clean, private space for nursing or pumping "other than a bathroom."[258] Employers with fewer than fifty workers are exempt from the law if the requirements would impose an "undue hardship," defined as a "significant difficulty or expense when considered in relation to the size, financial resources, nature, or structure of the employer's business."[259]

Despite substantial Republican opposition to the ACA at the time of its passage, the Senate Health, Education, Labor, and Pensions Committee unanimously approved the breastfeeding amendment before it was signed into law.[260] The law covers hourly workers who fall under the FLSA—workers who are eligible for minimum wage and overtime protections—but leaves most salaried workers unprotected.[261] Complaints, therefore, tend to be filed by lower-wage workers, particularly from the retail sector.[262]

The ACA amendment, codified at Section 207(r) of the FLSA, contains no specification on how the law will be enforced, nor any mention of penalties for noncompliant employers.[263] Existing penalties under the FLSA depend on a

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257. 29 U.S.C. § 207(r)(1)(A) (2012).

258. *Id.* § 207(r)(1)(B) (2012).

259. *Id.* § 207(r)(3).

260. *See* H.R. 3590, 111th Cong. (2010) (showing that all 178 Republicans in the House of Representatives voted against the ACA in 2010); Press Release, Sen. Jeff Merkley, Merkley: Health Care Amendment Looks Out for Nursing Mothers (June 23, 2009), https://www.merkley.senate.gov/news/press-releases/merkley-health-care-amendment-looks-out-for-nursing-mothers [https://perma.cc/6AQU-T6B3].

261. *See Breastfeeding*, CAROLYN B. MALONEY, https://maloney.house.gov/issues/womens-issues/breastfeeding-0 [https://perma.cc/YBK7-V6Q3]. According to the United States Breastfeeding Committee, this carveout for salaried workers was unintentional. *Supporting Working Moms Act (SWMA)*, U.S. BREASTFEEDING COMM., http://www.usbreastfeeding.org/swma [https://perma.cc/3DEC-D4VL] ("Although [Section 7 of the FLSA] was intended to cover all employees, its placement within existing statute means that it does not cover millions of salaried executive, administrative, and professional employees, including teachers. While it provides protection and support for the most vulnerable workers, this distinction in the law was unintentional, causes confusion, and could be addressed with a simple amendment.").

262. *See* Jamieson, *supra* note 9 (describing file of 105 closed cases resulting from breastfeeding complaints made to the Department of Labor between 2010 and 2013 obtained by the Huffington Post under the Freedom of Information Act).

263. 29 U.S.C. § 207(r). The Department of Labor has acknowledged the lack of enforcement mechanisms for the new law, stating that "Section 7(r) of the FLSA does not specify any penalties if an employer is found to have violated the break time for nursing mothers requirement." Reasonable

worker's lost wages, unpaid overtime, or liquidated damages.[264] However, the amendment specifically states that employers need not compensate workers for any break time used for expressing breast milk.[265] Thus, the only available remedies under the FLSA require that a worker have suffered monetary loss, even while the pumping amendment involves no monetary compensation. Taken together, these provisions effectively prevent working mothers from attaining a remedy for employer violations.[266]

The absence of an enforcement mechanism in Section 207(r) has stymied litigation efforts under the new law and stumped courts that are otherwise sympathetic to these claims.[267] In *Hicks v. City of Tuscaloosa*, the U.S. District Court for the Northern District of Alabama lamented its inability to remedy the plaintiff's legitimate claim of her employer's violation of Section 207(r): "No alternative right to damages beyond minimum wages or overtime pay is provided for plaintiffs asserting a right under § 207(r)(1). Accordingly, § 216(b) renders § 207(r)(1) virtually useless in almost all practical application."[268] The United States District Court for the Eastern District of New York made a similar observation on Section 207(r)'s "enforcement paradox" in *Lico v. TD Bank,*[269] noting that "recovery under the statute is limited to lost wages, but an employer is not required to compensate nursing mothers for lactation breaks. As a result, it will often be the case that a violation of § 207(r) will not be enforceable, because it does not cause lost wages."[270] Due to these shortcomings, the ACA amendment to the FLSA requiring accommodations for breastfeeding workers has not remedied the gaps in protection resulting from divergent judicial interpretations of the PDA.[271]

Break Time for Nursing Mothers, 75 Fed. Reg. 80,073, 80,078 (Dec. 21, 2010).

264. 29 U.S.C. § 216(b).

265. *Id*. § 207(r)(3).

266. Reasonable Break Time for Nursing Mothers, 75 Fed. Reg. at 80,078 ("Because employers are not required to compensate employees for break time to express breast milk, in most circumstances there will not be any unpaid minimum wage or overtime compensation associated with the failure to provide such breaks.").

267. *See* Hicks v. City of Tuscaloosa, No. 7:13-CV-02063-TMP, 2015 WL 6123209, at *27–28 (N.D. Ala. Oct. 19, 2015) (assessing plaintiff's claim under the Fair Labor Standards Act with respect to breastfeeding and expressing milk, noting that her employer failed to comply with the provision, but concluding there were no available remedies under the law).

268. *Id*. at *28.

269. No. 14-CV-4729 JFB AKT, 2015 WL 3467159, at *3 (E.D.N.Y. June 1, 2015).

270. *Id*.; *see also* Salz v. Casey's Mktg. Co., No. 11-CV-3055-DEO, 2012 WL 2952998, at *3 (N.D. Iowa July 19, 2012) (granting defendant's motion to dismiss plaintiff's claim under Section 207(r) because the court could locate no manner of enforcing the express breast milk provisions).

271. The court in *Hicks v. City of Tuscaloosa* explicitly urged reliance on the PDA instead of the FLSA amendment. *Hicks*, 2015 WL 6123209, at *29 ("[I]t does not appear that the statute prohibits or provides a remedy for an allegedly wrongful termination related to breastfeeding; rather, by its express terms, it remedies only the employer's failure to provide unpaid break time for breastfeeding during actual employment."); *id*. at *29 n.14 ("The court acknowledges the absurdity of this conclusion. An employer faced with a request to allow an employee to take breaks to breastfeed may simply fire the employee rather than attempt to accommodate the request for breaks.

B. State and Local Laws

Twenty-two states, along with the District of Columbia and Puerto Rico, have enacted laws that require employers to accommodate the needs of breastfeeding and lactating employees.[272] These laws typically require certain employers in the state to provide unpaid break time for employees to express milk at work, as well as make "reasonable efforts" to provide a private, sanitary space in which to pump, other than a bathroom.[273] Many of these protections lie within broader accommodation laws called Pregnant Workers Fairness Acts. PWFAs, which have been passed in twenty-four states and Washington, D.C., along with four localities, usually require that certain employers provide reasonable accommodations to pregnant workers such that they can continue working during their pregnancy but avoid endangering their health.[274] These laws provide workers with an affirmative right to accommodations without the complex steps required under the PDA.[275]

Nevertheless, the language in § 207(r)(1) and § 216(b) is clear. Break time and a nursing room are all that is required under the FLSA, and even if those are denied, the only remedy is for unpaid minimum wage or overtime pay. *Of course, protection against such a termination may be found under the Pregnancy Discrimination Act, as discussed above, which provides a much broader and more robust remedy*.") (emphasis added).

272. Those states are: Arkansas (ARK. CODE ANN. § 11-5-116 (West 2017)), California (CAL. LAB. CODE § 1030 (West 2018)), Colorado (COLO. REV. STAT. ANN. § 8-13.5-104 (West 2017)), Connecticut (CONN. GEN. STAT. ANN. § 31-40w (West 2017)), Delaware (DEL. CODE ANN. tit. 19, §§ 710, 711 (2018)), Hawaii (HAW. REV. STAT. ANN. §§ 378-2, -91 to -93 (LexisNexis 2018);, Illinois (820 ILL. COMP. STAT. ANN. 260/10 (West 2017)), Indiana (IND. CODE ANN. §§ 5-10-6-2, 22-2-14-2 (West 2017), Maine (ME. REV. STAT. ANN. tit. 26, § 604 (West 2017)), Massachusetts (MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2018); Minnesota (MINN. STAT. ANN. § 181.939 (West 2017)), Mississippi (MISS. CODE ANN. § 71-1-55 (West 2017)), Nebraska (NEB. REV. STAT. §§ 48-1102(11), 1107.02(2) (2018)), Nevada (NEV. REV. STAT. ANN. § 613.4383 (LexisNexis 2017)), New Mexico (N.M. STAT. ANN. § 28-20-2 (West 2017)), New York (N.Y. LAB. LAW § 206-c (Consol. 2017)), Oregon (OR. REV. STAT. ANN. § 653.077 (2017)), Rhode Island (23 R.I. GEN. LAWS ANN. § 23-13.2-1 (West 2017)), South Carolina (2018 S.C. Acts 244), Tennessee (TENN. CODE ANN. § 50-1-305 (West 2018)), Utah (UTAH CODE ANN. §§ 34-49-202, 34A-5-106(g) (West 2017)), and Vermont (VT. STAT. ANN. tit. 21, § 305 (2017)). D.C. CODE §§ 2-1402.82(d), 2-1401.05(a) (2017); P.R. LAWS ANN. tit. 3, § 1466 (2018). The Kentucky legislature passed a lactation accommodation law on March 28, 2019 as part of a state PWFA but the governor has not yet signed it into law. S.B. 18, 2019 Leg., Reg. Sess. (Ky. 2019).

273. *See, e.g.*, CAL. LAB. CODE ANN. § 1030.

274. *See* A BETTER BALANCE, *supra* note 94 (showing a complete list of the states and localities to pass PWFAs); *see also* NAT'L P'SHIP FOR WOMEN & FAMILIES, REASONABLE ACCOMMODATIONS FOR PREGNANT WORKERS: STATE AND LOCAL LAWS (2018), http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf [https://perma.cc/K7BE-LXSG]. The Kentucky legislature passed a PWFA on March 28th, 2019. However, I have not included it in this list because, as of the publication date of this Article, the governor has not signed the bill into law. S.B. 18, 2019 Leg., Reg. Sess. (Ky. 2019); *see* A BETTER BALANCE, *Kentucky Poised to Become Twenty-Fifth State to Guarantee Pregnant Workers a Clear Right to Workplace Accommodations* (Mar. 28, 2019), https://www.abetterbalance.org/kentucky-poised-to-become-twenty-fifth-state-to-guarantee-pregnant-workers-a-clear-right-to-workplace-accommodations/ [https://perma.cc/GA2X-CBKZ].

275. *See supra* Part II.D-E (discussing how a pregnant worker is entitled to an accommodation under the PDA only if she can demonstrate that certain non-pregnant workers are granted similar

Some of these laws explicitly protect pumping-related accommodations in the statute,[276] while others have been interpreted to include breastfeeding and pumping accommodations through regulatory guidance.[277]

But some of these laws contain limits similar to that of the FLSA amendment.[278] For example, many of these laws exempt employers from complying if doing so would pose an undue hardship on their business.[279] Some extend breastfeeding protections only to public employees,[280] or only cover workers who work for employers with a specified minimum number of employees.[281] A handful of states have passed laws or resolutions encouraging employers to make accommodations to breastfeeding workers but have stopped short of requiring them to do so.[282] Many of these states include anti-discrimination provisions within their accommodation laws, but some do not.[283]

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accommodations); *see also* Bakst, *supra* note 94 (noting how pregnant workers bringing a PDA claim must go through a multi-step process and produce sufficient evidence of intentional discrimination to prevail on a PDA claim).

276. *See, e.g.*, NEB. REV. STAT. §§ 48-1102(11), 1107.02(2); UTAH CODE ANN. §§ 34A-5-102, -106; MASS. GEN. LAWS ANN. ch. 151B, § 4. Providence and Central Falls, Rhode Island, have both passed local PWFA laws that require employers to provide break time and a private space to pump within the language of the statute itself. Providence, R.I. CODE § 16-57 (2014); Central Falls, R.I. CODE § 12-5 (2014).

277. New York City's PWFA, discussed below, has been interpreted by the N.Y.C. Commission on Human Rights to include accommodations and protection for nursing workers. N.Y.C. ADMIN. CODE § 8-107(22) (2016); NYC COMM'N ON HUMAN RIGHTS, NYC COMMISSION ON HUMAN RIGHTS LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF PREGNANCY: LOCAL LAW NO. 78 (2013); N.Y.C. ADMIN. CODE § 8-107(22) (2016), http://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Pregnancy_InterpretiveGuide_2016.pdf [https://perma.cc/M7JN-QB4G].

278. *See supra* Part V.A (discussing the enforcement limitations of the FLSA amendment).

279. *See, e.g.*, CAL. LAB. CODE ANN. § 1032 ("An employer is not required to provide break time under this chapter if to do so would seriously disrupt the operations of the employer."); DEL. CODE ANN. tit. 19, § 711 (2018); 820 ILL. COMP. STAT. ANN. 260/10 (West 2017); MINN. STAT. ANN. § 181.939 (West 2017); OR. REV. STAT. ANN. § 653.077(4) (2017) ("An employer is not required to provide rest periods under this section if to do so would impose an undue hardship on the operation of the employer's business.").

280. MONT. CODE ANN. § 39-2-215 (West 2017); TEX. GOV'T CODE ANN. § 619.002 (West 2017). Louisiana covers only public school employees. 2013 La. Acts 87.

281. *See, e.g.*, DEL. CODE ANN. tit. 19, § 710(7) (2018) (defining employer as those with four or more employees); IND. CODE ANN. § 22-2-14-1 (West 2017) (defining employer as an entity that employs 25 or more employees); OR. REV. STAT. ANN. § 653.077(8) (2017) (applying breastfeeding accommodation requirements to employers of 25 or more employees); UTAH CODE ANN. § 34A-5-102(I)(i)(i)(D) (defining employer as those employing fifteen or more employees).

282. *See e.g.*, H.J.R. Res. 145, 107th Cong. (Va. 2002). North Dakota and Washington State permit employers to call themselves "infant friendly" if they adopt workplace breastfeeding policies like flexible work scheduling, breaks for pumping, and a private sanitary space for pumping, but do not require employers to do so. N.D. CENT. ANN. CODE § 23-12-17 (West 2016); WASH. REV. CODE ANN. § 43.70.640 (West 2002). Texas has a similar law but permits employers to use the phrase "mother-friendly." TEX. HEALTH & SAFETY CODE ANN. § 165.003 (West 2018). Georgia and Oklahoma have passed laws *permitting* employers to provide reasonable break time and a location to pump for nursing workers, but do not require them to do so. GA. CODE ANN. § 34-1-6 (West 2017); OKLA. STAT. ANN. tit. 40, § 435 (West 2017).

283. For example, Rhode Island law requires employers to provide reasonable breaks and

As with many legislative innovations, the varying state and local laws offer divergent examples and avenues for what a comprehensive federal law protecting nursing workers might look like. In New York, protections for breastfeeding workers exist at both the local[284] and state level.[285] The state law is part of New York's labor law, and provides:

> An employer shall provide reasonable unpaid break time or permit an employee to use paid break time or meal time each day to allow an employee to express breast milk for her nursing child for up to three years following child birth. The employer shall make reasonable efforts to provide a room or other location, in close proximity to the work area, where an employee can express milk in privacy. No employer shall discriminate in any way against an employee who chooses to express breast milk in the work place.[286]

This law requires employers to accommodate nursing workers and bars discrimination against employees who pump in the workplace.[287]

New York City's protections for nursing workers are even stronger. The city passed a PWFA in 2014 under its human rights law, requiring employers of four or more employees to provide workers reasonable accommodations for their pregnancy, childbirth, or related medical conditions.[288] While lactation and nursing were not mentioned in the original statute, the N.Y.C. Commission on Human Rights, the agency charged with enforcing the PWFA, made it clear that such conditions were included.[289] And in 2018, the city amended the statute to explicitly require employers to accommodate pumping workers, provide a lactation room, and create a written policy on lactation accommodations.[290]

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make reasonable efforts to provide a private space to pump but does not bar discrimination within the same statutory provision. 23 R.I. GEN. LAWS ANN. § 23-13.2-1 (West 2012). Rhode Island's employment discrimination law bars discrimination on the basis of sex, with sex defined as the same as under the PDA, leaving the question of whether lactation counts as a "related medical condition" up to courts. §§ 28-5-6 to -7. Tennessee similarly requires employers to provide reasonable break time and space to pump for nursing workers but says nothing about discrimination. TENN. CODE ANN. § 50-1-305 (West 2018).

284. N.Y.C. ADMIN CODE § 8-107(22) (2016).

285. N.Y. LAB. LAW § 206-c (Consol. 2007).

286. *Id*. § 206-c.

287. Vermont's law similarly folds these two legal requirements into a single statutory scheme. VT. STAT. ANN. tit. 21, § 305 (West 2016).

288. N.Y.C. ADMIN CODE § 8-107(22) (2016).

289. NYC COMM'N ON HUMAN RIGHTS, *supra* note 277, at 8–9 ("Lactation is a medical condition related to childbirth and therefore must be accommodated absent an undue hardship. Employers must provide reasonable time for an employee to express breast milk and may not limit the amount of time that an individual can use to express milk unless the employer can demonstrate that the time needed presents an undue hardship to the employer.").

290. N.Y.C. Local Law No. 185 (2018) (amending the New York City human rights law to explicitly require employers to provide lactation accommodations, including a sanitary lactation room, unless such accommodation would pose an undue hardship on the employer); N.Y.C. Local

Furthermore, the Commission has robust enforcement powers, resulting in a city agency eager and able to enforce these protections.[291] Thus, city workers are uniquely empowered to advocate for their rights because they have a powerful and reliable agency invested in enforcing those rights.[292]

Such state and local laws requiring employers to provide break time for breastfeeding employees represent critical steps in protecting workers from discrimination, but the availability of legal recourse for a woman fired after requesting a clean place to pump should not depend on her zip code. Having a patchwork of varying state laws means employers operating in multiple states have obligations to accommodate some of their employees and not others. It also means that while workers in states with well-funded agencies may have real recourse to remedies, workers in states or cities with underfunded or understaffed agencies may be out of luck. And in nearly two-thirds of states, new mothers returning to work while lactating remain without clear legal protections for pumping.[293]

C. Recommendations for the Future

A clear federal standard establishing the right to workplace accommodations for pregnant and pumping workers would obviate the need to parse the PDA's language. A federal accommodation law requiring employers to grant workers reasonable accommodations related to pregnancy, childbirth, lactation, and other related conditions would moot the judicial debate over whether lactation is a "related medical condition" of pregnancy. Such a law would eliminate the problematic distinction between "equal" and "special" treatment, disposing of the discrimination/accommodation divide and the need to carefully frame a claim as lactation-based. Members of Congress have introduced several federal bills over the last ten years that would improve protections for pregnant and pumping workers—though a comprehensive federal law could, and should, be stronger than these proposals.

Law No. 186 (2018) (requiring employers to develop a written policy regarding lactation accommodations and distribute the policy to all employees upon hiring).

291. *See* Carmelyn P. Malalis, *If Fearless Girl Were a Woman in Today's Workforce*, HUFFINGTON POST, https://www.huffingtonpost.com/entry/if-wall-streets-fearless-girl-were-a-woman-in-todays_us_58de88d5e4b03c2b30f6a5cf [https://perma.cc/7L9H-N5N5] (last updated Apr. 3, 2017) (discussing the enforcement power of the Commission to impose fines on employers of up to $250,000, award monetary damages to victims, and require violators to attend trainings on the law, change their policies, and inform employees of their rights).

292. *Id.*; *see also* Kristen Meriwether, *City Officials Sharpening Teeth of Human Rights Commission,* GOTHAM GAZETTE (Mar. 2, 2015), http://www.gothamgazette.com/government/5608-city-officials-sharpening-teeth-of-human-rights-commission-law-mark-viverito [https://perma.cc/5XVR-VKUN] (noting that New York City has one of the most robust human rights laws in the country and that the Human Rights Commission has the power to initiate investigations, levy fines, and file criminal proceedings against those who discriminate).

293. *See supra* note 272 (listing the 22 states that require employers to accommodate the needs of breastfeeding and lactating employees).

1. The Supporting Working Moms Act & the Breastfeeding Promotion Act

The Breastfeeding Promotion Act is a federal bill that was first introduced in 1998, and most recently in 2011,[294] but has never made it past committee.[295] Sponsored by Senator Jeff Merkley (D-Ore) and Representative Carolyn Maloney (D-NY), the Act would expand the ACA's breastfeeding protections to include salaried workers and prohibit workplace discrimination on the basis of lactation.[296] The Act would amend the PDA to include the word "lactation" in the list of prohibited bases of discrimination based on sex, obviating the need for judicial interpretation of whether lactation is a "related medical condition" of pregnancy.[297]

In recent years, Senator Merkley and Representative Maloney have sponsored a similar bill, the "Supporting Working Moms Act," which would expand the ACA's breastfeeding protections to include salaried workers, but would not amend the PDA.[298] The Supporting Working Moms Act was introduced in 2013, 2015, and most recently in 2017.[299] The Act would extend the FLSA's breastfeeding protections to salaried workers, including elementary and secondary school teachers, covering an estimated 13.5 million additional American workers.[300]

Expanding the FLSA breastfeeding protections to include a wider swathe of workers would undoubtedly be a step forward. However, for salaried workers as well as hourly employees, being denied an unpaid break to pump would not result in any lost wages in the sense cognizable by the FLSA. Expanding the ACA protections instead of amending the PDA will not resolve the enforcement paradox that results from the FLSA framework, unless the bill also provides a separate enforcement mechanism for workers denied accommodations.[301] Without a new enforcement mechanism, the same "enforcement paradox" noted by the Eastern

294. *See* Breastfeeding Promotion Act of 2011, H.R. 2758, 112th Cong. (2011); New Mothers' Breastfeeding Promotion and Protection Act of 1998, H.R. 3531, 105th Cong. (1998).

295. *See* Orozco, *supra* note 137, at 1292–93. Representative Maloney was successful in passing a provision of the bill in 1998 that allowed states to spend more money on breastfeeding support through the Women, Infant, and Children ("WIC") nutrition program. She also succeeded in passing a 1999 law granting women the right to breastfeed on federal property. Press Release, Rep. Carolyn B. Maloney, Rep. Maloney Joins with Moms and Advocates to Support Mothers' Rights to Breastfeed (July 7, 2017), https://maloney.house.gov/media-center/press-releases/rep-maloney-joins-with-moms-and-advocates-to-support-mothers-rights-to [https://perma.cc/M4PL-YNGU].

296. H.R. 2758; *see* Orozco, *supra* note 137, at 1292.

297. H.R. 2758; Orozco, *supra* note 137, at 1293.

298. Supporting Working Moms Act of 2017, S. 2122, 115th Cong. (2017).

299. *Id*.; Supporting Working Moms Act of 2015, H.R. 4113, 114th Cong. (2015); Supporting Working Moms Act of 2013, H.R. 1941, 113th Cong. (2013).

300. U.S. BREASTFEEDING COMM., *supra* note 261; Press Release, Sen. Jeff Merkley, Senators Introduce Bipartisan Legislation to Expand Breastfeeding Protections at Work (Nov. 15, 2017), https://www.merkley.senate.gov/news/press-releases/senators-introduce-bipartisan-legislation-to-expand-breastfeeding-protections-at-work [https://perma.cc/6VA7-XMY7].

301. See discussion *supra* Part V.A.

District of New York would remain, leaving workers relying on these protections with little remedy.[302]

2. The Pregnant Worker's Fairness Act

The federal Pregnant Worker's Fairness Act (PFWA) was introduced on May 11, 2017 by Senators Bob Casey (D-Pa.), Jeanne Shaheen (D-N.H.), and Dean Heller (R-Nev.) and Representative Jerrold Nadler (D-N.Y.), and was referred to committee.[303] The PWFA would require employers covered by Title VII to provide reasonable accommodations to workers affected by pregnancy, childbirth, or related medical conditions, unless it would create an undue hardship for the employer.[304] The PWFA would also protect employees from being forced to take an accommodation they do not want or need, or from being forced on leave when an alternative accommodation could enable them to remain working.[305]

If passed by Congress, the federal PWFA would set a national standard for how employers must treat workers who are pregnant or have recently given birth, and would be a tremendous step forward. However, the current bill does not explicitly protect lactating and pumping employees.[306] Congress should amend the PWFA to make clear that lactation and pumping fall within the definition of "related medical conditions" to ensure that workers don't face the same barriers to inclusion as seen under the PDA.

If Congress passes a federal PWFA that explicitly covers lactating and pumping workers, litigators would no longer need to demonstrate that a plaintiff was treated worse than another group of workers similar in their ability or inability to work.[307] Rather, a litigator bringing a lactation discrimination claim under a federal PWFA would need to show that 1) the plaintiff is pregnant, has recently experienced childbirth, or has a medical condition related to pregnancy or childbirth; 2) the plaintiff requested an accommodation that would enable them to pump at work; and 3) the employer refused to accommodate the plaintiff.[308] This would substantially simplify lactation and pumping discrimination claims across

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302. Lico v. TD Bank, No. 14-CV-4729 JFB AKT, 2015 WL 3467159, at *3 (E.D.N.Y. June 1, 2015); *see also supra* notes 269–271 and accompanying text.

303. *See* Pregnant Workers Fairness Act, S. 1101, 115th Cong. (2017); Pregnant Workers Fairness Act, H.R. 2417, 115th Cong. (2017); Press Release, A Better Balance, A Better Balance Applauds Federal Bipartisan Pregnant Workers Fairness Act to be Introduced Tomorrow (May 10, 2017), https://www.abetterbalance.org/press-release-a-better-balance-applauds-federal-bipartisan-pregnant-workers-fairness-act-to-be-introduced-tomorrow [https://perma.cc/V399-GZNE].

304. S. 1101.

305. *See Fact Sheet: Fairness for Pregnant Workers*, A BETTER BALANCE, https://www.abetterbalance.org/resources/fairness-for-pregnant-workers-bill-factsheet [https://perma.cc/C484-VAYY] (last updated Sept. 7, 2018).

306. H.R. 2417.

307. This is the standard under the PDA. 42 U.S.C. § 2000e(k) (2012).

308. *See* NYC COMM'N ON HUMAN RIGHTS, *supra* note 277 (describing how to establish discrimination based on an employer's failure to accommodate a pregnant worker).

the country by providing workers with an affirmative right to reasonable changes on the job, regardless of how non-pregnant workers are treated.

Finally, a comprehensive federal law should cover all workers, not just those who work for employers with fifteen or more employees. A woman's right to pump breast milk and keep earning her paycheck should not depend on how many employees work in her place of employment. The federal PWFA should require employers to accommodate *all* nursing workers' needs in the workplace, without carve-outs for small businesses.

VI. CONCLUSION

The number of working mothers has increased in recent decades and continues to climb. In 2015, nearly 70 percent of mothers with children under age eighteen were in the labor force, representing over a third of working women.[309] The ability to return to one's job after giving birth is of crucial economic and social benefit to working mothers and their families.[310] If workplaces do not permit mothers to express breast milk at work, women who cannot afford to take time off will either resign themselves to pumping in unsanitary and unsafe conditions, or stop breastfeeding altogether. Both of these alternatives contravene the purpose of the PDA and Title VII—to prevent the differential treatment of women in the workplace. Punishing women for getting pregnant and giving birth is precisely what the PDA was aimed to prevent.[311]

A worker who suffers an adverse employment action resulting from her decision to breastfeed or her request for an accommodation to express milk at work should have a cognizable claim under the PDA. Moreover, her right to pump breast milk at work and not be punished for doing so should not depend on how many people she works with, how her wages are calculated, or where she resides. Anything that falls short of this disregards the central purpose of Title VII as amended by the PDA: to prevent gender stereotypes from influencing employment decisions and to equalize the playing field for all workers.

309. WOMEN'S BUREAU, U.S. DEP'T OF LABOR, *supra* note 111, at 1.

310. *Id*. at 6 (noting that 2.7 million families with a working mother and children under 18 were living in poverty in 2014, 2.1 million of which were mother-only families, and that families with children under age 6 had even higher poverty levels); *see also* Hicks, *supra* note 220 ("I struggled with the decision to leave my job because I loved it, and my family depended on the income. I believe women can be good mothers and still go to work. I never intended to be a stay-at-home mom because I love to work and our family needs two salaries to live. But I felt I had no choice but to quit my job in order to keep breastfeeding my newborn son.").

311. H.R. REP. NO. 95-948, at 3 (1978) ("[T]he assumption that women will become pregnant and leave the labor force leads to the view of women as marginal workers, and is at the root of the discriminatory practices which keep women in low-paying and dead-end jobs."); S. REP. NO. 95-331, at 3 (1977) ("[T]he assumption that women will become pregnant and leave the labor market is at the core of the sex stereotyping resulting in unfavorable disparate treatment of women in the workplace."); *see supra* Part II.C.