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Laura T. Kessler

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MISCARRIAGE OF JUSTICE: EARLY PREGNANCY LOSS AND THE LIMITS OF U.S. EMPLOYMENT LAW

Laura T. Kessler[*]

This Article explores judicial responses to miscarriage under federal employment law in the United States. Miscarriage is an incredibly common experience. Of confirmed pregnancies, about fifteen to twenty-five percent will end in miscarriage. Yet this experience slips through the cracks of every major federal employment law in the United States.

The Pregnancy Discrimination Act of 1978, for example, defines sex discrimination to include discrimination on the basis of pregnancy, childbirth, or related medical conditions. The Family and Medical Leave Act of 1993 requires covered employers to provide employees with job-protected, unpaid leave for personal or family illness. The Americans with Disabilities Act of 1990 mandates both nondiscrimination and reasonable accommodations for employees with disabilities. The Occupational Safety and Health Act of 1970 is supposed to ensure that American workplaces are free of recognized hazards that may cause serious physical harm to workers. However, as this Article demonstrates, none of these laws clearly addresses the experience of miscarriage. Moreover, courts and agencies often refuse to interpret these statutes in obvious and reasonable ways to provide meaningful equality to workers when they suffer the common experience of miscarriage.

Many scholars have examined the limitations of employment law with regard to pregnancy. This Article is the first to comprehensively examine this problem as it specifically relates to miscarriage. In addition to bringing attention to this important issue, which silently affects so many workers, this Article provides an opportunity to challenge the artificial conceptual separation of employment and health law, as well as to consider the problem of pregnancy discrimination through the broader lens of reproductive justice.

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[*] Professor of Law, University of Utah, S.J. Quinney College of Law; kesslerl@law.utah.edu. Many thanks to Rachel Arnow-Richman, Stephanie Bornstein, Deborah Brake, Teneille Brown, Michael Green, Joanna Grossman, Jill Hasday, Camille Hebert, Yvette Lindgren, Anibal Rosario Lebrón, Ann McGinley, Dana Phillips, Radhika Rao, and Marley Weiss for comments on early drafts of this Article, and to research assistants Briana Allen, Dylan Raymond, Elena Todorova, and Cate Vaden. All errors are my own.

INTRODUCTION

A. Prologue

I have had five miscarriages. They tend to blur together in my head. The one enduring memory, though, is of blood. With one miscarriage, I remember running to the bathroom at work with blood trickling down my legs and having to leave the building quickly to get to the hospital on

campus. With another, I remember a river of blood moving and changing shape and expanding across the tiny octagonal tiles of my bathroom floor, as I, dizzy and alone, held on to the shower riser to stay steady, fearing I would pass out or die before I could get help.[1]

I remember the waiting. Waiting to know if a pregnancy was succeeding or failing after a "threatened miscarriage."[2] Waiting for the expulsion after the pregnancy had definitively failed. Sometimes a miscarriage comes suddenly and unexpectedly. But most pregnancies do not unravel that way. More commonly, miscarriage is a process, a slow motion train wreck. In the first trimester of a normal pregnancy, the pregnancy hormone hCG[3] rapidly increases from 0 to up to 288,000, like the tachometer of a race car when the driver floors it.[4] When a pregnancy fails, this process reverses, but it takes time for the body to get the message, maybe days—or weeks. Indeed, with the most common form of failed pregnancy, a fertilized egg implants into the uterus but does not develop into an embryo at all, yet the gestational sac and placenta continue to grow and release pregnancy hormones.[5] This all sounds very clinical, but what does it mean for the person who is miscarrying? It is a surreal experience that is hard to describe, this being pregnant but not pregnant. Tired and nauseous but to no good. Sad and worried. Waiting. And the outcome may not be clear until it is over. Not pregnant or maybe pregnant? Waiting. I have to go to work, I have to teach a class, no one knows this is happening inside me.

I remember the kind professionals who thought they were helping but said and did things that increased my suffering. With one miscarriage, my doctor had privileges only at a Catholic-owned hospital. "You have a failed pregnancy. There is no embryo. But unfortunately, I can't schedule you for a D&C[6] until your hCG levels drop further, perhaps three to four

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[1] I acknowledge that this description is graphic. However, I wish to make clear just how jarring the experience is. I cannot make it sound and look pretty.

[2] A threatened miscarriage is defined as vaginal bleeding in the presence of a viable pregnancy. *See* Christine I. Ekechi & Catriona M. Stalder, *Spontaneous Miscarriage*, *in* DEWHURST'S TEXTBOOK OF OBSTETRICS AND GYNAECOLOGY 559, 561 t.40.1(Christoph Lees & Tom Bourne eds., 9th ed. 2018).

[3] Human chorionic gonadotropin is made by cells formed in the placenta that nourishes the egg after it attaches to the uterine wall. This is the hormone that home pregnancy tests can detect in urine about twelve to fourteen days after conception. *See* Betty Mishkin, *Human Chorionic Gonadotropin (hCG) Pregnancy Test*, *in* 2 THE GALE ENCYCLOPEDIA OF SURGERY AND MEDICAL TESTS 882, 882 (Deirdre S. Hiam ed., 4th ed. 2020).

[4] Specifically, hCG levels typically double every two days, rising from 0 to up to 288,000 milli-international units per milliliter (miUL/L) in the first trimester. *What is HCG?*, AM. PREGNANCY ASS'N., https://americanpregnancy.org/getting-pregnant/hcg-levels/ (last visited Feb. 4, 2022); *see also* HUMAN CHORIONIC GONADOTROPIN (HCG) (Lawrence A. Cole & Stephen A. Butler eds., 2nd ed. 2015).

[5] This is called an anembryonic pregnancy or a "blighted ovum" in medical terminology. Candace Goldstein & Sandra L. Hagen-Ansert, *First-Trimester Complications*, *in* TEXTBOOK OF DIAGNOSTIC SONOGRAPHY 1194, 1198 (2018); *see also* Eric R.M. Jauniaux & Joe Leigh Simpson, *Pregnancy* Loss, *in* MARK LANDON ET AL, GABBE'S OBSTETRICS: NORMAL AND PROBLEM PREGNANCIES 615, 616 (2020) ("[A]almost all losses are retained in utero for an interval before clinical recognition. . . .").

[6] A "D&C" is short for "dilation and curettage," a surgical procedure to evacuate the uterus after a failed pregnancy. *See* Ekechi & Stalder, *supra* note 2, at 570.

weeks. Hospital policy."[7] With my last miscarriage, #5, as I lay on the table with my feet in stirrups, having my uterus suctioned, cramping: "You really need to stop trying to get pregnant. You are burdening the health system."

And through all of this, which transpired over about three years, I remember the secrecy, which made these experiences all the more excruciating. I didn't tell anyone. Not my friends, not my parents, certainly not my employer.[8]

B. Miscarriage of Justice

This Article explores judicial responses to miscarriage under federal employment law. The major federal employment laws in the United States would seem to protect employees who suffer adverse employment actions as a result of the experience of miscarriage. The Pregnancy Discrimination Act of 1978 (PDA),[9] for example, defines sex discrimination to include discrimination on the basis of pregnancy, childbirth, or related medical conditions. The Family and Medical Leave Act of 1993 (FMLA)[10] requires covered employers to provide employees with job-protected, unpaid leave for personal or family illness. The Americans with Disabilities Act of 1990

[7] *See* Lori R. Freedman, Uta Landy & Jody Steinauer, *When There's a Heartbeat: Miscarriage Management in Catholic-Owned Hospitals*, 98 AM. J. PUB. HEALTH 1774, 1778 (2008) ("Patients entering a Catholic-owned hospital may be aware that abortion services are not available there, but few prenatal patients conceive of themselves as potential abortion patients and therefore they are not aware of the risks involved in being treated there; these include delays in care and in being transported to another hospital during miscarriage, which may adversely affect the patient's physical and psychological well-being.").

[8] This is just my story. I recognize that it is partial. No two miscarriages are the same. Of particular relevance to my experience, these were desired pregnancies. Many are not. *See* GUTTMACHER INSTITUTE, UNINTENDED PREGNANCY IN THE UNITED STATES (2019), https://www.guttmacher.org/sites/default/files/factsheet/fb-unintended-pregnancy-us.pdf (estimating that nearly half of pregnancies in the United States are unintended, with 27% "wanted later" and 18% "unwanted"; the figures are significantly higher for low-income women, young women, women who are cohabiting, black women, and women without a high school degree). For those with unintended pregnancies, a miscarriage is probably a huge relief. Still, I choose to share my story for a few reasons, which I hope are persuasive. First, medical and social science research suggest that many elements of my experience are representative. *See* discussion Part II.A., *infra*. Second, the stigma surrounding miscarriage, combined with rampant workplace retaliation against individuals who use workplace leave or benefits for pregnancy, has stifled women's willingness to talk about miscarriage. This silence, in turn, distorts policy discussions and law. I share my story in an effort to change the culture of secrecy surrounding miscarriage, which I believe is a collective response to the harms of disclosure. *Cf.* CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA (2017) (seeking to "pry open" the silence surrounding abortion so that "women's decisions about whether or not to become mothers will be treated more like those of other adults making significant personal choices."). Finally, adopting one of the methodologies of critical race and feminist theory, I am sharing my story in an effort to "denaturalize legal and social arrangements that conventional forms of scholarship [do] not question." *See* Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 72 STAN. L. REV. 821, 876 (2021). Examples of scholarship in this vein include Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991), Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989), Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986), Verónica C. Gonzales-Zamora, *The COVID Ceiling*, 57 HARV. C.R.-C.L. L. REV. (forthcoming in 2022), and PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991).

[9] 29 U.S.C. §§ 2000e(k), 2000e-2).

[10] 29 U.S.C. §§ 2601-54 (2012).

(ADA), as amended by the ADA Amendments Act of 2008,[11] mandates both nondiscrimination and reasonable accommodations for employees with disabilities. The Occupational Safety and Health Act of 1970 (OSH Act) is supposed to ensure that American workplaces are free of recognized hazards that may cause serious physical harm.[12] However, none of these laws clearly addresses the experience of miscarriage as it interfaces with the workplace.[13] Moreover, courts and agencies often refuse to interpret these statutes in obvious and reasonable ways to provide meaningful equality to workers when they suffer the common experience of miscarriage.[14]

Many scholars have examined the limitations of employment law with regard to pregnancy.[15] Others have drawn attention to the need for menstrual justice.[16] This Article is the first to comprehensively examine these problems as they specifically relate to miscarriage. In addition to bringing attention to this important issue, which silently affects so many workers, this Article provides an opportunity to challenge the artificial conceptual separation of employment and health law, as well as to consider the problem of pregnancy discrimination through the broader lens of reproductive justice.

Part I of this Article provides a summary of current medical, psychological, and sociological understandings of miscarriage, including its definition, prevalence, risk factors, and broader health and societal impacts. As this Part highlights, a miscarriage does not typically occur in a moment or a day or a week; it is a physical and emotional event that often lasts several weeks or months, at best, and has long term impacts on women and people who miscarry. The impact of miscarriage also extends well beyond the individual who physically miscarries to partners and other family members, intended parents who utilize assisted reproductive technologies, and surrogates. Yet despite the substantial workplace, health, and societal effects, miscarriage, like other reproductive health matters such as menstruation, pregnancy, and abortion, is shrouded in secrecy. In the words of Meghan Markle, the Duchess of Sussex, who bravely went public about her miscarriage in the middle of the pandemic, "[D]espite the staggering

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[11] 42 U.S.C. § 12101-12213.

[12] 29 U.S.C. § 654(a)(1).

[13] *See infra* Part II.

[14] *Id.*

[15] *See, e.g.,* Stephanie Bornstein, *The Politics of Pregnancy Accommodation*, 14 HARV. L. & POL'Y REV. 293 (2020); David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309 (2019); Joanna L. Grossman, *Pregnancy, Work, and The Promise of Equal Citizenship*, 98 GEO. L.J. 567 (2010); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Theory*, 34 U. MICH. J.L. REFORM 371 (2001); Saru Matambanadzo, *Reconstructing Pregnancy*, 69 SMU L. REV. 187 (2016); Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After* Young v. UPS, 50 U.C. DAVIS L. REV. 1423 (2017).

[16] *See, e.g.,* BRIDGET J. CRAWFORD & EMILY GOLD WALDMAN, MENSTRUATION MATTERS: CHALLENGING THE LAW'S SILENCE ON PERIODS (2022); Margaret E. Johnson, *Asking the Menstruation Question to Achieve Menstrual Justice*, 41 COLUM. J. GENDER & L. 158 (2021); Bridget J. Crawford , Margaret E. Johnson , Marcy L. Karin, Laura Strausfeld & Emily Gold Waldman, *The Ground on Which We All Stand: A Conversation about Menstrual Equity Law and Activism*, 6 MICH. J. GENDER & L. 341 (2019).

commonality of this pain, the conversation remains taboo, riddled with (unwarranted) shame, and perpetuating a cycle of solitary mourning."[17] This silence has massively distorted how miscarriage is regulated in the workplace.

Part II examines each of the major federal employment statutes that could plausibly protect workers from employment discrimination or unsafe work conditions related to miscarriage, including the PDA, FMLA, ADA, and OSHA. As this Part demonstrates, when workers who miscarry (or who have health conditions increasing their risk of miscarriage) experience pregnancy or disability discrimination, are denied FMLA leave, face workplace hazards increasing the risk of miscarriage, or suffer retaliation for exercising their statutory rights, federal law usually does not provide a remedy, particularly given the narrow interpretation that federal agencies and courts have given to these statutes.

Part III examines some of the unique social and psychological circumstances surrounding miscarriage, particularly the culture of secrecy and privacy, which renders federal law particularly ineffective in this realm. In particular, statutory provisions and judicial interpretations that require employees to share private health information with their employers as a precondition to receiving the protection of federal employment discrimination law, paired with insufficient privacy and retaliation protections, further frustrate employees' ability to benefit from what little protection exists under federal employment discrimination law.

Finally, Part IV turns to solutions, inviting introspection and regulatory shifts to include miscarriage in mainstream employment law. Among other reforms, Part IV examines the urgent need to pass the Pregnant Workers Fairness Act, a proposed federal law that would provide a basic right to reasonable workplace accommodations for normal pregnancy and related medical conditions, enhanced antiretaliation and privacy protection for employees' medical information when they invoke statutory protections under federal employment discrimination law, a right to paid sick leave for American workers, and occupational safety standards that would reduce the risk of miscarriage.

I. DEFINING MISCARRIAGE AND ITS HEALTH, EMOTIONAL, AND SOCIAL IMPACTS

In the United States, a miscarriage is usually defined as loss of a fetus before the twentieth week of pregnancy.[18] The causes of many miscarriages are unknown.[19] The biological mechanisms to explain miscarriage are not well-understood. Therefore, individuals who experience

[17] Opinion, Meghan, The Duchess of Sussex, *The Losses We Share*, NY Times, Nov. 25, 2020, https://www.nytimes.com/2020/11/25/opinion/meghan-markle-miscarriage.html.

[18] *Miscarriage*, NEW OXFORD AM. DICTIONARY (3d ed. 2010).

[19] Lesley Regan & Raj Rai, *Epidemiology and the Medical Causes of Miscarriage*, 14 BAILLIERE'S CLINICAL OBSTETRICS & GYNAECOLOGY 839, 849 (2000).

miscarriage are often left without answers to why a pregnancy failed. Miscarriage is a very common experience. Although statistics on pregnancy loss vary from country to country, researchers in the United States estimate that, of confirmed pregnancies, about fifteen to twenty-five percent will end in miscarriage.[20] Moreover, the risk of pregnancy loss is greater for certain groups of women.[21] Older individuals are at higher risk of miscarriage.[22] African Americans also have a nearly two-fold higher risk of miscarriage compared with whites, and a 93% greater hazard for a later miscarriage.[23] Other risks for miscarriage include obesity, prior history of miscarriage, and certain health conditions (such as polycystic ovary disease, high blood pressure, and diabetes).[24] Despite the incredibly common experience of miscarriage, public perception differs substantially, perhaps because miscarriage is so shrouded in secrecy. According to a recent survey of more than one-thousand adults in the United States, 55% incorrectly believed miscarriage was "rare" (occurring in 6% or fewer pregnancies).[25]

Most miscarriages occur early in pregnancy and are generally invisible to all but the closest family members.[26] Yet miscarriage is a complex biological and psychological event with significant impacts. For many who suffer a miscarriage, it may represent the loss of a desired future child. It is generally unexpected, and its exact cause is often unclear, which challenges a person's sense of control and trust in their bodies. It may involve considerable physical pain, potentially disturbing images of blood and tissue, hospitalization, and surgery. Sometimes, a surgery is required to clear the uterus. Fetal demise may occur weeks before the expulsion, which may evoke uncertainty and stress.

Miscarriage is a traumatic event. After a miscarriage, most women experience a period of intense emotional distress, typically for six weeks. [27] Symptoms of grief may be impossible to distinguish from depression, and some women may continue to experience depressive symptoms for months

[20] *Id.* at 840.

[21] Not all persons who can become pregnant identify as women. Transgender men and non-binary or gender nonconforming individuals can become pregnant. *See, e.g.*, Juno Obedin-Maliver & Harvey J. Makadon, *Transgender Men and Pregnancy*, 9 OBSTETRIC. MED. 4 (2016). However, because most persons who become pregnant identify as female, and because societal norms and expectations regarding pregnancy are tightly wrapped up with gender, this Article frequently refers to "pregnant women" or "women." This is not to diminish the fact that unique and possibly even worse discriminatory harms are likely to be experienced by transgender, non-binary and gender nonconforming individuals who become pregnant while working. While these unique harms are beyond the scope of the Article, it is hoped that the analysis presented here will be beneficial to all pregnant workers who experience miscarriage, regardless of how they identify.

[22] *Id.*

[23] Sudeshna Mukherjee et al., *Risk of Miscarriage Among Black Women and White Women in a US Prospective Cohort Study*, 177 AM. J. EPIDEMIOLOGY 1271, 1276 (2013).

[24] Regan & Rai, *supra* note 19, at 843–45.

[25] Jonah Bardos et al., *A National Survey on Public Perceptions of Miscarriage*, 125 OBSTETRICS & GYNECOLOGY 1313, 1315 (2015). Additionally, "[t]his misperception was more common among men; the odds of men reporting that miscarriages are uncommon was 2.5 . . . that of women. *Id.*

[26] Johanna Nynas et al., *Depression and Anxiety Following Early Pregnancy Loss: Recommendations for Primary Care Providers*, THE PRIMARY CARE COMPANION FOR CNS DISORDERS 1, 3 (2015).

[27] *Id.* at 2.

or years.[28] Studies show that, after suffering a miscarriage, about two thirds of women report they are still upset two years after the event and that the experience affected their decisions about subsequent pregnancies.[29] Moreover, nearly 20% of women who experience miscarriage become symptomatic for depression and/or anxiety, with symptoms typically lasting one two three years, impacting quality of life and subsequent pregnancies.[30] Contrary to popular belief, a subsequent pregnancy after a miscarriage is not a protective factor against depression or anxiety,[31] and mood symptoms following a miscarriage do not always resolve with the birth of a subsequent healthy child.[32]

Further, research shows that miscarriage can have emotional impacts on family members and a wide-range of individuals well beyond the person who experiences physical pregnancy loss. For example, new studies have found that when a pregnancy is desired, non-pregnant partners grieve over a miscarriage more than once thought. According to a study of eighty-three women who received treatment in a hospital setting for miscarriage, along with their male partners, "[a]lthough the psychological impact of miscarriage on men was less enduring when compared with that on women, a significant proportion of men demonstrate[] psychological distress after miscarriage."[33] Miscarriage also represents a significant loss for intended parents utilizing assisted reproductive technologies (ART), whether or not their role is that of a gestational parent.[34] That is, the emotional experience of reproductive loss spans across many reproductive contexts and is not limited miscarriage's physical aspects.

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[28] *Id.* at 2–3.

[29] *Id.* at 5.

[30] *Id.* at 2 ("Women at highest risk for psychiatric morbidity following miscarriage include those who are younger, Hispanic, or of lower socioeconomic status and those with loss of a planned pregnancy, a history of infertility or prior miscarriages, and poor social support or coping skills.").

[31] *Id.* at 5.

[32] *Id.*

[33] GWS Kong et al., *Gender Comparison of Psychological Reaction After Miscarriage—A 1-Year Longitudinal Study*, 117 BJOG: INT'L J. OBSTETRICS & GYNECOLOGY 1211, 1211 (2010).

[34] For example, those seeking to access procreation through surrogacy face an array of logistical, emotional, legal, and financial obstacles, especially LGBT couples. Judith Stacey, *Gay Parenthood and the Decline of Paternity as We Knew It*, 9 SEXUALITIES 27, 30 (2006). Intended parents utilizing surrogacy are often intimately involved in the lives of surrogates and are highly invested in becoming parents. *See* Dana Berkowitz & William Marsiglio, *Gay Men: Negotiating Procreative, Father, and Family Identities*, 69 J. MARRIAGE & FAM. 366, 378 (2007); Darren Rosenblum, *Pregnant Man? A Conversation*, 22 YALE J.L. & FEMINISM 207 (2010). It should come as no surprise, then, that intended parents utilizing surrogacy suffer emotional losses after a failed pregnancy, if not more so than individuals who do not utilize surrogacy to procreate. *See* CHRISTA CRAVEN, REPRODUCTIVE LOSSES: CHALLENGES TO LGBTQ FAMILY-MAKING (2019). Moreover, research suggests that surrogates also suffer a number of complex emotional losses after a miscarriage, even if they may "emphatically disclaim any attachment to the fetus," including loss of attachment to the success of the pregnancy, loss of their relationship with the intended parents, and loss of status in the surrogate community. *See* Zsuzsa Berend, *Losses: Understandings of Pregnancy Loss and Assisted Reproduction Among Surrogate Mothers*, 24 MED. ANTHROPOLOGY Q. 240, 240, 243, 253–55, 257 (2010). Surrogates commonly identify with the intended parent's or parents' grief, yet they are often not treated with much sympathy by anyone except other surrogates. *Id.* at 254–55.

Despite the significant physical and emotional health effects of miscarriage, federal employment laws do not adequately protect employees who suffer adverse employment actions as a result of suffering a miscarriage or being at increased risk of miscarriage. Nor does the law facilitate necessary leave or work accommodations for workers affected by miscarriage. Even worse, many workplaces and jobs, themselves, present hazards to carrying a successful pregnancy, especially for low income and non-white workers, yet workplace safety laws do not prohibit these conditions in substance or practice. Indeed, as Part II demonstrates, the common experience of miscarriage slips through the cracks of every major federal employment statute intended to protect workers from discrimination on the basis of sex, pregnancy, and disability, as well as federal laws intended to guarantee protected medical leave and worker safety.

II. MAJOR FEDERAL EMPLOYMENT LAWS FAIL TO PROTECT EMPLOYEES WHO SUFFER ADVERSE EMPLOYMENT ACTIONS DUE TO MISCARRIAGE

A. The Pregnancy Discrimination Act

Congress passed the PDA in 1978 to prevent discrimination on the basis of pregnancy, childbirth, or related medical conditions.[35] The PDA defines sex discrimination under Title VII, to include discrimination "because of pregnancy, childbirth, or related medical conditions."[36] The PDA forbids discrimination based on pregnancy when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoff, training, fringe benefits, such as leave and health insurance, and any other term or condition of employment.[37] Employers with fifteen employees or more are covered by the provisions provided in the PDA.[38]

In its operation, the PDA works in two ways. First, the PDA prohibits employers from taking an adverse employment action against an employee on any of the defined bases (pregnancy, childbirth, or related medical conditions) who are capable of performing their job duties.[39] In this sense, the PDA can be understood as a simple nondiscrimination mandate. Second, the PDA requires employers to treat pregnancy, childbirth, and related medical conditions as they do other temporary disabilities.[40] That is, if a woman is temporarily unable to perform her job due to a medical condition related to pregnancy or childbirth, the employer must treat her in the same way as it treats any other temporarily disabled employees who are similar in their ability or inability to work, but unaffected by pregnancy. This

[35] Pub. Law No. 95-555, 92 Stat. 2076 (1978).

[36] *Id.*

[37] U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Pregnancy Discrimination*, https://www.eeoc.gov/laws/types/pregnancy.cfm (last visited Feb. 5, 2022).

[38] *See* 42 U.S.C. § 2000e (2018); *Pregnancy Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/fs-preg.cfm (last visited Feb. 4, 2022).

[39] *Id.*

[40] *Id.*

mandate can be conceptualized as an equal accommodation mandate, that is, employers must accommodate pregnancy, childbirth, and related medical conditions in a manner equal to its accommodation of employees with similar temporary disabling conditions.[41] Finally, the availability of disparate-impact liability under the PDA has the potential to make illegal facially neutral policies that in fact fall more harshly on pregnant workers and cannot be justified by business necessity (such as strict attendance policies, harsh sick leave policies).[42] How have plaintiffs who have suffered miscarriage fared under the PDA and its various theories of liability?

1. Miscarriage Stereotyping Cases under the PDA

Plaintiffs have fared relatively well, especially when there is direct evidence[43] or strong circumstantial evidence of discrimination and the plaintiff demonstrates excellent work performance. For example, in *Gatten v. Life Time Fitness*, the plaintiff was an excellent employee.[44] She worked at a health club for four years and had been promoted to supervisor.[45] She suffered a stillbirth and then two subsequent miscarriages.[46] A few days after the second miscarriage, her employer presented her with the choice of accepting a demotion or resigning.[47] She went on short term disability leave for a couple of months and then resigned.[48] In response to her pregnancy discrimination claim, the gym said she was fired because she cried at work too much and talked about her pregnancy losses.[49] The court denied her employer's motion for summary judgment, stating that a reasonable jury could find that her demotion was the result of discriminatory animus.[50]

In *Ingarra v. Ross Educ.*, the plaintiff was a dental instructor at a private, for-profit community college focusing on medical education in Michigan.[51] After a year of employment and receiving a promotion to lead instructor, she suffered a miscarriage at work. The next day, she was demoted from her supervisory position and her schedule was reduced from

[41] *Id.*

[42] Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 436 (2011).

[43] Direct evidence refers to evidence that, if believed, would establish a fact at issue without the need to draw any inferences. *See* 1 MCCORMICK ON EVIDENCE § 185 (Kenneth S. Broun et al. ed., 8th ed. 2020). In disparate treatment cases, this is understood to require "a statement by the decision maker that showed they were motivated by illegitimate considerations with respect to the at-issue decision." *See* TIMOTHY P. GLYNN, CHARLES A. SULLIVAN & RACHEL S. ARNOW-RICHMAN, EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 577 (4th ed. 2019).

[44] Gatten v. Life Time Fitness, Inc., No. 11-2962, 2013 WL 1331231, at *2 (D. Minn. Mar. 29, 2013)

[45] *Id.* at *1.

[46] *Id.* at *2–3.

[47] *Id.* at *3.

[48] *Id.*

[49] *Id.*

[50] *Id.* at *6.

[51] Ingarra v. Ross Educ., LLC, No. 13-CV-10882, 2014 WL 688185, at *1 (E.D. Mich. Feb. 21, 2014).

full-time to part-time.[52] Subsequently, her supervisor said her fertility hormones were making her "moody" and making her act "weird." Her supervisor also repeatedly pressed Ingarra about her future plans for pregnancy.[53] Ingarra sued under the PDA, claiming she was demoted and ultimately terminated because of her pregnancy and miscarriages despite an excellent work record.[54] On the basis of these facts, she defeated a motion for summary judgment.[55]

In *Tuttle v. Advanced Roofing Sys., Inc.*, the court declined to grant the defendant summary judgment on a wrongful termination claim relating to miscarriage brought under the PDA.[56] In this case, a newly hired manager informed the pregnant plaintiff that she was to report all absences and late arrivals to work to him directly.[57] When, during the same week, the plaintiff took three days off work because she suffered a miscarriage, she reported the reason for her absences to a coworker and the general manager, whom she had known longer than the new manager.[58] She called the new manager personally on the third day to explain her absences, but he told her she was fired.[59] The plaintiff filed suit, claiming wrongful termination and asserting that the new manager had not given the alleged instruction,[60] that she had never before been disciplined for absences from work, and that she had not witnessed nonpregnant coworkers being disciplined in similar situations.[61] The court declined to grant the employer summary judgment, explaining that the plaintiff should be able to advance with the pretext inquiry.[62]

As these decisions illustrate, it is illegal discrimination under the PDA to treat women workers unequally just because they become pregnant or suffer a miscarriage. But how much and what kind of equality the PDA imposes on employers beyond formal equality is less clear. As the next section discusses, courts have had a harder time interpreting and applying the PDA to protect women from discrimination when they experience pregnancy-related temporary disabilities such as miscarriage that necessitate accommodations at work.

2. Miscarriage Equal Accommodation Cases Under the PDA

To understand how federal courts have addressed miscarriage accommodations cases under the PDA, a brief explanation of the leading Supreme Court case addressing the scope of the PDA's protections for pregnancy-related temporary disabilities is required. In *Young v. United*

[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.* at *6.
[56] Tuttle v. Advanced Roofing Sys., Inc., 2016 WL 8716486 at *2–3 (S.D. Ind. Jan. 15, 2016).
[57] *Id.* at *2.
[58] *Id.* at *3.
[59] *Id.*
[60] *Id.* at *2.
[61] *Id.* at *4.
[62] *Id.* at *10.

Parcel Service, Inc.,[63] an employee brought a PDA suit against United Parcel Service (UPS), a multinational package delivery company, when UPS refused to temporarily transfer her to a position that did not require heavy lifting after she became pregnant.[64]

Peggy Young worked as a delivery driver for UPS.[65] When she became pregnant, her doctor advised her not to lift more than twenty pounds during her first twenty weeks of pregnancy and no more than ten pounds thereafter.[66] UPS refused to transfer her to a desk job, even though it had provided this accommodation to many men who experienced comparable short-term disabilities, and even to men who had lost their federal Department of Transportation driving certifications for drunk driving.[67] The plaintiff also showed that UPS maintained policies that provided accommodations for several other categories of non-pregnant employees who were similarly situated in their need for light-duty assignments, for example, employees who were injured on the job, had disabilities covered ADA, or had lost their DOT driving certifications.[68] She claimed that this disparate treatment was enough to prove discrimination, that is, that the PDA "requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work."[69] UPS maintained the position that other temporarily disabled employees were not appropriate comparators, because their situations were allegedly too different to qualify as "similarly situated" to Young's.[70] Refusing to defer to EEOC guidelines that supported Young's interpretation of the statute,[71] the Supreme Court largely took the side of UPS:

> The problem with Young's approach is that it proves too much. It seems to say that the statute grants pregnant workers a "most-favored-nation" status. As long as an employer provides one or two workers with an accommodation—say, those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked at the company for many years, or those who are over the age of 55—then it must provide similar accommodations to all pregnant workers (with comparable physical

[63] 135 S. Ct. 1338 (2015).
[64] *Id.* at 1344.
[65] *Id.*
[66] *Id.*
[67] *Id.* at 1347.
[68] *Id.*
[69] *Id.* at 1349.
[70] *Id.* at 1347.
[71] *Id.* at 1352 ("The EEOC promulgated its 2014 guidelines only recently, after this Court had granted certiorari in this case. In these circumstances, it is fair to say that the EEOC's current guidelines take a position about which the EEOC's previous guidelines were silent. And that position is inconsistent with positions for which the Government has long advocated. . . . Nor does the EEOC explain the basis of its latest guidance. Does it read the statute, for example, as embodying a most-favored-nation status? Why has it now taken a position contrary to the litigation position the Government previously took? Without further explanation, we cannot rely significantly on the EEOC's determination").

> limitations), irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria.[72]

However, the Court ultimately provided a small window of opportunity that would permit Young to prove pregnancy discrimination because she was not treated the same as non-pregnant co-workers similar in the ability or inability to work. It held that a plaintiff may, as a matter of law, use similarly situated non-pregnant employees as comparators to create an inference of this type of discrimination.[73] However, if the employer responds to the plaintiff's prima facie case by "offer[ing] an apparently 'legitimate, non-discriminatory' reason for its actions," the plaintiff must "provid[e] sufficient evidence that the employer's policies impose a *significant* burden on pregnant workers and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden.[74] According to the Court, the plaintiff can create an issue of material fact on this issue by demonstrating that the defendant accommodates a "*large percentage*" of such workers, while failing to accommodate a "*large percentage*" of pregnant workers.[75]

The heightened evidentiary requirement to prove PDA discrimination where the plaintiff is seeking to receive the same accommodation as a similarly situated non-pregnant worker is at odds with the statutory language of Title VII, as amended by the PDA. The heightened evidentiary standard announced by the Supreme Court in *Young* also departs from the conventional evidentiary rule of civil litigation that the burden of persuasion of fact is generally by a preponderance of the evidence.[76] The principle that no heightened evidentiary standard or particular type of evidence is required to prove discrimination under Title VII has also repeatedly been confirmed by the Supreme Court.[77] Indeed, to illustrate just how out-of-step the *Young* Court's unique "large percentage"

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[72] *Id.* at 1349–50.

[73] *Id.* at 1354–55. Furthermore, the *Young* Court announced the following modified version of the *McDonnell Douglas* test for establishing a prima facie case of employment discrimination in these cases. The plaintiff must prove: (i) "that she belongs to the protected class,' (ii) "that she sought accommodation," (iii) "that the employer did not accommodate her," and (iv) "that the employer did accommodate others 'similar in their ability or inability to work.'" *Id.* at 1354.

[74] *Id.* (emphasis added).

[75] *Id.* (emphasis added).

[76] 2 MCCORMICK ON EVIDENCE § 339 (Kenneth S. Broun et al. ed., 8th ed. 2020).

[77] *See, e.g.*, Desert Inc. v. Costa, 539 U.S. 90, 99-100 (2003) (holding that direct evidence is not necessary for a plaintiff to prove a mixed-motive claim of discrimination under section 703(m) of Title VII and that the Court should not depart from the "[c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases") (quoting Price Waterhouse v. Hopkins, 490 U.S. 228, 253 (1989) and Rogers v. Missouri Pacific R. Co., 352 U.S. 500, 508 n.17 (1957)); Price Waterhouse v. Hopkins, 490 U. S. 228, 253 (1989) ("Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief"); Reeves v. Sanderson Plumbing Products, Inc., 530 U. S. 133, 147 (2000) (rejecting the "pretext plus" doctrine requiring evidence beyond that supporting the plaintiff's prima facie case and holding that evidence that a defendant's explanation for an employment practice is "unworthy of credence" is "one form of circumstantial evidence that is probative of intentional discrimination" and that nothing more is required as a matter of law); McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973) (formulating a burden-shifting framework that employees may utilize to prove discriminatory treatment prohibited by Title VII with any type or amount of circumstantial evidence).

requirement is, several appellate circuits' have adopted the opposite rule that class-wide, statistical evidence is *inadmissible* in individual disparate treatment suits.[78] Although not explicit, perhaps the sheer number of workers who experience pregnancy[79] or a fear by members of the Court that requiring employers to accommodate pregnant workers just as they do temporarily disabled non-pregnant workers would subvert the exclusion of normal pregnancy from the Americans with Disabilities Act's coverage[80] motivated the majority to adopt this unusual evidentiary framework. In any case, according to *Young*, pregnant employees who experience a temporary disability related to their pregnancies and who seek equal benefits or accommodations—that is, the same treatment—as similarly disabled non-pregnant employees will generally need especially strong evidence to overcome defendants' motion for summary judgment.

Young is a relatively new precedent, but several federal district and appellate courts have applied *Young*'s holding in cases involving pregnant employees seeking similar accommodations as non-pregnant employees. While these courts regularly cite *Young* for the proposition that *McDonnell Douglas* burden shifting framework applies in pregnancy accommodation cases, they have not consistently followed *Young's* direction with regard to the comparative evidence required in such cases. Some courts have allowed cases to proceed past summary judgment with little comparator evidence, while others have required exact comparators or large numbers of comparators. Many courts have relied on pre-*Young* circuit precedents in analyzing pregnancy discrimination claims.

In *Legg v. Ulster County*, citing the Court's "significant burden" and "large percentage" language in *Young,* the Second Circuit returned to the district court for retrial a case very similar in facts to *Young*.[81] The plaintiff, Anne Marie Legg, the Ulster County's only pregnant county corrections officer, requested a light duty assignment with no direct inmate contact during her pregnancy.[82] She had a history of pregnancy complications, so her pregnancy was considered high risk for a miscarriage.[83] Despite a policy of providing light duty to workers injured on the job,[84] the jail gave her two

[78] *See* Laura T. Kessler, *Employment Discrimination and the Domino Effect*, 44 FLA. ST. L. REV. 1041, 1115 (2017).

[79] *See* George Gao & Gretchen Livingston, *Working While Pregnant Is Much More Common Than It Used To Be*, PEW RES. CTR. (Mar. 31, 2015), https://www.pewresearch.org/fact-tank/2015/03/31/working-while-pregnant-is-much-more-common-than-it-used-to-be/ ("The data suggests that not only are a higher share of women expecting their first child continuing to work, but they are working longer into their pregnancy."). Although the U.S. Government does not collect data on the percentage of pregnant women who work, the Bureau of Labor Statistics reports that 57.4% of women with a child less than one year old worked in 2019–2020, up slightly from 55.1% in 2018. BUREAU OF LAB. STATS., U.S. DEP'T OF LAB., EMPLOYMENT CHARACTERISTICS OF FAMILIES, https://www.bls.gov/news.release/famee.toc.htm (select "Table 6. Employment status of mothers with own children under 3 years old by single year of age of youngest child and marital status, 2019-2020 annual averages").

[80] *See* discussion *infra* Part II.C.

[81] 820 F.3d 67, 75–76 (2d Cir. 2016).

[82] *Id.* at 71.

[83] *Id.*

[84] *Id.*

options: go on disability leave (with substantially reduced income) or get a note from your doctor clearing you for full duty.[85] She did the latter, and the county Sherriff granted her request for light duty as a courtesy for a few months, but eventually reassigned her back to regular duty in a cell block working directly with inmates.[86] In this position, while approximately seven months pregnant, a fleeing inmate bumped her after a fight broke out in a bathroom, which resulted in preterm labor.[87] She left work and did not return until after she gave birth.[88] At trial, the judge granted judgment as a matter of law for the defendants at the close of the plaintiff's case, explaining that there was no discrimination, because the policy of only granting light duty for on-the-job injuries "applied across the board to everyone."[89] As to the disparate impact claim, the judge found that the Ulster County's light duty policy disadvantaged pregnant workers as compared to their non-pregnant peers, but refused to shift the burden to the County to explain how exclusion of pregnancy from its policy is necessary to its business. Instead, the court demanded that Legg go even further by proving that all or mostly all pregnant correctional officers will need light duty in order to continue working.[90]

On appeal, applying the rule announced in *UPS v. Young,* the Second Circuit reversed on the disparate treatment claim, reasoning that while a "large percentage of non-pregnant employees" were eligible for light duty assignments, the County "categorically denied light duty accommodations to pregnant women."[91] Because no pregnant guard needing light duty ever would receive light duty while guards injured on the job almost always would under this policy, the Second Circuit concluded that the policy "imposed a significant burden on pregnant employees."[92] Therefore, the court concluded that Legg had adduced evidence sufficient for a jury to have considered whether the refusal to accommodate her was motivated by discriminatory intent.[93] While a seeming victory as a legal matter, after the Second circuit

[85] *Id.*

[86] *Id.* Legg claimed that her reassignment to full duty with regular contact with inmates was taken in retaliation for charges she had filed with the EEOC for sex discrimination in promotional opportunities, but that claim was dismissed by the trial court early in the litigation. The trial court reasoned, "[a]lthough Plaintiff Legg has alleged sufficient facts from which a fact finder might be able to conclude that her filing of her EEOC charge was the 'but for' cause of Defendants' decision to reassign her and to discipline her, she has failed to demonstrate that these actions constitute material adverse employment actions and, thus, her retaliation claim must fail." Meadors v. Ulster County, 984 F. Supp. 2d 83, 100 (N.D.N.Y. 2013), *vacated and remanded sub nom*. Legg v. Ulster County, 820 F.3d 67 (2d Cir. 2016).

[87] 820 F.3d at 71.

[88] *Id.*

[89] *Id.*

[90] *See* Corrected Brief of Amici Curiae American Civil Liberties Union Foundation et al., at 1, Legg v. Ulster Co., 820 F.3d 67 (2d Cir. 2016), Nos. 14–3636, 14–3638, 14–4635, 2018 WL 551796, at *1.

[91] 820 F.3d at 75–76.

[92] *Id.*

[93] The court did not reach her disparate impact arguments. *Id.* at 74.

remanded to the district court for a new trial,[94] Legg lost her claims of disparate treatment and disparate impact.[95]

In *Martin v. Winn–Dixie Louisiana, Inc.*, the plaintiff, a manger of a Winn-Dixie supermarket, survived summary judgment by citing her employer's failure to provide the lifting restriction recommended by her doctor when two other non-pregnant coworkers had received lifting-restriction accommodations.[96] Martin had worked at Winn-Dixie for seventeen years, working her way up from part-time cashier to co-manager.[97] Of her eight primary duties, only one involved lifting, but when her doctor recommended that she not lift more than ten pounds throughout her pregnancy, Winn-Dixie told her they could not accommodate this restriction and that she could either take a leave of absence or accept a demotion to a part-time position.[98] The court rejected Winn-Dixie's proposed standard that Martin must introduce evidence of "nearly identical comparators," stating that two employees who had served in the same position as plaintiff, but in different locations and at different times, were "sufficiently close comparators [to meet] the PDA's minimum."[99] In its analysis, the court ignored *Young*, relying on a pre-*Young* Fifth Circuit decision, allowing the case to survive summary judgment and move on to trial without reference to whether the defendant afforded lifting restrictions to a "large percentage" of similarly situated non-pregnant workers.[100]

Although these two cases demonstrate that some plaintiffs seeking equal accommodations as similarly situated non-pregnant co-workers have been able to succeed in getting past a motion for summary judgment and reaching a jury even after *Young's* announced more stringent evidentiary requirements, this no guarantee of winning a suit for denial of

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[94] *Id.* at 70.

[95] Legg v. Ulster Cnty., No. 109CV550, 2017 WL 3207754, at *1 n.2, *10 (N.D.N.Y. July 27, 2017). The jury found that Plaintiff had failed to establish a disparate treatment claim. *Id.* at *1 n.2. As to the disparate impact claim, which was tried by the court, the district court determined that Legg had failed to present evidence that all pregnant women were unable to perform full duty assignments, and therefore she did not establish an evidentiary basis from which the court could conclude that the county policy disparately impacted pregnant women as a class. *Id.* at *9. The Second Circuit affirmed, sadly and irrationally, relying in part on the second doctor's note that Legg obtained at the county's direction clearing her for full duty so she would not be forced to take a disability leave after the county denied her request (with medical documentation) for a light duty assignment. Legg v. Ulster Cnty., No. 17-2861, 2020 WL 6325850, at *1 (2d Cir. Oct. 29, 2020). Offering cold comfort, it said, "[w]e are sympathetic to the difficult choice that Legg faced between working full duty in a hazardous environment and losing substantial income by going on leave and receiving only disability benefits. . . . On the record before us, however, we are compelled to conclude that the district court did not clearly err in finding that the evidence presented by Legg was insufficient to sustain her claim." *Id.* at *5.

[96] 132 F. Supp. 3d 794, 802, 819–20 (M.D. La. 2015).

[97] *Id.* at 801–02.

[98] *Id.* at 802–03.

[99] *Id.* at 800, 819–20.

[100] *Id.* at 820 (quoting Lee v. Kansas City S. Ry. Co., 574 F.3d 253, 259–60 (5th Cir.2009)) ("The employment actions being compared will be deemed to have been taken under nearly identical circumstances when the employees being compared held the same job or responsibilities, shared the same supervisor or had their employment status determined by the same person, and have essentially comparable violation histories.").

accommodations at trial. Moreover, other courts have awarded summary judgment to employers in cases with similar facts.

In *Durham v. Rural/Metro Corp.*,[101] an EMT, informed her manager when she became pregnant that her doctor instructed her not to lift over fifty pounds.[102] Durham and her manager agreed that she would not be able to continue her normal role on the truck, where EMTs had to lift up to 100 pounds as they regularly lifted patients and stretchers.[103] Durham requested to be assigned to light duty or dispatch, but her manager told her that light duty was only available to employees injured on the job and that no dispatch positions were currently available.[104] Instead, Durham was offered ninety days of unpaid personal leave, which she did not accept because she understood the leave policy to require her not to seek other employment, and she was removed from the schedule.[105] The district court relied on *Young's* "large percentage" test to grant Rural/Metro summary judgment regarding their failure to assign Durham to light duty, stating that although Durham had established a prima facie case, she had not demonstrated that Rural/Metro's non-discriminatory reason for denying the accommodation was pretextual.[106] According to Rural/Metro, their failure to accommodate Durham was not discriminatory because their light duty policy was only available to those injured on the job.[107] The court cited *Young,* stating "that a plaintiff can establish that an employer's policy puts a significant burden on pregnant workers 'by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers[,]'" but that Rural/Metro's light work policy "accommodates only workers injured on the job, and excludes all other workers, including pregnant workers."[108] The Eleventh Circuit rejected this analysis as applied to a plaintiff's prima facie case,[109] but did not decide whether the limitation of accommodations to employees injured at work were enough to show pretext, leaving it to the district court to consider on remand.[110]

In *Santos v. Wincor Nixdorf, Inc.*, the Fifth Circuit affirmed the district court's grant of summary judgment to the defendant, stating that

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[101] Durham v. Rural/Metro Corp., 955 F.3d 1279, 1286 (11th Cir. 2020) (citing Legg, 820 F.3d at 74).

[102] No. 16-CV-01604, 2018 WL 4896346, at *1 (N.D. Ala. Oct. 9, 2018).

[103] *Id.*

[104] *Id.*

[105] *Id.*

[106] Durham v. Rural/Metro Corp., No. 16-CV-01604, 2020 WL 7024892, at *4 (N.D. Ala. Nov. 30, 2020).

[107] *Id.* at *3.

[108] *Id.* (quoting Young, 135 S. Ct. at 1354). In this way, the court in *Durham* gave *Young's* "large percentage" language the most restrictive possible interpretation, suggesting that this language imposes not just as a numerical requirement that the plaintiff present evidence that her employer accommodated many temporarily disabled non-pregnant employees similar in their ability or inability to work as the plaintiff, but also a qualitative requirement that her comparators include accommodated non-pregnant employees whose disabilities were incurred outside the workplace.

[109] Durham, 955 F.3d at 1286.

[110] *Id.* at 1287.

the plaintiff had failed to identify comparators in her same position (relatively new, temp-agency employees in their training period needing to work from home).[111] Santos was a project analyst placed by a staffing agency at Wincor, a corporation providing software and technology systems for retailers and banks. She was fired shortly after being given permission to work from home due to complications of her pregnancy.[112] Santos was informed by her doctor that she needed to work from home following a hospitalization in the third term of her high-risk pregnancy due to complications.[113] The court relied on a pre-*Young* Fifth Circuit precedent, stating that to survive summary judgment "an employee who proffers a fellow employee as a comparator [must] demonstrate that the employment actions at issue were taken 'under nearly identical circumstances.'"[114] This requirement directly contradicted *Young's* holding that that the plaintiff and comparators do not have to be "similar in all but the protected ways."[115] Moreover, although Santos did not have much persuasive comparative evidence, she did present other circumstantial evidence of pregnancy discrimination, including the timing of the decision to terminate her and Wincor's failure to give warnings about her allegedly poor performance before she started working at home.[116]

Beyond *Young's* substantive hurdles, recent decisions suggest the difficulty that plaintiffs may face obtaining discovery demonstrating that an employer accommodates a "large percentage" of non-pregnant workers similar in their ability or inability to work, while failing to accommodate a "large percentage" of pregnant workers.[117] For example, in *Equal Employment Opportunity Comm'n v. TriCore Reference Labs.*,[118] Kellie Guardiana, a phlebotomist, filed a charge with the EEOC,[119] stating that when she requested accommodations to her work schedule and responsibilities because her rheumatoid arthritis was exacerbated by a pregnancy,[120] Tri-Core gave her the option to apply for other jobs through the company's regular application process but did not allow her to transfer positions.[121] As part of its investigation, the EEOC asked Tri-core for a list of pregnant and non-pregnant employees who had sought or were granted

[111] 778 F. App'x 300, 304 (5th Cir. 2019).

[112] *Id.* at 301–02.

[113] Santos v. Wincor Nixdorf, Inc., No. 16-CV-440, 2018 WL 1463710, at *1 (W.D. Tex. Mar. 23, 2018).

[114] 778 F. App'x at 303 (quoting Lee v. Kansas City Southern Ry. Co., 574 F.3d 253, 260 (5th Cir. 2009).

[115] Young v. United Parcel Serv. Inc., 135 S. Ct. 1338, 1354 (2015).

[116] 778 F. App'x 300, 303 (5th Cir. 2019).

[117] 135 S. Ct. at 1354.

[118] 849 F.3d 929, 938 (10th Cir. 2017).

[119] Plaintiffs are required to file a "Charge of Discrimination" with the EEOC prior to filing a lawsuit. U.S. EQUAL EMP. OPPORTUNITY COMM'N, Filing a Charge of Discrimination, https://www.eeoc.gov/employees/charge.cfm (last visited Feb. 5, 2022); 42 U.S.C. § 2000e-5(e)(1) (2018) (stating that charges of discrimination must be filed with the E.E.O.C. within 180 days or within 300 days if charges are filed with an equivalent state entity).

[120] Specifically, "her doctors recommend[ed] she sit for at least 75 percent of her shift and avoid exposure to infectious diseases, a common risk faced by phlebotomists." 849 F.3d at 934.

[121] *Id.* at 934.

any accommodation in the prior three year.[122] When Tri-Corp refused to comply, the EEOC issued a subpoena for this information, and, ultimately, submitted an application to the federal court requesting an order to show cause why the subpoena should not be enforced.[123] The district court denied the EEOC's application as overly broad and the Tenth Circuit affirmed.[124] This discovery dispute exemplifies an added layer of legal and evidentiary complexity that pregnant women needing accommodations and who seek equal treatment may face under the *Young* standard. Although the evidentiary burden for these PDA claims is higher than for other Title VII disparate treatment claims, plaintiffs may not be able to access the evidence necessary to overcome summary judgment.

And plaintiffs lose even when they do access systemic evidence. For example, in a 2018 case in Tennessee, Cassandra Adduci, who had asked her employer, FedEx, for a lighter duty, created a spreadsheet of 261 other employees who were given temporary work assignments. The court still found that those instances were not similar enough to her situation and denied her motion.[125]

Large employers also have the ability to settle individual cases with women who have been denied equal accommodations for pregnancy or pregnancy-related medical complications, frustrating systemic change. For example, from 2015 to 2019, Amazon routinely fired pregnant warehouse ("fulfillment center") workers who asked for pregnancy-related accommodations, such as more frequent bathroom breaks or fewer continuous hours on their feet, even though Amazon routinely places non-pregnant injured workers unable to perform their regular job functions on light duty, with the company logging nearly 25,000 instances of reassignment to light duty following an injury across its facilities since 2017.[126] When pregnant Amazon workers sued Amazon for discrimination,[127] Amazon settled out of court to avoid legal precedents.[128] The story of Patty Hernandez, a former packer at Amazon's OAK4

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[122] *Id.* at 935.

[123] *Id.*

[124] *Id.* at 942. Although the decision in part was influenced by the EEOC's failure to argue in the district court that the comparative data was needed, the court stated that even if this argument had been made, the request still may have been overly broad. *Id.*

[125] *See* Adduci v. Fed. Express Corp., 298 F. Supp. 3d 1153, 1164 (W.D. Tenn. 2018).

[126] Letter from Senators Kirsten Gillibrand, Bernard Sanders, Robert Casey, Jr., Richard Blumenthal, Sherrod Brown, and Elizabeth Warren, to Hon. Charlotte Burrows, Chair, U.S. Equal Employment Opportunity Commission (Sept. 9, 2021), https://www.gillibrand.senate.gov/imo/media/doc/Letter%20to%20EEOC%20Amazon%20Pregnancy%20Accomodations%209.9.21.pdf.

[127] *Id.*

[128] *See* Alfred Ng & Ben Fox Rubin, *Amazon Fired These 7 Pregnant Workers, Then Came the Lawsuits*, CNET (May 6, 2019), https://www.cnet.com/news/features/amazon-fired-these-7-pregnant-workers-then-came-the-lawsuits/; Allison Prang, *Senators Seek Investigation of Amazon Over Treatment of Pregnant Workers*, WSJ (Sept. 10, 2021, 11:09 PM), https://www.wsj.com/articles/senators-seek-investigation-of-amazon-over-treatment-of-pregnant-workers-11631294571.

fulfillment center in Tracy, California,[129] is emblematic this situation. When Hernandez learned she was pregnant, she submitted a doctor's note and repeatedly asked Amazon for lighter duty, but was denied.[130] She continued to be assigned to lift bins filled with merchandise that weighed up to fifty pounds for ten hours at a time.[131] Hernandez miscarried at seven weeks.[132]

In sum, consistent with the cautious optimism by some experts at the time of the decision,[133] *Young* appears to have had a mixed consequences for temporarily disabled pregnant workers seeking the same workplace accommodations as non-pregnant disabled workers under the PDA. On the one hand, where plaintiffs have strong, almost class-like comparative evidence, the decision in *Young* has enabled pregnant workers to at least get to a jury on the question of whether denial of accommodations given to temporarily disabled non-pregnant workers violates the PDA. On the other hand, *Young* may have actually made it more difficult for some pregnant workers to access workplace accommodations for pregnancy under the PDA by suggesting that plaintiffs in individual disparate treatment cases must have evidence of systemic disparate treatment to prevail.[134] This is especially difficult for those who work for small employers[135] or in sex-segregated occupations,[136] where finding comparators of large numbers of

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[129] Lauren Kaori Gurley, *Amazon Denied a Worker Pregnancy Accommodations. Then She Miscarried.*, VICE.COM (July 20, 2021), https://www.vice.com/en/article/g5g8eq/amazon-denied-a-worker-pregnancy-accommodations-then-she-miscarried.

[130] *Id.*

[131] *Id.*

[132] *Id.*

[133] Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law As It Approaches Full Term*, 52 IDAHO L. REV. 825, 857 (2016) (expressing cautious optimism of "*Young's* contribution to pregnancy discrimination law").

[134] Perhaps this outcome should not be surprising. The lower courts' inconsistency in application of *Young* were predicted by scholars writing about the decision, critical that "the Court imposed new subjective requirements on pregnant workers" that "were not defined and will create considerable ambiguity in litigating pregnancy claims[.]" 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, 705 (2016); *see also* Lara Grow, *Pregnancy Discrimination in the Wake of* Young v. UPS, 19 U. PA. J.L. & SOC. CHANGE 133, 156 (2016) (noting that *Young* fundamentally fails to resolve the circuit split regarding how to identify the relevant comparator when establishing a prima facie case of disparate treatment under the PDA and thus potentially risks creating even more confusion).

[135] *See* Helene Jorgensen & Eileen Appelbaum, *Expanding Federal Family and Medical Leave Coverage: Who Benefits from Changes in Eligibility Requirements?* (2014), CTR. FOR ECON. AND POL'Y RESCH., https://cepr.net/documents/fmla-eligibility-2014-01.pdf, at 9 ("Women of childbearing age are disproportionally employed by smaller employers. . . ."). *Cf.* " NATIONAL WOMEN'S LAW CENTER, REFORM MATTERS: WOMEN AND EMPLOYER-SPONSORED INSURANCE (2008), https://nwlc.org/wp-content/uploads/2015/08/Section%203%20Issues%20in%20Health%20Reform.pdf (citing Paul Fronstin & Ruth Helman, Employee Benefit Research Inst., Issue Brief No. 253, Small Employers and Health Benefits: Findings from the 2002 Small Employer Health Benefits Survey (Jan. 2003)) ("[W]omen are more likely than men to work for small businesses who do not offer health insurance.").

[136] For example, according to labor force statistics from the 2021 U.S. Census Bureau Current Population Survey, 96.8% of childcare workers, 94.6% of preschool and kindergarten teachers, 92.5% of secretaries and administrative assistants, 88.9% of nursing assistants, 88.7% of maids and housekeeping cleaners, 87% of home health aides, and 83% of manicurists and pedicurists are

accommodated non-pregnant workers is difficult if not impossible. More generally, all women claiming disparate treatment under *Young's* heightened evidentiary standard may face challenges obtaining the necessary class-wide comparative evidence.

a. The PDA and Bedrest

Bedrest is "probably the most commonly prescribed intervention for preventing miscarriage. . . ." [137] Bedrest is frequently advised by doctors for women who have had previous miscarriages or who show symptoms indicating a risk of miscarriage.[138] Despite controversy over its effectiveness,[139] doctors regularly recommend bedrest therapy to treat and prevent a variety of pregnancy complications including "preterm labor, placenta previa or abruption, incompetent cervix, premature rupture of membranes, pregnancy-induced hypertension, multiple gestations, uterine irritability, and fetal growth retardation, as well as bleeding of early pregnancy and threatened miscarriage."[140] There is no single definition of bedrest. Treatment varies from resting periodically at home to full-time bed rest in a hospital with monitoring.[141] Some level of bedrest therapy is recommended in close to twenty percent of pregnancies,[142] with 11.4 percent

women. *See* BUREAU OF LAB. STATS., U.S. DEP'T OF LAB., CURRENT POPULATION SURV., EMPLOYED PERSONS BY DETAILED OCCUPATION, SEX, RACE, AND HISPANIC OR LATINO ETHNICITY, https://www.bls.gov/cps/tables.htm#annual (under "CPS Tables" select "11. Employed persons by detailed occupation, sex, race, and Hispanic or Latino ethnicity"). Further, African American women and Latinas are concentrated in sex-segregated occupations that may pose a risk to healthy pregnancy, such as nursing assistants, home health aides, vocational nurses, agricultural sorters and pickers, maids and housekeepers, childcare workers, and laundry and dry-cleaning workers. *Id.*

[137] A. Aleman et al., *Bed Rest During Pregnancy for Preventing Miscarriage*, 2 COCHRANE DATABASE SYSTEMATIC REVIEWS 1, 3 (2005).

[138] *Id.*

[139] Studies show that bedrest presents risks to pregnant women without any proven benefit to the fetus. *See* SOCIETY FOR MATERNAL-FETAL MEDICINE, FIFTEEN THINGS PHYSICIANS AND PATIENTS SHOULD QUESTION (2019), http://www.choosingwisely.org/wp-content/uploads/2015/02/SMFM-Choosing-Wisely-List.pdf; Christina A. McCall et al., *"Therapeutic" Bed Rest in Pregnancy: Unethical and Unsupported by Data*, 121 OBSTETRICS & GYNECOLOGY 1305, 1305 (2013). McCall and coauthors argued that doctors' continued use of bedrest without proven benefits "reflects a 'risk distortion' common to reasoning regarding pregnancy. Namely, it attends to fetal risk and works toward its elimination without due regard for risks or burden to pregnant women. Indeed, women are often expected (and willing) to accept such burden if it has the potential to benefit the fetus." *Id.* at 1307. Feminist scholars have written extensively on the law's role in defining how women should mother, beginning with expectations about their behavior during pregnancy. *See, e.g.,* Dara Purvis, *The Rules of Maternity*, 84 TENN. L. REV. 367, 368–69 (2017) ("Rule 1 begins in pregnancy, with the message that "your body is your child's vessel." During pregnancy, women are counselled that doctor knows best."); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 384 (1996) ("In a variety of settings law has regulated women's decisions about maintaining their connections with children. Thus restrictions on the employment of pregnant women, of women who might become pregnant, or of women with children already, have been perfectly legal for most of this century.").

[140] Judith H. Maloni, *Averting the Bed Rest Controversy*, 2 AWHONN LIFELINES 64, 64 (1998).

[141] *Bed Rest*, AM. PREGNANCY ASS'N (Oct. 11, 2019, 2:54 PM), https://americanpregnancy.org/pregnancy-complications/bed-rest/. *See also* Maloni, *supra note* 140, at 64 ("There is no standard definition of antepartum bed rest.").

[142] Catherine Bigelow & Joanne Stone, *Bed Rest in Pregnancy*, 78 MT. SINAI J. MED. 291, 292 (2011).

of pregnant women spending at least a week in bed and 12.9 percent having to stop or reduce work due to bedrest therapy.[143]

The PDA offers little job protection to women with pregnancy complications requiring bedrest. In these circumstances, courts often find that the plaintiffs' inability to do her job or that her inability to demonstrate other similarly situated employees were treated differently constitute a legitimate reason for termination.

There are many cases in this vein. For example, in *Spees v. James Marine, Inc.*,[144] the Sixth Circuit affirmed the district court's grant of summary judgment to an employer who terminated an employee as a result of her having to go on bed rest. The plaintiff, Heather Spees, was hired as a welder for JMI, a construction facility building cargo barges, towboats, and drydocks for Kentucky's marine freight transportation industry.[145] Of the 935 labor positions at JMI, only four were held by women, and Spees was the only woman assigned to her particular facility. Like many labor jobs, welding work at JMI was physically demanding, requiring "heavy lifting, climbing up ladders and stairs, maneuvering into barge tanks, and, occasionally, the overhead handling of equipment."[146] Spees's foreman described her as "a good employee" and "a good welder."[147] In addition, [t]he summer of 2007 was also particularly hot, with temperatures reaching 100 degrees Fahrenheit or more on multiple occasions . . . . [and] [w]elders are exposed to fumes, dust, and organic vapors in the course of their work."[148] After successfully completing her training period, Spees's became pregnant.[149] Two years prior to the pregnancy in question, she had suffered a miscarriage.[150] Spees visited her doctor who advised her that there was "no problem" working as a welder while pregnant.[151] Despite having a doctor's note clearing Spees to continue working,[152] JMI demoted her to working the night shift in the "tool room," a position that involved physical tasks that were just as demanding as the welding position,[153] was just as hot,[154] "more boring,"[155] and posed scheduling difficulties given Spees's status as a single mother.[156] Among other reasons for the demotion, a safety officer informed Spees that the physician's note "wasn't good enough" and that working as a

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[143] Robert L. Goldberg et al., *Bed Rest in Pregnancy*, 84 OBSTETRICS & GYNECOLOGY 131, 134 (1994).

[144] 617 F.3d 380, 395 (6th Cir. 2010).

[145] *Id.* at 384; *see also* THE AMERICAN WATERWAYS OPERATORS, THE TUGBOAT, TOWBOAT AND BARGE INDUSTRY IN KENTUCKY (n.d.), https://www.americanwaterways.com/sites/default/files/Fact%20Sheet_Kentucky%206-11.pdf.

[146] *Spees*, 617 F.3d. at 34.

[147] *Id.* at 385.

[148] *Id.*

[149] *Id.*

[150] *Id.*at 385.

[151] *Id.*

[152] *Id.*

[153] *Id.* at 385–86.

[154] *Id.*

[155] *Id.* at 392.

[156] *Id.* at 387.

welder "was not women's work."[157] A foreman, who happened to be Spees's brother, indicated that "he was motivated by concern for the health of his sister's unborn child."[158] Finally, a manager stated that Spees "is not going to weld no matter what your doctor is going to do."[159] Because of the problems Spees was experiencing with the tool room position, JMI management advised Spees to try to seek medical leave.[160] Spees complied, returning from doctor with a note stating that she required bedrest due to an incompetent cervix,[161] and JMI immediately fired her.[162] At trial, Spees proceeded on a mixed-motive theory that her pregnancy was a motivating factor for her termination.[163] The court held that the plaintiff's termination was "based on a combination of her being unable to work and her lack of any available medical leave, not upon her pregnancy per se."[164] The court acknowledged that the plaintiff's "pregnancy played a role in her termination," but determined that the plaintiff's pregnancy being "a link in the chain of the events that resulted in her firing" was insufficient to show mixed-motive discrimination which required "evidence that JMI was motivated by Spees's pregnancy in making its decision to terminate her."[165] Spees presents a case of a pregnant worker who was both stereotyped on the basis of her pregnancy and then, later, needed an accommodation due to her risk of miscarrying;[166] either way, the PDA left her unprotected.

The Fifth Circuit also affirmed a district court's grant of summary judgment to the defendant when an employee was terminated after informing her employer that she needed to go on bed rest.[167] The plaintiff, Heather Appel, began working for Inspire, a pharmaceutical sales company, as a territory manager in April 2018.[168] According to the plaintiff, in September 2018, she was flown to a company event and recognized for being

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[157] *Id.* at 386.

[158] *Id.*

[159] *Id.* at 393.

[160] *Id.* at 387.

[161] *Id.*

[162] *Id.*

[163] *Id.* at 394 (citing White v. Baxter Healthcare Corp., 533 F.3d 381, 401 (6th Cir.2008)). The mixed-motive theory of recovery under Title VII was first announced by the Court in *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003). In a mixed-motive case, an employer is in violation of Title VII if an adverse employment action is motivated by discriminatory and nondiscriminatory reasons, the latter being sufficient to motivate the adverse decision. However, if the employer would have made the same decision in the absence of the discrimination, the plaintiff's remedy is limited to declaratory and injunctive relief, attorney's fees, and costs (i.e., no damages, back pay, or reinstatement). *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 93–94 (2003); Civil Rights Act of 1991 § 107, 42 U.S.C. § 2000e-5(g) (2012).

[164] *Id.* at 395.

[165] *Id.* at 394.

[166] However, it should be noted that a reasonable inference from the record is that Spees was driven out of the workplace. That is, rather than actually needing an accommodation, a reasonable inference can be drawn that JMI's actions and statements were undertaken to pressure Spees into claiming a temporary disability as a means of either firing her or forcing her on leave.

[167] Appel v. Inspire Pharm., Inc., 428 F. App'x 279, 282 (5th Cir. 2011).

[168] *Id.* at 281.

a top salesperson.[169] Around the same time, she informed Inspire that she was experiencing a high-risk pregnancy and submitted a doctor's note stating she needed to go on bed rest for the rest of her pregnancy.[170] Because of complications, Appel had to undergo cerclage, a surgical procedure to sew her cervix closed to prevent miscarriage.[171] Although Appel's supervisor talked to her about possible accommodations for her pregnancy on the flight back from the event, her employment was terminated the following day.[172] Appel argued that her supervisor's statement that "she was fired because he believed Appel could not perform all the duties in her job description . . . because of complications arising from her pregnancy" showed direct evidence of discrimination based on pregnancy.[173] However, the court determined that the statement was "actually evidence that she was terminated because she was incapable of performing her job functions because of medical complications specific to her pregnancy."[174] The court also held that the plaintiff could not make a prima-facie claim of discrimination using the *McDonnell Douglas* burden-shifting framework because she could not meet the second requirement of showing "that she was qualified for the position given the medical restrictions placed by her physician during the high-risk pregnancy."[175] Appel claimed that she was able to maintain sales relationships with doctors using phone and e-mail communications, but the court held that Inspire had demonstrated that face-to-face visits were an essential part of the job.[176]

Several district courts have also granted summary judgment to defendants in cases where plaintiffs brought claims under the PDA after being terminated following a need for bed rest. In *Soodman v. Wildman, Harrold, Allen & Dixon*, the district court granted summary judgment for the defendants on the plaintiff's PDA claim resulting from her termination while on leave for bed rest.[177] The court stated that "an employer must ignore an employee's pregnancy but not her absence from work, unless like absences of nonpregnant employees go unheeded."[178] The court found that the employer's dismissal of three other employees on medical leave demonstrated that the plaintiff was terminated "because of her absence from the workplace, not because of her pregnancy."[179] In *Sanchez-Estrada v. MAPFRE Praico Ins. Co.*, the plaintiff alleged that she was suspended from her work as a result of her pregnancy that included two occasions where she

[169] Brief for Appellant at 4, Appel v. Inspire Pharm., Inc., 428 F. App'x 279 (5th Cir. 2011) (No. 10-10960).
[170] *Id.*
[171] *Id.*
[172] *Id.*
[173] 428 F. App'x at 282.
[174] *Id.*
[175] *Id.*
[176] *Id.* at 283.
[177] No. 95 C 3834, 1997 WL 106257, at *9 (N.D. Ill. Feb. 10, 1997).
[178] *Id.*
[179] *Id.*

had to stay home on bedrest.[180] The court granted the defendants' motion for summary judgment, finding that the plaintiff had not submitted evidence that she had properly documented her absences as pregnancy-related and also not demonstrated that other similarly situated non-pregnant employees were treated differently with regard to absences.[181]

b. The PDA and Depression Following Miscarriage

Women commonly experience depression, increased anxiety, and grief following a miscarriage.[182] Depression and grief are most common in the first six months following a miscarriage, but many women continue to suffer from depression and grief up to three years later.[183] One study revealed that fifty percent of women suffered from major depressive disorder following a miscarriage.[184] Women without partners, who lack social support, have a history of mental illness, have no children, or who have experienced previous miscarriages are at a greater risk of severe psychological distress.[185] Women who conceived using reproductive assistance are also more likely to experience severe depression and anxiety following a pregnancy loss.[186] Miscarriage also has potential long-term effects on mental health. One recent study, for example, found that among women with mental health issues, those who have previously experienced miscarriage are more likely to attempt suicide during a subsequent pregnancy or postpartum period.[187] Although still an area of research, the major hormonal changes experienced during miscarriage are a suspected cause of depression.[188] Given the extensive scientific evidence on the short and long-term mental health consequences of miscarriage, one would expect that PDA should prohibit discrimination against (and require equal accommodations of) workers who experience depression, anxiety, or grief after a miscarriage, since these mental health effects are "medical

[180] 126 F. Supp. 3d 220, 234 (D.P.R. 2015).

[181] *Id.*

[182] Olga BA van den Akker, *The Psychological and Social Consequences of Miscarriage*, 6 EXPERT REV. OBSTETRICS & GYNECOLOGY 295, 297 (2011).

[183] Francine deMontigny, *Women's Persistent Depressive and Perinatal Grief Symptoms Following a Miscarriage: The Role Of Childlessness and Satisfaction with Healthcare Services*, 20 ARCHIVE WOMEN'S MENTAL HEALTH 655, 659–61 (2017).

[184] Trevor Friedman & Dennis Gath, *The Psychiatric Consequences of Spontaneous Abortion*, 155 BRITISH J. PSYCHIATRY 810, 810 (1989).

[185] Van den Akker, *supra* note 182, at 297.

[186] CS Cheung et al., *Stress and Anxiety-Depression Levels Following First-Trimester Miscarriage: A Comparison Between Women Who Conceived Naturally and Women Who Conceived with Assisted Reproduction*, 120 BJOG: AN INT'L J. OBSTETRICS & GYNAECOLOGY 1090, 1096 (2013).

[187] Florence Gressier et al., *Risk Factors for Suicide Attempt in Pregnancy and the Post-Partum Period in Women with Serious Mental Illnesses*, 84 J. PSYCHIATRIC RES. 284, 286–87 (2017) ("The hypothesis could be that for some of these women, getting involved in another pregnancy is difficult, or that the new pregnancy reactivates the trauma of the previous terminated pregnancy, possibly as a result of difficult or pathological bereavement processes.").

[188] Elka Serrano & Julia "Jill" K. Warnock, *Depressive Disorders Related to Female Reproductive Transitions*, 20 J. PHARMACY PRACTICE 385, 385 (2007).

condition[s]" that are "related" to pregnancy."[189] However, a review of the cases involving the mental health issues due to miscarriage and pregnancy show that plaintiffs may face challenges both establishing that they were suffering from a medical condition related to pregnancy and identifying appropriate comparators.

In *Hollstein v. Caleel & Hayden, LLC*, the plaintiff, Hollstein, lost her job as an inside sales person for a cosmetics company after she requested to delay her travel after returning from maternity leave.[190] Hollstein had worked at the company for five years in the customer service department, and then accepted a promotion to the inside sales team.[191] She was able to take maternity leave for ninety days, and was granted a one month extension because of "anxiety complications in her pregnancy."[192] When she returned to work, Hollstein discovered that travel requirements for her position had increased from one week a quarter to one week a month.[193] She requested to defer her first travel assignment for two months, but was told that the scheduled travel was mandatory to keep her position.[194] Hollstein claimed in her lawsuit that she requested to delay travel because she was suffering from postpartum depression, but she had not submitted supporting medical documentation to her employer outside of the doctor's letter she had previously used to extend her leave a month.[195] Her email to her employer did not specifically refer to postpartum depression, but stated "she was not mentally ready to leave her son for a week."[196] The court found that although "the PDA prohibits employers from discriminating against employees on the basis of conditions related to pregnancy that occur after the actual pregnancy. . . . there [was]s no evidence that Plaintiff was suffering any medical conditions related to her pregnancy" when she lost the inside sales position.[197] Relying on the explanation given by Hollstein in the email to her employer, the court determined that she was not suffering from a medical condition but just the "desire to avoid leaving her infant son."[198]

In *Reilly v. Revlon, Inc.*, the court found that the plaintiff did not show a relation between her pregnancy and her termination, but acknowledged that "Postpartum depression is a condition related to pregnancy and accordingly falls within the PDA's protections."[199] The court

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[189] *See* 42 U.S. Code § 2000e(k).
[190] No. 11-CV-00605, 2012 WL 4050302, at *4 (D. Colo. Sept. 14, 2012).
[191] *Id.* at *1.
[192] *Id.*
[193] *Id.*
[194] *Id.*
[195] *Id.*
[196] *Id.*
[197] *Id.* at *3.
[198] *Id.* at *4.
[199] 620 F. Supp. 2d 524, 544 (S.D.N.Y. 2009). It seems that many cases where plaintiffs are seeking reparations for being terminated due to postpartum depression are brought under the ADA. However, courts are divided on whether postpartum depression is considered a disability under the ADA. *See* discussion *infra* Part II.C.3.

held that because "the PDA only requires that women affected by pregnancy or related medical conditions be treated the same as other persons not so affected but similar in their ability or inability to work[,]" Reilly needed to demonstrate "that she was treated differently from male or non-pregnant female employees who suffered from depression unrelated to pregnancy for extended periods."[200] In this pre-*Young* decision, the court limited comparators to other depressed and non-pregnant employees, seeming to argue that only the narrow category of other depressed persons could be considered similar to Reilly in their ability or inability to work.[201]

It seems that plaintiffs may occasionally get past summary judgement if they have very strong direct evidence of discrimination, but this is not common. In *Nayak v. St. Vincent Hospital & Health Care Center, Inc.*, the plaintiff was able to defeat her employer's motion for summary judgment when she had direct evidence that her termination was related to her complicated pregnancy and struggle with postpartum depression.[202] Nayak became pregnant with twins during the second year of her residency in the OB/GYN program at St. Vincent Hospital.[203] She experienced medical complications during her pregnancy and had to take medical leave to go on bed rest.[204] While out on leave, she lost one of the twins and had to spend the final period of her pregnancy in the hospital.[205] Following giving birth, she struggled with both postpartum depression and severe pelvic pain.[206] After returning to work, Nayak was told others in the program had raised "concerns" including that "she appeared distracted, sad, and tearful."[207] She was placed on probation the following week and following her probationary period, her residency was not renewed for the following year.[208] The court denied St. Vincent's motion for summary judgment, noting direct, written evidence of discrimination as Nayak's supervisor's "letter to the American Board of Obstetrics and Gynecology . . . specifically stated that St. Vincent did not renew Plaintiff's contract '[*d*]*ue to a medically complicated pregnancy*. . . .'"[209]

c. The PDA and Fertility Treatment

Approximately 12% of all women require some level of fertility assistance during their lifetime and the use of fertility treatments has been

[200] *Id.* at 545.

[201] Reilly was able to defeat summary judgment under the ADA in the same case, which is discussed *infra*, Part II.C.3.

[202] No. 12-CV-00817, 2014 WL 2179277, at *12 (S.D. Ind. May 22, 2014).

[203] *Id.* at *5.

[204] *Id.*

[205] *Id.*

[206] *Id.* at *6.

[207] *Id.* at *7.

[208] *Id.*

[209] *Id.* at *11.

growing for several years.[210] The risk of infertility increases with age; approximately one third of women over thirty-five will have difficulty conceiving naturally.[211] Fertility counseling and possible subsequent fertility treatment is recommended for women "not . . . able to achieve pregnancy after 1 year of having regular, unprotected intercourse, or after 6 months if the woman is older than thirty-five years of age."[212] Doctors today use a variety of fertility treatments, ranging from one time use medications to surgical procedures, with an overall success rate of 50%.[213] Women under age thirty-five are most likely to use medication based fertility treatments, while women over forty are most likely to need surgical treatments, [214] such as in vitro fertilization (IVF).[215]

Fertility treatment is expensive. The cost of IVF ranges from approximately $12,000 to $17,000 without necessary medications[216] and $25,000 with them.[217] Most couples require multiple cycles to achieve a successful pregnancy and birth.[218] Other fertility treatments cost less but still involve significant expense. For example, one study of 332 couples undergoing fertility treatment across eight private and public fertility clinics found the median out-of-pocket expenses for medication-only infertility treatments to be $912 and $2,623 for intrauterine insemination.[219] According to a survey by the Society for Human Resources Management, a

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[210] Holly Vo et al., *Health Behaviors Among Women Using Fertility Treatment*, 20 MATERNAL & CHILD HEALTH J. 2328, 2329 (2016).

[211] Sarah Kroeger & Giulia La Mattina, *Assisted Reproductive Technology and Women's Choice to Pursue Professional Careers*, 30 J. POPULATION ECON. 723, 725 (2017); *cf. 2019 ART Success Rates*, CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/art/artdata/index.html (last visited Feb. 14, 2022) (noting that of 330,773 assisted reproductive technology (ART) cycles, 77,998 resulted in live births, a success rate of 24%).

[212] *Infertility & Fertility*, *Eunice Kennedy Shriver*, NAT'L INST. CHILD HEALTH & HUM. DEV. (Jan. 31, 2017), https://www.nichd.nih.gov/health/topics/infertility.

[213] *Fertility Treatments for Females*, *Eunice Kennedy Shriver*, NAT'L INST. CHILD HEALTH & HUM. DEV. (Jan. 31, 2017), https://www.nichd.nih.gov/health/topics/infertility/conditioninfo/treatments/treatments-women.

[214] Kroeger & La Mattina, *supra* note 211, at 726.

[215] In vitro Fertilization ("IVF") "is the process of fertilization by extracting eggs, retrieving a sperm sample, and then manually combining an egg and sperm in a laboratory dish. The embryo(s) is then transferred to the uterus." *IVF – In vitro Fertilization*, AM. PREGNANCY ASS'N (Apr. 24, 2019), https://americanpregnancy.org/getting-pregnant/infertility/in-vitro-fertilization-70966/. IVF treatment is complicated and often "involv[es] short-notice doctor appointments early in the morning, physically invasive procedures that can require sedation, endless blood draws, regular self-injections of intense hormones, and the emotional roller coaster of waiting to find out if a procedure was successful." Katherine Goldstein, *"My Boss Said, 'I Understand What You're Going Through, but You Have a Job to Do'"*, SLATE (Jan. 30, 2019, 9:00 AM), https://slate.com/human-interest/2019/01/infertility-workplace-pregnancy-challenges-2019.html.

[216] *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT'L CONF. OF STATE LEGIS., (Mar. 12, 2021), https://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx. In IVF, drugs are used to stimulate egg production before retrieval.

[217] *IVF – In Vitro Fertilization, Costs of IVF*, FERTILITY IQ, https://www.fertilityiq.com/ivf-in-vitro-fertilization/costs-of-ivf#is-ivf-good-value (last visited Feb. 2, 2022).

[218] Kroeger & La Mattina, *supra* note 211, at 726 ("[I]t often takes multiple cycles to achieve a pregnancy. . . .").

[219] *See* Alex K. Wu et al., *Out-of-Pocket Fertility Patient Expense: Data from a Multicenter Prospective Infertility Cohort*, 191 J. UROLOGY 427, 429 t.2 (2014). This was measured over an eighteen month period. *Id.* at 428.

major association of private-sector human resources management professionals, only about twenty to twenty-five percent of employers in the United States offer health insurance plans that cover fertility treatment.[220] The exceptions are employers in the high-tech sector[221] and large employers,[222] which tend to be more generous with fertility benefits. In 2020, just 14% of employers with 50 to 499 employees offer insurance benefits covering IVF.[223] Currently, nineteen states mandate, by statute, some form of insurance coverage for an infertility diagnosis and its treatment, although the type of coverage varies widely,[224] from low-cost, low-yield treatments such as medical advice and medications, to high-cost, higher yield treatment like IVF.[225] Studies of assisted reproductive technology availability find that individuals who access these services tend to be white, highly-educated, and wealthy.[226]

The two federal appellate circuits to have addressed the question, the Second and Eight Circuits, have held that the exclusion of infertility treatment from health insurance plans does not fall within the scope of the PDA, because infertility is a gender neutral condition that applies to both

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[220] *See* SOC'Y HUM. RES. MGMT., 2019 EMPLOYEE BENEFITS: HEALTHCARE & HEALTH SERVICES 6, 9 (2019), https://www.shrm.org/hr-today/trends-and-forecasting/research-and-surveys/pages/benefits19.aspx (choose "Healthcare and Health Services") [hereinafter SHRM 2019 SURVEY] (reporting, based on a survey of 2,763 Society of Human Resources Management members (i.e., employers), that while 26% of employer health insurance plans included non-IVF infertility treatment and 24% included IVF treatment in 2017, these numbers have declined to 19% covering non-IVF infertility treatment and 18% covering IVF treatment in 2019).

[221] *See* Ann Carrns, *Tech Companies Get High Marks for Covering Infertility Treatments*, NY TIMES, Nov. 15, 2017, https://www.nytimes.com/2017/11/15/your-money/infertility-treatment-coverage.html (reporting that Big tech companies such as Facebook, Google, and Microsoft have been leaders in offering fertility benefits in order to attract and retain workers).

[222] *See 2021 FertilityIQ Workplace Index*, FERTILITYIQ, https://www.fertilityiq.com/topics/fertilityiq-data-and-notes/fertilityiq-workplace-index (last visited Feb. 6, 2022) (reporting that large employers in the industrial and retail sectors such as BP, Starbucks, and Dressbarn have been catching up with employer in the high-tech sector); MERCER, 2021 SURVEY ON FERTILITY BENEFITS 5 (2021), https://resolve.org/wp-content/uploads/2021/05/2021-Fertility-Survey-Report-Final.pdf (reporting, based on a survey of 459 employers, that 27% of surveyed employers with more than 500 employees and 42% of employers with more than 20,000 employees covered IVF fertility treatment in 2020).

[223] *See* MERCER, *supra* note 222, at 5; *see also* Carrns, *supra* note 221 ("A relatively small number of companies offer generous benefits for infertility treatment to employees, while most have minimal or no coverage.").

[224] *See Infertility Coverage by State*, RESOLVE (Apr. 2021), https://resolve.org/what-are-my-options/insurance-coverage/infertility-coverage-state/; *State Laws Related to Insurance Coverage for Infertility Treatment*, NAT'L CONF. OF STATE LEGIS. (Mar. 12, 2021), https://www.ncsl.org/research/health/insurance-coverage-for-infertility-laws.aspx.

[225] *Id.*

[226] Ahmad O. Hammoud et al., *In Vitro Fertilization Availability and Utilization in the United States: A Study of Demographic, Social, and Economic Factors*, 91 FERTILITY & STERILITY 1630, 1634 (2009); Tarun Jain & Mark D. Hornstein, *Disparities in Access to Infertility Services in a State with Mandated Insurance Coverage*, 84 FERTILITY & STERILITY 221, 222 (2005); Molly Quinn & Victor Fujimoto, *Racial and Ethnic Disparities in Assisted Reproductive Technology Access and Outcomes*, 105 FERTILITY & STERILITY 1119, 1120–21 (2016); J. Farley Ordovensky Staniec & Natalie J. Webb, *Utilization of Interfertility Services: How Much Does Money Matter?*, 42 HEALTH SERVS. RSCH. 971, 985–86 (2007).

men and women.[227] Therefore, many women who experience infertility are not able to receive the employer-sponsored health coverage they need to address this common health condition. The hurdles do not end with cost, however. Even those employees lucky enough to be in a position afford cost of treatment out-of-pocket or who have health insurance coverage may face discriminatory challenges in the workplace as a result of their treatment, mainly due to their need for time off from work to undergo treatment and oftentimes simply due to stereotyping about employees who are seeking pregnancy.

The majority of women undergoing IVF require time off work; the most common reason is for medical appointments, followed by physical and emotional difficulties.[228] One study found the average time off needed for IVF treatment to be twenty-three hours.[229] Although one day may not seem like a significant period of time, many workers, especially low-wage, contingent workers, have no sick leave.[230] For these workers, one missed day can mean losing one's job.[231] Even many professional workers are subject to probationary periods, during which a perfect job attendance is expected.[232] Women who experience physical and emotional difficulties during treatment need more time off from work.[233] In addition to the physical limitations associated with some fertility treatments, women experiencing infertility are

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[227] Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 680 (8th Cir. 1996), *abrogated on other grounds by* Bragdon v. Abbott, 524 U.S. 624 (1998) ("[B]ecause the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender-neutral," it does not violate Title VII); Saks v. Franklin Covey Co., 316 F.3d 337, 345–46 (2d Cir. 2003) ("[R]eproductive capacity is common to both men and women," but "for a condition to fall within the PDA's inclusion of 'pregnancy . . . and related medical conditions' as sex-based characteristics, that condition must be unique to women.").

[228] Clazien A. M. Bouwmans et al., *Absence from Work and Emotional Stress in Women Undergoing IVF or ICSI: An Analysis Of IVF-Related Absence from Work in Women and the Contribution of General and Emotional Factors*, 87 ACTA OBSTETRICIA ET GYNECOLOGICA SCANDINAVICA 1169, 1171 (2008).

[229] *Id.*

[230] While overall, 78% of civilian workers had access to paid sick leave in 2020, the numbers are much worse for low wage earners. U.S. DEP'T OF LAB., NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN THE UNITED STATES, MARCH 2020, at 119 (2020), https://www.bls.gov/ncs/ebs/benefits/2020/employee-benefits-in-the-united-states-march-2020.pdf. For those in the lowest 25% of wage earners, only 52% of employees had paid sick leave. *Id.* Of those being paid the least, the lowest 10% of wage earners, only 33% had access to paid sick leave. *Id.*

[231] Garcia v. Colvin, 741 F.3d 758, 762 (7th Cir. 2013) (citing "vocational expert's testimony that missing even one day a month could get a full-time employee fired" in analysis of disability applicant's ability to work).

[232] Employers' use of probationary periods is on the decline, but this is because employers can fire at-will employees regardless. Indeed, most human resource firms now recommend that employers do not use probationary periods because they already can terminate employees for any reason under general at-will hiring. *See, e.g.*, Stephanie Overman, *Are Probationary Periods Passé?*, SHRM (Jan. 23, 2019), https://www.shrm.org/resourcesandtools/hr-topics/talent-acquisition/pages/are-probationary-periods-pass%C3%A9.aspx (stating that probationary periods may be harmful to companies by giving employees the impression that they are in a quasi-contractual relationship after the period ends); Claudia St. John, *Time to Ditch the Probationary Period*, AFFINITY HR GRP. (Sept. 13, 2019), https://affinityhrgroup.com/time-to-ditch-the-probationary-period/ (same).

[233] Bouwmans et al., *supra* note 228, at 1172 (finding that absence from work nearly doubled for those experiencing emotional or physical problems as a result of IVF).

at a high risk of "social, marital, and personal distress."[234] Emotional difficulties can continue after the treatment itself is over, with one study finding that over twenty percent of women continued to experience anxiety and depression six months after completing an unsuccessful IVF treatment.[235]

Courts have generally held that although infertility on its own is not protected by the PDA, women experiencing discrimination based on undergoing IVF treatment may fall within the scope of the PDA because only women undergo IVF treatments.[236] These decisions are promising, in theory, but they are of cold comfort to most women undergoing IVF treatment, as there is no duty to accommodate women who need time off from work to undergo IVF. That is, when encountering discrimination due to fertility treatment, the employees that are most likely to prevail are those who do not need any time off from work but who experience with direct evidence of discrimination due to the mere fact that they are trying to become pregnant. In *LaPorta v. Wal-Mart Stores, Inc.*, [237] the plaintiff claimed she was discriminated against in violation of the PDA because she was terminated based on absences related to undergoing IVF fertility treatment.[238] The court granted the defendant summary judgment, stating that "the only rational construction of the statute is the one adopted by the Eighth Circuit in *Krauel* . . . that infertility is not a medical condition related to pregnancy or childbirth within the meaning of the PDA."[239]

The lack of a right to accommodation to undergo fertility treatment, particularly IVF which has greater physical and emotional costs than other types of treatment, is particularly troubling, given that most women who request time off of work to undergo fertility treatment are not commonly accommodated. As explained by one expert:

> Employers often refuse to accommodate infertile women who request time off to undergo fertility treatments, forcing them to choose between family and work. Employers have even terminated infertile women because of their potential to strain company resources over a prolonged period of time. In addition, employer-

[234] W.D. Winkelman et al., *The Psychosocial Impact of Infertility Among Women Seeking Fertility Treatment*, 104 FERTILITY & STERILITY 359, 360 (2015). Women experience more infertility related stress than men. B.D. Peterson et al., *Gender Differences in How Men and Women Who Are Referred for IVF Cope with Infertility Stress*, 21 HUM. REPRODUCTION 2443, 2448 (2006). Women who undergo infertility treatment multiple times also experience decreasing resilience to stress and anxiety. Kathy Turner et al., *Stress and Anxiety Scores in First and Repeat IVF Cycles: A Pilot Study*, 8 PLOS ONE 1, 4 (2013).

[235] C.M. Verhaak et al., *A Longitudinal, Prospective Study on Emotional Adjustment Before, During and After Consecutive Fertility Treatment Cycles*, 20 HUM. REPRODUCTION 2253, 2253 (2005).

[236] *See, e.g.,* Hall v. Nalco, 534 F.3d 644, 649 (7th Cir. 2008); Ingarra v. Ross Educ., LLC, No. 13-CV-10882, 2014 WL 688185, at *4 (E.D. Mich. Feb. 21, 2014); Govori v. Goat Fifty, LLC, No. 10 CIV. 8982, 2011 WL 1197942, at *3 (S.D.N.Y. Mar. 30, 2011).

[237] LaPorta v. Wal-Mart Stores, Inc., 163 F. Supp. 2d 758, 771 (W.D. Mich. 2001).

[238] *Id.* at 763. The court was troubled that including protection for infertile women under the PDA would cause difficulty in determining "whether the plaintiff was replaced by an individual outside the protected class," as it would suggest "that replacement of an infertile plaintiff with a fertile woman or (even a pregnant woman) violates the act[.]" *Id.* at 770–71.

[239] *Id.* at 771.

> funded health plans rarely provide coverage for fertility treatments, leaving infertile working women at a disadvantage compared to their pregnant counterparts. [240]

d. Summary: The PDA and "Unequal" Accommodation

The cases discussed in this Section are really just the tip of the iceberg. Whether one views them as a glass half full or a glass half empty, they likely suggest an overly rosy view of *Young's* impact. Pregnant workers must go through enormous effort, both within their workplaces and sometimes with the help of lawyers, just to prove that they are not being treated the same as others similar in their ability or inability to work.

If a pregnant employee needs to temporarily switch to a job where they are not standing on their feet all day to avoid a higher risk of miscarriage, for example, or if an employee who suffers a pregnancy-related medical complication suffers a miscarriage requiring time to recover, they must not only have a difficult conversation with their manager, but they may need (if their request is denied), to somehow discover what other workers who are "similar in their ability or inability to work" are receiving in terms of job adjustments. This information is often impossible to gather without filing a lawsuit, which could take years to resolve and most certainly will not be concluded before the pregnancy or its medical consequences.

Moreover, for employees who have experienced a miscarriage, the cost/benefit calculus of making these requests (with or without the help of a lawyer) is even more dismal. If the pregnancy was intended, the employee risks sharing their intentions of becoming a parent with the employer—and potential retaliation—without any immediate benefit of a successful pregnancy and birth.

And even though PDA pregnant employees "half won" in *Young v. UPS*, receiving the opportunity to obtain equal treatment so long as they can access class-wide comparative evidence showing that all they are seeking is the same benefits as their non-pregnant coworkers, the decision has continued to confuse lower federal courts. What constitutes "similar" remains unanswered by the *Young* decision. In this vacuum, pregnancy discrimination is still very commonplace. In an extensive review of post-*Young* pregnancy accommodation cases, the national nonprofit, A Better Balance, found that in more than two-thirds of cases, despite the new *Young* standard, courts held employers were permitted to deny pregnant workers accommodations under the PDA.[241]

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[240] Jeanne Hayes, *Female Infertility in the Workplace: Understanding the Scope of the Pregnancy Discrimination Act*, 42 CONN. L. REV. 1299 (2010). This article was written before the seminal Supreme Court decision in *Young v. United Parcel Serv., Inc.*, 135 S. Ct. 1338 (2015), which significantly altered plaintiff proof structure under the PDA, so its recommendations may not be feasible under current jurisprudence. *See* discussion *supra* Part II.A.2.

[241] *See* DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, LONG OVERDUE: IT IS TIME FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT 5 (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf.

B. The Family and Medical Leave Act

Congress passed the FMLA in 1993 in order to guarantee employees unpaid but job-protected leave for certain family and medical leave reasons, including pregnancy, personal or family illness, adoption, and others.[242] Employers with more than fifty employees are bound by the Act.[243] The Act provides a baseline of twelve weeks of unpaid leave for qualified reasons per employee per twelve-month period.[244] The FMLA does not provide bereavement leave.[245]

1. The Serious Health Condition Requirement

In order to obtain FMLA leave, an employee must have a "serious health condition."[246] A serious health condition is defined by the statute and relevant Department of Labor (DOL) regulations as an illness, injury, or impairment that requires inpatient care[247] or continuing treatment by a healthcare provider.[248] "Any period of incapacity due to pregnancy, or for prenatal care"[249] also constitutes a serious health condition. A DOL regulation on "Leave for pregnancy or birth" sets the rules for FMLA leave for pregnancy or birth of a child. Section a(4) clarifies that:

> The mother is entitled to FMLA leave for incapacity due to pregnancy, for prenatal care, or for her own serious health condition following the birth of the child. Circumstances may require that FMLA leave begin before the actual date of birth of a child. An expectant mother may take FMLA leave before the birth of the child for prenatal care or if her condition makes her unable to work. The mother is entitled to leave for incapacity due to pregnancy even though she does not receive treatment from a health care provider during the absence, and even if the absence does not last for more than three consecutive calendar days. For example, a pregnant

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[242] 29 U.S.C. § 1212(a)(1) (2021).

[243] 29 U.S.C. § 1211(4)(A)(i) (2021).

[244] 29 U.S.C. § 1211(2)(A)(i)-(ii) (2021).

[245] Sarah Grace-Farley-Kluger Act, S. 528, 115th Cong. (2017).

[246] 29 U.S.C. § 2612(a)(1)(D) (2021).

[247] 29 C.F.R. § 825.114. Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity, i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, or any subsequent treatment in connection with such inpatient care. *Id.*

[248] 29 U.S.C. § 2611(11) (2018). The relevant Department of Labor regulation defines continuing treatment in several ways, including a period of incapacity for more than three consecutive days that requires ongoing treatment by a health care provider, 29 C.F.R. § 825.115(a), or continuing treatment by a health care provider for a chronic health condition. 29 C.F.R. § 825.115(c). Ongoing treatment is defined in the regulation as "(1) Treatment two or more times, within 30 days of the first day of incapacity, unless extenuating circumstances exist, by a health care provider, by a nurse under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or (2) Treatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider." 29 C.F.R. § 825.115 (a)(1)–(2).

[249] 29 C.F.R. § 825.115 (b).

> employee may be unable to report to work because of severe morning sickness.[250]

Section a(5) extends this entitlement to the spouse of a pregnant woman needing care.[251]

The legislative history of the FMLA shows that Congress intended leave be available to women who experience miscarriages. Both the House and Senate reports that accompanied the FLMA specifically referred to miscarriages as an example of "serious health conditions" the legislation is intended to cover.[252] Additionally, several organizations provided written statements in congressional hearings leading up to the FMLA referencing the need to protect women either at risk of or experiencing miscarriages.[253]

Likely due to the strong statutory language encompassing pregnancy and prenatal care as a serious health condition, there are few reported decisions where a plaintiff could not request FMLA leave for a miscarriage or threatened miscarriage because a court did not consider a miscarriage a "serious health condition" under these factors. That is, employees who suffer a miscarriage or who are ordered on bedrest due to a threatened miscarriage seem to qualify for FMLA leave without issue. Cases primarily revolve around issues that arise after FMLA leave has been granted, such as retaliation[254] or the need for additional time off.[255]

For example, in *Lopez v. Lopez v. City of Gaithersburg*,[256] Jammie Lopez, a police officer, was diagnosed with gestational diabetes and ordered on bedrest due to her high-risk pregnancy and threat of a miscarriage.[257] The police department had a policy of permitting employees to use paid sick before the commencement of FMLA leave (i.e., to use paid sick leave and

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[250] 29 C.F.R. § 825.120(a)(4).

[251] 29 C.F.R. § 825.120(a)(4). This regulation was amended in 2015 to change the previous language, which referred to "husband and wife" and "mother and father," to "spouses" and "parents," in or to clarify that equal benefits would be available for same sex couples. *See* Definition of Spouse Under the Family and Medical Leave Act, 80 Fed. Reg. 9,989-01 (Feb. 25, 2015) (codified at 29 C.F.R. § 825.120).

[252] S. REP. NO. 103-3, at 29 (1993); H.R. REP. NO. 103-8, pt. 1, at 40 (1993).

[253] *See, e.g.*, *Hearing on H.R. 770, the Family and Medical Leave Act of 1989: Hearing before the Subcomm. on Labor-Management Relations of the Comm. on Education and Labor*, 101st Cong. 244 (1989) (report by ABA) (discussing the need for job protection when "a woman must take leave because of temporary disability caused by miscarriage"); *Family and Medical Leave Act of 1987: Joint Hearing before the H. Post Office and Civil Service Comm., Subcomm. on Civil Service and Compensation and Employee Benefits*, 100th Cong. 40 (1987) (testimony on behalf of women's and civil rights groups and unions) (discussing women's risk of job loss when experiencing temporary disability related to "threatened miscarriage"); *Family and Medical Leave Act of 1989: Hearing before the Subcomm. on Children, Family, Drugs & Alcoholism of the Comm. on Labor & Human Resources*, 101st Cong. 102 (1989) (statement by Dana Friedman) (discussing how flexible benefit plans would not protect a woman who had a miscarriage).

[254] Under the FMLA, it is unlawful for an employer "to discharge or in any other manner discriminate against any individual" for requesting or taking a family leave, or for "opposing any practice made unlawful by this subchapter." 29 U.S.C. § 2615(a)(2).

[255] Grant v. Hosp. Auth. of Miller Cty., No. 15-CV-201, 2017 WL 3527703, at *3 (M.D. Ga. Aug. 16, 2017);Wanamaker v. Town of Westport Bd. of Educ., 11 F. Supp. 3d 51, 59 (D. Conn. 2014); Jones v. Elmwood Centers Inc., No. 12 CV 3046, 2014 WL 1761567, at *2 (N.D. Ohio Apr. 30, 2014).

[256] No. CV 15-1073, 2016 WL 4124215, at *11–15 (D. Md. Aug. 3, 2016).

[257] *Id.* at *1–2

FMLA consecutively rather than concurrently).[258] After Lopez combined her sick leave days and FMLA leave to cover the period of bedrest and recovery after the birth of her child and informed the department that she would need a light-duty assignment for one month due to heavy bleeding upon her return to work,[259] the department retroactively designated her period of paid sick leave as FMLA parental leave, leaving her one-week short of the medically necessary leave recommended by her physician.[260] The police department then terminated her for not returning to work a week earlier than she was able to.[261] Lopez prevailed on the department's summary judgement motion to dismiss her FMLA retaliation claim, mainly because she had evidence that the department violated its own policy.[262] Others are not so lucky.

For example, in *Daneshpajouh v. Sage Dental Group of Florida, PLLC*, [263] the court ruled that the plaintiff, who claimed that she was terminated for inquiring about FMLA rights while on bedrest from an emergency surgery to save her pregnancy, did not prove retaliation; the close timing between her requesting FMLA leave and termination, alone ,was not enough to prove causation.[264]

2. Partner FMLA Miscarriage Claims

In the last twenty years, there has been increasing research showing that a miscarriage impacts both partners in a relationship. Non-pregnant partners experience grief following their partners' miscarriages that is complicated by their need to be a source of strength and support.[265] Research has shown that men can struggle to cope with grief that is commonly not acknowledged by society and also their identity as fathers.[266] Men also have been documented to have less coping skills for grief.[267] Studies show that partners commonly experience depressive systems in the year following a miscarriage, including "feelings of sadness, loss, and helplessness," with the worst symptoms occurring soon after the loss.[268] Couples that have a miscarriage also have an increased risk of a relationship breakdown and separation or divorce.[269]

The regulations implementing the FMLA state that "[a] spouse is entitled to FMLA leave if needed to care for a pregnant spouse who is

[258] *Id.* at *8.
[259] *Id.* at *3.
[260] *Id.* at *8.
[261] *Id.* at *5.
[262] *Id.* at *11–12.
[263] No. 19-CIV-62700, 2021 WL 3674655, at *18 (S.D. Fla. Aug. 18, 2021).
[264] *Id.* at *18.
[265] Bernadette Susan McCreight, *A Grief Ignored: Narratives of Pregnancy Loss from a Male Perspective*, 26 SOCIOLOGY OF HEALTH & ILLNESS 326, 337 (2004).
[266] *Id.* at 346–47.
[267] *Id.* at 329.
[268] Ingrid H. Lok & Richard Neugebauer, *Psychological Morbidity Following Miscarriages*, 21 BEST PRACTICE & RESEARCH CLINICAL OBSTETRICS & GYNAECOLOGY 229, 239–40 (2007).
[269] Katherine J. Gold et al., *Miscarriage and Cohabitation Outcomes after Pregnancy Loss*, 125 PEDIATRICS 1202, 1205–06 (2010).

incapacitated or if needed to care for her during her prenatal care, or if needed to care for her following the birth of a child if she has a serious health condition."[270]

In *Jadali v. Michigan Neurology Associates, P.C.*, the Michigan Court of Appeals considered whether an employer could deduct money for an employee's "lost productivity during his medical absences." [271] The employee had taken thirteen or fourteen days off following his wife's miscarriage.[272] The defendant conceded the validity of taking such time off under the FMLA, and the court also acknowledged that the plaintiff had taken time off to care for a spouse with a "serious health condition."[273] The court held that a jury could determine that a financial penalty for taking leave was interference prohibited by the FMLA. The Department of Labor, in educational materials about the FMLA, concurs: "A father can use FMLA leave for the birth of a child and to care for his spouse who is incapacitated (due to pregnancy or child birth)."[274] Indeed it seems that courts look quite favorably upon fathers are discriminated against because they take family leave to care for a partner after the birth of a child,[275] so long as the father is actually providing care.[276]

Although the FMLA successfully protects new fathers, the law is limited because it offers no bereavement leave. The *Chicago Tribune* ran a story in 2015 about a family who had struggled to obtain FMLA leave after a stillborn birth at twenty-two weeks.[277] The family advocated for a measure

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[270] 29 C.F.R. § 825.120(5).

[271] 2011 WL 6848356, at *11 (Ct. App. Mich. Dec. 29, 2011).

[272] *Id.* at *4.

[273] *Id.* at *11.

[274] *See Frequently Asked Questions and Answers About the Revisions to the Family and Medical Leave Act*, U.S. DEP'T OF LAB., https://www.dol.gov/whd/fmla/finalrule/NonMilitaryFAQs.htm (last visited Jan. 13, 2022).

[275] For example, in *Meyer v. Town of Wake Forest*, the court held that a jury could reasonably find a new father used FMLA leave time to care for his wife and baby on trips to the beach and fair. No. 16-CV-348, 2018 WL 4689447, at *6 (E.D.N.C. Sept. 28, 2018). Meyer planned with his employer to use intermittent FMLA leave to care for his wife and newborn child in the months following her birth by caesarian section. *Id.* at *6. According to company policies, Meyer first had to exhaust his sick time before moving to FMLA leave. *Id.* at *2. Meyer requested time off to care for his wife and newborn baby on trips to the beach and fair and classified it as sick leave. *Id.* at *3. He was terminated for purposefully misusing sick leave. *Id.* at *4. Meyer's employer argued that going to the beach and the fair with his family could not fall within the partner provisions of the FMLA, but the court disagreed: "In essence, defendants argue there is a geographical limitation to the activities covered by the FMLA, particularly regarding care provided to a spouse who has a serious health condition. The court finds no such limitation in the text of applicable regulations nor in binding precedent." *Id.* at *7–8. *Cf. also* Blohm v. Dillard's Inc., 95 F. Supp. 2d 473, 480 (E.D.N.C. 2000) (holding that father who verbally informed his supervisor of his intent to take FMLA leave a month before his child's birth, and was then demoted and ultimately terminated for missing work for the birth of his child, raised a genuine issue of material fact sustaining his claims of FMLA interference and retaliation).

[276] *See* Tellis v. Alaska Airlines, 414 F.3d 1045, 1046–47 (9th Cir. 2005) (holding that using FMLA leave for a cross-country trip to retrieve a family car, away from spouse with a serious health condition, was an abuse of FMLA leave).

[277] *See* Becky Yerak, *The Push for Unpaid, Job-protected Bereavement Leave After Losing a Child*, CHICAGO TRIBUNE (July 2, 2016) http://www.chicagotribune.com/business/ct-parental-bereavement-act-0705-biz-20150702-story.html.

to amend the FMLA to include a provision providing twelve weeks of leave to parents after the death of a child. As it currently stands, the FMLA does not provide bereavement leave. Taking up the cause, beginning in 2017, Representative Paul Gosar (AZ-R) and Senator Jon Tester (MT-D) introduced congressional bills adding bereavement leave to the FMLA.[278] The bills stalled due to congressional gridlock, and the similar bills have been introduced each year since then,[279] though none have passed. However, progress has been made for federal employees, who gained two weeks of parental bereavement as part of the National Defense Authorization Act for Fiscal Year 2022,[280] though a reduced amount from the original bill language that permitted twelve weeks of paid leave.[281]

A recent case shows that the lack of FMLA coverage following the death of a newborn baby continues to be a problem for employees. In *Towns v. Kipp Metro Atlanta Collaborative, Inc.*, the court awarded summary judgment for the employer, finding that the plaintiff could not make a prima facie case of FMLA interference when he was terminated after requesting FMLA leave for the birth of his child that passed away shortly after birth.[282] The court found that the father was not entitled to FMLA leave to care for a newborn child since the child had died and bereavement leave is not covered by the FMLA.[283] The court also rejected the plaintiff's claim that he suffered from a serious condition following the death of his baby, stating that "he never allege[d] that he suffered from any particular physical or mental condition, such as depression or anxiety."[284] The court determined that even if plaintiff was incapacitated following his baby's death, he did not seek the required subsequent treatment from a "health care provider."[285] The court rejected plaintiff's arguments that he sought help from "spiritual guidance counselors" and that he did not seek medical treatment because his employment had been terminated and he thought he no longer had insurance.[286] This case shows the difficulty that partners and also women may face to qualify for FMLA leave based on mental health conditions associated with childbirth under the current regulations.

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[278] *See* Sarah Grace-Farley-Kluger Act, S. 528, 115th Cong. (2017); Sarah Grace-Farley-Kluger Act, H.R. 1560, 115th Cong. (2017).

[279] Sarah Grace-Farley-Kluger Act, H.R. 5031, 117th Cong. (2021); Sarah Grace-Farley-Kluger Act, S. 2935, 117th Cong. (2021); Sarah Grace-Farley-Kluger Act, H.R. 983, 116th Cong. (2019); Sarah Grace-Farley-Kluger Act, S. 559, 116th Cong. (2019).

[280] National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 6329d, 135 Stat. 1541, 1953 (2021).

[281] Jessy Bur, *FY22 Defense Bill Gives Feds Parental Bereavement Leave, Makes Changes at The Pentagon*, DEFENSENEWS (Dec. 15, 2021) (https://www.defensenews.com/federal-oversight/congress/2021/12/15/fy22-defense-bill-gives-feds-parental-bereavement-leave-makes-changes-at-the-pentagon/).

[282] Towns v. Kipp Metro Atlanta Collaborative, Inc., No. 18-CV-405, 2019 WL 5549279, at *9 (N.D. Ga. July 30, 2019).

[283] *Id.*

[284] *Id.* at *8.

[285] *Id.*

[286] *Id.* at *9.

3. The FMLA and Post-Miscarriage Depression

The regulations interpreting the FMLA include mental health conditions as those which can be considered "serious health conditions" covered by the statute if they involve inpatient care or incapacity followed by subsequent treatment.[287] In order to qualify for FMLA leave for a mental health condition, the employee must require "inpatient care" or experience "[a] period of incapacity of more than three consecutive, full calendar days, and . . . subsequent treatment or period of incapacity relating to the same condition, that also involves" either "[t]reatment two or more times, within 30 days of the first day of incapacity" or "[t]reatment by a health care provider on at least one occasion, which results in a regimen of continuing treatment under the supervision of the health care provider."[288] Consequently, the case law provides many examples of plaintiffs who are able to meet this standard and take FMLA leave for a mental health issue.[289] However, because of the requirement under the FMLA that the health condition must be "serious," women who experience mild to moderate depression after a miscarriage are unlikely to be protected by the FMLA. As one commentator examining failure of the FMLA to protect domestic violence victims explains, "[i]t is quite difficult for a psychological or emotional injury to qualify as a serious health condition under the FMLA."[290]

For example, in a 2007 case from Maine, the court found that an employee who was chronically late for work because she was "sick and depressed" did not qualify for intermittent leave under the FMLA.[291] The employee's doctor stated the employee suffered from myofascial pain disorder, which "is associated with profound fatigue, weakness and lethargy, to a degree that made it medically impossible for her to arrive at work on time at least for the year prior to her termination."[292] Nevertheless, the court refused to treat the lateness as intermittent leave under the FMLA: "to treat

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[287] *See* 29 C.F.R. § 825.113. "(a) For purposes of FMLA, serious health condition entitling an employee to FMLA leave means an illness, injury, impairment or physical or mental condition that involves inpatient care as defined in § 825.114 or continuing treatment by a health care provider as defined in § 825.115. (b) The term incapacity means inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefore, or recovery therefrom.".

[288] 29 C.F.R. § 825.114; 29 C.F.R. § 825.115(a).

[289] *See, e.g.*, Saenz v. Harlingen Med. Ctr, L.P., 613 F.3d 576, 577 (5th Cir. Aug. 2, 2010) (reversing summary judgment for the employer where the employee provided the employer with enough information to make clear she was requesting FMLA leave following a severe psychiatric episode); Collins v. NTN-Bower Corp., 272 F.3d 1006, 1008–09 (7th Cir. 2001) (holding that periodic episodes of depression, affecting 10-20% of the plaintiff's working days may be a "serious health condition" covered by the FMLA); Mileski v. Gulf Health Hosps., Inc., No. CA 14-0514-C, 2016 WL 1295026, at *15 (S.D. Ala. Mar. 31, 2016), judgment entered, No. CA 14-0514-C, 2016 WL 1268261 (S.D. Ala. Mar. 31, 2016) (finding that plaintiff's depression, PTSD, and ensuing suicide attempts impeded her major life activities and were therefore covered by the FMLA).

[290] Anastasia M. Sotiropoulos, *Words Can Cut the Deepest Wounds: Why the Family Medical Leave Act Should Be Amended to Expand Protection for Victims of Domestic Violence*, 65 DEPAUL L. REV. 1361, 1362 (2016).

[291] Brown v. E. Maine Med. Ctr., 514 F. Supp.2d 104 (D. Me. 2007).

[292] *Id.* at 110.

chronic lateness, even if caused by a medical condition, as an incapacity, or inability to perform, that requires intermittent "leave" for the brief duration of the lateness, distorts the English language and trivializes the purpose of the Act."[293]

The FMLA definition of "serious health condition" excludes many mental illnesses by requiring not only incapacity but also treatment; in contrast, the ADA definition of "disability" does not include a requisite level of treatment. The FMLA defines a "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves: a. inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider,[294] while the ADA defines "disability" as "a physical or mental impairment that substantially limits one or more major life activities."[295]

A related problem for those experiencing depression after a miscarriage is shame. Because both miscarriage and depression are health conditions that are culturally embedded with shame in our society, the experience of depression after a miscarriage is like a double whammy of shame that may deter employees from seeking FMLA leave due to depression. Without giving proper notice to their employers about the situation, employees who experience miscarriage are likely to be unprotected by the FMLA. For example, in *Maitland v. Employease, Inc.*, [296] the court awarded the employer summary judgment based on the employee not adequately informing her employer that she qualified for FMLA leave for a serious health condition.[297] The employee was diagnosed with depression and adjustment disorder, but in discussions with her employee did not reveal these diagnoses, instead stating that "she was 'psychologically stressed' and 'spoke of severe fatigue, inability to-very difficult for me to come to work, that something was wrong with me. I really didn't understand. I felt very sad.'"[298] The court found that although depression can be covered by the FMLA, the plaintiff's statements to her employer did not provide sufficient notice that she had a serious health condition.[299] In *Gay v. Gilman Paper Co.*, the plaintiff's FMLA claim similarly failed because the employer was not given proper notice of the serious medical condition.[300] The plaintiff was admitted to a psychiatric hospital for a nervous breakdown, but her husband informed the employer only that "'she was in the hospital'" and "'having some tests run.'"[301] The plaintiff's husband admitted to lying about her condition, stating that he "'didn't want them to know her condition'" and "'didn't think

[293] *Id.*
[294] 29 C.F.R. § 825.113.
[295] 42 U.S.C. § 12102.
[296] Maitland v. Employease, Inc., No. 05-CV-0661, 2006 WL 3090120, at *18 (N.D. Ga. Oct. 13, 2006).
[297] *Id.* at *16.
[298] *Id.*
[299] *Id.*
[300] 125 F.3d 1432 (11th Cir. 1997).
[301] *Id.* at 1433.

they needed to know.'"[302] The Eleventh Circuit affirmed the district court's grant of summary judgment to the employer, holding that "[w]hen notice of a possible serious medical condition is deliberately withheld and false information is given, it cannot be said that an employee has been terminated in violation of the FMLA."[303] These cases demonstrates the tension between an employee's ability to claim FMLA leave and also maintain privacy.

Finally, the FMLA definition of "serious health condition" excludes some mental illnesses by requiring not only incapacity but also treatment. The FMLA defines a "serious health condition" as "an illness, injury, impairment, or physical or mental condition that involves: a. inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider.[304] Although even mild depression may have significant impacts on an employees work performance and attendance, they are less likely to seek regular treatment for mild depression, [305] which definitionally excludes them from FMLA protection.

Taken as a whole, these cases and statutory rules may explain why few recent reported cases involving FMLA claims following miscarriage exist. That is, miscarriage is covered by the FMLA, but the way it is covered by the FMLA is ineffective. This is because the common subsequent mental health effects of miscarriage such as mild depression, are not covered or because employees are unlikely to seek FMLA leave in the first place given the shame surrounding miscarriage and depression.

C. The Americans with Disabilities Act

Congress passed the ADA in 1990 "to establish a clear and comprehensive prohibition of discrimination on the basis of disability."[306] The Act is designed to prevent employment discrimination against individuals with disabilities.[307] The Act defines disability as either "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment;

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[302] *Id.*

[303] *Id.* at 1436.

[304] 29 C.F.R. § 825.113.

[305] MICHAEL E. THASE & SUSAN S. LANG, BEATING THE BLUES: NEW APPROACHES TO OVERCOMING DYSTHYMIA AND CHRONIC MILD DEPRESSION 4 (2004) ("Although many people would recognize a major change in mood, well-being, and sleep or eating patterns (symptoms of major depression), mild depression creeps in so insidiously that you often don't notice anything is wrong."); *id.* at 5 ("As for dysthymia, although millions suffer from it, most don't know it. It is one of the most underrecognized and undertreated mood disorders."); *Dysthymia*, Johns Hopkins Medicine, https://www.hopkinsmedicine.org/health/conditions-and-diseases/dysthymia (last visited Jan. 22, 2022) ("Often, people with dysthymia grow accustomed to the mild depressive symptoms and do not seek help."); *Signs and Symptoms of Mild, Moderate, and Severe Depression*, Healthline, https://www.healthline.com/health/depression/milddepression#:~:text=Despite%20the%20challenges%20in%20diagnosis,exercising%20daily (last visited Jan. 22, 2022) ("Though mild depression is noticeable, it's the most difficult to diagnose. It's easy to dismiss the symptoms and avoid discussing them with your doctor.").

[306] Americans With Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified at 42 U.S.C. § 12101).

[307] *Id.*

or (C) being regarded as having such an impairment."[308] The Act requires employers to not discriminate in hiring and promotional decisions, and to provide a reasonable accommodation once an employee requests one and makes a showing of their disability.[309]

Despite the ADA's stated goal of eliminating workplace discrimination based on disability, the law was largely viewed as "a huge disappointment, especially in the employment context."[310] This disappointment stemmed from federal courts' narrow interpretation of the ADA's definition of "disability."[311] In *Sutton v. United Air Lines, Inc.*, the Supreme Court determined that whether or not a person is disabled is to be determined "with reference to corrective measures," so that two applicants for pilot positions denied jobs based on not having uncorrected 20/20 vision were not disabled under the act since they had 20/20 vision after using corrective measures.[312] The Court also interpreted the "regarded as" definition of disability to only apply if the employer regarded the individual as having an impairment that substantially limits major life activities.[313] The Supreme Court again narrowly interpreted the scope of the ADA in *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, stating that the terms "substantial" and "major life activities" from the ADA's disability definition "need to be interpreted strictly to create a demanding standard for qualifying as disabled."[314]

In response to these Supreme Court's decisions, Congress passed the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") with the purpose of "restor[ing] the intent and protections of the Americans with Disabilities Act of 1990."[315] The ADAAA included the express purpose of superseding the Supreme Court's decisions in *Sutton* and *Toyota*, which Congress viewed as narrowing the definition of disability to be less inclusive than Congress intended.[316] The ADAAA clarified that "the definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by this act."[317] The ADAAA also expanded the intended scope of disability stating that

> (C) An impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability; (D) An impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when

[308] *Id.* at 104 Stat. 329–30.

[309] *Id.*

[310] Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. U.L. REV. COLLOQUY 217 (2008).

[311] *Id.* at 218 ("People with a variety of serious physical or mental impairments, ranging from AIDS, to cancer, to bipolar disorder, have been found not to have disabilities under the ADA.").

[312] 527 U.S. 471, 488 (1999).

[313] *Id.* at 489.

[314] 534 U.S. 184, 197 (2002).

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

[316] *Id.*

[317] *Id.*

> active; [and] (E)(i) The determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures. . . .[318]

The ADAAA has resulted in more claims under the ADA making it past motions to dismiss and for summary judgment based on the plaintiff not meeting the Act's definition of disabled.[319]

1. Normal Pregnancy

Prior to the ADAAA, most pregnancy related disability claims failed under the ADA either because the duration of the impairment was considered too short to be a disability; the courts' "overly restrictive interpretation" of "whether an impairment 'substantially limited' a 'major life activity'"; or courts determining that "conditions related to a 'normal pregnancy' were . . . not considered impairments."[320] The changes to the definition of disability under the ADAAA have "eas[ed] the duration requirement" and stopped courts from applying strict interpretations of what substantially limits a major life activity, but the idea that normal pregnancy conditions are not impairments continues to limit the applicability of the ADAAA to pregnancy.[321]

The Supreme Court in *Young* anticipated that the "expanded . . . definition of 'disability' under the ADA" may "limit the future significance of our interpretation of the [PDA]," suggesting that most pregnancy accommodation needs may be covered as a result of the ADAAA.[322] However, despite the ADAAA clarifying that the definition of disability under the ADA should be construed broadly, courts have still found pregnancy not to be a disability "based on the fact that pregnancy and its complications have only a temporary effect."[323] Jeanette Cox identified the largest barrier to courts recognizing pregnancy as a disability under the ADA as "the assumption that the ADA only encompasses medically diagnosed disorders."[324] While pregnancy related impairments are likely to be covered under the ADAAA, courts still find that accommodation needs related to pregnancy itself, and not a complication or impairment arising from pregnancy, are not disabilities.[325] An examination of cases decided both before and Congress amended the ADA reveals that the ADAAA has not resulted in substantial

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[318] *Id.* at 122 Stat. 3556.

[319] Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2071 (2013).

[320] Joan C. Williams, Robin Devaux, Danielle Fuschetti, Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97, 109 (2013).

[321] *Id.* at 113.

[322] Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1348 (2015).

[323] Mary Ziegler, *Choice at Work: Young v. United Parcel Service, Pregnancy Discrimination, and Reproductive Liberty*, 93 DENV. L. REV. 219, 269 (2015) (citing Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 554 (7th Cir. 2011)).

[324] Jeannette Cox, *Pregnancy As "Disability" and the Amended Americans with Disabilities Act,* 53 B.C. L. REV. 443, 445 (2012).

[325] *See* Widiss, *supra* note 15, at 1434.

change in how courts analyze pregnancy-related medical conditions, such as miscarriage, under the ADA.[326]

2. Pregnancy-Related Complications, Including Miscarriage

a. Pre-ADAAA Cases

Before passage of the ADAAA, Courts were split on whether miscarriage constituted a disability under the ADA. In *Conley v. United Parcel Serv.*, 88 F. Supp. 2d 16, 19 (E.D.N.Y. 2000), the plaintiff brought suit for being harassed and disciplined for missing more work than was allowed under the company sick leave policy due to a miscarriage. However, because she could not show any major life activities that were limited by her miscarriage, and pointed to no case law that articulated the premise that courts do consider pregnancy or miscarriage an ADA disability, the court stated:

> For the purposes of the ADA, short term, temporary restrictions are not "substantially limiting" and do not render a person "disabled." *Id.* Conditions, such as pregnancy, that are not the result of a physiological disorder are not impairments, nor are temporary, non-chronic impairments of short duration with little or no long term or permanent impact. 29 C.F.R. § 1630.2(h)(1). In the present case, the Plaintiff alleges that her miscarriage constitutes a "disability." However, the Plaintiff does not articulate any "major life activity" that her miscarriage "substantially limited." Any limitations on the Plaintiff's activities resulting from her miscarriage were of short duration, as she returned to work without any further need for accommodation after her five day recovery period. As the EEOC has explained, short-term, non-chronic impairments with no permanent impact, such as the Plaintiff's miscarriage here, are not considered "disabilities" under the ADA.

Likewise, the court in *Tsetseranos v. Tech Prototype, Inc.*,[327] found that neither pregnancy nor pregnancy-related conditions could be considered disabilities under the ADA.[328] This court relied on the guidance published by

[326] Commentators predicted that expanded coverage of disabilities from the ADAAA should lead to more comparators for plaintiffs in pregnancy discrimination cases and as a result greater protection under the PDA. *Id.* at 1439; Williams et al., *supra* 320, at 113. The idea was that "[e]ven when courts find the ADAAA not to cover pregnancy directly, it "expands the pool of comparators to whom a pregnant woman may point when seeking to use comparators as evidence of discrimination under the PDA." Williams et al., *supra* note 320, at 113. But a close analysis of PDA decisions after the 2008 ADA amendments suggests that these predictions were overly optimistic; the cases suggested mixed results. *See* Part II.A. *supra.*

[327] 893 F. Supp. 109, 119 (D.N.H.1995).

[328] Other courts found that—absent unusual circumstances—pregnancy in and of itself is not a disability. *See* Richards v. City of Topeka, 934 F. Supp. 378, 382 (D.Kan.1996); Jessie v. Carter Health Care Ctr., 926 F. Supp. 613, 616 (E.D.Ky.1996); Villarreal v. J.E. Merit Constructors, Inc., 895 F. Supp. 149, 152 (S.D.Tex.1995); Tsetseranos v. Tech Prototype, Inc., 893 F. Supp. 109, 119 (D.N.H.1995); Byerly v. Herr Foods, Inc., 1993 WL 101196, at *4 (E.D.Pa. April 6, 1993). This is widely established.

the EEOC (cited above) that defined pregnancy and related conditions as not constituting an impairment under the ADA.

In cases where the plaintiff was able to show that a miscarriage or pregnancy did limit substantial life activities, however, courts allowed these conditions to be considered disabilities under the ADA. For example, in *Navarro v. Pfizer Corp.*,[329] the court stated: "While pregnancy itself may not be an impairment, the decided ADA cases tend to classify complications resulting from pregnancy as impairments."[330] Similarly, in *Spees v. James Marine, Inc.*,[331] the court found that pregnancy-related impairments not related to a normal pregnancy (such as miscarriage) are a disability under the ADA.[332] Shortly after being employed as a welder for James Marine, Inc. (JMI), Heather Spees discovered that she was pregnant. At the direction of her foreman, Spees obtained a note from her physician restricting her to light-duty work, which resulted in JMI reassigning her to a position in the company's tool room. JMI terminated Spees two months later when a second doctor placed her on bedrest for the duration of her pregnancy. Spees sued JMI and its subsidiary, JamesBuilt, LLC, for disability and discrimination.[333] Reversing the trial court's grant of summary judgement for the employer and remand for further proceedings,[334] the appellate court found that Spees' past history of miscarriage could be an impairment under the ADA, and she could arguably prove the other elements of her ADA claim as well.[335]

b. Post-ADAAA Cases

Despite the passage of the ADAAA, it does not seem as though courts are any more likely than prior to the ADAAA to read the ADA broadly to cover miscarriage. For example, the Seventh Circuit, in *Serednyj v. Beverly Healthcare, LLC*[336] stated that pregnancy-related complications which did not last a minimum of six months were not an ADA-covered disability. Part of the case was overturned by *Young*, which incorporated the ADAAA. The facts of the case are summarized by the appellate court as follows:

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[329] 261 F.3d 90, 97 (1st Cir. 2001).

[330] *See also* Gabriel v. City of Chicago, 9 F. Supp.2d 974, 981–82 (N.D.Ill.1998); Hernandez v. City of Hartford, 959 F. Supp. 125, 130 (D.Conn.1997); Cerrato v. Durham, 941 F. Supp. 388, 393 (S.D.N.Y.1996); Patterson v. Xerox Corp., 901 F. Supp. 274, 278 (N.D.Il.1995); Darian v. Univ. of Mass. Boston, 980 F. Supp. 77, 85–87 (1997); Garrett v. Chicago Sch. Reform Bd. of Trustees, 1996 WL 411319, at *2–3 (N.D.Ill. July 19, 1996).

[331] 617 F.3d 380, 397 (6th Cir. 2010).

[332] *See* Spees v. James Marine, Inc., 617 F.3d 380, 397 (6th Cir. 2010). The court states: "Pregnancy-related conditions have typically been found to be impairments where they are not part of a "normal" pregnancy . . . Susceptibility to a miscarriage, moreover, has been deemed by some courts to be such a condition. . . ."

[333] *Id.* at 384.

[334] *Id.* at 380.

[335] *Id.* at 397.

[336] 656 F.3d 540 (7th Cir. 2011), *abrogated by* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015).

> Beverly Healthcare, LLC ("Beverly"), employed Victoria Serednyj as an Activity Director in Beverly's Golden Living nursing home in Valparaiso, Indiana, from August 2006 to March 2007. In early January 2007, Serednyj learned she was pregnant, and, at the end of February 2007, she began to experience pregnancy-related complications. Her doctor placed her on bed rest for two weeks, and, at the end of this two-week period, her doctor placed her on light duty restrictions. Serednyj asked to be accommodated, and Beverly denied her request under its modified work policy. Because Serednyj also did not qualify for leave under the Family Medical Leave Act ("FMLA"), Beverly terminated her employment. Serednyj then filed suit against Beverly, alleging gender discrimination under Title VII of the Civil Rights Act of 1964 ("Title VII"), pregnancy discrimination under Title VII, as amended by the Pregnancy Discrimination Act ("PDA"), disability discrimination under the Americans with Disabilities Act ("ADA"), and retaliation.[337]

The court affirmed the district court's summary judgment order in favor of the employer.[338]

Along the same lines, in *Love v. First Transit*,[339] the plaintiff's case did not survive summary judgment because she was unable to show she suffered pregnancy complications that imposed a substantial limit on her major life activities.[340] She worked as a customer service representative for a public transit customer service call center.[341] The plaintiff was dismissed from her job after failing to provide medical documentation explaining her absence for a probable miscarriage on or around December 8, 2014, after she was instructed to provide such documentation.[342] She missed just part of one day of work.[343] It was unclear to the employer and the court whether or not the plaintiff suffered her miscarriage on the day she missed work.[344] Although the plaintiff did have a miscarriage, the court found that it did not qualify for a disability under the ADA because it did not substantially limit her life activities.[345] The court reasoned that although the post-ADAAA regulations state that "an impairment lasting or expected to last fewer than six months" may be a disability, "[p]laintiff does not cite any case law holding that an impairment lasting less than a day can qualify as a 'substantial limit' on major life activities."[346] It said:

> That may be because the EEOC's Interpretive Guidance continues to state—even after the ADAAA—that "conditions, *such as*

[337] *Id.* at 544.
[338] *Id.*
[339] No. 16-cv-2208, 2017 WL 1022191, at *6 (N.D. Ill. Mar. 16, 2017).
[340] *Id.* at *6.
[341] *Id.* at *1.
[342] *Id.*
[343] *Id.*
[344] *Id.*
[345] *Id.*
[346] *Id.* at *5–6 (quoting 29 C.F.R. § 1630.2(j)(1)(ix)).

> *pregnancy*, that are not the result of a physiological disorder are also not impairments." 29 C.F.R. Pt. 1630, App. § 1630.2(h) (emphasis added). Furthermore, the EEOC's post-ADAAA enforcement guidelines on pregnancy discrimination continue to advise that "pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability.[347]

In another decision, in dicta, one court cites EEOC guidance to explain that "conditions like . . . pregnancy, that are not the result of a physiological disorder[,] are also not impairments."[348] Further, one court has summarized pre- and post-ADAAA case law without distinguishing any difference between the two, explaining that courts have generally held that normal pregnancy and post-pregnancy do not qualify as a disability.[349]

In *Adirieje v. ResCare, Inc.*, the court found that a month of intermittent cramping and subsequent miscarriage did not qualify as a disability under the ADA.[350] The court explained the law on pregnancy related impairments qualifying as disabilities, stating "[t]he case law and the EEOC's regulations and interpretive guidance are clear that pregnancy is not a disability for purposes of the ADA absent unusual circumstances," so "[t]he most persuasive decisions draw a distinction between a normal, uncomplicated pregnancy, and an abnormal one—i.e., one with a complication or condition arising out of, but distinguishable from, the pregnancy."[351] The court determined that even if the plaintiff's cramps and miscarriage were "a pregnancy related complication," there was "no evidence that her cramps limited her ability to work or other major life activities" and similarly that her miscarriage resulted in only about six hours of hospitalization and that "she was released to return to work without any restrictions three days after the hospital visit."[352] The decisions in both *Love* and *Adirieje* show that plaintiffs will have difficulty getting protection under the ADA for miscarriages unless they base their pleadings on more long lasting complications or effects.[353]

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[347] *Id.* at *5.

[348] Mark Richardson, v. Chicago Trans. Auth., No. 16-CV-3027, 2017 WL 5295701, at *4 (N.D. Ill. Nov. 13, 2017).

[349] Mayer v. Pro. Ambulance, LLC, 211 F. Supp. 3d 408, 420 (D.R.I. 2016) (citations omitted). This interpretation of the ADAAA is consistent with agency interpretation. For example, in its notice of proposed rulemaking implementing the ADAAA, the Department of Justice explained:

> Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition. Alternatively, a pregnancy-related impairment may constitute a "record of" a substantially limiting impairment, or may be covered under the "regarded as" prong if it is the basis for a prohibited action and is not both "transitory and minor."

See Amendment of Americans with Disabilities Act Title II and Title III Regulations to Implement ADA Amendments Act of 2008, CRT Docket No. 124; AG Order No. RIN 1190–AA59.

[350] No. 118CV01429, 2019 WL 4750037, at *8 (S.D. Ind. Sept. 30, 2019).

[351] *Id.*

[352] *Id.* at *8–9.

[353] However, plaintiffs that have a high-risk pregnancy following previous miscarriages seem to have more success under the ADA. In *Wadley v. Kiddie Acad. Int'l, Inc.*, the court found that the

3. The ADA and Post-Miscarriage Depression

The text of the ADA makes no reference whatsoever to the duration of an impairment or disability. Congress in its legislative history made clear that the ADA was not expected to apply to "trivial" impairments but did not refer explicitly to length of time as a necessary requirement to be deemed disabled.[354] Yet, from the beginning, courts interpreted the ADA such that temporary, relatively minor mental health issues were not covered. Thus, courts consistently found that the ADA does not cover leave for transient periods of psychological distress such as depression due to a major life event.[355] Similarly, courts held that that the transient nature of a mental health episode prevents an affected individual from experiencing a "substantial limitation on their ability to undertake major life activities,"[356] which is required to be considered a person with a disability under the ADA. Likewise, an early (1997) EEOC enforcement guidance on psychiatric disabilities stated that: "An impairment . . . is not substantially limiting if it lasts for only a brief time or does not significantly restrict an individual's ability to perform a major life activity." [357]

There are no reported decisions directly addressing ADA claims based on depression following miscarriage, likely because of the stigma

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plaintiff's claim for failure to accommodate relating to having a disability based on a high risk pregnancy after a prior miscarriage was sufficient to survive summary judgment. No. CV 17-05745, 2018 WL 3035785, at *5 (E.D. Pa. June 19, 2018).

[354] *See* S. Rep. No. 116, pt. 1, at 23 (1989) ("Persons with minor, trivial impairments such as a simple infected finger are not impaired in a major life activity"); H.R. Rep. No. 485, pt. 2, at 52 (1990) (same). This point was also emphasized by thirteen of the seventeen Republicans members of the House of Representatives Judiciary Committee in the legislative history of the ADAAA. *See* H.R. Rep. No. 110-730, pt. 2, at 30 (2008) ("We want to make clear that we believe that the drafters and supporters of this legislation, including ourselves, intend to exclude minor and trivial impairments from coverage under the ADA, as they have always been excluded."). For a full list of the House Judiciary Committee members in 2008, see the National Archives record of the 2008 U.S. House of Representatives, Committee on the Judiciary, https://www.webharvest.gov/congress110th/20081212012537/http://judiciary.house.gov/about/members.html (last visited Feb. 17, 2022).

[355] *See, e.g.*, Ramirez v. New York City Bd. of Educ., 481 F. Supp. 2d 209 (E.D.N.Y. 2007) (holding a teacher who was absent for more than a third of the school year due to depression was not a qualified individual under the ADA, reasoning that the teacher's ailments were temporary and did not substantially limit his ability to teach).

[356] *See* Williams v. Philadelphia Hous. Auth. Police Dep't., 380 F.3d 751 (3d Cir. 2004) (stipulating that a number of factors should be considered—including the nature and severity of the impairment, its duration, and its permanent or long-term impact— and concluding that, as a matter of law, a "transient, non-permanent condition" or a "temporary, non-chronic impairment of short duration" fell short of ADA requirements, because it was not substantially limiting to major life activities); Mescall v. Marra, 49 F. Supp. 2d 365, 367 (S.D.N.Y. 1999) (finding that an employee suffering from panic attacks, depression, and dermatological symptoms associated with stress was not disabled under the ADA, because the employee's mental condition was temporary, and she had no impairments once she began working as a guidance counselor under a different supervisor).

[357] U.S. Equal Emp. Opportunity Comm'n, No. 915.002, Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (Mar. 25, 1997), https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities.

associated with depression and mental illness,[358] culture of secrecy surrounding miscarriage,[359] risks of retaliation for seeking workplace accommodations due to miscarriage,[360] and absence of a right to ADA accommodations for transient disabilities before the 2008 ADA amendments. But cases on post-partum depression and depression generally are instructive.

Before passage of the ADAAA, courts were almost uniformly unwilling to find that a short-term episode of depression qualified as a disability under the ADA. For example, in *Sanders v. Arneson Products*, the Ninth Circuit Court of Appeals held that a temporary cancer-related psychological disorder lasting three and a half months was not sufficient to constitute a disability under the ADA.[361] Similarly, in *Morales v. Pabon Community Health Center*, the court held that an employee's temporary depression and anxiety did not constitute a disability within the meaning of the ADA.[362]

After the enactment of the ADAAA, courts seem more willing to find that mental disabilities are covered by the statute.[363] Yet there is still substantial uncertainty as to Congress's intent to expand the Act's coverage to temporary disabilities such as depression following a miscarriage. The ADAAA explicitly provides in its statutory language that individuals cannot be protected as a person "regarded as" disabled if their impairment lasts less than six months.[364] Whether this exclusion applies to individuals seeking accommodations for actual disabilities is unclear from the statute itself, as Congress was silent on that question. In post-ADAAA regulations, the EEOC has taken the position that this limitation does not apply to persons who are seeking accommodations based on actual disabilities.[365] And the EEOC's post-ADAAA enforcement guidelines on pregnancy discrimination even includes depression as an example of a pregnancy-related impairment that

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[358] *See* REBECCA L. COLLINS, ET AL., INTERVENTIONS TO REDUCE MENTAL HEALTH STIGMA AND DISCRIMINATION, RAND CORP. 3 (2012) ("Mental illness stigma is common in the United States. . . . In 2006, nearly one in three U.S. adults endorsed the view that schizophrenia and depression are a result of "bad character." . . ."); Patrick W. Corrigan et al., *Challenging the Public Stigma of Mental Illness: A Meta-Analysis of Outcome Studies*, 63 PSYCH. SERVS. 963, 967 (2012) ("[E]mployers who endorse stigma may be less likely to hire people with mental illness. . . .").

[359] *See* notes 417–422 *infra* and accompanying text.

[360] *See* discussion *infra* Part III.A.

[361] Sanders v. Arneson Prods., Inc., 91 F.3d 1351, 1354 (9th Cir. 1996).

[362] 310 F. Supp. 955, 416 (2004).

[363] Debbie N. Kaminer, *Mentally Ill Employees in the Workplace: Does the ADA Amendments Act Provide Adequate Protection?*, 26 HEALTH MATRIX 205, 224 (2016) (showing that "the summary judgment win rate for employers based on disability status dropped from . . . 60% to 40% in cases involving a mental disability).

[364] *See* 42 U.S.C. § 12102(3)(B). The ADA includes three alternative definitions of "disability" covering different scenarios in which disability discrimination may occur. The three definitions are a person with an "actual" disability, "record of" a disability, and a person whose is "regarded as" a person with a disability by their employer. 42 U.S.C. §12102(1).

[365] *See* Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16,978 (Mar. 25, 2011) (codified as amended at 29 C.F.R. pt. 1630; 29 C.F.R. § 1630.2(j)(iv)).

should qualify as a disability under the ADA, as amended.[366] But federal courts, including the Supreme Court, have shown that they have no reservations rejecting EEOC's regulations and interpretive guidances when deciding cases under ADA.[367] Consistent with this lack of deference, post ADAAA, some courts have continued to cite pre-ADAAA precedents excluding temporary or situational depression from the Act's protections, even where the plaintiff's claim is not brought under the "regarded as" prong.[368]

On the other hand, other courts have found that temporary or situational depression can be a disability.[369] Still, plaintiffs seem to fare better on this type of claim if their symptoms are severe and relatively long lasting. For example, in *Reilly v. Revlon, Inc.*, the court found that the plaintiff's post-partum depression that resulted in her "two-week hospitalization" and five months of "significant limitations in her ability to sleep, eat, think and concentrate, taken, collectively create an issue of fact as to whether her postpartum depression rises to the level of an emotional or mental illness."[370] The court denied the employer's motion for summary judgment based on the plaintiff not having a disability.[371] Along the same lines, in *Hostettler v. College of Wooster*,[372] the Sixth Circuit determined that the plaintiff was disabled under the ADA despite some of her symptoms of her "severe post-partum depression" being episodic because "when [plaintiff] was experiencing her depression and anxiety she was substantially limited in her ability to care for herself, sleep, walk, or speak, among others."[373] Further, the plaintiff was experiencing post-partum panic attacks, "during which she would have difficulty breathing, thinking, and even walking."[374]

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[366] U.S. Equal Emp. Opportunity Comm'n, No. 915.003, Enforcement Guidance: Pregnancy Discrimination and Related Issues (June 25, 2015), 2015 WL 4162723, at *19–20 [hereinafter 2015 EEOC Pregnancy Enforcement Guidance] ("[A] number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though they are only temporary. . . . Examples include pregnancy-related . . . depression . . . .").

[367] Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1937 (2006); *see also* Lisa Eichhorn, *The Chevron Two-Step and the Toyota Sidestep: Dancing Around the EEOC's "Disability" Regulations Under the ADA*, 39 WAKE FOREST L. REV. 177, 177 (2004).

[368] *See, e.g.,* Seibert v. Lutron Elecs., 408 Fed. Appx. 605, 608 (3d Cir. 2010) (holding that plaintiff's depression, induced by specific, non-recurring events, was temporary and thus not a disability within the meaning of the ADA); MacEntee v. IBM (Int'l Bus. Machines), 783 F. Supp.2d 434, 443 (2011) ("Courts in this circuit have found that depression may qualify as a disability for purposes of the ADA, provided that the condition is not a temporary psychological impairment.") (internal citations omitted).

[369] *See, e.g.,* Moore v. CVS Rx Servs., Inc., 142 F. Supp.3d 321, 344 (2021) (finding that pregnancy-related complications, such as round-ligament syndrome and postpartum depression, constitute "disabilities" as contemplated by the ADA, even if pregnancy is not a qualifying disability). However, of note, the parties stipulated as to this issue in this case. *Id. Cf.* Nagle v. E. Greenbush Cent. Sch. Dist., No. 16-cv-00214, 2018 WL 4214362, at *16 (N.D.N.Y. Feb. 21, 2018) (holding that facts showing premature labor resulting in hospitalization were sufficient to raise a triable of fact as to whether Plaintiff was disabled).

[370] 620 F. Supp. 2d 524, 539–40 (S.D.N.Y. 2009).

[371] *Id.* at 541.

[372] 895 F.3d 844, 854 (6th Cir. 2018).

[373] *Id.* at 854.

[374] *Id.* at 850.

The plaintiff had been fired when she could not immediately come back to work full-time after a maternity leave due to post-partum depression.[375]

In sum, it appears that, depending on the severity of the depression (and length of symptoms), the ADAAA could make it more likely that employees who are terminated or denied accommodations for depression following a miscarriage to at least get past their employer's motion for summary judgement. Congress did, after all, intend to restore the ADA to its original purpose and has directed courts to construe the definition of disability under the ADA in favor of broad coverage.[376] But the results overall have been mixed for individuals with depression. Some courts still persist in clinging to the pre-ADAAA narrow definition of disability in ADA cases involving depression, especially if the depression is not long-lasting or severe. Because it cannot yet be said that there has been a sea change in judicial interpretation with regard to whether episodic depression related to a traumatic life event counts as a disability under the ADA, individuals affected by depression related to miscarriage are not clearly protected by the statute.

4. Bedrest

Like the depression cases, courts seem split on whether a pregnant employee may take ADA leave when the person is ordered on bedrest. Largely, this depends on how long bed rest is ordered for.

In two cases, plaintiffs survived motions for summary judgment when they had experienced adverse employment actions after using ADA leave for bedrest lasting two months and eleven weeks, respectively. A district court in Tennessee precluded summary judgment in favor of the employer in regards to whether an employee, who had taken leave under the ADA after she was put on bedrest for her pregnancy, suffered an adverse employment action when she was subsequently given a poor rating on her annual performance review.[377] Despite the employer claiming that the review was based on performance issues unrelated to the plaintiffs' ADA leave, the court considered the nature of the comments on the review and the temporal proximity of the plaintiff's leave and performance enough to survive summary judgment.[378] A District Court in D.C. held that a plaintiff had shown she was disabled during her period of bedrest, which was prescribed for her pregnancy.[379] Therefore, since she had taken ADA leave and was subsequently terminated, she "suffered the consequences of that alleged discriminatory act," and even though it occurred "after she gave birth

[375] *Id.* at 851. The Sixth Circuit reversed the district court's grant of summary judgment to the employer and remanded on the question of whether her need to work part-time for two additional months made her "otherwise qualified" for her job, or not, under the ADA. *Id.* at 859.

[376] 42 U.S.C. § 12102(4)(A).

[377] Meachem v. Memphis Light, Gas & Water Div., 119 F. Supp. 3d 807, 820 (W.D. Tenn. 2015).

[378] *Id.* at 821.

[379] Holmes v. Univ. of the D.C., 244 F. Supp. 3d 52, 64 (D.D.C. 2017).

[it] does not vitiate what was, at the time it occurred, an allegedly unlawful act."[380]

Conversely, a District Court in Georgia held that a two-week period of pregnancy-related bedrest did not qualify as a disability.[381] The plaintiff worked as a successful bartender at the defendant's themed restaurant that required "female staff . . . to wear certain revealing uniforms."[382] After the plaintiff announced her pregnancy and suffered complications that led to two weeks of doctor-recommended bedrest, the defendant assigned the plaintiff to work at a less popular restaurant location, reducing the plaintiff's income, and ultimately terminated her.[383] Though the plaintiff prevailed on her Title VII and FMLA claims, she did not on her ADA claims; the court held that she did not "show her pregnancy-related complications constituted a disability under the ADA."[384]

D. The Occupational Safety and Health Protection Act

Low-income women and women of color are more likely to work in sectors of the economy involving taxing physical labor, such as in warehouses,[385] food processing plants,[386] low-paid service jobs,[387] and nursing and retirement homes and as home-health aides.[388] These jobs and work environments often entail long hours standing on one's feet; lifting heavy boxes; lifting, transferring or wheeling or bodies; working in extreme heat or cold, and working night shifts,[389] all conditions that can all increase

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[380] *Id.*

[381] Alger v. Prime Rest. Mgmt., LLC, No. 15-CV-567, 2016 WL 3741984, at *8 (N.D. Ga. July 13, 2016).

[382] *Id.* at *1.

[383] *Id.* *1–2.

[384] *Id.* at *8. In its analysis, the court noted that a "pregnancy per se" is not a disability, and that though pregnancy complications may become disabilities, to do so, they must satisfy the long list of criteria and exceptions the court included in its rule language. *Id.* at *7.

[385] *See, e.g.*, Ellen Reese, *Gender, Race, and Amazon Warehouse Labor in the United States*, *in* THE COST OF FREE SHIPPING: AMAZON IN THE GLOBAL ECONOMY 107 (Jake Alimahomed-Wilson & Ellen Reese eds., 2020) (describing Amazon's female workers as "mostly women of color").

[386] *See, e.g.,* Human Rights Watch, *Case Studies of Violations of Workers' Freedom of Association: Food Processing Workers and Contingent Workers*, 32 INT'L J. HEALTH SERVS. 755, 763 (2002) ("Nearly all the plant's workers [at Jenkens Foods' Cabana potato chip plant in Detroit, Michigan] are African- American, and a majority are women.").

[387] BUREAU OF LAB. STATS., U.S. DEP'T OF LAB., CURRENT POPULATION SURV., EMPLOYED PERSONS BY OCCUPATION, RACE, HISPANIC OR LATINO ETHNICITY, https://www.bls.gov/cps/tables.htm#annual (under "CPS Tables" select "10. Employed persons by occupation, race, Hispanic or Latino ethnicity, and sex") (reporting that one-quarter (25%) of black women were employed in service jobs in 2021 compared with less than one-fifth (18.6%) of white women).

[388] Janette Dill & Mignon Duffy, *Structural Racism and Black Women's Employment in the US Health Care Sector*, 41 HEALTH AFFAIRS 265, 266 (2022) ("Women of color are concentrated in the most physically demanding direct care jobs (nursing aide, licensed practical nurse, or home health aide), along with the "back-room" jobs of cleaning and food preparation in hospitals, schools, and nursing homes.").

[389] *See, e.g.,* Reese, *supra* note 385, at 112. According to Reese, Amazon warehouse workers on the night shift explained some of their challenges as follows:

the risk of miscarriage.[390] Yet when employers deny employee requests for light duty or other accommodations, the law generally does not provide much protection to pregnant workers.

In a 2018 report, the *New York Times* reviewed thousands of legal documents and court records of pregnant women whose pregnancies resulted in miscarriages or premature labor, all because their requests for temporary modifications to their jobs were rejected.[391] For example, Ceeadria Walker, an African-American woman, was a warehouse worker at XPO Logistics, "a global provider of transportation and contract logistics company."[392] XPO is the largest provider of last mile shipping for heavy goods in North America—arranging the home delivery of heavy goods that typically require assembly or installation, such as washing machines, refrigerators, exercise equipment and home entertainment systems.[393] Walker often worked twelve-hour shifts at XPO's Memphis warehouse.[394] When she became pregnant, she gave her XPO supervisor a doctor's letter from OB/ GYN Centers of Memphis saying she should not lift more than fifteen pounds.[395] She asked to reduce the hours on her feet and to be assigned to an area handling lighter items. Her supervisor ignored her request. Rather, he regularly sent her to a conveyor belt where she spent her days "hoisting 45-pound boxes."[396] Walker thought

> Destiny, a single mom who worked graveyard shift [at an Amazon warehouse] from 6:30 p.m. until 5 a.m. in San Bernardino four days per week, had a care provider to watch her children at night in Riverside, where she lived (about 30 minutes away from her workplace). . . . As she describes, "I would pick them up around 5:30 a.m. I would sleep in the parking lot at my kids' school, have them dressed and ready to go, and I would then drop them off at school by 8 in the morning." Kelly, another mother employed in a graveyard shift, struggled to take her infant daughter to daytime medical appointments and feared something might happen to her daughter if she fell asleep while watching her. After Amazon's management denied all four of her requests for a daytime shift, she finally accepted Amazon's "offer" of compensation for agreeing to quit and never work for the company again.

Id. at 112.

[390] *See* sources cited *infra* notes 401–408 and accompanying text. Of relevance here:

> Since the era of slavery, the dominant view of black women has been that they should be workers, a view that contributed to their devaluation as mothers with caregiving needs at home. African-American women's unique labor market history and current occupational status reflects these beliefs and practices. . . .Black women's main jobs historically have been in low-wage agriculture and domestic service. . . . The 1970s was also the era when large numbers of married white women began to enter into the labor force and this led to a marketization of services previously performed within the household, including care and food services. Black women continue to be overrepresented in service jobs. . . . . The legacy of black women's employment in industries that lack worker protections has continued today. . . .

Nina Banks, *Black Women's Labor Market History Reveals Deep-Seated Race and Gender Discrimination*, ECON. POL'Y INST. (Feb. 19, 2019), https://www.epi.org/blog/black-womens-labor-market-history-reveals-deep-seated-race-and-gender-discrimination/

[391] Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES, Oct. 21, 2018, https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html.

[392] *About Us*, XPO LOGISTICS, https://www.xpo.com/about-us/ (last visited Feb. 5, 2022).

[393] *Id.*

[394] *See* Silver-Greenberg & Kitroeff, *supra* note 391.

[395] *Id.*

[396] *Id.*

about leaving. But she couldn't just quit her job—she needed the money.[397] One day, after a long shift of handling "hundreds" of these heavier boxes, Ceeadria miscarried. "This was going to be my first," Ceeadria told *The New York Times*.[398] Five workers had miscarriages at the same warehouse since 2014 after being refused light duty work.[399]

According to the Center for Disease Control's National Institute for Occupational Safety and Health,[400] as well as guidelines published by the American College of Obstetricians and Gynecologists (ACOG),[401] there is an increased risk of miscarriage for women who do extensive lifting in their jobs. Metanalyses of studies measuring the effect of occupational lifting on pregnancy outcomes reaches a similar conclusion.[402] Pregnant women are also a greater risk of musculoskeletal injuries from lifting and prolonged standing, as well as of falling.[403] Accordingly, the ACOG adopted the National Institutes of Occupational Safety and Health recommended limitations for lifting by pregnant workers.[404] These recommendations, for example, state that women in the early gestation period, defined as less than

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[397] *Id.*

[398] *Id.*

[399] *Id.*

[400] *See Physical Demands (lifting, standing, bending) – Reproductive Health*, THE NATIONAL INSTITUTE FOR OCCUPATIONAL SAFETY AND HEALTH (Oct. 19, 2021), https://www.cdc.gov/niosh/topics/repro/physicaldemands.html ("heavy lifting, standing for long periods of time, or bending a lot during pregnancy could increase your chances of miscarriage, preterm birth, or injury during pregnancy.").

[401] *See* COMMITTEE ON OBSTETRIC PRACTICE, AM. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, ACOG COMMITTEE OPINION NO. 733: EMPLOYMENT CONSIDERATIONS DURING PREGNANCY AND THE POSTPARTUM PERIOD e119 (2018) [hereinafter ACOG 2018 GUIDELINES], https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period.pdf.

[402] *See* Agathe Croteau, *Occupational Lifting and Adverse Pregnancy Outcome: A Systematic Review and Meta-Analysis*, 77 OCCUPATIONAL & ENV'T MED. 496, 496 (2020) (concluding, based on a systemic review of fifty-one studies, that for pregnant workers who lift frequently (or ≥10x/day) lift heavy (or ≥10 kg) loads, positive associations are measured with preterm delivery and spontaneous abortion). For an earlier, often-cited, large cohort study out of Denmark, see Mette Juhl et al., *Occupational Lifting During Pregnancy and Risk of Fetal Death in a Large National Cohort Study*, 39 SCANDINAVIAN J. WORK & ENV'T HEALTH 335 (2013).

[403] *See* ACOG 2018 GUIDELINES, *supra* note 401, at e120; Bulent Cakmak et al., *Postural Balance and the Risk of Falling During Pregnancy*, 29 J. MATERNAL-FETAL & NEONATAL MEDICINE 1623, 1625 (2016). A large study of 3,997 pregnant women found the overall fall rate during pregnancy was 26.8%, and of the women in this study who were employed and fell at work, the occupations with the highest rates of falling were food service, other service (such as beauticians and housecleaners), and teaching and childcare and this was due to slippery floors, moving at a hurried pace, and carrying an object or child. *See* Karri Kunning et al., *Falls in Workers During Pregnancy: Risk Factors, Job Hazards, and High Risk Occupations*, 44 AM. J. INDUS. MED. 664, 668 (2003).

[404] *See* ACOG 2018 GUIDELINES, *supra* note 401, at e121 (citing Leslie A. MacDonald et al., *Clinical Guidelines for Occupational Lifting in Pregnancy: Evidence Summary and Provisional Recommendations*, 209 AM. J. OBSTETRICS & GYNECOLOGY 80 (2013)). ACOG has repeated its support of these guidelines in its most recent recommendations on exercise during pregnancy. *See* COMMITTEE ON OBSTETRIC PRACTICE, AM. COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, ACOG COMMITTEE OPINION NO. 804: PHYSICAL ACTIVITY AND EXERCISE DURING PREGNANCY AND THE POSTPARTUM PERIOD e184–e185 (2020) [hereinafter ACOG 2020 GUIDELINES], https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2020/04/physical-activity-and-exercise-during-pregnancy-and-the-postpartum-period.pdf.

twenty weeks, who have a long-duration, heavy lifting pattern, should not lift greater than thirteen pounds, almost one-fourth the weight of the forty-five pound boxes that Ceeadria Walker was ordered to lift during her long shifts at the XPO warehouse.

Dehydration and overheating are also a risk for pregnant women during physical activity,[405] yet women who work in industries involving physical labor often work in unairconditioned conditions, such as warehouses.[406] For example, investigative reporting found that workers routinely faint at the XPO and other similar warehouses from overwork, dehydration, and heat.[407] There is also an association of miscarriage and night shift work.[408]

Despite extensive research establishing a link between physically demanding work and miscarriage, the most important federal law governing occupational health and safety in the United States does not protect women from work conditions that increase their risk of miscarriage, or provide an effective remedy when they do. Congress passed the Occupational Safety and Health Act (OSH Act) in 1970 to ensure employees of a work environment free of recognized hazards.[409] Unfortunately for pregnant workers, the OSH Act, in practice, mainly regulates occupational hazards that were most common when the American economy consisted primarily of industrial jobs occupied by men, such as exposure to toxic chemicals, excessive noise, electrical hazards, and mechanical dangers.[410]

The OSH Act regulates workplace safety in two ways. First, it establishes a minimum general duty that applies to all covered employers. However, the scope of this duty is extremely narrow; employers must only ensure their workplaces are free from "recognized hazards that are causing

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[405] *See* ACOG 2020 GUIDELINES, *supra* note 404, at e180 ("During exercise, pregnant women should stay well hydrated, wear loose-fitting clothing, and avoid high heat and humidity to protect against heat stress, particularly during the first trimester.").

[406] *See* Silver-Greenberg & Kitroeff, *supra* note 391 (noting that there is no air-conditioning on the floor of the XPO warehouse and that temperatures can rise past 100 degrees; "[w]orkers often faint. . . ."); *see also* discussion of welder Heather Spees' work conditions, *supra* notes 144–166.

[407] *See* Silver-Greenberg & Kitroeff, *supra* note 391.

[408] *See* ACOG 2018 GUIDELINES, *supra* note 401, at e119; Luise Moelenberg Begtrup, *Night Work and Miscarriage: A Danish Nationwide Register-Based Cohort Study*, 76 OCCUPATIONAL ENV'T MED. 302, 302 (2019). In this study of 22,744 pregnant Danish women, which tracked their work schedules and hospital admissions for miscarriage using government databases, women who had worked two or more night shifts during the previous week had a 32% increased risk of miscarriage compared with women who did not work nights. *Id.*

[409] Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified at 29 U.S.C. §§651-78).

[410] John D. Meyer et al., *Reproductive and Developmental Hazard Management*, 58 J. OCCUPATIONAL & ENV'T. MED. 94, 94 (2016) ("Industrial exposure limits promulgated for most chemical agents by the US Occupational Safety and Health Administration (OSHA) . . . have in most cases been established without considering protection from adverse reproductive or developmental health effects."); Christopher Cole, *Lawmaker Worried By Nail Salon Chemicals Calls OSHA Reg Process 'Unacceptable,'* INSIDEOSHAONLINE (May 12, 2015), https://login.ezproxy.lib.utah.edu/login?url=https://www.proquest.com/trade-journals/lawmaker-worried-nail-salon-chemicals-calls-osha/docview/1680423894/se-2?accountid=14677 (noting that most of OSHA's permissible exposure limits were set in 1971 and have not been updated, exposing some women who become pregnant, like those working in nail salons, to chemicals that appear to increase the odds of miscarriage and developmental issues in children).

or likely to cause death or serious physical harm to . . . employees."[411] Second, the OSH Act authorizes the Occupational Safety and Health Administration (OSHA) to set specific standards concerning workplace safety and health.[412] However, due to the "need for substantial scientific support in a world of scientific uncertainty, combined with challenges by industry, other procedural hurdles, and resistance or delays within OSHA itself has resulted in few permanent standards actually being promulgated."[413] Finally, there is no private cause of action for employees who allege they are injured at work due to an OSH Act violation; rather, OSHA inspectors from the federal agency issue citations for violations of specific standards or the general duty clause.[414] It maintains about 2,000 inspectors who are "responsible for the health and safety of 130 million workers (employed at more than 8 million worksites), [which] translates into about one inspector for every 59,000 workers."[415] "Given OSHA's limited resources, few doubt that the agency never uncovers many violations,"[416] much less the type of physical harms that pregnant women experience due to work conditions increasing risk of pregnancy.

III. SPECIAL LEGAL OBSTACLES RELATED TO MISCARRIAGE AND EMPLOYMENT

Women who experience miscarriage or whose pregnancies are at a risk of miscarriage often strive to keep their health condition secret. This secrecy is driven by a host of factors, including cultural norms; fear of discrimination and retaliation by employers; wanting to save limited sick, family, or disability leave for recovery and parenting after delivery (in the case of planned pregnancies); and avoidance of invasive advice and questions.

Studies show that women and their partners are not comfortable talking about miscarriage and have difficulty sharing the news with others.[417] Most women do not share news of their pregnancies until after the

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[411] 29 U.S.C. § 654(a)(1). To establish a violation of this general duty clause, OSHA must prove that (1) the employer failed to furnish a workplace free of a hazard, and its employees were exposed to that hazard; (2) the hazard was recognized; (3) the hazard was causing, or was likely to cause, death or serious physical harm; and (4) a feasible method existed to correct the hazard. *See* Nat'l Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1265-67 (D.C. Cir. 1973).

[412] See 29 U.S.C. § 655 (2018).

[413] *See* GLYNN, SULLIVAN & ARNOW-RICHMAN, *supra* note 43, at 879.

[414] *Id.* at 891.

[415] *Id.* Although beyond the scope of this article, other aspects of the OSHA Act's statutory scheme further complicate enforcement of federal occupational safety standards, including the fact that the OSH Act does not apply (is preempted) where health and safety-related matters are the jurisdiction of other federal agencies, where states have adopted their own "at least as effective" employment safety laws, and employers covered by other safety regimes. *Id.* at 877; *see also generally* Paul M. Secunda, *Hybrid Federalism and the Employee Right to Disconnect*, 46 PEPP. L. REV. 873 (2019) (detailing the OSH Act's elaborate form of "hybrid federalism").

[416] *See* GLYNN, SULLIVAN & ARNOW-RICHMAN, *supra* note 43, at 894.

[417] Jennifer J. Bute & Maria Brann, *Co-ownership of Private Information in the Miscarriage Context*, 43 J. APPLIED COMM. RES. 23, 24 (2015).

first trimester, "so keeping a miscarriage a secret seems a natural extension of the pregnancy secret."[418] One study revealed that most couples perceive a "societal-level rule" that miscarriage should be "kept behind closed doors."[419] Another study described the decision to keep a miscarriage secret as "so automatic as to be involuntary."[420] This difficulty is amplified for women who experience miscarriage in the first trimester and have not yet shared the news of their pregnancy.[421] Other women who have shared news of their miscarriages have reported feeling a lack of support or understanding of their loss.[422]

In addition to these cultural taboos surrounding miscarriage, employees are often scared to tell their employers that they are pregnant and wait as long as possible to share the news.[423] A 2011 study revealed that many pregnant employees hide their pregnancies out of fear of negative attitudes, discrimination, and invasive advice and questions.[424] A 2018 study commissioned by Bright Horizons, the largest U.S. provider of employer-sponsored childcare in the United States,[425] showed an increase in fear among women to report to their employers that they are pregnant, with 21% of women stating they "would be worried to tell their boss they are expecting a child."[426] These fears are rational considering the prevalence of pregnancy discrimination.[427] Scholars have documented that pregnant women are less likely to be hired or promoted and receive lower salaries than non-pregnant applicants and employees.[428]

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[418] Porschitz & Siler, *supra* note 432, at 571.

[419] Jennifer J. Bute et al., *Exploring Societal-level Privacy Rules for Talking About Miscarriage*, 36 J. SOC. & PERS. RELATIONSHIPS 379, 386 (2017).

[420] Porschitz & Siler, *supra* note 432, at 575.

[421] Bute et al., *supra* note 419, at 390–91.

[422] Ariella Lang, et al., *Perinatal Loss And Parental Grief: The Challenge Of Ambiguity And Disenfranchised Grief*, 63 OMEGA- J. DEATH & DYING 183, 192 (2011).

[423] Caroline Gatrell, *Policy and the Pregnant Body at Work: Strategies of Secrecy, Silence and Supra-performance*, 18 GENDER, WORK & ORG. 158, 166 (2011); Kathryn Haynes, (*Re)figuring Accounting and Maternal Bodies: The Gendered Embodiment Of Accounting Professionals*, 33 ACCT., ORGS. & SOC'Y 328, 338 (2008) (citing example of study participant who waited five months to tell her employer she was pregnant out of fear of not getting promotion).

[424] Gatrell, *supra* note 423, at 166 (describing pregnant employees' strategy of "secrecy and silence, in which pregnancy was kept secret for as long as possible and not discussed at work, and its physical manifestations—nausea, an expanding waistline and the threat of breaking waters and leaking breasts—were concealed").

[425] *Who We Are*, BRIGHT HORIZONS, https://www.brighthorizons.com/who-we-are (last visited Feb. 1, 2022).

[426] BRIGHT HORIZONS, 2018 MODERN FAMILY INDEX 9 (increase from 12% in 2014), https://www.brighthorizons.com/-/media/BH-New/Newsroom/Media-Kit/MFI_2018_Report_FINAL.ashx.

[427] NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, THE PREGNANCY DISCRIMINATION ACT WHERE WE STAND 30 YEARS LATER 2 (2008) (documenting a 65% increase in pregnancy discrimination complaints between 1992 and 2007), http://go.nationalpartnership.org/site/DocServer/Pregnancy_Discrimination_Act_-_Where_We_Stand_30_Years_L.pdf.

[428] *See, e.g.*, Elizabeth Palley, *Pregnancy Discrimination and the Law: Implications for Social Work*, 32 J. WOMEN & SOCIAL WORK 188, 189 (2016) (stating that research suggests "pregnant women in the workplace and pregnant job applicants are viewed negatively by supervisors,

And there is an additional risk of disclosure of a miscarriage for some of the most disadvantaged women: the risk of prosecution. Since its inception, a faction of the anti-abortion movement in the United States has been working to pass state laws that define embryos and fetuses as persons.[429] The result has been that women can be punished for actions they take, or don't take, while pregnant. Experts and women's rights organizations have documented thousands of such cases in the past several decades.[430] Often, these prosecutions target women of color and low-income women.[431]

Given the toxic mix of cultural secrecy surrounding miscarriage, fear of employment discrimination or retaliation for disclosing a miscarriage—and perhaps even the risk of being prosecuted for a failed pregnancy—it should not be surprising that individuals who experience miscarriages typically never tell their employers.[432] This secrecy, which itself is a product

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employers, and coworkers"); Whitney Botsford Morgan et al., *A Field Experiment: Reducing Interpersonal Discrimination Toward Pregnant Job Applicants*, 98 J. APPLIED PSYCH. 799, 799 (2013).

[429] MARY ZIELGER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 89, 164–65 (2015); Michele Goodwin, *Pregnancy and the New Jim Crow*, 53 CONN. L. REV. 543, 564 (2021); Jeannie Suk Gersen, *How Fetal Personhood Emerged as the Next Stage of the Abortion Wars*, NEW YORKER (June 5, 2019), https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars.

[430] *See* Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809 (2019) (documenting 124 cases in Tennessee from 2014 to 2016); Lynn M. Paltrow, *Constitutional Rights for the "Unborn" Would Force Women to Forfeit Theirs*, MS. (Apr. 15, 2021), https://msmagazine.com/2021/04/15/abortion-constitutional-rights-unborn-fetus-14th-amendment-womens-rights-pregnant/ (reporting more than 1,000 cases documented by the nonprofit organization National Advocates for Pregnant Women from 2006-2020 nationwide); Grace Elizabeth Howard, The Criminalization of Pregnancy: Rights, Discretion, and the Law 64–65, 68–70 (Oct. 2017) (Ph.D. dissertation, Rutgers University), https://rucore.libraries.rutgers.edu/rutgers-lib/55493/ (documenting 182 cases in South Carolina, 501 cases in Alabama, and 99 cases in Tennessee from 1973 to 2015). For more privileged women, this has not been a routine occurrence, but if and when *Roe v.* Wade, 410 U.S. 113 (1973), falls, prosecutors in states with such laws will have free rein to go after women who have miscarriages.

[431] *See* MICHELE GOODWIN, POLICING THE WOMB: THE NEW RACE & CLASS POLITICS OF REPRODUCTION (2019); DOROTHY E. ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY (1997); Bach, *supra* note 430; Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. (2017). For more privileged women, this has not been a routine occurrence, but if *Roe v.* Wade (410 U.S. 113 (1973)) falls, prosecutors in states with such laws will have free rein to go after women when they miscarry.

[432] *See, e.g.*, Emily T. Porschitz & Elizabeth A. Siler, *Miscarriage in the Workplace: An Authoethnography*, 24 GENDER, WORK & ORG. 565, 573 (2017) (explaining that authors "never considered revealing" their miscarriages at work); Emily Kane Miller, *Fighting the Silence Around Miscarriage—With a Greeting Card,* DAILY BEAST (May 18, 2015, 5:15 AM), https://www.thedailybeast.com/fighting-the-silence-around-miscarriagewith-a-greeting-card ("The nasty hush that comes rushing in after a miscarriage blocks our path to the people we rely on in all other aspects of life."); Katy Lindemann, *The 12-week Pregnancy Rule Makes Miscarriage Worse*, THE GUARDIAN (Oct. 7, 2019, 3:00 EDT), https://www.theguardian.com/commentisfree/2019/oct/07/12-week-pregnancy-rule-miscarriage-shame-failure ("Most [miscarriages] will be suffered in silence, because it's considered so socially unacceptable to reveal that you're pregnant before 12 weeks – let alone that you were pregnant, but now you're not."); Katherine Hobson, *People Have Misconceptions About Miscarriage And That Can Hurt*, NPR (May 8, 2015, 9:00 AM), https://www.npr.org/sections/health-shots/2015/05/08/404913568/people-have-misconceptions-about-miscarriage-and-that-hurts (explaining that secrecy around miscarriage perpetuates myths and isolates women from support).

of socio-legal dynamics, in turn creates additional barriers to obtaining workplace protections from discrimination, necessary work accommodations, and safe work working conditions. This section describes a number of specific legal requirements and doctrines within employment discrimination law that further frustrate legal relief for women who experience miscarriage given the common practice of hiding the experience or risk of miscarriage.

A. Retaliation

Title VII, the FMLA, and the ADA all prohibit retaliation for making a claim or exercising protected rights under these statutes.[433] Courts generally apply the same legal standards to retaliation claims under Title VII and the ADA.[434] A standard formulation of the prima facie case for retaliation requires the plaintiff to show "(1) 'participation in a protected activity'; (2) the defendant's knowledge of the protected activity; (3) 'an adverse employment action'; and (4) 'a causal connection between the protected activity and the adverse employment action.'"[435] If plaintiff is able to establish her prima facie case, the burden of production shifts to the employer to introduce into the evidence a nonretaliatory reason for its action. At that point, the plaintiff may still prevail by proving that purported reason is a pretext for retaliation.[436] Although the FMLA is not a discrimination statute, courts also generally use this framework to analyze retaliation claims under the FMLA.[437] Under both the FMLA and ADA, engaging in "protected activities" includes not just opposing discrimination or participating in a formal legal action claiming discrimination, but also asking for or receiving a FMLA leave or ADA accommodation.[438]

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[433] 42 U.S.C. § 2000e-3(a) (2018) (Title VII retaliation provision); 29 U.S.C. § 2615(a)(2) (FMLA retaliation provision); 42 U.S.C. § 12203(a) (ADA retaliation provision). Courts generally apply the same legal standards to retaliation claims under the ADA as they do under Title VII.

[434] *See* Smith v. District of Columbia, 430 F.3d 450, 455 (2005) (collecting cases from eleven other federal judicial circuits).

[435] Kwan v. Andalex Grp., LLC, 737 F.3d 834, 844 (2d Cir. 2013).

[436] Jute v. Hamilton Sundstrand Corp., 420 F.3d 166, 179 (2d Cir. 2005).

[437] Specifically, a plaintiff making an FMLA retaliation claim must demonstrate a right to leave and that the employer had a discriminatory reason for denying reinstatement after the leave or taking other adverse action. *See* GLYNN, SULLIVAN & ARNOW-RICHMAN, *supra* note 43, at 787–86. The courts generally apply Title VII proof structures to determine whether the requisite intent exists. *Id.* Thus, retaliation claims brought on the basis of circumstantial evidence are assessed under the *McDonnell Douglas* burden-shifting framework for Title VII claims. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800–06 (1973). That is, to establish a prima facie case of FMLA retaliation the employee must prove they: engaged in protected activity under the FMLA, suffered an adverse employment action or decision, and show a causal connection between the protected activity and the adverse employment action. *See, e.g.*, Caldwell v. Clayton Cty. Sch. Dist., 604 Fed.App'x. 855, 860 (11th Cir. 2015). Thereafter, the burden of production shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employment action at issue. If the employer carries this burden of production, the burden shifts back to the employee to demonstrate that the proffered reason is mere pretext for discrimination. *Id.*

[438] *See*, *e.g.*, Salemi v. Colorado Pub. Employees' Ret. Ass'n, 747 Fed. Appx. 675, 700 (10th Cir. 2018) ("The taking of FMLA leave is a protected activity. . . .").

Proving causation is a significant hurdle[439] that has been made even more difficult for plaintiffs since the Supreme Court's 2013 decision in *Univ. of Texas Sw. Med. Ctr. v. Nassar*.[440] In *Nassar*, the Supreme Court held that retaliation claims under Title VII must be proven by but-for causation;[441] that is, plaintiffs must show not only that their protected activity was a motiving factor leading to an adverse employment action,[442] but that the unlawful retaliation would not have occurred but-for the protected activity.[443] Prior to *Nassar*, circumstantial evidence in the form of temporal proximity between the protected activity (i.e., asking for a light duty assignment due to pregnancy under the ADA) and alleged retaliation could establish the causation element of the plaintiff's retaliation case. But since *Nassar*, several courts have taken the position that temporal proximity, alone, has little probative value, even at the prime facie stage of the analysis.[444]

Further, since *Nassar* was decided, courts have imported its holding into FMLA retaliation cases,[445] even though the FMLA is a minimum labor

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[439] Alex B. Long, *Retaliation Backlash*, 93 WASH. L. REV. 715, 727 (2018); Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE 49, 54 (2018) (collecting ADA retaliation cases).

[440] Univ. of Texas Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).

[441] *Id.* at 362.

[442] The "motivating factor" causation standard was first announced in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), and codified for Title VII by Congress in the Civil rights Act of 1991, 42 U.S.C. § 2000e-2(m) (2018).

[443] Nassar, 570 U.S. at 362. The majority offered three justifications for its decision: First, the ordinary meaning of the words "because of" of in Title VII's antiretaliation provision is but-for causation. *Id.* at 350 (citing Gross v. FBL Financial Servs., Inc., 577 U.S. 167, 176 (2009). Second, when Congress amended the causation standard for Title VII via the Civil Rights Act of 1991 to be the lesser "motivating factor" standard for Title VII claims, it left in place the words "because of" in the antiretaliation provision of Title VII. Therefore, the lesser motivating factor causation standard is not applicable to claims under the anti-retaliation provision. *Id.* at 360. Finally, the lesser "motivating factor" causation standard could incentivize plaintiffs to file frivolous retaliation claims. *Id.* at 358.

[444] *See* GLYNN, SULLIVAN & ARNOW-RICHMAN, *supra* note 43, at 675; Long, *supra* note 439, at 736; Porter, *supra* note 439, at 846.

[445] Specifically, in three federal circuits, to get past a motion for summary judgment, the plaintiff must prove that asking for or taking an FMLA leave was a "determinative factor" or the "but-for" cause of the alleged retaliation. *See, e.g.,* Sharp v. Profitt, 674 Fed. Appx. 440, 451 (6th Cir. 2016)*;* Nathan v. Great Lakes Water Auth., 992 F.3d 557, 571 (6th Cir. 2021); Massey-Diez v. Univ. of Iowa Cmty. Med. Servs, Inc., 826 F.3d 1149, 1160 (8th Cir. 2016); Matamoros v. Broward Sheriff's Off., 2 F.4th 1329, 1337 (11th Cir. 2021); Williams v. Verizon Washington D.C. Inc., 304 F. Supp. 3d 183, 190 (D.D.C. 2018).

There are district court decisions on both sides of the issue in the Fourth and Tenth Circuits, though none of the decisions is published. Fourth Circuit: *Compare* Sigler v. Black River Electric Coop., Inc., No. 20-2203, 2020 WL 9209285, at *2 (D. S.C. July 24, 2020) and Fry v. Rand Construction, No. 17-cv-0878, 2018 WL 4031546, at * 7 (E.D. Va. Aug. 22, 2018) (adopting the "but for" causation standard for FMLA retaliation claims), *with* Antekeier v. Lab. Corp. of Am., 17-CV-786, 2018 WL 3647109, at *2 (E.D. Va. July 31, 2018) (adopting the "motivating factor" standard). Tenth Circuit: *Compare* Montoya v. Retiree Health Care Auth., No. 18-CV-0578, 2019 WL 7596230, at *8 (D.N.M. Nov. 19, 2019) and Kutrell Barnes v. COXCOM, LLC, No. 16-CV-764, 2018 WL 773990, at *9 (N.D. Okla. Feb. 7, 2018) (adopting the "but for" causation standard for FMLA retaliation claims), *with* Hayes v. Skywest Airlines, Inc., 15-CV-02015, 2017 WL 6550891, at *5 n.10 (D. Colo. May 19, 2017) (adopting the "motivating factor" standard).

standard statute, not an antidiscrimination statute,[446] and even though the Department of Labor issued regulations reaffirming the lesser "motivating factor" test for FMLA retaliation claims.[447] For example, in *Kubik v. Cent. Michigan Univ. Bd. of Trustees,* [448] the Sixth Circuit affirmed a grant of summary judgment for the plaintiff's employer. Kubik was an assistant tenure-track journalism professor for a public University.[449] The court concluded that although the plaintiff had experienced adverse actions after she took a family leave, she had not created a genuine issue of material fact on her retaliation claim, because her employer had expressed concerns about her scholarship prior to her leave.[450] This case demonstrates how the "but-for" causation standard prevents plaintiffs from prevailing on retaliation claims if they have had any prior issues in their employment. Other recent FMLA cases similarly show plaintiffs not meeting courts' stringent standards for proving retaliation.[451] FMLA retaliation claims could become

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Six federal circuits follow the more plaintiff-friendly test for FMLA retaliation cases that simply assesses whether the FMLA-protected leave was a "negative factor" in an employment decision. *See* Chase v. U.S. Postal Serv., 843 F.3d 553, 554 (1st Cir. 2016); Ameen v. Amphenol Printed Circuits, Inc., 777 F.3d 63, 69 (1st Cir. 2015); Carrero–Ojeda v. Autoridad de Energia Electrica, 755 F.3d 711, 718 (1st Cir. 2014); Egan v. Delaware River Port Auth., 851 F.3d 263, 273–74 (3d Cir. 2017); Richardson v. Monitronics Int'l, Inc., 434 F.3d 327, 333–35 (5th Cir. 2005); Olson v. United States by & through Dep't of Energy, 980 F.3d 1334, 1337–38 (9th Cir. 2020); *cf.* Woods v. START Treatment & Recovery Ctrs., Inc., 864 F.3d 158, 169 (2d Cir. 2017) (applying the motivating factor test for FMLA retaliation claim, at least where the retaliatory action takes the form of outright termination). However, in two of these circuits, the Second and Fifth, it seems that the question may not be fully settled. In Geordeau v. City of Newton, 238 F. Supp.3d 179, 194–95 (D. Mass 2017), a district court judge issued a detailed opinion challenging the reasoning of First Circuit appellate court precedents and applying the "but-for" causation test, an exercise of real judicial chutzpah given that the issue was settled by an appellate panel in that circuit. In the Fifth Circuit, although district courts generally applied a mixed-motive standard even after *Nassar*, *see, e.g.,* Mead v. Lattimore Materials Co., No. 16-CV-0791, 2018 WL 807032, at *5 (N.D. Tex. Feb. 9, 2018) (subsequent history omitted), the issue of whether *Nassar* must apply to FMLA retaliation claims is presently on appeal. *See* Crankshaw v. City of Elgin, No. 18-CV-75, 2020 WL 889169 (W.D. Tex. Feb. 24, 2020), *appeal granted*, No. 20-90022, 2020 WL 6277551 (5th Cir. 2020).

Finally, "the Seventh Circuit has not yet had occasion to weigh in on the question. Thus, the motivating factor test still represents the 'controlling law in the Seventh Circuit.'" *See* Haworth v. Round Lake Area Sch., Cmty. Unit Sch. Dist. 116, No: 17 C 7038, 2019 WL 3080928, at *5 n.2 (N.D. Ill. 2019) (citations omitted).

[446] *See* Martin H. Malin, *Interference with the Right to Leave Under the Family and Medical Leave Act*, 7 EMPLOYEE RTS. & EMP. POL'Y J. 329, 334–35, 349–50 (2003) (arguing that the FMLA is a minimum labor standard statute and that its antiretaliation provision is modeled on the National Labor Relations Act's antiretaliation provision, with rights that are much broader than a prohibition on discrimination).

[447] *See* Protection for Employees Who Request Leave or Otherwise Assert FMLA Rights, 29 C.F.R. § 825.220 (2022). Note that under the FMLA, the "motivating factor" causation test is called the "negative factor" test. *Id.*

[448] Kubik v. Cent. Michigan Univ. Bd. of Trustees, 717 F. App'x 577 (6th Cir. 2017).

[449] *Id.* at 579.

[450] *Id.* at 585.

[451] Twigg v. Hawker Beechcraft Corp., 659 F.3d 987, 1006 (10th Cir. 2011) (holding that temporal proximity was insufficient to show causation); Chase v. United States Postal Serv., 843 F.3d 553, 558 (1st Cir. 2016) (holding that employer's knowledge that plaintiff was on medical leave was not sufficient to show retaliation was based on protected activity when employer was not aware that medical leave was FMLA leave); Garrison v. Dolgencorp, LLC, 939 F.3d 937, 943 (8th Cir. 2019) (holding that employer's spreading rumors about plaintiff that she intended to quit was not an

even more difficult to prove if more circuits decide to apply *Nassar's* requirement of but-for causation in Title VII retaliation cases to FMLA cases.

Nassar has been subjected to criticism by employment law experts,[452] but its impact is particularly devastating for workers who have experienced miscarriage or are at risk of a miscarriage. "Fear of retaliation is the leading reason why people stay silent."[453] And EEOC data suggest that retaliation is rampant. In fiscal year 2020, 37,632 retaliation charges were filed with the EEOC. [454] Retaliation remained the most frequently cited claim in charges filed with the agency—accounting for a staggering 55.8 percent of all charges filed—followed by disability, race, and sex.[455]

If an employee feels deterred from requesting workplace accommodations or leave under the PDA (Title VII),[456] ADA, or FMLA because she is worried about her employer retaliating against her, the goals of these statutes will not be realized. This is already a problem for all employees these statutes are intended to protect. But for employees who experience miscarriage, the lack of protection for retaliation has an especially harsh bite, given the existing cultural barriers to even sharing this information at all.

B. Notice without Privacy

The desire for privacy presents special problems for employees who suffer miscarriages, as oftentimes, an employer does not even know the employee or an employee's family member is going through this significant life event. This runs directly up against a basic requirement of all federal antidiscrimination statutes: notice, or at least knowledge, of an employee's protected status. Under Title VII and other major federal employment discrimination statutes, an employer typically must know the facts underlying an employee's claim for any statutory duties to exist. This requirement can place the employee in a vulnerable position, as they risk negative employment and/or social consequences from the potential exposure of private health or family information.

An employee must share medical information about a miscarriage or their risk of miscarriage (or the health condition of family members who have had a miscarriage or are at risk of miscarriage) with their employer in

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adverse action); Quinn v. St. Louis Cty., 653 F.3d 745, 754 (8th Cir. 2011) (holding that accusations of lying, change of office, and exclusion from workshops were not adverse actions).

[452] *See* Long, *supra* note 439; Michael J. Zimmer, *Hiding the Statute in Plain View: University of Texas Southwestern Medical* Center v. Nassar, 14 NEV. L. REV. 705 (2014).

[453] *See* Deborah L. Brake, *Retaliation*, 90 MINN. L. REV. 18, 20 (2005).

[454] *See Charge Statistics (Charges Filed with EEOC) FY 1997 Through FY 2020*, EEOC, https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020 (last visited Feb. 5, 2022).

[455] *Id.* The EEOC does not report retaliation claims by basis of discrimination, so the data is limited to showing charges filed under all statutes.

[456] The Pregnancy Discrimination Act amended the definition of "sex" in Title VII. As such, protections under the PDA are Title VII protections. *See* discussion *supra* Part II.A.

order to receive protection from discrimination law, especially if the employee needs an accommodation or a leave. Yet, a review of Title VII, FMLA, and ADA demonstrates that privacy protections provided by these statutes are weak or uncertain at best.

This section reviews how courts have analyzed issues of notice and confidentiality of health information under Title VII, FMLA, and ADA, demonstrating how the combination of mandatory notice without sufficient privacy protections often renders the substantive protections intended by these statutes illusory for employees affected by miscarriage.

1. Notice Requirements

a. Notice and Title VII

Title VII does not require that a plaintiff give her employer formal notice of her protected status to be covered by the statute, because, in the vast majority of discrimination cases, the plaintiff's membership is either patent (race or gender), or is documented on the employee's personnel record.[457] However, on this question, courts often distinguish pregnancy discrimination claims from other types of discrimination claims, since pregnancy is not always readily observable to others. Thus, courts have held that in order to prove causation under the PDA, the employee bears the burden of demonstrating that the employer had actual knowledge of her pregnancy at the time that the adverse employment action was taken."[458] This is because courts "cannot presume that an employer most likely practiced unlawful discrimination when it did not know that the plaintiff even belonged to the protected class."[459]

Accordingly, courts have granted summary judgment to employers in pregnancy discrimination cases where there is documentation that the decision to take an adverse action against the employee predated the employer's knowledge of her pregnancy;[460] the employee hasn't presented evidence that the employer knew of her pregnancy;[461] or that those with knowledge of the employee's pregnancy were not the decision makers.[462]

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[457] Geraci v. Moody-Tottrup, Int'l, Inc., 82 F.3d 578, 581 (3d Cir. 1996).

[458] Prebilich-Holland v. Gaylord Ent. Co., 297 F.3d 438, 444 (6th Cir. 2002); Geraci, 82 F.3d at 581.

[459] Geraci. 82 at 581.

[460] Prebilich-Holland 297 F.3d at 444 (noting that manager made termination decision four days before learning that employee was pregnant); Forde v. Beth Israel Med. Ctr., 546 F. Supp. 2d 142, 151 (S.D.N.Y. 2008) (finding that complaints about employee's job performance started before she announced her pregnancy).

[461] Lambert v. McCann Erickson, 543 F. Supp. 2d 265, 277–78 (S.D.N.Y. 2008) ("Plaintiff must also be able to point to some admissible evidence from which a rational jury could infer that the employer knew that the plaintiff was pregnant."); Weiner v. Flyer Pub. Co., 945 F. Supp. 1559, 1563 (S.D. Fla. 1996) (granting summary judgment to employer because plaintiff "failed to introduce any evidence that The Flyer Publishing Company fired her because she was pregnant and miscarried").

[462] Lambert, 543 F. Supp. At 277–78 (internal citations omitted) (stating that plaintiff cannot rely on coworkers' knowledge of her pregnancy but "was obliged to offer evidence indicating that

b. Notice and the ADA

For ADA claims based on failure to accommodate, the statute states that discrimination based on disability includes "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee."[463] The statute includes the term "known," indicating that some notice is required. Courts have interpreted this language to mean that "[o]nly after the employee has satisfied this burden and the employer fails to provide that accommodation can the employee prevail on a claim that her employer has discriminated against her."[464] Thus, the ADA requires an individual who has experienced a miscarriage or is at risk of a miscarriage, to disclose private health information. As discussed, below, the ADA includes a confidentiality provision to limit the disclosure of health information once it has been obtained, but the scope of information protected is quite narrow.[465]

c. Notice and the FMLA

Under FMLA regulations, "[a]n employee must provide the employer at least 30 days advance notice before FMLA leave is to begin if the need for the leave is foreseeable" and "[i]f 30 days notice is not practicable, such as because of a lack of knowledge of approximately when leave will be required to begin, a change in circumstances, or a medical emergency, notice must be given as soon as practicable."[466] The regulations define "as soon as practicable" as "the same day or the next business day" after employee is aware.[467] The required minimum notice can be verbal and must be "sufficient to make the employer aware that the employee needs FMLA–qualifying leave, and the anticipated timing and duration of the leave."[468] The first time an employee seeks FMLA leave, they "need not expressly assert rights under the FMLA or even mention the FMLA."[469] However, "[w]hen an employee seeks leave due to a FMLA-qualifying reason, for which the employer has previously provided FMLA-protected leave, the employee must specifically

persons who actually participated in her termination decision" knew she was pregnant); Prebilich-Holland v297 F.3d at 444 (determining that plaintiff informing two coworkers of her pregnancy was not significant when there was no evidence "that the decision-makers at WSM had actual knowledge of her pregnancy at the time they made the decision to discharge her").

[463] 42 U.S.C. § 12112 (2018).

[464] Gaston v. Bellingrath Gardens & Home, Inc., 167 F.3d 1361, 1364 (11th Cir. 1999); Matuska Tp. v. Hinckley, 56 F. Supp.2d 906, 917 (1999) (holding an employee who fails to inform his employer of the specific limitations that he experienced as a result of his physical and mental impairments cannot establish that the employer knew or had reason to know of his disability, and therefore the employer had no duty to provide a reasonable accommodation).

[465] *See* discussion *infra* Part II.B.

[466] 29 C.F.R. § 825.302(a) (2020).

[467] 29 C.F.R. § 825.302(b) (2020).

[468] 29 C.F.R. § 825.302(c) (2020).

[469] *Id.*

reference the qualifying reason for leave or the need for FMLA leave."[470] Additionally,

> the employer should inquire further of the employee if it is necessary to have more information about whether FMLA leave is being sought by the employee, and obtain the necessary details of the leave to be taken. In the case of medical conditions, the employer may find it necessary to inquire further to determine if the leave is because of a serious health condition and may request medical certification to support the need for such leave.[471]

When an employer asks questions, "[a]n employee has an obligation to respond to an employer's questions designed to determine whether an absence is potentially FMLA-qualifying" and "[f]ailure to respond to reasonable employer inquiries regarding the leave request may result in denial of FMLA protection if the employer is unable to determine whether the leave is FMLA-qualifying."[472] An employer may use their own policy that could require the reason for the leave be in writing or the notice to submitted to a specific employee.[473]

One federal circuit has interpreted these regulations as requiring women requesting FMLA based on pregnancy to disclose their pregnancies,[474] even though the relevant part of the regulation suggests that this should not be mandatory.[475] Even in circuits that do not require this, an employee will have to disclose her miscarriage if her employer does not accept her notice at face value and seeks to determine if she qualified for FMLA leave.[476]

2. Privacy "Protections"

a. Privacy and Title VII

There are no statutory provisions in Title VII protecting employees from disclosure of their private health information, even though receiving equal accommodations as other employees, such as light duty assignments, will require an employee to share her medical status with her employer in order to be protected by Title VII. The same lack of protection would exist, for example, if an employee who is an intended parent suffers depression

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[470] *Id.*

[471] *Id.*

[472] *Id.*

[473] 29 C.F.R. § 825.302(d) (2020).

[474] *See, e.g.*, Avena v. Imperial Salon & Spa, Inc., 740 F. App'x 679, 681 (11th Cir. 2018) (citing § 825.302(c)) (stating that "notice must be 'sufficient to make the employer aware that the employee needs FMLA-qualifying leave, and the anticipated timing and duration of the leave' and, if applicable, include 'that the employee is pregnant'").

[475] Specifically, the regulation states "such information *may* include that a condition renders the employee unable to perform the functions of the job; that the employee is pregnant or has been hospitalized overnight[.]"29 C.F.R. § 825.302(c) (2020) (emphasis added). This language seems more like an example of a way to give notice than a mandatory disclosure of pregnancy.

[476] *Id.*

after the miscarriage of a partner or surrogate and seeks temporary leave or other accommodations similar to other employees in their workplace who have suffered from depression. That is, Title VII affords no privacy to employees affected by miscarriage even though they will need to inform their employer of the miscarriage or related health conditions in order to receive protections under the statute.

b. Privacy and the FMLA

Under the FMLA, employers must maintain employee's privacy with regard to medical information collected for the purposes of granting leave. The applicable regulations state, in relevant part:

> [M]edical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential medical records in separate files/records from the usual personnel files, and if ADA is also applicable, such records shall be maintained in conformance with ADA confidentiality requirements, except that: (1) Supervisors and managers may be informed regarding necessary restrictions on the work or duties of an employee and necessary accommodations. . . .[477]

Although several courts have stated that it is "unsettled law" whether the FMLA creates a private cause of action for breach of confidentiality, no court has yet held that such a claim is impermissible.[478] Several courts have avoided the question by dismissing claims on other grounds or not addressing the issue because it was not raised by the defendant.[479] Some plaintiffs have successfully brought FMLA interference claims based on disclosure of confidential information.

In *Mahran v. Benderson Dev. Co., LLC*, the court held that the FMLA did create private right of action for violation of confidentiality because "[t]he confidentiality of any medical information that plaintiff submitted . . . when applying for leave is one of the rights protected under the FMLA" and "[t]he FMLA permits private civil actions to enforce its provisions."[480] The plaintiff's claim survived the defendant's motion to dismiss because his employer "knew or should have known about the confidentiality of any medical information that it reviewed when assessing plaintiff's leave application, but chose to disclose it anyway" which "caused him mental and emotional aguish."[481]

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[477] Recordkeeping Requirements, 29 C.F.R. § 825.500 (2022).

[478] *See, e.g.*, Ekugwum v. City of Jackson, Miss., No. 09CV48, 2010 WL 1490247, at *2 (S.D. Miss. Apr. 13, 2010) (stating it is not settled whether FMLA creates a private cause of action for breach of confidentiality); Walker v. Gambrell, 647 F. Supp. 2d 529, 539 n. 5 (D. Md. 2009) (finding that "[i]t is not settled whether this provision gives rise to a private right of action for disclosure").

[479] *See, e.g.*, Johnson v. Moundsvista, Inc., No. CIV. 01-915, 2002 WL 2007833, at *7 (D. Minn. Aug. 28, 2002) (dismissing claim without deciding whether or not FMLA allows for private cause of action for improper disclosure).

[480] No. 10-CV-715A, 2011 WL 1467368, at *4 (W.D.N.Y. Apr. 18, 2011).

[481] *Id.*

In *Holtrey v. Collier Cty. Bd. of Cty. Commissioners*, the plaintiff claimed a breach of confidentiality after his employer disclosed information from his FMLA leave request about a "serious health condition with his genito-urinary system" to eight of the plaintiff's coworkers and subordinates in a staff meeting which resulted in those employees "making jokes and obscene gestures about [his] condition."[482] The court noted that the law is not settled as to the whether the FMLA allows a private right of action for disclosure, but "limit[ed] its review to the sufficiency of the . . . Complaint" because the defendant did not challenge the claim on these grounds.[483] The plaintiff's claim survived a motion to dismiss as the court found that the "[p]laintiff has sufficiently alleged a right of confidentiality and that Defendant breached that right when it disclosed his protected medical information during a staff meeting and without his permission."[484]

However, plaintiffs are not consistently successful in their claims for breach of privacy under the FMLA. For example, in *Dodge v. Trustees of Nat'l Gallery of Art*,[485] the plaintiff obtained FMLA leave to care for his son, who was diagnosed with HIV.[486] Subsequently, the plaintiff refused to work on a mandatory overtime assignment, and the employer released the plaintiff's son's medical records to his supervisor in order to allow the supervisor to decide whether the plaintiff's refusal to work was appropriate.[487] The court found that this release of records did not violate the FMLA's privacy requirements.[488] Since the defendant in this case followed these regulations, no FMLA privacy violation was found.

c. Privacy and the ADA

An employer is required to keep all employee medical disclosures and examination results related to disability leave or accommodations confidential under the ADA.[489] Information obtained must be "maintained on separate forms and in separate medical files and is treated as a confidential medical record."[490] The EEOC has interpreted this requirement broadly to encompass more medical information than is protected by federal law, commonly known as "HIPAA."[491]

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[482] No. 16-CV-00034, 2017 WL 119649, at *1 (M.D. Fla. Jan. 12, 2017).

[483] *Id.* at *2.

[484] *Id.*

[485] 326 F. Supp. 2d 1 (D.D.C. 2004).

[486] *Id.* at 4.

[487] *Id.*

[488] *Id.* at 14.

[489] *See* Americans with Disabilities Act, 42 U.S.C. § 12112(d)(3)(B); §12112(d)(4)(C); *see also The ADA: Your Employment Rights as an Individual With a Disability*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/eeoc/publications/ada18.cfm (last visited Feb. 5, 2022).

[490] 42 U.S.C. § 12112(d)(4)(C) (2016).

[491] *See* Health Insurance Portability and Accountability Act Of 1996, Pub. L. 104-191, 110 Stat. 1936 (1996). HIPAA requires that the privacy and security of certain health information is protected. *Id.* To fulfill this requirement, the federal Department of Health and Human Services (HHS) published the HIPAA Privacy Rule and the HIPAA Security Rule. The Privacy Rule, or "Standards

However, there are exceptions to these confidentiality requirements. According to the ADA, "(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations."[492] Additionally, courts have interpreted the ADA confidentiality provisions such that they do not attach unless the medical information was received as a result of an employer-initiated medical inquiry or exam. This means that information provided to employers either voluntarily or as the result of a non-medical inquiry is not confidential under the ADA and may be disclosed by the employer. Under this rule, courts have decided that health information was not confidential even where it seemed that the employer solicited the information.

For example, the plaintiff in *EEOC v. Thrivent Financial for Lutherans* self-disclosed a problem with migraines in an email chain with management after a manager asked the employee to give him a call so he could determine what was going on, given the employee's absence over a number of days.[493] When the employee subsequently listed the manager as a reference for his next job, the manager told the new company that the plaintiff suffered from migraines.[494] The Seventh Circuit ruled that since the employee self-disclosed the information in response to a general inquiry, rather than a specific medical inquiry, the employer was not obligated to keep it confidential.[495] When an employee is absent from work or appears ill on the job, employers sometimes ask general questions such as "is everything okay?" or perhaps less supportively, "what is wrong with you?" As *Thrivent* demonstrates, if an employee answers and shares private health information, it may not be protected.

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for Privacy of Individually Identifiable Health Information," establishes national standards for the protection of certain health information. *See* 45 C.F.R. §§ 160, 162, 164 (2022); OFFICE FOR CIVIL RTS., U.S. DEP'T HEALTH AND HUM. SERVS., HIPAA ADMINISTRATIVE SIMPLIFICATION: REGULATION TEXT (2013), https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/administrative/combined/hipaa-simplification-201303.pdf. The Security Rule, or "Standards for the Protection of Electronic Protected Health Information," establishes a national set of security standards for protecting certain health information that is held or transferred in electronic form. 45 C.F.R. §§ 160, 164 (2022). The Security Rule operationalizes the protections contained in the Privacy Rule by addressing the technical and non-technical safeguards that organizations called "covered entities" must put in place to secure individuals' electronic protected health information or "e-PHI." *Id.* Within HHS, the Office for Civil Rights has responsibility for enforcing the Privacy and Security Rules with voluntary compliance activities and civil money penalties. For a summary of key elements of HIPAA, including who is covered, what information is protected, and what safeguards must be in place to ensure appropriate protection of electronic protected health information, see *Health Information Privacy*, HHS.gov, https://www.hhs.gov/hipaa/index.html (last visited Feb. 1, 2022).

[492] 42 U.S.C. § 12112(d)(3)(B)(i)-(iii). Additionally, " (ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and (iii) government officials investigating compliance with this provision of the ADA shall be provided relevant information upon request." *Id.*

[493] *See* EEOC. v. Thrivent Financial for Lutherans, 700 F.3d 1044, 1046 (7th Cir. 2012).

[494] *Id.* at 1047–50.

[495] *Id.*; *see also* Perez v. Denver Fire Dep't, 243 F. Supp. 1186, 1192 (2017) ("[A]n employee's voluntary disclosure of medical information outside the context of an authorized employment-related medical examination or inquiry is not protected under § 12112(d) [of the ADA]").

In an analogous case dealing with disclosures (albeit also brought under the Privacy Act and the FMLA), the plaintiff in *Walker v. Gambrell* brought suit claiming that her employer's disclosure of her miscarriage to coworkers violated the Privacy Act,[496] the ADA, and the FMLA.[497] The court disagreed, and stated that FMLA/ADA confidentiality provisions only cover employee medical information that is obtained by an employer after a medical inquiry.[498] In this instance, the plaintiff's husband had called one of her coworkers on the phone to ask her to report the plaintiff's absence and cause for it to management.[499] The plaintiff was upset because she felt her personal information had been disclosed to a large number of coworkers without her permission.[500]

The court in *Rodgers v. Rensselaer Cty. Sheriff's Dep't*,[501] considered whether an employer violated an employee's Fourteenth Amendment right to privacy when the employer obtained the employee's medical records on depression without his consent.[502] The employee filed suit alleging that obtaining his medical records in this manner violated both the Constitution and the ADA. The court, however, ruled that "violations of his Fourteenth Amendment right to privacy . . . are outside the scope of the protections afforded by the ADA."[503] The plaintiff only pleaded the case as a Fourteenth Amendment claim.[504]

Perhaps of some small comfort, the ADA prohibits employers from asking invasive questions in the application process about pregnancy and previous miscarriages,[505] and, at least on the front end, when applying for a position, it appears that the ADA may protect applicants when they are denied employment for refusing to answer invasive questions regarding pregnancy and miscarriage. For example, in *Garlitz v. Alpena Reg'l Med. Ctr.*, the court denied summary judgment on an ADA discrimination claim for an employer that rescinded its employment offer after the plaintiff complained about and refused "to answer questions regarding, inter alia,

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[496] The Privacy Act establishes regulations governing federal agency collection, use, and dissemination of individual information. The Privacy Act allows plaintiffs to bring suit when an agency's disclosures violate the Act, were committed willfully or intentionally, and adversely affected the plaintiff. *See also* 5 U.S.C. § 552a(g)(1)(D), (g)(4).

[497] Walker v. Gambrell, 647 F. Supp. 2d 529 (D. Md. 2009).

[498] *Id.* at 540–41.

[499] *Id.*

[500] *See generally id.*

[501] 2015 WL 4404788 (N.D.N.Y. July 17, 2015).

[502] This occurred when "Defendants Dinan and Young . . . authorized as RCJ nurses to access the hospital's electronic medical record system in order to retrieve inmate's records . . . exceeded their authority when they accessed Plaintiff's records." Rodgers v. Rensselaer Cnty. Sheriff's Dep't, No. 14-CV-01162, 2015 WL 4404788, at *1 (N.D.N.Y. July 17, 2015). The statute then provides some examples of discrimination. It also states: "(1) The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries." *Id.*

[503] *Id.* at *8.

[504] *Id.*

[505] The ADA provides: "No covered entity shall discriminate against a qualified individual on the basis of disability in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *See* 42 U.S.C.A. § 12112(a).

whether she was pregnant, had ever been pregnant, or was planning to become pregnant; whether she had ever had an abortion, miscarriage, or live birth, and if so, how many times; and whether she was on birth control and, if so, what type."[506]

However, the overall lesson from an analysis of the statute and cases is that the scope of information protected by the ADA's confidentiality provision is narrower than what first meets the eye. Employers can freely disclose health information without violating the ADA unless the information was obtained from the employee in response to a request by the employer for medical information, such as a request for a doctor's note to support a reasonable accommodation request, or from an employer-mandated physical fitness for duty exam.

IV. A WAY FORWARD: THE PREGNANT WORKERS FAIRNESS ACT IS NOT ENOUGH

A. The Pregnant Workers Fairness Act

To provide more robust protection to pregnant workers, thirty the states and many cities have enacted laws called "pregnant workers fairness acts" that require reasonable accommodations for pregnant workers, without the need to identify any comparators.[507] A federal version of this law, the Pregnant Workers Fairness Act (PWFA), was first introduced in 2012 by Congressman Jerrold Nadler (D-NY)[508] and has been reintroduced in the House almost every legislative session since then.[509] The federal PWFA would solidify the groundwork laid by the states and create a much-needed uniform federal standard. The PWFA requires employers covered by Title VII to provide reasonable accommodations to employees for pregnancy, childbirth, and related medical conditions, unless such accommodation would cause an undue hardship for the employer.[510] Modeled largely on the corresponding definition in the ADA, a qualified employee under the PWFA is "an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the position, with specified exceptions."[511] Even during the Trump Presidency, the PWFA had

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[506] Garlitz v. Alpena Reg'l Med. Ctr., 834 F. Supp. 2d 668, 679 (E.D. Mich. 2011).

[507] *State Pregnant Workers Fairness Laws*, A BETTER BALANCE (last updated Nov. 29, 2021), https://www.abetterbalance.org/resources/pregnant-worker-fairness-legislative-successes/ (displaying an interactive map with information on what protections each of the thirty states and five municipalities provide).

[508] *See* H.R. 5647, 112th Cong. (2012). For background on the PWFA, see Alisha Haridasani Gupta and Alexandra E. Petri, *There's a New Pregnancy Discrimination Bill in the House. This Time It Might Pass*, N.Y. TIMES, Mar. 4, 2021, https://www.nytimes.com/2021/03/04/us/pregnancy-discrimination-congress-women.html.

[509] *See*, *e.g.,* H.R. 2694 (introduced May 14, 2019).

[510] *Id.*

[511] *Id.* Specifically, the PWFA would make it an unlawful employment practice to, among other things: (1) fail to make reasonable accommodations to known limitations of such employees unless the accommodation would impose an undue hardship on an entity's business operation; (2) require

significant bipartisan support.[512] Congressman Nadler reintroduced the PWFA in the House in 2021[513] and it passed in the House in May 2021 by a 329-73 vote[514] but fizzled in the Senate.[515]

The PWFA would resolve much of the uncertainty generated by the Court's decision in *Young v. UPS*.[516] Under *Young*, pregnant workers must discover what accommodations an employer has given to others, which is often difficult, even in the context of litigation where there is a right to discovery.[517] Secondly, the employer only must provide accommodations similar to what it has offered in similar situations. Therefore, in essence, there is presently no affirmative duty to accommodate a pregnant worker under the PDA even if it is possible. The PWFA would make it crystal clear that employers are obligated to make reasonable accommodation for pregnancy and related conditions, including miscarriage.

Passing the PWFA would go a long way toward addressing the systemic injustices experienced by workers who are affected by miscarriage. But it would not fully address the gaps in federal law that permit workers to suffer silently, experience discrimination, lose desired pregnancies, or lose income, among other harms when they are affected by a miscarriage, especially low-income workers in physically demanding jobs. Patching the holes in the PDA is not enough. As the next sections discuss, enhanced antiretaliation and privacy protections, guaranteeing a right to paid sick leave for American workers, and establishing occupational safety standards that would reduce the risk of miscarriage are also necessary to address the unique vulnerabilities facing workers affected by miscarriage

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a qualified employee affected by such condition to accept an accommodation other than any reasonable accommodation arrived at through an interactive process; (3) deny employment opportunities based on the need of the entity to make such reasonable accommodations to a qualified employee; (4) require such employees to take paid or unpaid leave if another reasonable accommodation can be provided; or (5) take adverse action in terms, conditions, or privileges of employment against a qualified employee requesting or using such reasonable accommodations. *Id.*

[512] *Roll Call: Bill Number H.R. 2694*, CLERK (Sept. 17, 2020, 2:24 PM), https://clerk.house.gov/Votes/2020195 (reporting all Democrats and 103 Republicans voting yea, compared to only 72 Republicans and 1 Independent voting nay).

[513] H.R. 1065, 117th Cong. (2021).

[514] *See Summary: H.R.1065 — 117th Congress (2021-2022)*, https://www.congress.gov/bill/117th-congress/house-bill/1065?r=2&s=1 (last visited Feb. 21, 2022). Separately, a group of Republican representatives sponsored a watered-down version of the bill. *See* Pregnancy Discrimination Amendment Act, H.R. 3229, 117th Cong. (2021). An identical version this bill introduced in 2019 was criticized by the National Women's Law Center as "one step forward and two steps back for pregnant workers," because the Republican version still limits accommodations to those received by non-pregnant workers "in work that is performed under similar working conditions," rather than establishing a right to an accommodation for pregnancy outright like the PWFA. *See* NAT'L WOMEN'S LAW CTR., THE PREGNANCY DISCRIMINATION AMENDMENT ACT: ONE STEP FORWARD AND TWO STEPS BACK FOR PREGNANT WORKERS (Oct. 2019), https://nwlc.org/wp-content/uploads/2019/10/PDAA-One-Step-Forward-Two-Steps-Back-2019-v5.pdf.

[515] *See Summary: S.1486 — 117th Congress (2021-2022)*, https://www.congress.gov/bill/117th-congress/senate-bill/1486 (last visited Feb. 21, 2022) (showing that no action has been taken on the bill since placing it on the Senate Legislative Calendar on September 30, 2021).

[516] *See supra* Part II.A.2.

[517] *See* notes 118–124 and accompanying text. Of note, even the EEOC with its highly experienced lawyers was not able to successfully employ civil discovery to generate comparative evidence in the case discussed, *supra*.

B. Enhanced Antiretaliation and Privacy Protections

Many women and people who miscarry do not feel comfortable sharing their pregnancy status and especially miscarriages with employers, given the prevailing stigma many attach to pregnancy, disability, and women's bodies and sexuality more generally.[518] This silencing is particularly acute for the most vulnerable workers, as outing oneself comes with a risk of workplace retaliation,[519] including job loss or even prosecution for harming a fetus,[520] for which the law provides little protection.[521] Yet the notice requirements of Title VII, the ADA, and FMLA require workers to provide notice in order to be protected by these federal employment statutes, with weak or nonexistent privacy protections for shared health information.[522] This mutually reinforcing dynamic of cultural taboo and legally coerced invisibility and silence mean, in practice, that employees affected by miscarriage are unlikely to even pass "go." Employment law functions, in a sense, as a legally constructed closet for individuals who experience miscarriage, who may be at an increased risk of a miscarriage, or who have family members they must care for in these circumstances.

In order for employees to even have an opportunity to access the protections intended by Congress when it enacted the PDA, ADA, FMLA, and OSH Act when affected by the life disrupting event of miscarriage, there must be enhanced privacy and antiretaliation provisions. Such reforms could be enacted by Congress via the legislative process or through judicial interpretations consistent with the clear and broad protective purpose of these statute, as indicated by both Congress and the EEOC.

Let's start with antiretaliation. As expert commentators have already argued, Supreme Court's 2013 decision in *Univ. of Texas Sw. Med. Ctr. v. Nassar*,[523] increasing plaintiffs' burden of proof for retaliation claims under Title VII, was wrongly decided, as the "but for" sole causation standard announced by the Court is at odds with the plain language of the statute.[524] Contrary to the majority's interpretation, Congress clearly indicated in the plain language of the Civil Rights Act of 1991 that the standard of proof for all "unlawful practices" under Title VII, including retaliation, is the "motivating factor" standard.[525] Congress must step in to overturn *Nassar's* unjustified interpretation of the Title VII (and thus of the PDA) that makes challenging discrimination in the workplace more difficult. But short of that, there are still other ways to limit and contain the

[518] *See supra* notes 417–432 and accompanying text.
[519] *See* discussion Part III.A., *supra.*
[520] *See* notes 429–431 *supra* and accompanying text.
[521] *See* discussion Part II, *supra.*
[522] *See* Part III.B. *supra.*
[523] 570 U.S. 338 (2013).
[524] *See* Zimmer, *supra* note 452, at 712–13.
[525] *Id.*; *see also* Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 371–72 (2013) (Ginsburg, J., dissenting).

unjustified and unjust impact of the *Nassar* decision, starting with the FMLA.

It is alarming how many lower federal courts have imported the Supreme Court's flawed construction of the causation standard for Title VII retaliation claims into the FMLA,[526] an entirely different statute with a different structure, purpose, and scheme. The FMLA is not even an antidiscrimination statute. It is a minimum labor standard providing for entitlements to unpaid leave for a minimum period of time for the birth or adoption of a child or a covered employee's own or his qualifying family member's serious health condition.[527] The FMLA's "antiretaliation" provision is modeled on the National Labor Relations Act's[528] antiretaliation provision and is different in language and structure from Title VII's antiretaliation provision.[529] Indeed, the FMLA does not even use the words "retaliation." Rather, the statute speaks of an employer's "interference" with an employee's exercise of rights protected by the FMLA and "interference" with proceedings, such filing a charge or suit for violation of FMLA rights.[530] As such, there is no basis for courts to use *Nassar's* stringent "but for" causation standard when analyzing FMLA retaliation claims. Indeed, there is no basis for courts to require proof of discriminatory intent to establish a claim of interference under the FMLA at all. Some courts have established a distinction between an outright denial of FMLA leave rights ex ante from an adverse employment action that occurs after an employee exercises FMLA rights.[531] Such courts categorize the former scenario as FMLA interference, which does not require proof of intent to discriminate and the latter scenario as "retaliation," which does.[532] But even this slightly more generous interpretation is not supported by the plain language of the statute.[533] Discrimination is a foreign concept under the FMLA. Yet courts have held that once an employee takes a protected FMLA leave (or is even just approved for a leave), any adverse employment action that occurs is a discrimination claim requiring proof of intent to retaliate for exercising FMLA rights.[534] And then many courts have, in turn, applied *Nassar's* "but-

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[526] *See* notes 445–451 and accompanying text.

[527] *See* notes 242–245 and accompanying text.

[528] 29 U.S.C. § 158(a)(1). "Congress passed the National Labor Relations Act in 1935 to encourage collective bargaining" (i.e., unionization) and "to curtail certain private sector labor and management practices, which can harm the general welfare of workers, businesses and the U.S. economy." *The Law*, NAT'L LAB. RELATIONS BD. https://www.nlrb.gov/about-nlrb/rights-we-protect/the-law#:~:text=Congress%20enacted%20the%20National%20Labor,businesses%20and%20the%20U.S.%20economy (last visited Feb. 22, 2022).

[529] *See* Malin, *supra* note 446, at 349.

[530] 29 U.S.C. § 2615(a).

[531] *See*, e.g., Goelzer v. Sheboygan Co. Wisc., 604 F.3d 987, 995(10th Cir. 2010); Kauffman v. Fed. Express Corp., 426 F.3d 880, 884 (7th Cir. 2005); Malin, *supra* note 446, at 358–61 (collecting and discussing cases).

[532] *Id.*

[533] *Id.*

[534] *See* Malin, *supra* note 446, at 358–61. Other courts have drawn the line between outright denials of protected leave and terminations while on protected leave, on the one hand (categorized

for" sole causation standard to analyze whether the employer intended to "retaliate" under the FMLA. Which means, in practice, that when a woman is fired while out on FMLA leave due to pregnancy complications such as miscarriage or being ordered on bed rest to reduce the risk of a miscarriage (or if an employee is terminated after taking a leave to care for a family member affected in these ways), they must prove that the termination was solely because they exercised their rights under the FMLA. That is a heavy if not impossible burden given that most employees do not have perfect employment records.

In sum, whether the adverse employment action occurs in response to an employees' request for a FMLA leave or takes place after the employee is granted and takes an FMLA leave, and whether the adverse employment action is an outright denial of leave, termination while on leave, or some lesser action, intent is simply not properly an element of a claim of interference under the FMLA.[535] Under this framework, the burden of persuasion should be on the defendant to show that the reason for an adverse employment action around the time of a requested, approved, or completed FMLA leave is unrelated to the request for FMLA leave or exercise of an FMLA-protected right.[536] And if courts were to properly analyze the FMLA retaliation claims in this manner, which is consistent with Congress's intent and the plain language of the statute, *Nassar* would be wholly irrelevant to retaliation claims under the FMLA. However, if courts are to persist in improperly constructing the FMLA as an antidiscrimination statute, and to equate FMLA interference with Title VII retaliation, they should at least evaluate FMLA "retaliation" claims under the less onerous, pre-*Nassar* "motivating factor" causation standard.

And finally (and more broadly) with regard to retaliation, there are common sense reasons to believe employees who claim they are victims of retaliation for exercising their rights to leave or work accommodations under the PDA, FMLA, and ADA—and thus not to place additional hurdles in their way when they claim retaliation (or, in the case of the FMLA, interference) under these statutes. This is because workplace leave and alternative work arrangements are perceived as (and can be) disruptive to employers' day-to-day operations and bottom line. In contrast, when an employee complains

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as FMLA interference) and lesser adverse employment actions such as demoting an employee while on leave (categorized as FMLA "retaliation"). *Id.* Neither of these distinctions is supported by the plain language or legislative history of the FMLA. *Id.*

[535] An example of this correct approach can be seen in Gordon v. United States Capitol Police, 778 F.3d 158 (D.C. Cir. 2015), which held that "an employer action with a reasonable tendency to 'interfere with, restrain, or deny' the 'exercise of or attempt to exercise' an FMLA right may give rise to a valid interference claim under § 2615(a)(1) even where the action fails to actually prevent such exercise or attempt." *Id.* at 165.

[536] Rachel Arnow has made a similar proposal that would apply in a narrower set of circumstances. *See* Rachel Arnow-Richman, *Public Law and Private Process: Toward an Incentivized Organizational Justice Model of Equal Employment Quality for Caregivers*, 2007 UTAH L. REV. 25, 57 (arguing for "a judicially created burden shift on proof of substantive violations of the FMLA and Title VII in cases where employers fail to engage in a good-faith process [to consider an employee's request] and the plaintiff can demonstrate a prima facie case of retaliation or discriminatory failure to accommodate").

about disparate treatment under Title VII or the ADA, that is, when an employee is asserting a simple right to nondiscrimination, and then, subsequently, something bad happens to them at work, it may be more reasonable to give the employer the benefit of the doubt and require the employee to bring forth strong evidence connecting the adverse employment action to their complaints of discrimination. After all, bad things happen to employees for legitimate and illegitimate reasons unrelated to illegal discrimination all the time. In contrast, being demoted or losing a job after asking for or receiving a leave or workplace accommodation for a pregnancy related complication, serious health condition, or disability is inherently suspect. Therefore, when an employee is seeking to vindicate their right to leave or accommodations under the PDA, FMLA, or ADA, and claims retaliation, it is not appropriate to require that she establish that her protected activity was the "but-for" cause of retaliation or interference by the employer just to have a jury consider her claim.

Admittedly, the typical employee is not going to consider evidentiary standards or burdens of proof when deciding whether to ask for an FMLA leave or workplace accommodation while experiencing a miscarriage (or facing an increased risk of miscarriage). Yet the systemic impact of making retaliation claims so hard to win is that employers can deny leave or accommodations or punish employees for exercising or attempting to exercise their rights without consequences, which creates a space for this behavior to flourish. This frustrates Congress's intent to broadly protect individuals from discrimination in passing the PDA, FMLA, and ADA. But it is doubly problematic for employees who experience miscarriage, given the existing culture of secrecy surrounding miscarriage. For individuals who experience miscarriage, in order to be able to come out of the shadows, federal antiretaliation provisions must be strengthened.

For the same reasons, employers must have a clear duty to keep private health information confidential when an employee shares this information pursuant to a request for a leave or workplace accommodation due to a miscarriage under the PDA, FMLA, or ADA. Ideally, there must be substantive legal consequences for such breaches independent of an employee's remedies for discrimination under these statutes, so that there is a meaningful incentive to protect employee health information in its own right.[537] Toward that end, a private cause of action for breaching confidentiality should be established under all of these statutes, including Title VII, which presently has no privacy provision at all. It may be that courts will not be willing to read such a provision into Title VII (and hence the PDA) absent further elaboration by Congress. In that case, a confidentiality provision, with a corresponding right to sue for a breach, should be added to the PWFA. The PWFA's proposed amendment to the

[537] Some courts, as discussed *supra*, Part III.B.2., have construed this type of breach as form interference under the FMLA. While this may be another reasonable approach, especially if intent to interfere is not a required element of that claim, a separate cause of action would more clearly put employers on notice that they are expected to protect employee health information.

PDA, by design, contemplates that employees will share private health information in order to receive reasonable workplace accommodations for pregnancy, childbirth, and related medical conditions, much same way employees share medical information when seeking accommodations under the ADA. As such, it is entirely appropriate and logical to add a comparable duty of confidentiality to the PWFA. Further, courts should interpret the existing confidentiality provisions in the FMLA and ADA more expansively. This could easily be achieved, for example, through judicial interpretations that protect employee's health information whether shared voluntarily by an employee in the process of seeking to exercise statutory rights or the information is shared in response to a formal request for health information by the employer. This is easily justifiable in light of the existing FMLA and ADA statutory and regulatory language, which protects employee health information without distinctions as to whether the information was shared by an employee or requested by an employer.[538] Establishing and expanding the scope of confidentiality provisions in these ways would further the purposes of the PDA, FMLA, and ADA by making it possible for employees to provide the notice that is required to receive statutory rights without fearing that their health information will be shared beyond particular decisionmakers responsible for determining eligibility for leave.[539] No employee should be faced with a choice of having their private health information compromised or receiving a statutorily protected leave or workplace accommodation when they experience a miscarriage.

C. Paid Personal and Sick Leave

Having access to paid sick and personal leave is important for workers affected by miscarriage for a number of reasons. First, the FMLA only guarantees a right to unpaid leave.[540] Therefore, many eligible workers simply cannot afford to take it.[541] The ability to use accrued sick leave to

[538] For example, the FMLA confidentiality requirements say nothing about the source of information having any bearing on whether health information is protected. *See* Recordkeeping Requirements, 29 C.F.R. § 825.500 (2022) ("Records and documents relating to certifications, recertifications or medical histories of employees or employees' family members, created for purposes of FMLA, shall be maintained as confidential. . . ."). As for the ADA, as amended, the regulation governing confidentiality specifies that health information gathered pursuant to an employer required medical examination must be treated as a confidential medical record, *see* 29 C.F.R. § 1630.14 (2022), but this should not preclude a court or the EEOC from interpreting the ADA, § 12112(d), to also protect voluntarily shared health information.

[539] *See supra* Part III.B. 1, discussing notice requirements of the PDA, FMLA, and ADA.

[540] *See* discussion *supra* Part II.B.

[541] Elise Gould, *Providing Unpaid Leave Was Only the First Step; 25 Years after the Family and Medical Leave Act*, ECON. POL'Y INST. (Feb. 1, 2018), https://www.epi.org/blog/providing-unpaid-leave-was-only-the-first-step-25-years-after-the-family-and-medical-leave-act-more-workers-need-paid-leave/ (reporting that about forty-five percent of FMLA-eligible workers did not take leave because they could not afford unpaid leave, and that among workers who took FMLA leave, one-third cut their time off short due to cover lost wages); *Who Can Afford Unpaid Leave?*, CTR. FOR AM. PROGRESS (Feb. 5, 2013), https://www.americanprogress.org/article/who-can-afford-unpaid-leave/ ("[N]early half of workers who qualify for [FMLA] leave but do not take it say they are unable to for financial reasons, and two-thirds of those who do take leave report experiencing financial difficulties as a result).

replace pay while taking an FMLA or other leave is a crucial benefit for making the protections of the FMLA and other federal employment statutes accessible to lower-wage workers who experience a miscarriage or who have family members in these circumstances. Second, although sick and personal leave are best suited for relatively short-term impacts of miscarriage and do not address the longer term physical and mental health effects, which are common,[542] these types of leave can at least protect the most vulnerable workers who can lose their job for missing even a day of work.[543] Sick and personal leave can fill in the gaps when the impact of miscarriage does not rise to the level of a serious health condition under the FMLA or a disability under the ADA. Another benefit is that employers may be less likely to require employees to divulge private medical information to use intermittent sick or personal leave, which would protect the privacy of those affected by miscarriage.[544] Therefore, while not a stand-alone solution,[545] having the access to paid sick leave and personal days is an important supplement to the rights afforded by the PDA, FMLA, and ADA, especially for low-wage workers.

Sadly, however, low-wage workers are least likely to have paid sick or personal leave. Only eleven countries do not provide guaranteed paid sick leave, and the United States is one of them.[546] Faced with the health and labor crisis caused by the COVID-19 pandemic, Congress enacted emergency federal legislation that provided enhanced sick leave benefits, but these benefits were temporary and most have expired.[547] Despite lacking a federal right to paid sick leave, almost 80% of workers in the United States had access to paid sick leave as of March 2021.[548] But a closer look reveals a

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[542] *See* Part I *supra* for a discussion of the health effects of miscarriage.

[543] *See* notes 231–232 and accompanying text; *see also* Love v. First Transit, No. 16-cv-2208, 2017 WL 1022191, at *6 (N.D. Ill. Mar. 16, 2017) (recounting the facts of a call center worker fired for missing less than a day of work when she was experiencing a miscarriage).

[544] *See* Part III.B. *supra* for a discussion of the cultural norm of secrecy surrounding miscarriage.

[545] Another limitation is that many employers do not permit employees to use sick leave to care for others. *See, e.g.,* Johns v. Univ. of Iowa, 431 F.3d 325 (8th Cir. 2005) (holding that policy allowing birth mothers and adoptive parents of both sexes, but not birth fathers, to use accrued sick leave for absences after the birth or adoption of a child, is not sex discrimination). So, again, sick leave is not a comprehensive solution to the current gaps in legal protection for individuals affected by miscarriage, particularly partners and intended parents, but as I argue here, it is an important supplement.

[546] FACT SHEET, PROTECTING HEALTH DURING COVID-19 AND BEYOND: WHERE DOES THE U.S. STAND COMPARED TO THE REST OF THE WORLD ON PAID SICK LEAVE, WORLD POLICY ANALYSIS CENTER (May 2020), https://ph.ucla.edu/sites/default/files/attachments/Fact%20Sheet%20-%20Protecting%20Health%20During%20COVID-19%20and%20Beyond%20-%2011May2020.pdf; OECD POLICY RESPONSES TO CORONAVIRUS (COVID-19): PAID SICK LEAVE TO PROTECT INCOME, HEALTH AND JOBS THROUGH THE COVID-19 CRISIS, OECD, https://www.oecd.org/coronavirus/policy-responses/paid-sick-leave-to-protect-income-health-and-jobs-through-the-covid-19-crisis-a9e1a154/ (last updated Jul. 2, 2020) (noting that South Korea is the only other OECD member who does not mandate paid sick leave).

[547] *See Paid Leave in the U.S.*, KFF (Dec. 17, 2021), https://www.kff.org/womens-health-policy/fact-sheet/paid-leave-in-u-s/#footnote-543162-1; *Paid Sick Leave*, NCSL (Jul. 21, 2020), https://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx.

[548] *The Economics Daily, Paid Sick Leave was Available to 79 Percent of Civilian Workers in March 2021*, BUREAU OF LAB. STAT. (Oct. 21, 2021), https://www.bls.gov/opub/ted/2021/paid-sick-leave-was-available-to-79-percent-of-civilian-workers-in-march-2021.htm.

correlation between income and paid sick leave: while 95% of workers in the top 10% earnings bracket receive sick pay, only 35% of workers in the bottom 10% bracket have access to sick pay,[549] a disparity exacerbated by the pandemic.[550] Somewhat alleviating the lack of coverage, fourteen states now guarantee paid sick leave, as well as Washington D.C. and twenty cities and counties.[551] Further, Maine and Nevada recently enacted general paid leave laws that workers may use for any purpose, including sickness.[552] The specifics of these laws vary by state, such as differences in waiting periods before accruing leave and exemptions for small employers of different sizes, but most provide thirty to forty hours of leave per year.[553]

Since at least 2004, many bills have been introduced in Congress that would address and some of the problems caused by insufficient paid sick leave in the United States. These proposed laws include the Family and Medical Insurance Leave Act,[554] which would create a national family and medical leave insurance fund to provide workers with up to twelve weeks of partial income when they take time off for their own serious health conditions (including pregnancy-related health conditions and childbirth) or for the serious health condition of qualified family members, among other benefits, and the Healthy Families Act,[555] which mandates that employers with more than fifteen employees provide paid sick days for all employees. A Republican proposal is the Strong Families Act,[556] which would provide tax credits to employers that offer paid leave to employees on FMLA leave. Finally, President Biden's Build Back Better Act[557] would mandate four weeks of paid family and medical leave starting in 2024 as part of a $2 trillion economic relief package; while the spending legislation passed the House of Representatives in November 2021,[558] it stalled and died in the Senate when one Republican refused to support the package.[559]

As a recent student note on paid sick leave correctly asserts, "[t]he United States needs a national paid sick day standard to protect all working people."[560] While individuals who experience miscarriage or whose family members are affected by miscarriage are not unique in this regard, such a

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[549] *Id.*

[550] Editorial Board, Opinion, *A Pandemic Shows Why the United States Should Not Be One of Only 11 Nations Without Paid Sick Leave*, WASH. POST (Jan. 15, 2022, 8:00 AM), https://www.washingtonpost.com/opinions/2022/01/15/pandemic-shows-why-united-states-should-not-be-one-only-11-nations-without-paid-sick-leave/.

[551] *See Paid Leave in the U.S.*, *supra* note 544.

[552] *Id.*

[553] *See Paid Sick Leave*, *supra* note 544.

[554] *See* H.R. 804, 117th Cong. (2021); S. 248, 117th Cong. (2021).

[555] *See* H.R. 2465, 117th Cong. (2021); S. 1195, 117th Cong. (2021).

[556] *See* H.R. 3595, 115th Cong. (2017); S. 1716, 115th Cong. (2017).

[557] *See* H.R. 5376, 117th Cong. (2021); S. 1716, 115th Cong. (2017).

[558] *See Summary: H.R.5376 — 117th Congress (2021-2022)*, https://www.congress.gov/bill/117th-congress/house-bill/5376?r=1&s=3 (last visited Feb. 23, 2022) .

[559] *See Joe Manchin Kills the Build Back Better Act, Joe Biden's Ambitious Legislative Package*, ECONOMIST, Dec. 19, 2021, https://www.economist.com/united-states/2021/12/19/joe-manchin-kills-the-build-back-better-act-joe-bidens-ambitious-legislative-package.

[560] Dylan Karstadt, *Too Sick to Work? Defending the Paid Leave Movement and the New Jersey Sick Leave Act*, 44 SETON HALL L. REV. 145, 174 (2019).

development is an important component of any response to the incredibly common experience of miscarriage.[561]

D. Occupational Safety and Health Protections

Dangerous work conditions that increase the risk of miscarriage can conceivably be perceived as a harm within the jurisdiction of the Occupational Safety and Health Administration (OSHA). This idea has received very little attention, likely due to the fear that protecting fetuses from workplace hazards will feed into the fetal "personhood" movement[562] that underlies efforts to end women's constitutional rights to contraception and abortion, and, ultimately, to overturn *Roe v. Wade*.[563] Another possible reason for this neglect is the success of the feminist argument in the 1980s, which prevailed in then-debates on the issue, that workplace fetal protection policies were designed to drive women out of higher paid blue-collar industrial jobs dominated by men.[564] These fetal protection policies broadly excluded women from jobs that exposed them to hazardous chemicals, such as lead. As the Supreme Court concluded with little difficulty in the seminal case of *International Union UAW v. Johnson Controls*,[565] sex-based fetal protection policies are suspect on their face.[566] However, carefully crafted, scientifically grounded occupational safety standards such as those NIOSH has issued concerning heavy or repeated lifting while pregnant,[567] seem less likely to carry the political and legal risks of sex-based workplace rules of the past,[568] which were blatantly based on stereotypes about women as inauthentic workers[569] and flawed scientific information.[570]

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[561] A state-by-state and city-by-city response may also help, and this patchwork approach may be all that is politically feasible at the present time, but, ideally, the response should in the form of be a federal law that uniformly protects the maximum percentage of the United States workforce.

[562] *See* discussion *supra* note 429 and accompanying text.

[563] 410 U.S. 113 (1973).

[564] *See* Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1238-41 (1986).

[565] 499 U.S. 187 (1991). Johnson Controls had adopted a fetal protection policy that broadly excluded women under age seventy from jobs that exposed them to lead unless they could show they were sterilized . Virginia Green, then fifty years old, was out of a job on Johnson Control's battery assembly line she had held for eleven years due to the policy; other women decided to be sterilized to keep their jobs, as they needed the income. These women sued Johnson controls for sex discrimination and won. *See* David Kirp, *Fetal Hazards, Gender Justice and the Justices: The Limits of Equality*, 34 WM. & MARY L. REV. 101, 104-06 (1992).

[566] *Id.* at 197 ("The bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job.")

[567] *See Physical Demands*, *supra* note 400.

[568] The fact that men can now become pregnant further undermines the argument that workplace safety rules aimed at reducing miscarriage risk would reinforce gender-based stereotypes. *See* Obedin-Maliver & Makadon, *supra* note 21.

[569] Vicki Schultz can be credited developing the idea of "women as inauthentic workers." *See* Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1892 (2000).

[570] Moreover, establishing and enforcing occupational safety standards for pregnancy might, in turn, promote opportunities for new expectations about workplace safety for all workers and thus lead to similar safety standards for non-pregnant workers as well, thus, for example, reducing risks for musculoskeletal injuries for all workers.

Workplace hazards and conditions that increase the risk of miscarriage is consistent with the language of the statute that established OSHA. Although there is no evidence that Congress contemplated pregnancy risks when it sought to regulate workplace safety in 1970, this argument has not stopped the Supreme Court from expanding the coverage of other major federal employment statutes.[571] For example, there is no evidence that Congress had disparate impact,[572] sexual harassment,[573] same-sex sexual harassment,[574] or sexual-orientation or sexual-identity discrimination[575] in mind when it sought to regulate employment discrimination, yet this argument has not stopped American courts from equating these types of discrimination with discrimination outlawed by Title VII. Indeed, as Anita Bernstein has pointed out many years ago when arguing that the OSH Act should cover sexual harassment:

> [A] statutory reference to the "psychological factors involved" in occupational safety and health is more than exists in the Civil Rights Act of 1964 to support the sex-discrimination paradigm. The official purpose of OSHA is to address the problem of workplace health and safety, nothing narrower than that. The agency, founded only in 1973 and altered several times by political forces since then, does not have a long heritage of only one approach to regulation that would make it unable to function in this new domain. Case law, moreover, supports a broad mandate. [576]

A great deal of theorizing and advocacy has conceptualized pregnancy and work as separate and independent of one another. Work is public and pregnancy is private. Work is where individuals go without their bodies or families; pregnancy concerns sex, family, and bodies. Work is paid and pregnancy is unpaid. Employment law and health law are separate fields, and so on. Thus, the focus has been on legal reforms that would adjust work to "accommodate" the experience of pregnancy. But, as Part II.D. of this Article demonstrated, for many workers, especially the most marginalized workers in physically strenuous occupations, work itself can be hazardous to a successful pregnancy and a risk factor for miscarriage. This understanding brings to light the urgent need to include all women, not just the most privileged, in any agenda addressing miscarriage and the workplace. Toward that end, it is time for states and OSHA to tackle the issue of occupational safety for pregnant workers.

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[571] *See, e.g.,*

[572] Griggs v. Duke Power Co., 401 U.S 424 (1971).

[573] Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998); Faragher v. Boca Raton, 524 U.S. 775 (1998).

[574] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75 (1998).

[575] Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020).

[576] *See* Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L.R. 1277, 1292 (1994) (internal citations to the OSH Act omitted). Catharine MacKinnon also briefly floated this idea in her influential book, *Sexual Harassment of Working Women*. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 159 n.48 (1979).

The clinical practice guidelines that ACOG has developed for lifting while pregnant,[577] and which OBGYN doctors refer to when they recommend light duty for their pregnant patients, are based on the OSHA NIOSH occupational standards for lifting during pregnancy.[578] That is, occupational safety standards are already presently the basis for the vast majority of workers' requests for light duty work assignments under the PDA and (if adopted, PWFA), as represented in the doctor's notes that workers present to their employers. While it is heartening to know that OSHA occupational safety standards are perhaps indirectly seeping into workplace practices via the medical profession, a legal framework requiring individual workers to request leave or accommodations (which are often denied) when work poses a risk of miscarriage is a highly inefficient and ineffective means of ensuring occupational safety for pregnant workers. Why not simply regulate occupational risks for pregnant workers directly? Toward that end, OSHA should prioritize hazardous work conditions such as heavy and repetitive lifting, standing on one's feet for many hours without breaks, working in very hot environments, and night-shift work, which are linked to an increased risk of miscarriage. OSHA's regulatory approach, whereby inspectors visit a worksite and impose citations with fines attached, can readily be applied to these types of physical work requirements. Moreover, OSHA has experience in regulating these types of work conditions. Therefore, its inspectors and experts are prepared to act in this area. This could be achieved outright, by OSHA, or through OSHA-approved state plans.[579] Ideally, it would make more sense to have a set of permanent, national standards on work and pregnancy safety, which would promote predictability, uniformity, and consistency with how employees would be treated throughout the country. However, given that OSHA is so under-resourced and limited in its regulatory capacity, it may make sense to start with state plans. Presently, more than half of U.S. states have OSHA-approved plans in place for other kinds of work hazards.[580] However this is approached, it is time to start a national movement for occupational safety for pregnant workers.

CONCLUSION

Miscarriage is a consequential life event experienced by up to one-fourth of pregnant people and affecting hundreds of thousands of American

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[577] ACOG 2018 GUIDELINES, *supra* note 401.

[578] *Compare id.* at e121 fig.1, *with* MacDonald et al., *supra* note 404 (demonstrating that the ACOG standards are copied directly from the NIOSH standards, including the illustrations).

[579] OSHA allows states to run their own state occupational safety plans if approved by OSHA and they provide at least as generous coverage as federal OSHA standards. *See* 29 U.S.C. §§ 667(c)(2), 672. For a description of the rather complicated federal-state partnership for regulating occupational safety set by the OSH Act, see Seconda, *supra* note 415.

[580] *See State Plans*, OCCUPATIONAL SAFETY AND HEALTH ADMIN., U.S. DEP'T OF LAB., https://www.osha.gov/stateplans/ (last visited Feb. 24, 2022) (reporting that there are twenty-eight OSHA-approved workplace safety and health programs operated by individual states or U.S. territories).

workers. Despite this, none of the federal employment laws passed by Congress to protect workers from pregnancy discrimination, provide job protected leave for serious illness, or reasonable disability accommodations adequately accounts for miscarriage. Even worse, the conditions of work itself can place a desired pregnancy at risk, especially for low income and minority pregnant women working in occupations involving strenuous physical tasks, such as childcare, warehouse picking and packing, mail delivery, food processing, and home health and nursing care. Yet our country's federal employment laws do not sufficiently regulate these occupational pregnancy risks, whether through a right to leave, light-duty work accommodations, or occupational safety rules. The Pregnant Workers Fairness Act is an excellent first step to address these shortfalls in federal law, but it would not be anywhere near enough, particularly given the entrenched culture of secrecy surrounding miscarriage that is reinforced by legal doctrines that require workers to divulge private health information in order to receive necessary leave or work adjustments, yet insufficiently protect them from retaliation and breaches of confidentiality when they do. Therefore, a more comprehensive approach is required. This includes not only passing the PWFA, but enhanced antiretaliation and privacy protections, access to paid sick and personal leave, and occupational safety standards to reduce the risk of miscarriage for American workers. For there to be real reproductive justice, workers affected by miscarriage must be able to safely come out of the shadows, with the assistance of employment law.