

2015

Disparate Impact and Pregnancy: Title VII's Other Accommodation Requirement

Camille Hébert

Follow this and additional works at: <http://digitalcommons.wcl.american.edu/jgspl>

 Part of the [Civil Law Commons](#), [Civil Rights and Discrimination Commons](#), [Disability Law Commons](#), [Law and Gender Commons](#), and the [Law and Society Commons](#)

Recommended Citation

Camille Hébert (2015) "Disparate Impact and Pregnancy: Title VII's Other Accommodation Requirement," *Journal of Gender, Social Policy & the Law*: Vol. 24: Iss. 1, Article 3.

Available at: <http://digitalcommons.wcl.american.edu/jgspl/vol24/iss1/3>

This Article is brought to you for free and open access by the Washington College of Law Journals & Law Reviews at Digital Commons @ American University Washington College of Law. It has been accepted for inclusion in *Journal of Gender, Social Policy & the Law* by an authorized administrator of Digital Commons @ American University Washington College of Law. For more information, please contact fbrown@wcl.american.edu.

DISPARATE IMPACT AND PREGNANCY: TITLE VII'S OTHER ACCOMMODATION REQUIREMENT

L. CAMILLE HÉBERT*

- I. Introduction 108
- II. The Supreme Court’s Decisions on Pregnancy Discrimination..... 111
- III. The Supreme Court’s Decision in *Young v. United Parcel Service, Inc.* 117
- IV. The Equal Employment Opportunity Commission’s Position on Accommodation of Pregnancy 124
- V. What the Pregnancy Discrimination Act Says About the Comparative Treatment of Women Affected by Pregnancy 130
- VI. The Viability of Disparate Impact Claims Based on Pregnancy 135
- VII. The Duty of Employers to Accommodate Pregnancy under the Disparate Impact Theory 142
 - A. The Prima Facie Case of Disparate Impact Based on Pregnancy 143
 - 1. Nature of Required Showing of Disparate Impact 143
 - 2. Disparate Impact Challenges to Restrictive Leave Policies..... 149
 - 3. Disparate Impact Challenges to Physical Job Requirements 155
 - 4. Disparate Impact Challenges to Restrictive Accommodation Policies 158
 - B. The Job-Relatedness and Business Necessity of Employer Failures to Extend Accommodations to Pregnant Women..... 163
 - C. Alternative Employment Practices to Failures to Accommodate on the Basis of Pregnancy 169

* Carter C. Kissell Professor of Law, Michael E. Moritz College of Law at the Ohio State University. I appreciate the helpful comments provided on an earlier draft of this article by Martha Chamallas, as well as the research support provided by the summer research grant program of the Moritz College of Law. I also appreciate Christopher McNeil’s willingness to read drafts of my writings, as well as his provision of moral support and other accommodation for my scholarly work.

108	JOURNAL OF GENDER, SOCIAL POLICY & THE LAW	[Vol. 24:1
VIII. Conclusion		171

I. INTRODUCTION

There has been a good deal of attention focused recently on questions concerning how employers are allowed to treat pregnant women in the workplace under Title VII of the Civil Rights Act of 1964.¹ The Equal Employment Opportunity Commission (EEOC), the agency charged with the enforcement of Title VII, has recently issued revised guidance addressing issues of pregnancy, including the requirements imposed by Title VII with respect to the accommodation of pregnant or recently pregnant women experiencing disabling conditions.² Additionally, the United States Supreme Court recently decided a case, *Young v. United Parcel Service, Inc.*,³ which addresses the circumstances under which an employer will be found to have violated Title VII's prohibition against intentional discrimination for refusing to provide the same accommodation to women affected by pregnancy as that employer provides to a number of other categories of employees, including those injured on the job, employees who have disabilities under the Americans With Disabilities Act, or employees who have otherwise lost their ability to perform at least some of the functions of their employment.

The disparate treatment theory, on which both the *Young* case and the EEOC guidance are focused, is undoubtedly an important resource for women affected by pregnancy and childbirth to seek accommodations similar to those provided to other employees. However, neither the *Young* case nor the new EEOC guidance focuses on the provision of Title VII most likely to provide a mandate for employers to provide accommodation to women affected by pregnancy who experience temporary inability to perform part or all of their job functions. That provision, not raised at all in the decision before the Supreme Court⁴ and slighted by the EEOC

1. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (2015).

2. U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.003, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES (July 14, 2014). These guidelines were superseded by modified guidelines issued after the *Young v. United Parcel Serv., Inc.* case was decided by the Supreme Court. See U.S. EQUAL EMP. OPPORTUNITY COMM'N NO. 915.003, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (June 25, 2015).

3. 575 U.S. ___, 135 S. Ct. 1338 (2015).

4. The plaintiff in the *Young v. United Parcel Service, Inc.* case was allowed to assert only a disparate treatment, not a disparate impact, claim; her motion to amend her complaint to make out a claim of disparate impact was rejected by the district court. See *Young v. United Parcel Serv. Inc.*, 707 F.3d 437, 442 (4th Cir. 2013). The

guidance, is the prohibition on employers maintaining even pregnancy-neutral policies and practices that disproportionately disadvantage women affected by pregnancy and cannot be justified by business necessity. It is the disparate impact theory, rather than the disparate treatment theory,⁵ in which Title VII's requirement to accommodate pregnancy is most likely to be found.

In a number of recent cases, both under Title VII and other statutes, the Supreme Court has reaffirmed the importance of the disparate impact theory to the anti-discrimination framework. Similarly, Congress, in the Civil Rights Act of 1991, made clear its commitment to the disparate impact theory as an important component of Title VII's prohibition against discrimination, including discrimination on the basis of sex. Although the disparate treatment theory is an important tool for challenging employer decisions that impose disadvantages on women affected by pregnancy and childbirth, the disparate impact theory may provide assistance to women challenging employer practices that impose similar disadvantages but may not be unlawful as a matter of disparate treatment.

This article analyzes the Supreme Court's decisions on pregnancy

Supreme Court's decision also makes clear that the case before it involved only a claim of disparate treatment; the Court noted that Young has not alleged a disparate impact claim. *Young*, 135 S. Ct. at 1345 ("This case requires us to consider the application of the second clause [of the Pregnancy Discrimination Act] to a 'disparate-treatment' claim—a claim that an employer intentionally treated a complainant less favorably than employees with the 'complainant's qualifications' but outside the complainant's protected class.").

5. An early articulation by the Supreme Court of the differences between the disparate treatment theory and the disparate impact theory remains one of its clearer explanations. In *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977), the Court explained the two theories in the following terms:

"Disparate treatment" such as is alleged in the present case is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment. Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII.

Claims of disparate treatment may be distinguished from claims that stress "disparate impact." The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity. Proof of discriminatory motive, we have held, is not required under a disparate impact theory. Either theory may, of course, be applied to a particular set of facts.

discrimination, including the Court's most recent decision in *Young v. United Parcel Service, Inc.*, as well as the EEOC's recent and prior statements on pregnancy discrimination and accommodations for pregnant women.⁶ In doing so, the article first explains the limitations that the disparate treatment theory poses for women seeking accommodations for pregnancy. Next, the article measures the Court's decisions and the EEOC guidance against the language and legislative history of the Pregnancy Discrimination Act and explains how that language and legislative history is consistent with the use of the disparate impact theory to challenge employers' failures to accommodate pregnancy.⁷ The article then turns to an analysis of whether and how pregnancy discrimination claims are cognizable under the disparate impact theory as articulated by Congress and the courts.⁸ The article then concludes with an examination of how the disparate impact theory can mandate that employers provide accommodations to women affected by pregnancy, whether or not they provide those accommodations to other employees who are temporarily unable to perform their job duties.⁹

The article identifies three types of employer policies and practices with respect to accommodation of disabilities associated with pregnancy and childbirth that might be challenged under the disparate impact theory: employer limitations on leave or absences; heavy lifting or other physical requirements imposed by certain jobs; and employer accommodation policies that restrict accommodation to employees injured on the job or to some other class of workers.¹⁰ The article first discusses how such employer practices and policies might be challenged as a prima facie violation of the disparate impact theory, demonstrating that such policies

6. See *infra* Parts II, III, IV.

7. See *infra* Part V.

8. See *infra* Parts VI, VII.

9. Other commentators have argued that litigants should look to the disparate impact theory as a way to challenge actions by employers that disadvantage women affected by pregnancy and childbirth. See Joanna L. Grossman & Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 YALE J.L. & FEMINISM 15, 41-49 (2009); Christine Jolles, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 660-65 (2001); Reva Siegel, Note, *Employment Equality under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929, 940-49 (1985). Those commentators, however, have not generally undertaken to critique in detail the existing cases addressing disparate impact claims based on pregnancy or to demonstrate how a correct application of the standards of disparate impact announced by the Supreme Court, as well as the Court's cases on pregnancy discrimination, should result in success for a plaintiff in a properly litigated claim.

10. See *infra* Part VII.

and practices are likely to disproportionately disadvantage women affected by pregnancy because of the temporary physical limitations associated with pregnancy and childbirth.¹¹ The article critiques existing cases that have rejected such challenges and explains both the errors of analysis in those cases and the ways in which plaintiffs might avoid the rejection of such challenges.

Next, the article discusses the defenses employers are likely to assert to combat prima facie claims of disparate impact challenging these types of practices, explaining what employers should be required to prove to justify their challenged practices as job related and supported by business necessity.¹² The article also demonstrates why courts should generally reject those defenses in the context of the three types of claims likely to be made under the disparate impact theory. Even if employers are able to justify their practices under the job-related and business-necessity defenses, the article demonstrates that women affected by pregnancy may prevail under the third step of disparate impact analysis, by establishing the existence of less discriminatory alternatives to those practices, including an alternative that provides the same accommodations to women affected by pregnancy that the employer already provides to other employees.¹³

The article concludes with a call to the EEOC to not only clarify and supplement its recent guidance on pregnancy discrimination with respect to issues of disparate impact, but, consistent with its stated strategic goals, to become more heavily involved in the litigation of disparate impact challenges to employer practices that disproportionately affect pregnant women and the failure of employers to provide accommodations to those women.¹⁴

II. THE SUPREME COURT'S DECISIONS ON PREGNANCY DISCRIMINATION

The track record of the United States Supreme Court in its consideration of issues of pregnancy discrimination under Title VII of the Civil Rights Act of 1964 has been mixed. Its first encounter with these issues was inauspicious. In the first case in which the legality under Title VII of disadvantaging women on the basis of their pregnancy was squarely presented,¹⁵ *General Electric Co. v. Gilbert*,¹⁶ the majority of the Court

11. See *infra* Part VII.A.

12. See *infra* Part VII.B.

13. See *infra* Part VII.C.

14. See *infra* Part VIII.

15. In an earlier case, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 651 (1974), the Court held that rules by school boards mandating that pregnant women take leave four or five months before the expected birth constituted a denial of due process because those arbitrary dates had no valid relationship to a legitimate state interest.

held that discrimination on the basis of pregnancy was in fact not sex discrimination. The Court held that an exclusion based on pregnancy was not a distinction based on gender, noting that such a distinction merely divided pregnant persons, whom the Court conceded were all women, from non-pregnant persons, who could be either men or women.¹⁷ In addition, the majority justified treating pregnant women differently from other persons disabled in the workplace because pregnancy was different: “Pregnancy is, of course, confined to women, but it is in other ways significantly different from the typical covered disease or disability. The District Court found that it is not a ‘disease at all, and is often a voluntarily undertaken and desired condition.’”¹⁸

The majority’s reasoning and holding in *Gilbert* was soundly rejected, not just by the dissenters,¹⁹ but also by Congress. In direct response to *Gilbert*, Congress enacted the Pregnancy Discrimination Act of 1978, which added § 701(k) to Title VII, which provides in part that:

The Court noted that since the events in the case, Title VII had been amended to apply to state agencies and that the EEOC had taken the position that mandatory leave for pregnant women presumptively violated Title VII and that the “practical impact of our decision in the present cases may have been somewhat lessened by [those] recent developments.” *LaFleur*, 414 U.S. at 638 n.8.

16. 429 U.S. 125, 147 (1976).

17. In reaching this conclusion, the *Gilbert* majority relied on the earlier case of *Geduldig v. Aiello*, in which the Court had held that discrimination on the basis of pregnancy was not sex discrimination in connection with an equal protection challenge to a state disability leave program that excluded coverage for pregnancy-related disabilities. *Geduldig v. Aiello*, 417 U.S. 484, 496-97, n.20 (1974) (“The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and non-pregnant persons. While the first group is exclusively female, the second group includes members of both sexes.”). The Court’s analysis in *Aiello* was indeed cursory. As Justice Brennan indicated in his dissent in that case, the program’s “dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination.” *Id.* at 501 (Brennan, J., dissenting).

18. *Gilbert*, 429 U.S. at 134-36.

19. The dissent by Justices Brennan and Marshall disagreed with the conclusion of the majority that General Electric’s decision to cover all other disabilities, even those that were sex-linked, but to exclude disabilities arising from pregnancy, was sex-neutral, essentially faulting the majority for allowing pregnancy to be singled out for disadvantageous treatment as inconsistent with the purpose of Title VII. *Id.* at 160 (Brennan, J., dissenting). Justice Stevens was even more direct in his dissent. He noted that the challenged rule was not neutral but “places the risk of absence caused by pregnancy in a class by itself.” He stated persuasively that: “By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male.” *Id.* at 161-62 (Stevens, J., dissenting).

The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.²⁰

The legislative history of the Pregnancy Discrimination Act makes clear that Congress intended to disapprove not only of the holding in *Gilbert*, that pregnancy could be excluded from coverage under fringe benefit programs, but also its reasoning that discrimination on the basis of pregnancy was not a form of sex discrimination.²¹

In *Newport News Shipbuilding and Dry Dock Co. v. EEOC*,²² the Supreme Court’s first post-*Gilbert* and post-Pregnancy Discrimination Act case addressing issues of pregnancy discrimination,²³ the majority of the Court recognized that Congress had in fact overruled the *Gilbert* decision.²⁴

20. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1976).

21. See Foreword by Chairman Harrison A. Williams, Jr., Legislative History of the Pregnancy Discrimination Act of 1978, Prepared for the Committee on Labor and Human Resources, United States Senate (U.S. Government Printing Office June 1980). The United States Supreme Court in *Newport News Shipbuilding & Dry Dock Co. v. EEOC* itself recognized that Congress in the Pregnancy Discrimination Act “unambiguously expressed its disapproval of both the holding and the reasoning” of the Court’s decision in *Gilbert*. 462 U.S. 669, 677 (1983). See also *infra* text accompanying notes 93-107 (discussing the legislative history of the Pregnancy Discrimination Act of 1978).

22. 462 U.S. 669 (1983).

23. The Supreme Court did decide another case of pregnancy discrimination after *Gilbert* and before the enactment of the Pregnancy Discrimination Act of 1978. That case, *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), is discussed at text accompanying notes 108 to 110.

24. *Id.* at 670 (“In 1978 Congress decided to overrule our decision in *General Electric Co. v. Gilbert* by amending Title VII of the Civil Rights Act of 1964 ‘to prohibit sex discrimination on the basis of pregnancy.’”). The dissent, on the other hand, claimed that “it is the Court, and not Congress, which is now overruling *Gilbert*.” *Id.* at 686 (Rehnquist, J., dissenting).

Years later, when the majority of the Court in *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009), held that the Pregnancy Discrimination Act did not prevent the employer from penalizing women with respect to their current pension benefits because of the treatment of pregnancy leaves that they had taken before the effective date of that Act, in that that treatment was not unlawful at the time of those leaves because of the Court’s decision in *Gilbert* that discrimination on the basis of pregnancy was not sex

That case involved the question of whether the employer unlawfully discriminated against its male employees by providing less generous coverage for their spousal dependents for pregnancy than for other medical conditions.²⁵ The Court held that the employer violated Title VII because “it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.”²⁶ The Court went on to conclude that because the male employees were provided worse coverage for their spouses than were female employees, whose spouses did not suffer the same limitation, the male employees suffered discrimination because of sex.²⁷ The Court concluded that “[b]y making clear that an employer could not discriminate on the basis of an employee’s pregnancy, Congress did not erase the original prohibition against discrimination on the basis of an employee’s sex.”²⁸

The Supreme Court took an expansive view of the Pregnancy Discrimination Act in its next decision interpreting that provision and its effect on Title VII’s prohibition against sex discrimination. In *California Federal Savings and Loan Ass’n v. Guerra*,²⁹ the Court had to decide whether Title VII preempted a state statute that mandated certain benefits for pregnant woman. In holding that the state statute was not preempted, the Court noted that Congress intended the Pregnancy Discrimination Act to be “a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.”³⁰ The Court noted that Congress had expressed concern about the ways in which pregnant women were disadvantaged in the workplace and made to choose between family and career, and indicated that the Pregnancy Discrimination Act was intended to “provide relief to working women and to end discrimination against pregnant workers.”³¹ The Court noted that the Pregnancy

discrimination, Justice Ginsburg called the *Gilbert* decision “astonishing” and “aberrational” and called for the Court to “explicitly overrule *Gilbert* so that decision can generate no more mischief.” *Id.* at 722, 726, 728 (Ginsburg, J., dissenting). Three years later, Justice Ginsburg in her dissent in *Coleman v. Court of Appeals of Maryland*, indicated that she would hold that the Court’s decision in *Geduldig v. Aiello*, on which the *Gilbert* Court had relied, “was egregiously wrong to declare that discrimination on the basis of pregnancy is not discrimination on the basis of sex.” 132 S. Ct. 1327, 1345 (2012) (Ginsburg, J., dissenting).

25. *Newport News*, 462 U.S. at 684.

26. *Id.*

27. *Id.* at 674-75.

28. *Id.* at 684-85.

29. 479 U.S. 272, 273 (1987).

30. *Id.* at 285 (quoting *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 758 F.2d 390, 396 (9th Cir. 1985)).

31. *Id.* at 285-86, n.19.

Discrimination Act extends to pregnancy Title VII's objective to "achieve equality of employment opportunity and remove barriers that have operated in the past," citing to a statement by the sponsor of the Act that "[t]he entire thrust behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life."³²

The Supreme Court also touched on the meaning of the Pregnancy Discrimination Act in its decision in *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc.*,³³ a decision striking down employer policies that explicitly restricted the ability of fertile women, but not fertile men, to work in jobs involving fetal hazards. Making clear that it was the disparate treatment, and not the disparate impact, theory that applied to such facially discriminatory policies, the Court described the Pregnancy Discrimination Act as containing a "BFOQ [bona fide occupational qualification] standard of its own: Unless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes.'"³⁴ The Court went on to indicate that "women as capable of doing their jobs as their male counterparts may not be forced to choose between having a child and having a job."³⁵

Some courts have asserted that the *Johnson Controls* case makes clear that the Pregnancy Discrimination Act cannot be interpreted to require an employer to make accommodations for pregnancy, seizing upon the Court's quotation from a concurring opinion in *Arizona Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*³⁶ to the effect that Congress made the decision to "forbid special treatment of pregnancy despite the social costs associated therewith."³⁷

32. *Id.* at 288-89 (quoting statement of Senator Williams, 123 CONG. REC. 2968 (1977)).

33. 499 U.S. 187, 211 (1991).

34. *Id.* at 204.

35. *Id.*

36. 463 U.S. 1073, 1084 n.14 (1983) (Marshall, J., concurring in the judgment). The *Norris* case did not deal with pregnancy discrimination at all, but rather addressed the question of whether employers could offer lesser pension benefits to women because of the greater costs of providing pension benefits to women, who generally live longer than men. The Court held in a per curiam opinion that such action violated Title VII. *Id.* at 1074.

37. See *Sussman v. Salem, Saxon & Nielsen, P.A.*, 153 F.R.D. 689, 692 (M.D. Fla. 1994) ("This Court recognizes the Supreme Court's opinion that the Pregnancy Discrimination Act was not intended to provide accommodations to pregnant employees when such accommodations rise to the level of preferential treatment. Congress considered at length the considerable cost of providing equal treatment of

116 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

However, the *Johnson Controls* case means no such thing. When the *Johnson Controls* Court quoted the “special treatment” language from *Norris*, it was clearly referring to “special treatment” that treated pregnancy worse than, not better than, other conditions³⁸; the reference to “special treatment” in *Norris* meant the same thing.³⁹ Accordingly, the *Johnson Controls* Court held that the Pregnancy Discrimination Act forbids treating pregnancy worse than other conditions; after all, the Court was addressing the question of whether employers could intentionally discriminate against pregnant or fertile women by refusing to employ them because of a perceived risk of fetal harm, not whether employers had to take action to reduce exposure of women to fetal harm. Nothing in that case holds or even suggests that employers do not have to provide accommodations sought by pregnant women to deal with the physical aspects of pregnancy.⁴⁰ Curiously, the courts that have wrenched this language out of

pregnancy and related conditions, but made the “decision to forbid special treatment of pregnancy despite the social costs associated therewith.”) (citations omitted).

38. This is what the Court in *Johnson Controls* said:

The extra cost of employing members of one sex, however, does not provide an affirmative Title VII defense for a discriminatory refusal to hire members of that gender. Indeed, in passing the PDA, Congress considered at length the considerable cost of providing equal treatment of pregnancy and related conditions, but made the ‘decision to forbid special treatment of pregnancy despite the social costs associated therewith.’

Johnson Controls, 499 U.S. at 210 (citations omitted). Read in context, it is clear that the Court is using the term “special treatment” to refer to disadvantaging women because of pregnancy, not the issue of accommodation of pregnancy.

39. This is what Justice Marshall said in the footnote to his concurring opinion in *Norris*:

In enacting the PDA, Congress recognized that requiring employers to cover pregnancy on the same terms as other disabilities would add approximately \$200 million to their total costs, but concluded that the PDA was necessary “to clarify [the] original intent” of Title VII. Since the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles, Congress’ decision to forbid special treatment of pregnancy despite the special costs associated therewith provides further support for our conclusion in *Manhart* that the greater costs of providing retirement benefits for female employees does not justify the use of a sex-based retirement plan.

Norris, 463 U.S. at 1084 n.14 (Marshall, J., concurring in the judgment) (citations omitted). Read in context, it is clear that the reference to “special treatment of pregnancy” was a reference to the fact that women could not be disadvantaged because of pregnancy and did not address in any way the issue of accommodation of pregnancy.

40. In any event, the *Johnson Controls* Court made clear that the claim involved in

2015]

DISPARATE IMPACT AND PREGNANCY

117

context to declare that the Pregnancy Discrimination Act forbids “preferential” treatment of pregnancy have ignored the language from the *Guerra* case, which was in fact dealing with issues of pregnancy accommodations under state law, declaring that Congress intended the Pregnancy Discrimination Act to be “a floor beneath which pregnancy disability benefits may not drop—not a ceiling above which they may not rise.”⁴¹ That is, the only time that the Court has considered the issue of the “preferential” treatment of pregnancy, it has made clear that such treatment is not inconsistent with the dictates of Title VII in general or the Pregnancy Discrimination Act in particular, yet the lower courts have chosen to ignore that aspect of the Court’s decisions on pregnancy.

Accordingly, in none of these cases did the Court directly address the question of whether employers are required by the Pregnancy Discrimination Act to provide workplace accommodations to women affected by pregnancy. But the Court’s general approach in its latter cases suggests its recognition that Congress wanted to reduce the burdens faced by working women associated with pregnancy, so that they were not forced to “choose between having a child and having a job” when they were similarly capable (or similarly limited) in performing their job functions as other employees who were not compelled to make that choice. The Court’s language also suggests that pregnancy is in fact required to be treated no worse than employers treat other medical conditions and that the focus of employers in making employment-related decisions concerning women affected by pregnancy should be their ability or inability to work, not other factors, such as the source of any such inability. Finally, the Court’s reference to the statutory phrase “all employment-related purposes” clearly would encompass issues of workplace accommodation for employees who face a temporary inability to perform the functions of their jobs.

III. THE SUPREME COURT’S DECISION IN *YOUNG V. UNITED PARCEL SERVICE, INC.*

The case of *Young v. United Parcel Service, Inc.* required the Court, for

that case was a claim of disparate treatment, not disparate impact, and that it was applying the bona fide occupational defense, which it said was the only defense available to justify the employer’s practice. The lower courts had applied the disparate impact theory and its business necessity defense to uphold the employer’s policy, which the Court said was inappropriate. 499 U.S. at 193-202. Accordingly, no matter what *Johnson Controls* might mean with respect to claims under the disparate treatment theory and its bona fide occupational qualification defense, it does not say anything about whether accommodation of pregnancy might be required under a claim of disparate impact.

41. Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 280 (1987).

the first time, to address the duty of employers under Title VII to extend accommodations to pregnant women when they extend accommodations to other similarly situated employees. Peggy Young worked for UPS as a part-time, early morning “air driver,” who generally carried lighter packages because the greater expense of air delivery means that lighter packages are generally sent by air, while heavier packages are sent by ground delivery.⁴² She became pregnant in a third round of *in vitro* fertilization, having suffered a previous miscarriage, and sought accommodation consistent with the twenty pound lifting restriction recommended by her health care provider.⁴³ That accommodation was refused, based on the employer’s asserted policy of providing accommodations only to employees who had suffered on-the-job injuries, who qualified as disabled under the American With Disabilities Act, or who had lost their DOT certification.⁴⁴

The district court held that Young had not even made out a prima facie case of pregnancy discrimination under Title VII.⁴⁵ The court concluded that Young had not shown that she was treated differently than similarly situated employees under UPS’s “pregnancy neutral” policy, because her inability to perform all aspects of her job was physical, while the inability of employees who had lost their DOT certification was legal in nature.⁴⁶ Accordingly, the district court granted summary judgment against Young on her claim of pregnancy discrimination under Title VII.⁴⁷

The court of appeals upheld the district court’s grant of summary judgment on essentially the same grounds,⁴⁸ although the court of appeals recognized that the language of the Pregnancy Discrimination Act could be read to support Young’s claim that she was entitled to the same accommodation provided by the employer to other employees. The court of appeals noted that the second clause of the Pregnancy Discrimination Act—that which mandates that women affected by pregnancy “shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work”—was

42. Young v. United Parcel Serv., Inc., No. DKC 08-2586, 2011 WL 665321, at *1 (D. Md. Feb. 14, 2011).

43. *Id.* at *7.

44. *Id.* at *2-6, 11.

45. *Id.* at *12-14.

46. *Id.* In rejecting Young’s claim that the Pregnancy Discrimination Act does not confer “least-favored nation” status on pregnant women, the district court noted that “[t]he law is different, however. ‘Employers can treat pregnant women as badly as they treat similarly affected but non-pregnant employees.’” *Id.* at *14.

47. *Id.* at *22.

48. Young v. United Parcel Serv., Inc., 707 F.3d 437, 445-51 (4th Cir. 2013).

2015]

DISPARATE IMPACT AND PREGNANCY

119

“unambiguous” and could be read to support the contention that pregnant women were required to receive different—“perhaps even preferential”—treatment.⁴⁹ But the court of appeals said that that reading was contradicted by the first clause of the Act, which specifies that discrimination on the basis of pregnancy is a form of sex discrimination.⁵⁰ The court of appeals read the first clause of the Act as an indication that pregnancy was to be treated just like any other form of sex discrimination.⁵¹ The court of appeals noted the anomaly of a contrary position—that “pregnancy would be treated more favorably than any other basis, including non-pregnancy-related sex discrimination, covered by Title VII.”⁵² The court of appeals noted, by way of example, that the position advocated by the plaintiff would mean that a pregnant woman would be entitled to accommodation,

49. *Id.* at 447.

50. *Id.*

51. *Id.*

52. *Id.* What the court of appeals apparently failed to understand is that the language on which it relied to limit the “unambiguous” mandate of the second clause of the Act—the definition of “sex” to include “pregnancy”—nowhere says that pregnancy is to be treated exactly like all other forms of sex discrimination or that that language must be read not to alter Title VII analysis in any other way. In fact, the addition of the language mandating that women affected by pregnancy must be treated in the same manner as other employees similarly situated with respect to their ability to work does result in differences between pregnancy and other forms of discrimination, simply because of differences in the statutory language. And the fact that this language is found in a definition section of the statute cannot be used to show that its effect is limited. After all, the statutory mandate to provide accommodation for religious practice and belief is also found in the section of Title VII that defines “religion.” See 42 U.S.C. § 2000e(j). The majority of the Court in *EEOC v. Abercrombie & Fitch Stores, Inc.* confirmed that that provision imposes an affirmative duty on employers to accommodate the religious practices and beliefs of employees and job applicants. 575 U.S. ___, 135 S. Ct. 2028, 2034 (2015).

Nor does the *Abercrombie* Court’s holding that the plaintiff’s claim in that case, that she was not hired because of the need to accommodate her religious belief by making an exception to its neutral “Look Policy” to allow her to wear a head scarf, was a disparate treatment claim rather than a disparate impact claim suggest that claims of accommodation are not cognizable under the disparate impact theory. *Abercrombie*, 135 S. Ct. at 2031-34. The Court in that case indicated that failure to accommodate claims under the religious discrimination provisions are disparate treatment claims precisely because there is an express accommodation requirement for religion, causing employer actions motivated by the desire to avoid that accommodation to be categorized as intentional discrimination. With respect to pregnancy, on the other hand, for which there is no express statutory requirement of accommodation, failures to accommodate by failing to waive neutral rules are cognizable under the disparate impact theory, the theory generally available for challenging the discriminatory effect of neutral employer practices, regardless of the motivation of the employer for that failure.

while “a temporary lifting restriction placed on an employee who injured his back while picking up his infant child or on an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter would be ineligible for any accommodation.”⁵³

The Supreme Court majority in *Young*, on the other hand, seemed to recognize that the statutory language regarding pregnancy did justify a different type of analysis of pregnancy discrimination claims than other types of claims, including other types of sex discrimination claims, under Title VII.⁵⁴ The Court noted that its approach was “limited to the Pregnancy Discrimination Act context”⁵⁵ but was still generally consistent with its approach of allowing employees to establish intent to discriminate on the part of the employer and to rebut the employer’s assertion of non-discriminatory reasons for its actions by circumstantial evidence.⁵⁶

The approach announced by the Court majority for employees seeking to prove by indirect or circumstantial evidence that an employer’s failure to accommodate pregnant women while accommodating other employees was intentionally discriminatory is a version of the *McDonnell Douglas* test previously adopted by the Court as the standard for plaintiffs to use to prove intent to discriminate inferentially.⁵⁷ The *Young* Court indicated that in order for an employee to make out a prima facie case of intentional discrimination on the basis of pregnancy based on the denial of an accommodation, she must establish: “that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others ‘similar in their ability or inability to work.’”⁵⁸ The Court held that *Young* had established a prima facie case under this standard, concluding that she had established a genuine dispute that UPS had treated more favorably “at least some employees whose situation cannot reasonably be distinguished from *Young*’s.”⁵⁹ Accordingly, it appears that the Court rejected the conclusion of the lower courts that employees injured on the job, employees who qualify as disabled under the ADA, and employees who lost their DOT certification were all not similarly situated to pregnant women as a matter of law.⁶⁰

53. *Young*, 707 F.3d at 448.

54. *Young v. United Parcel Serv., Inc.*, 575 U.S. ___, 135 S. Ct. 1338, 1355 (2015).

55. *Id.*

56. *Id.*

57. The test was developed in the case of *McDonnell Douglas v. Green*, 411 U.S. 792, 801 (1973).

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

59. *Id.* at 1355.

60. The Court made clear that the prima facie case does not require a plaintiff to

The Court indicated that once an employee has made a prima facie case of failure to accommodate, the employer can then seek to justify its refusal to accommodate with a legitimate, nondiscriminatory reason for denying the accommodation.⁶¹ Although the Court did not indicate what might constitute such a reason, it made clear what type of showing would not meet that burden: “But, consistent with the Act’s basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those (‘similar in their ability or inability to work’) whom the employer accommodates.”⁶² The Court seems to have reasoned that such an insubstantial justification for different treatment of pregnant women would not have the effect of rebutting the inference of intentional discrimination raised by the plaintiff’s prima facie case.

The *Young* Court next addressed the “pretext” stage of the *McDonnell Douglas* proof scheme. The majority of the Court indicated that a plaintiff can establish that the employer’s asserted reasons are pretextual and “may reach a jury on this issue” by making the following showing: “that the employer’s policies impose a significant burden on pregnant workers, and that the employer’s ‘legitimate, nondiscriminatory’ reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination.”⁶³ The Court noted that a plaintiff can establish the existence of such a significant burden by demonstrating, as alleged by *Young*, that the employer accommodates a large percentage of non-

establish “that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways.” *Id.* at 1354. The Court may have been suggesting that *Young* was similarly situated to each of those groups of employees by its question: “when the employer accommodated so many, could it not accommodate pregnant women as well?” *Id.* at 1355. In any event, the Court’s failure to make clear which of the three categories of other employees that UPS accommodated were similarly situated to *Young* is unfortunate, because the Court’s failure to do so is likely to generate confusion in the lower courts, particularly in view of the prior holdings of a number of courts that employees injured on-the-job and employees who qualify as disabled under the ADA are not similarly situated to pregnant women for purposes of the prima facie case. Justice Alito, in his opinion concurring in the judgment, seems to have taken the position that while employees injured on the job and employees who were disabled under the ADA were not similarly situated to pregnant women, employees who lost their DOT certification might be, such that UPS may not have had a “neutral,” that is, non-discriminatory, business reason for treating them more favorably than it treated pregnant women. *See id.* at 1360-61 (Alito, J., concurring in the judgment).

61. *Id.* at 1354.

62. *Id.*

63. *Id.* at 1354-55.

pregnant workers while failing to accommodate a large percentage of pregnant workers.⁶⁴ The Court noted that the existence of multiple policies of accommodating non-pregnant workers, as UPS had, might suggest that the reasons given for failing to accommodate pregnant workers were not sufficiently strong, allowing a jury to conclude that the employer had engaged in intentional discrimination against those pregnant women.⁶⁵ The reasoning of the Court majority seems to be that if the employer generally accommodates employees who are not pregnant, while refusing to extend accommodations to pregnant women without a strong reason, then the inference can be drawn that the employer's policies are motivated by an intent to discriminate on the basis of pregnancy. Or, as the Court put it: "why, when the employer accommodated so many, could it not accommodate pregnant women as well?"⁶⁶

Justice Scalia, in a dissent joined by Justices Thomas and Kennedy, harshly criticized the majority for not adopting his interpretation of the statute—he noted that the majority "refuses to adopt the reading I propose."⁶⁷ He proclaimed the majority's interpretation of the statutory language to be "as dubious in principle as it is senseless in practice" and indicated that the majority reached this interpretation by "a couple of waves of the Supreme Wand to produce the desired result"—he used to term "Poof!" three times in his opinion.⁶⁸ Justice Scalia's most reasoned challenge to the Court's decision occurred when he indicated that the Court had confused the disparate treatment and the disparate impact theories.⁶⁹ He suggested that the Court's opinion used the notions of the effects of an employer's practice and the lack of justification, borrowed from disparate impact analysis, and imported them into disparate treatment challenges to pregnancy discrimination. He asserted that "[t]oday's decision can thus serve only one purpose: allowing claims that belong under Title VII's disparate-impact provisions to be brought under its disparate-treatment provisions instead."⁷⁰

64. *Id.*

65. *Id.*

66. *Id.* at 1355.

67. *Id.* at 1363 (Scalia, J., dissenting).

68. *Id.* at 1361, 1364-65 (Scalia, J., dissenting).

69. Justice Scalia's challenge on this point may be more reasoned, but, as indicated below, it is still wrong. And it is no less disrespectful than the rest of his opinion. He introduced this part of his opinion with the phrase, "The fun does not stop there," and indicated that the Court's opinion "proceeds to bungle the dichotomy between claims of disparate treatment and claims of disparate impact"; he pronounced the majority's rule as "[d]eliciously incoherent." *Id.* at 1365 (Scalia, J., dissenting).

70. *Id.* at 1365-66 (Scalia, J., dissenting).

But Justice Scalia has mistaken both the intent and the effect of the Court's decision. Although it is true that the factors relied on by the majority to establish a claim under the standard that it articulated—the relative effect of the employer's policies on pregnant women and other persons and its justifications for the policies—might well be used to establish a claim of disparate impact challenging the failure to accommodate pregnant women,⁷¹ the majority made clear that these factors are relevant under the standard it articulated only to the issue of whether the plaintiff had made out a case of intentional discrimination.⁷² Accordingly, under the standard articulated by the majority, if the plaintiff were to make the showing required by the Court's standard, but the decision maker were still not convinced that the employer's motive was discriminatory, the plaintiff would presumably lose on her claim of discrimination. Nor is it unusual for the same facts and evidence to raise claims of both disparate treatment and disparate impact. The Court recognized in the very case in which it first clearly articulated the difference between the disparate treatment and disparate impact theories that “[e]ither theory may, of course, be applied to a particular set of facts.”⁷³

The *Young* Court's clarification that the disparate treatment challenge asserted by the plaintiff in that case will ultimately require the decision maker to determine that the employer acted with discriminatory intent in its different treatment of the plaintiff as compared to similarly situated employees reveals the limitations of the disparate treatment theory for women seeking accommodation of pregnancy and childbirth. If the employer engages in such different treatment, but the decision maker is not convinced that the employer had discriminatory motive, then the plaintiff's disparate treatment claim will fail. Similarly, the very nature of a disparate treatment claim requires different treatment, such that an employer's action of failing to accommodate pregnancy can be challenged under that theory only if the employer does accommodate other employees. The disparate impact theory, on the other hand, can be asserted to challenge an employer's failure to accommodate pregnancy and childbirth even in the absence of discriminatory intent or different treatment of other employees.

71. See *infra* text accompanying notes 138 – 251 (explaining how a disparate impact claim challenging failure to accommodate pregnant women might be established).

72. *Young*, 135 S. Ct. at 1355 (“Moreover, the continued focus on whether the plaintiff has introduced sufficient evidence to give rise to an inference of *intentional* discrimination avoids confusing the disparate-treatment and disparate-impact doctrines.”) (emphasis in original).

73. *Int'l Bd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

IV. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION'S POSITION ON ACCOMMODATION OF PREGNANCY

In reaching its decision in *Young v. United Parcel Service, Inc.*, the Court majority refused to give significant weight to the more recent pronouncement of the EEOC on the scope of the requirement that employers provide accommodations to pregnant women when they provide accommodations to other employees. The majority indicated that it would not “rely significantly” on the EEOC’s guidance because that guidance was issued recently, after the Court’s grant of certiorari, and because the position taken in the guidance was addressing an issue on which its prior guidelines were silent and was contrary to a position taken earlier by the United States government—not the EEOC. The majority also indicated that the EEOC had not explained the basis for its most recent guidance.⁷⁴

The EEOC’s Enforcement Guidance on Pregnancy and Related Issues was initially issued on July 14, 2014, over the dissents of two members of the Commission, who objected to the guidance for some of the same reasons noted by the *Young* majority for its refusal to defer to that guidance. Among other objections to that guidance, the dissenting members suggested that the Commission had acted improperly, or at least unwisely, in issuing guidance while some of the issues addressed in the guidance were pending before the Supreme Court; one dissenting member suggested that the Commission should not have acted “to get out in front of the Court,”⁷⁵ while the other expressed her hope that “this is the last time this Commission elects to jump ahead of the U.S. Supreme Court.”⁷⁶ This is a peculiar criticism by members of the agency charged with the enforcement of Title VII—to suggest that the agency should let the Supreme Court have the first opportunity to interpret a statute; one might have thought that the Court might be interested in the views of that expert agency in reaching its conclusions on the meaning of the statute. It is also peculiar to suggest that the Commission has somehow acted precipitously in rushing its guidelines to press before the Court is able to act—the administrative equivalent to trying to beat the train at the crossing gates—when the guidance was the result of an ongoing process started more than two years previously.⁷⁷ One might have thought to fault the agency for

74. *Young*, 135 S. Ct. at 1351-52.

75. Victoria A. Lipnic, *Statement of the Honorable Victoria A. Lipnic, Commissioner, U.S. Equal Employment Opportunity Commission, Enforcement Guidance on Pregnancy Discrimination and Related Issues* (July 14, 2014).

76. Constance S. Barker, *Public Statement on Issuance of EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues* (July 14, 2014).

77. Chai R. Feldblum, *Statement on Approval of the Enforcement Guidance on Pregnancy Discrimination and Related Issues* (July 14, 2014) (setting forth in

2015]

DISPARATE IMPACT AND PREGNANCY

125

moving too slowly, rather than for moving too fast.

The major substantive criticism by the dissenting members of the EEOC appears to be that the guidance contains a novel interpretation of the Pregnancy Discrimination Act of 1978. Commissioner Barker identified what she called a “fatal flaw” of the guidance—that it “offered a novel interpretation of the PDA for which there was no legal basis.”⁷⁸ She went on to identify that “novel interpretation” as the fact that the guidance “states that the PDA requires employers to give reasonable accommodations to employees who have work restrictions because of their pregnancy. Thus, the Guidance gives even those who do not have a disability as defined by the Act, as amended, the same right to reasonable accommodation as individuals with disabilities.”⁷⁹ Commissioner Lipnic declared that the guidance “adopts new and dramatic substantive changes to the law.” She identified one of those changes in the following way:

The Guidance takes the novel position that under the language of the PDA, a pregnant worker is, as a practical matter, entitled to “reasonable accommodation” as that term is defined by the Americans with Disabilities Act (“ADA”). No federal Court of Appeals has adopted this position; indeed, those which have addressed the question have rejected it. Moreover, the Pregnancy Guidance states that non-pregnant workers receiving such reasonable accommodations are the appropriate comparators for purposes of PDA compliance. This, too, is a position rejected by the majority of courts which have considered it. These positions represent a dramatic departure from the Commission’s prior position, and perhaps more important, contravene the statutory language of the PDA. They do so without sound legal basis or rigorous analysis, and no explanation for the reversal of long-standing Commission policy.⁸⁰

While it is certainly true that the Commission’s position on the proper interpretation of the Pregnancy Discrimination Act has not been adopted by

Appendix A to her statement the timeline for consideration of the issue addressed in the guidance, beginning with the February 8, 2012 announcement of a public meeting on the subject of pregnancy discrimination). Commissioner Feldblum also took issue with the suggestion of the dissenting commissioners that the Commission should have waited for the Court to act: “Under our basic constitutional structure, Congress is responsible for passing a law; an agency that executes the law is responsible for issuing guidance to advise those with rights and responsibilities under the law; and courts, including the Supreme Court, have the final authority and responsibility to interpret the works of a statute as applicable in a particular case.”

78. Barker, *supra* note 76.

79. *Id.*

80. Lipnic, *supra* note 75.

126 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

the courts generally, it is not clear that the Commission's current position is inconsistent with its prior approach to this issue, such that it can accurately be said that the Commission has reversed any "long-standing" policy.

First, the dissenting commissioners are not entirely accurate in characterizing the guidance as interpreting the Pregnancy Discrimination Act as imposing on employers an independent duty of "reasonable accommodation," as that term is defined under the Americans With Disabilities Act, with respect to pregnant women. Instead, what the guidance does say is that if the employer treats disabled employees in a certain way, it must extend that same treatment to pregnant women whose pregnancies impose obstacles to their ability to work similar to those experienced by the disabled workers.⁸¹ The Commission's interpretation is demonstrated by its Example 10 in the guidance:

An employer has a policy or practice of providing light duty, subject to availability, for any employee who cannot perform one or more job duties for up to 90 days due to injury, illness, or a condition that would be a disability under the ADA. An employee requests a light duty assignment for a 20-pound lifting restriction related to her pregnancy. The employer denies the light duty request, claiming that pregnancy itself does not constitute an injury, illness, or disability, and that the employee has not provided any evidence that the restriction is the result of a pregnancy-related impairment that constitutes a disability under the ADA. The employer has violated the PDA because the employer's policy treats pregnant employees differently from other employees similar in their ability or inability to work.⁸²

Accordingly, the Commission's position is not that reasonable accommodation of pregnancy is independently required, but that an employer who provides reasonable accommodation to disabled workers is required to provide similar accommodation to similarly situated pregnant workers. And, because employers are legally required to provide reasonable accommodation to disabled workers, the dissenting commissioners are not inaccurate in suggesting that pregnant workers may also as a practical matter be entitled to reasonable accommodation, not because of the Americans With Disabilities Act, but because of the Pregnancy Discrimination Act's dictate that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits

81. U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.003, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES (July 14, 2014).

82. *Id.*

2015]

DISPARATE IMPACT AND PREGNANCY

127

under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”⁸³

The question is whether the Commission’s position in the guidance—that pregnant women are entitled to the accommodations that employers provide for disabled workers similarly situated with respect to their ability or inability to work—is inconsistent with its prior positions on that issue. While it is difficult to judge the assertions of inconsistency by the dissenting commissioners when they point to no prior statements by the Commission as evidence of its prior position, a review of the Commission’s prior formal statements does not suggest any inconsistency.

While it is true that the General Counsel for the EEOC had apparently taken the position in a 1966 opinion letter that the Commission would not compare “an employer’s treatment of illness or injury with his treatment of maternity since maternity is a temporary condition unique to the female sex and more or less to be anticipated during the working life of most women employees,”⁸⁴ the Commission apparently rejected, or abandoned, that view when it issued regulations in 1972 providing in part that “[d]isabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery there from are, for all job-related purposes, temporary disabilities and should be treated as such”⁸⁵ Although the Supreme Court in *General Electric Co. v. Gilbert*⁸⁶ refused to rely on these regulations in connection with its conclusion that discrimination on the basis of pregnancy was not unlawful sex discrimination, the Court’s conclusion was rejected by Congress when it enacted the Pregnancy Discrimination Act two years later.⁸⁷

The Commission published in the Federal Register on April 20, 1979,

83. Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2 (2015).

84. The Supreme Court in *General Electric Co. v. Gilbert*, 429 U.S. 125, 142 (1976), relied on this informal opinion letter, which generally is not viewed as reflecting the formal views of the Commission, to reject the EEOC’s later formal regulation equating disabilities caused by pregnancy with other temporary disabilities.

85. Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.10(b) (1979). See 78 Fed. Reg. 6836 (April 5, 1972).

86. 429 U.S. 125 (1976).

87. The legislative history of the Pregnancy Discrimination Act contains several references to the EEOC’s regulations and suggests that the Court was wrong to reject those regulations. See, e.g., Legislative History of the Pregnancy Discrimination Act of 1978, Prepared for the Committee on Labor and Human Resources, United States Senate 2 (U.S. Government Printing Office June 1980) (statement of Senator Williams) (noting that Court rejected the EEOC guidelines, promulgated by the “agency which the Congress, in passing Title VII, vested with primary responsibility for implementing the law” in a “dramatic departure” from its previous policy of giving those guidelines great deference).

128 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

within six months of the effective date of the Pregnancy Discrimination Act, a series of questions and answers on the Pregnancy Discrimination Act. One of those questions and answers provides as follows:

Q: If, for pregnancy-related reasons, an employee is unable to perform the functions of her job, does the employer have to provide her an alternative job?

A: An employer is required to treat an employee temporarily unable to perform the functions of her job because of her pregnancy-related condition in the same manner as it treats other temporarily disabled employees, whether by providing modified tasks, alternative assignments, disability leaves, leaves without pay, etc. For example, a woman's primary job function may be the operation of a machine, and, incidental to that function, she may carry materials to and from the machine. If other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.⁸⁸

This exchange would suggest that the Commission took a position in the very early days of the Pregnancy Discrimination Act that employers must treat pregnant women in the same manner as they treat similarly situated disabled employees, including by providing accommodations for lifting and other job functions to pregnant women that they provide to other disabled employees. Of course, there is no reference of this exchange to employees who meet the definition of "disability" in the Americans With Disabilities Act because this exchange was published more than ten years before enactment of the ADA.

The Commission also seems to have taken the position that women disabled by pregnancy must be treated in the same manner as other disabled workers in its more informal pronouncements on the meaning of the Pregnancy Discrimination Act. In a fact sheet on pregnancy discrimination contained on the EEOC's website, which indicates that it was last modified on March 19, 2011, more than three years before the EEOC issued its most recent guidance and almost a year before the Commission began the process that culminated in the guidance, the Commission took the position that "[i]f an employee is temporarily unable to perform her job due to pregnancy, the employer must treat her the same as any other temporarily disabled employee; for example, by providing

88. Appendix to Part 1604 – Questions and Answers on the Pregnancy Discrimination Act, PUB. L., NO. 95-555, § 1604, 92 Stat. 2076 (1978), 44 Fed. Reg. 23805 (April 20, 1979).

light duty, modified tasks, alternative assignments, disability leave, or leave without pay.”⁸⁹ That the Commission is not suggesting that this obligation is imposed on employers only if the woman affected by pregnancy would independently meet the definition of disability under the ADA is made clear in the next paragraph of the fact sheet, in which the Commission discussed the additional duty imposed on employers to provide reasonable accommodations to employees who have a disability related to pregnancy that meets the definition of disability under the ADA.⁹⁰ As an example of such an accommodation, the fact sheet noted that “an employer may be required to provide modified duties for an employee with a 20-pound lifting restriction stemming from pregnancy related sciatica, absent undue hardship.”⁹¹ The structure of the fact sheet, as well as the use of the term “additionally” to introduce the paragraph on pregnancy-related disabilities that are covered under the ADA, makes clear the Commission’s position that accommodation, including light duty, is required of employers even with respect to pregnant woman who do not meet the definition of “disability” under the ADA. This fact sheet would seem to refute the statement of the dissenting commissioners that the 2014 guidance constitutes a break from any contrary “long-standing” policy on the part of the EEOC with respect to the duty to accommodate pregnant women.

Nor can the EEOC’s use of the phrase “any other temporarily disabled employee” in the March 19, 2011 fact sheet have been intended to refer only to employees who do not meet the definition of “disability” under the ADA, so as to preclude a claim by a temporarily disabled pregnant woman that she was entitled to be treated in the same manner as an employee that does meet that definition. Contemporaneously with the publication of this fact sheet, the EEOC issued formal regulations interpreting the term “disability” under the Americans With Disabilities Act, as amended by the Americans With Disabilities Act Amendments Act of 2008, to include impairments that are temporary in nature, including impairments expected to last up to six months.⁹² Accordingly, the position of the EEOC in its fact

89. U.S. Equal Employment Opportunity Commission, *Fact Sheet on Pregnancy Discrimination* (March 19, 2011), <http://www.eeoc.gov/eeoc/publications/index.cfm> [hereinafter *Fact Sheet on Pregnancy Discrimination*].

90. *Id.*

91. *Id.*

92. See Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2 (j)(1)(ix) (March 25, 2011) (“The effects of an impairment lasting or expected to last fewer than six months can be substantially limiting within the meaning of this section”). The Commission also indicated when it promulgated those regulations that its “long-standing position” had been that if an impairment was expected to substantially limit a major life activity for at least several months, it could be a disability under the Act. 76 Fed. Reg. 16978, 16982

130 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

sheet would seem to suggest that the EEOC believes, and believed before the issuance of its most recent guidance, that employers who provide accommodations to temporarily disabled employees, regardless of whether those employees are statutorily entitled to reasonable accommodation under the ADA, are also required to provide accommodation to pregnant women who have similar restrictions on their ability to work as those other temporarily disabled employees. The EEOC's use of the word "any" to modify temporarily disabled employees would seem to refute the contention that employers can escape the duty to accommodate pregnant women as long as they also refuse to accommodate at least one other category of employees with a temporary disability, such as employees injured off the job. In any event, the fact sheet gives no hint that the EEOC considers the source of the injury to be relevant in any way to the duty to accommodate temporarily disabled employees.

Accordingly, the criticisms of the guidance by the dissenting members of the EEOC are largely without merit. The *Young* Court majority's criticism that the EEOC has now taken a position inconsistent with the view previously taken by the government is also suspect; one might think that there was a difference between the deference given to a position that the government takes as a litigant, in defending against challenges to its practices as an employer, and the position taken by the expert agency charged with the enforcement of a statute. In addition, although the Court is accurate in suggesting that the EEOC has perhaps gone further in addressing an issue that it had not previously addressed, it is not clear why the EEOC should be faulted for attempting to address an issue of statutory construction on which its previous guidance and regulations were not entirely clear.

V. WHAT THE PREGNANCY DISCRIMINATION ACT SAYS ABOUT THE COMPARATIVE TREATMENT OF WOMEN AFFECTED BY PREGNANCY

The language of the Pregnancy Discrimination Act is consistent with the position of the EEOC that employers who provide accommodation to temporarily disabled employees, including but not limited to employees

(March 25, 2011). The Commission in its interpretative guidance issued at the same time as the regulations gave the following example of a temporarily disabled employee who would be entitled to the protections of the Act: "if an individual has a back impairment that results in a 20-pound lifting restriction that lasts for several months, he is substantially limited in the major life activity of lifting, and therefore covered under the first prong of the definition of disability." Interpretive Guidance on Title I of the Americans With Disabilities Act, 29 C.F.R. 1630 App. (2015). The EEOC's regulation has been upheld by the United States Court of Appeals for the Fourth Circuit in *Summers v. Altarum Instrument Corp.*, 740 F.3d 325 (4th Cir. 2014).

2015]

DISPARATE IMPACT AND PREGNANCY

131

with temporary disabilities protected by the Americans With Disabilities Act, are also required to provide those accommodations to women temporarily disabled by pregnancy. After all, the Act, which, in addition to making clear that discrimination on the basis of pregnancy is sex discrimination, also specifies that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.” Temporarily disabled workers, regardless of whether they qualify as an “individual with a disability” under the ADA, would appear to be in the category of persons “not so affected but similar in their ability or inability to work,” as long as the effects of their temporary disabilities affected their ability to work ways similar to the ways in which pregnant women are affected in their ability to work.

Of course, the term “other persons” in the statute is not modified by an adjective, in that the statutory language does not say either “any other person” or “all other persons,” so it does not directly address the question of whether employers are required to extend to pregnant women the treatment that they provide to any similarly situated person or whether they are required to extend to pregnant women only the treatment that they provide to all similarly situated persons. In the oral arguments for *Young v. United Parcel Service, Inc.*, Justice Scalia referred to the argument that employers are required to extend to pregnant women the treatment that they provide to any similarly situated person as “most favored nation” treatment,⁹³ while Justice Ginsburg referred to the argument that employers are required to extend protection to pregnant women that they extend only to all similarly situated persons as “least favored nation” treatment.⁹⁴

Given the ambiguity in the statutory language, the next question is whether the meaning of this ambiguous language might be resolved by the legislative history of the statute. Even though the legislative history does not definitively resolve this issue, that legislative history is helpful in determining the intent of Congress in enacting this statute. The legislative history of the statute appears to be more consistent with, in the language used by Justices Scalia and Ginsburg in the *Young v. United Parcel Service, Inc.* oral argument, granting pregnant women “most favored nation” status rather than “least favored nation” status.

Because the Pregnancy Discrimination Act was a direct response to the

93. Transcript of Oral Argument, *Young v. United Parcel Serv., Inc.*, No. 12-1226, p. 5, lines 19-20, p. 13, lines 22-25, p. 16, lines 15-18 (Scalia, J.). Justice Breyer also used the phrase “most favored nation” in his questions during oral argument. *Id.* at p. 7, lines 7-8, p. 16, lines 21-22 (Breyer, J.).

94. *Id.* at p. 46, lines 7-10 (Ginsburg, J.).

Court's decision in *Gilbert*, the focus of Congress in enacting the statute appears to have been the holding of the Court in the context of the factual situation raised by that case—whether women affected by pregnancy and childbirth could be excluded from a disability program for non-occupational conditions. Accordingly, in several places in the legislative history, members of the House of Representatives and the Senate did indicate that employers who provide a disability program “must treat disability due to pregnancy or any related medical conditions the same as all other nonwork-related disability with respect to the payment of benefits and to the provision of leave policies.”⁹⁵ The strongest language in favor of such an approach indicated that the Act “would not require extending coverage beyond job-related disability if that is all the existing coverage provides.”⁹⁶ Although this language does not, of course, directly address the question of whether employers are required to provide accommodations to pregnant women if they provide such accommodations to employees suffering from any disability or only other non-work-related disabilities, this language at least provides some support for the position that members of Congress were suggesting that they thought that the proper comparator for women affected by pregnancy was another employee affected by some other type of non-work-related disability.

The legislative history of the Pregnancy Discrimination Act, however, provides more evidence that members of Congress thought that the proper comparator for women affected by pregnancy was any disabled worker affected in the same or similar ways as such women, regardless of whether the disability of that other worker was work-related or non-work-related. The Senate Report on the bill that would become the Pregnancy

95. Legislative History of the Pregnancy Discrimination Act of 1978, Prepared for the Committee on Labor and Human Resources, United States Senate 8 (U.S. Government Printing Office June 1980) (statement of Senator Brooke); *id.* at 125 (“It simply requires that if coverage or benefits are given that any disability due to pregnancy must be treated the same as any other non-work-related disability.”) (statement of Senator Biden); *id.* at 133 (“it requires those employers who do provide disability coverage to treat pregnancy-related disabilities the same as any other non-work related disability with regard to benefits and leave policies”) (statement of Senator Culver); *id.* at 170 (“Providing pregnancy disability benefits as a required part of a non-work-related disability packages encourages working women to have children.”) (statement of Representative Sarasin). Similar statements are contained in the Fact Sheet on S. 995. *Id.* at 22 (“It will simply require employers who do provide a disability plan to treat disability due to pregnancy or a related medical condition the same as any other non-work-related disability with respect to benefits and leave policies.”).

96. Legislative History of the Pregnancy Discrimination Act of 1978, Prepared for the Committee on Labor and Human Resources, United States Senate 168 (U.S. Government Printing Office June 1980) (statement of Senator Sarasin).

2015]

DISPARATE IMPACT AND PREGNANCY

133

Discrimination Act stated broadly that:

By defining sex discrimination to include discrimination against pregnant women, the bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability to other conditions. Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees; and when they are not able to work for medical reasons, they must be accorded the same rights, leave privileges and other benefits, as other workers who are disabled from working.⁹⁷

The Report went on to indicate, with respect to the issue of disability benefits, that the bill would prohibit employers from “treating pregnancy and childbirth differently from other causes of disability.”⁹⁸

This language clearly suggests not only that it is the functional aspects of the disabilities of pregnant women and other disabled workers that is the proper basis for comparison, but that women whose functional ability to work is impaired by their pregnancy or related conditions must be provided the same rights and benefits as other disabled workers. Other statements made while the Act was being considered by the Senate also indicate that the provisions of the Act go beyond the issue of fringe benefits to require that employers treat women affected by pregnancy in the same manner with respect to employment conditions generally as they treat other conditions that cause inability to work. Senator Jarvis indicated that the “bill would prohibit as sex discrimination any personnel practice, fringe benefit program or other employment related action which treats pregnancy or pregnancy-related conditions differently than other conditions which also cause inability to work for limited periods.”⁹⁹ Senator Stafford indicated that “[w]hen an employer treats pregnancy, childbirth, and related conditions the same as he treats any other disabling condition, then he has complied with the bill.”¹⁰⁰

Similarly, the House Report on the bill also emphasized that the

97. S. REP. NO. 95-331, reproduced in Legislative History of the Pregnancy Discrimination Act of 1978, Prepared for the Committee on Labor and Human Resources, United States Senate 41 (U.S. Government Printing Office June 1980).

98. *Id.*

99. Legislative History of the Pregnancy Discrimination Act of 1978, Prepared for the Committee on Labor and Human Resources, United States Senate 67 (U.S. Government Printing Office June 1980) (statement of Senator Jarvis).

100. *Id.* at 83 (statement of Senator Stafford).

134 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

comparative treatment that the bill would require of employers focuses on the ability or inability of pregnant women to work, not on other factors, such as the source or cause of that functional inability. That report, in the section on “Basic Principles,” provided:

The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work. The “same treatment” may include employer practices of transferring workers to lighter assignments, requiring employees to be examined by company doctors or other practices, as long as the requirements and benefits are administered equally for all workers in terms of their actual ability to perform work.¹⁰¹

The House Report went on to specify that the bill would prohibit employers from treating pregnancy and related medical conditions “in a manner different from their treatment of other disabilities” and that the bill would require such women to “be provided the same benefits as those provided other disabled workers.”¹⁰² Certainly there is no suggestion in this language that some disabilities are entitled to more favored status with respect to employment than others.

This understanding of the bill is echoed in the discussion of the bill in the House of Representatives. Representative Green indicated that “this legislation, which requires that pregnant women be treated the same as other employees on the basis of their ability or inability to work—will help provide equal employment opportunities for millions of women—the goal of Title VII of the Civil Rights Act of 1964.”¹⁰³ Representative Akaka described the bill as requiring that “employers treat disabilities arising from pregnancy just as any other disability.”¹⁰⁴

Other aspects of the legislative history also support a reading of the statutory language that requires women affected by pregnancy to be treated like employers treat other employees who have functional limitations on their ability to work, regardless of the source of that limitation, such as whether it has a work-related cause, is considered a “voluntary” condition,

101. H. R. REP. NO. 95-948, reproduced in Legislative History of the Pregnancy Discrimination Act of 1978, Prepared for the Committee on Labor and Human Resources, United States Senate 150-51 (U.S. Government Printing Office June 1980).

102. *Id.* at 151.

103. Legislative History of the Pregnancy Discrimination Act of 1978, Prepared for the Committee on Labor and Human Resources, United States Senate 172 (U.S. Government Printing Office June 1980) (statement of Representative Green).

104. Legislative History of the Pregnancy Discrimination Act of 1978, Prepared for the Committee on Labor and Human Resources, United States Senate 177 (U.S. Government Printing Office June 1980) (statement of Representative Akaka).

2015]

DISPARATE IMPACT AND PREGNANCY

135

or is based on another “neutral” distinction that would operate to the disadvantage of women affected by pregnancy. The Senate sponsor of the bill indicated that “[t]he entire thrust behind this legislation . . . is to guarantee women the basic right to participate fully and equally in the work force, without denying them the fundamental right to full participation in family life.”¹⁰⁵ Other members of Congress who spoke in support of the bill indicated that it would “protect the income of millions of working women to the benefit of their families”¹⁰⁶ and that it would “facilitate a woman’s choice to conceive and bear children without facing undue economic hardships.”¹⁰⁷ If women affected by pregnancy can be treated worse than other employees simply because of the source of their impairment or other seemingly neutral classification and thereby be deprived of opportunities to maintain their employment and financial benefits, those results would appear to be inconsistent with the stated purposes of the legislation.

VI. THE VIABILITY OF DISPARATE IMPACT CLAIMS BASED ON PREGNANCY

Even before Congress overruled the Court’s conclusion in *Gilbert* that intentional discrimination on the basis of pregnancy was not sex discrimination, the Court had recognized that disparate impact claims could be maintained with respect to classifications based on pregnancy. In a decision issued a year after the *Gilbert* decision, the Court in *Nashville Gas Co. v. Satty*¹⁰⁸ held that the employer’s policy of denying accumulated seniority to women returning from pregnancy leave violated Title VII because, even though “neutral in its treatment of male and female employees,”¹⁰⁹ the employer’s practice imposed a substantial burden on women and not men with respect to their employment opportunities that had not been justified by business necessity.¹¹⁰

The question has been raised as to whether Congress in adopting the

105. Legislative History of the Pregnancy Discrimination Act of 1978, Prepared for the Committee on Labor and Human Resources, United States Senate 117 (U.S. Government Printing Office June 1980) (statement of Senator Williams).

106. Legislative History of the Pregnancy Discrimination Act of 1978, Prepared for the Committee on Labor and Human Resources, United States Senate 177 (U.S. Government Printing Office June 1980) (statement of Representative Quie).

107. Legislative History of the Pregnancy Discrimination Act of 1978, Prepared for the Committee on Labor and Human Resources, United States Senate 178 (U.S. Government Printing Office June 1980) (statement of Senator Corrado).

108. 434 U.S. 136 (1977).

109. *Id.* at 140.

110. *Id.* at 141-43.

136 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

Pregnancy Discrimination Act eliminated the possibility of challenging classifications based on pregnancy under the disparate impact theory. This claim was made by the dissenting justices in the *Guerra* case, who asserted in a footnote that the statutory language requiring that women affected by pregnancy be treated “the same” as other workers precluded not only the California statute requiring “preferential” treatment of such women but also precluded claims of disparate impact based on pregnancy:

The same clear language preventing preferential treatment based on pregnancy forecloses respondents’ argument that the California provision can be upheld as a legislative response to leave policies that have a disparate impact on pregnant workers. Whatever remedies Title VII would otherwise provide for victims of disparate impact, Congress expressly ordered pregnancy to be treated in the same manner as other disabilities.¹¹¹

The majority of the Court in *Guerra* found it unnecessary to address the issue of whether the California statute “could be upheld as a legislative response to leave policies that have a disparate impact on pregnant workers.”¹¹² But the rest of the majority’s decision is not agnostic on the continuing viability of a disparate impact claim based on pregnancy. Indeed, when the majority discussed the effect of the Pregnancy Discrimination Act on Title VII, it expressly noted the purpose of Title VII is to “achieve equality of opportunities and remove barriers,” citing to the Court’s decision in *Griggs v. Duke Power Co.*,¹¹³ the seminal disparate impact case, and noted that “[r]ather than limiting existing Title VII

111. Cal. Fed. Sav. & Loan Ass’n v. Guerra, 479 U.S. 272, 298 n.1 (1987) (White, J., dissenting). Curiously, elsewhere in the dissent, Justice White emphasized legislative history indicating that the Pregnancy Discrimination Act “did not mark a departure from Title VII principles.” *Id.* at 299. Justice White took the same approach in his concurring opinion in the *Johnson Controls* decision, discussed in text accompanying notes 33 to 40, *supra*. There, he stressed that the legislative history of the Pregnancy Discrimination Act indicated that “the purpose of the PDA was simply to make the treatment of pregnancy consistent with general Title VII principles” and that distinctions based on pregnancy “will be subject to the same scrutiny on the same terms as other acts of sex discrimination.” *UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 218-19 (1991) (White, J., concurring in part and concurring in the judgment) (emphasis in original). Reading the Pregnancy Discrimination Act as eliminating claims of disparate impact based on pregnancy, however, would constitute a marked departure from normal Title VII principles and would not treat claims of pregnancy discrimination in the same manner as other claims of sex discrimination.

112. *Guerra*, 479 U.S. at 292 n.32.

113. 401 U.S. 424, 429-30 (1971).

2015]

DISPARATE IMPACT AND PREGNANCY

137

principles and objectives, the PDA extends them to cover pregnancy.”¹¹⁴ The majority’s analysis seems to directly refute the claim by the dissent that the Pregnancy Discrimination Act was intended to cut back on the general principles and theories of discrimination under Title VII in general or the disparate impact theory in particular.

For there to be any validity to the *Guerra* dissent’s suggestion that the Pregnancy Discrimination Act eliminated disparate impact claims based on pregnancy, it would be necessary to find that Congress in enacting the Pregnancy Discrimination Act intended not only to overrule *Gilbert*, but also that it intended to overrule *Satty*, which relied on the disparate impact theory to invalidate the employer’s policy of denying accumulated seniority to women returning from maternity leave. But there is absolutely no support in the Pregnancy Discrimination Act for such a conclusion. While members of Congress made frequent and unfavorable comments about the Supreme Court’s decision in *Gilbert*, they barely mentioned the Court’s decision in *Satty*. One of the few references in the legislative history to the *Satty* case, contained in the House Report,¹¹⁵ makes clear the understanding that *Satty* was applying the disparate impact theory to a claim of pregnancy discrimination. Although that reference contains some criticism of the Court’s analysis in that case—in that it suggested that the distinction made in *Satty* between nonactionable “benefits” and actionable “burdens” would be difficult to apply—it contained no indication that Congress desired to overrule that case. Instead, what the House Report says is that enactment of the Pregnancy Discrimination Act “would eliminate the need in most instances to rely on the impact approach, and thus would obviate the difficulties in applying the distinctions created in *Satty*.”¹¹⁶ This language clearly indicates that disparate impact claims concerning pregnancy would survive the enactment of the Pregnancy Discrimination Act and such a claim might still be relevant in some instances in which a claim of explicit intentional discrimination might not be cognizable.

Congress’ consideration of the Conference Report reconciling the different versions of the Pregnancy Discrimination Act passed by the Senate and the House makes even more explicit that the Court’s decision in *Satty* survives enactment of that statute. Senator Williams, in explaining

114. *Guerra*, 479 U.S. at 288-89.

115. H. R. REP. NO. 95-948, reproduced in Legislative History of the Pregnancy Discrimination Act of 1978, Prepared for the Committee on Labor and Human Resources, United States Senate 152 (U.S. Government Printing Office June 1980).

116. *Id.* at 149, 154 (noting that “[m]any, if not all” employment policies not involving fringe benefits, including “refusing to hire pregnant women, firing women who became pregnant, denying seniority, and forcing women to take mandatory maternity leave” are “presumably invalid under present law as interpreted in *Satty*”).

the Conference Report, noted that the *Satty* Court had invalidated the denial of seniority to women taking leaves based on pregnancy under Title VII and indicated that “[t]his legislation, then, will insure that favorable decisions such as the decision with regard to seniority in the *Satty* case, will be preserved, as well as insuring that other forms of sex discrimination against women affected by pregnancy will not be permitted.”¹¹⁷

Recent decisions by the Supreme Court also indicate that disparate impact claims based on pregnancy continue to have viability. Although the Court majority in *Young v. United Parcel Service, Inc.* made it clear that it was addressing only the disparate treatment theory in that case, the Court noted that Young had not brought a disparate impact claim. The Court did not suggest that she could not have brought such a claim nor that there was any reason why the disparate impact theory, which the Court noted was cognizable under employment discrimination law,¹¹⁸ would not apply to pregnancy discrimination claims. Even Justice Scalia, not a friend to the disparate impact theory,¹¹⁹ seemed to acknowledge in his dissent in *Young* that disparate impact claims based on pregnancy could be asserted.¹²⁰ Justice Kennedy in his separate dissent went even further, expressly noting that the Pregnancy Discrimination Act “forbids not only disparate treatment but also disparate impact, the latter of which prohibits ‘practices that are not intended to discriminate, but nonetheless have a disproportionate

117. Legislative History of the Pregnancy Discrimination Act of 1978, Prepared for the Committee on Labor and Human Resources, United States Senate 201 (U.S. Government Printing Office June 1980) (statement of Senator Williams).

118. *Young v. United Parcel Serv., Inc.*, 575 U.S. ___, 135 S. Ct. 1338, 1345 (2015).

119. In addition to challenging the notion that Congress meant to include disparate impact within statutory schemes, as indicated by his joining of the dissent in the *Inclusive Communities Project* case, Justice Scalia has suggested that even when Congress indisputably did include that theory, its action in doing so might be unconstitutional as a violation of equal protection. He indicated in his dissenting opinion in *Ricci v. DeStefano* that the Court’s resolution of the issue before it “merely postpones the evil day on which the Court will have to confront the question: Whether, or to what extent, are the disparate-impact provisions of Title VII of the Civil Rights Act of 1964 consistent with the Constitution’s guarantee of equal protection?” 557 U.S. 557, 594 (2009) (Scalia, J., dissenting).

120. Justice Scalia in his dissent in *Young*, joined by Justices Thomas and Kennedy, noted as follows: “Title VII’s prohibition of discrimination creates liability for both disparate treatment (taking action with ‘discriminatory motive’) and disparate impact (using a practice that ‘fall[s] more harshly on one group than another and cannot be justified by business necessity’). Peggy Young did not establish pregnancy discrimination under either theory.” *Young*, 135 S. Ct. at 1361 (Scalia, J., dissenting). His opinion certainly does not suggest that it was not open to her to attempt to establish pregnancy discrimination under the disparate impact theory.

adverse effect.”¹²¹

The Court’s recent decision concluding that disparate impact claims can be brought under the Fair Housing Act, *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*,¹²² eliminates the validity of any assertion that the statutory terms “because of” or “on the basis of” incorporate a requirement of intent to discriminate inconsistent with the foundation of the disparate impact theory; the majority in that case expressly rejected such a claim by the dissent in that case.¹²³ One might have thought that that issue had been resolved by the Court’s unanimous decision in *Griggs v. Duke Power Co.*,¹²⁴ but neither its almost four and one-half decades as precedent nor its express codification by Congress into the text of Title VII¹²⁵ have deterred four members of the present Court from trumpeting what they see as its invalidity.¹²⁶

121. *Id.* at 1367 (Kennedy, J., dissenting).

122. 576 U.S. ___, No. 1301371, 2015 WL 2473449 (June 25, 2015).

123. In his dissent in that case, Justice Alito argued that the use of the phrase “because of” in the Fair Housing Act imports a requirement of intent: “Under a statute like the FHA that prohibits actions taken ‘because of’ protected characteristics, intent makes all the difference. Disparate impact, however, does not turn on ‘subjective intent.’” *Inclusive Communities Project, Inc.*, 2015 WL 2473449, at *25 (Alito, J., dissenting) (citing *Raytheon Co. v. Hernandez*, 540 U.S. 44, 53 (2003)). The majority of the Court, in an opinion written by Justice Kennedy and joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan, rejected that assertion, concluding that the FHA, like Title VII and the Age Discrimination in Employment Act before it, includes the disparate impact theory within its scope, despite the use of the phrase “because of”:

Emphasizing that the FHA uses the phrase “because of race,” the Department argues this language forecloses disparate impact liability since “[a]n action is not taken ‘because of race’ unless race is a *reason* for the action. *Griggs* and *Smith*, however, dispose of this argument. Both Title VII and the ADEA contain identical “because of” language, and the Court nonetheless held those statutes impose disparate-impact liability.

Inclusive Communities Project, Inc., 2015 WL 2473449, at *10. What Justice Alito apparently fails to comprehend is that “because of” imports a requirement of causation, not intent, into these three statutes. A practice with a disparate impact on the basis of race or other protected characteristic is caused by that protected characteristic just as much as a practice that is intentionally motivated by that protected characteristic.

124. 401 U.S. 424 (1971).

125. In the Civil Rights Act of 1991, Congress expressly provided that the purposes of the Act were to “confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits” and to “codify the concepts of ‘business necessity’ and ‘job related’ enunciated by the Supreme Court in *Griggs v. Duke Power Co.*” and other Supreme Court decisions. Civil Rights Act of 1991, PUB. L. NO. 102-166, § 3, 105 Stat. 1071 (1991).

126. Justice Thomas in his dissent in the *Inclusive Communities Project, Inc.* case

In addition to the Supreme Court cases that make clear that disparate impact claims are cognizable under the Pregnancy Discrimination Act, lower courts have also reached that conclusion.¹²⁷ For example, the United States District Court for the Northern District of Illinois in *Crnokrak v. Evangelical Health Systems Corp.*¹²⁸ addressed the possible concern that the Act's mandate that pregnant women be treated the same as similarly situated employees precluded reliance on the disparate impact theory. The court indicated that the Pregnancy Discrimination Act did not alter the "general framework" of Title VII, which it recognized made both disparate treatment and disparate impact claims cognizable. The court noted that a conclusion that an employer's leave policies were immune from attack as long as they treated pregnant women like everybody else would mean that the Act "would have expanded the rights of some pregnant women asserting disparate treatment claims only to abrogate the rights of other pregnant women asserting disparate impact claims."¹²⁹ The court noted that, in light of the purpose of the Pregnancy Discrimination Act to extend protection to pregnant women, "it is hardly possible the Congress sought to strip pregnant women of rights that they formerly had been granted" and that, instead, Congress recognized that "in some cases 'equality cannot be achieved by treating identically those who are not alike.'" ¹³⁰

The United States Court of Appeals for the Seventh Circuit in *Scherr v. Woodland School Community Consolidated District*¹³¹ also rejected the contention that disparate impact claims were not available under the Pregnancy Discrimination Act. The court of appeals noted that arguments against disparate impact claims on the basis of pregnancy were in error because they treated the Pregnancy Discrimination Act as an "independent

indicates that "[w]e should drop the pretense that *Griggs*' interpretation of Title VII was legitimate," *Inclusive Communities Project Inc.*, 2015 WL 2473449, at *18 (Thomas, J., dissenting), and asserts that *Griggs* "shows that our disparate-impact jurisprudence was erroneous from its inception," *id.* at *23. Justice Alito in his dissent is a little less direct in his challenge to *Griggs*, but complains about the confusion caused by what he calls the *Griggs* Court's "text-free reasoning," *id.* at *34-35 (Alito, J., dissenting).

127. See, e.g., *Smith v. F.W. Morse & Co.*, 76 F.3d 413, 420 (1st Cir. 1996) ("Like other Title VII plaintiffs, an employee claiming discrimination on the basis of pregnancy may proceed under either a disparate treatment or a disparate impact theory.").

128. 819 F. Supp. 737 (N.D. Ill. 1993).

129. *Id.* at 741.

130. *Id.* at 742 (quoting Melissa Feinberg, *After California Federal Savings & Loan Association v. Guerra: the Parameters of the Pregnancy Discrimination Act*, 31 ARIZ. L. REV. 141, 146 (1989)).

131. 867 F.2d 974 (7th Cir. 1988).

2015]

DISPARATE IMPACT AND PREGNANCY

141

statutory enactment” rather than “an amendment to a highly developed statutory scheme” in response to the Supreme Court’s decision in *Gilbert*.¹³² The court reasoned that the Pregnancy Discrimination Act does not contain its own substantive rules for pregnancy discrimination claims, but instead “finds force” through the substantive sections of the statute, which prohibit both disparate treatment and disparate impact.¹³³ Accordingly, the court said, a claim of pregnancy discrimination could be based on either theory, just like any other claim of discrimination under Title VII.¹³⁴ The court went on to explain why the text of the statute, requiring the “same” treatment, was not inconsistent with application of the disparate impact theory. The court noted that the context in which the Pregnancy Discrimination Act was enacted involved the pervasiveness of discrimination against pregnancy, particularly in disability and health insurance programs:

In this context, it is clear that the statutory requirement that pregnancy receive the “same” treatment as other disabilities was not intended as an ultimate end, but as a means of assuring that pregnancy would not be excluded, as it was in *Gilbert*, from any list of compensable disabilities. Moreover, interpreting “same” to mean “identical” would go against “[t]he entire thrust . . . behind this legislation [which] is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”¹³⁵

The court of appeals noted that because of the holding of *Gilbert* that pregnancy-based classifications were facially neutral rather than facially discriminatory, the disparate impact theory had to be used to challenge practices that facially discriminated on the basis of pregnancy, as in the *Satty* case. The court said that a correct understanding of the Pregnancy Discrimination Act makes clear that the Act did not abolish disparate impact claims for pregnancy but instead restored the theory “to its original purpose under Title VII as a means of challenging facially neutral employment practices that nevertheless discriminate.”¹³⁶ Accordingly, the court of appeals concluded that the disparate impact theory could be used to challenge discrimination with respect to terms and conditions of

132. *Id.* at 978.

133. *Id.*

134. *Id.* at 978-79.

135. *Id.* at 979 (citations and footnotes omitted).

136. *Id.* at 980.

142 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

employment, including the leave policy at issue in that case.¹³⁷

VII. THE DUTY OF EMPLOYERS TO ACCOMMODATE PREGNANCY UNDER
THE DISPARATE IMPACT THEORY

The EEOC's recent guidance on pregnancy discrimination says relatively little about claims of disparate impact on the basis of pregnancy. In its section on "Evaluating PDA-Covered Employment Decisions," the guidance contains the following explanation of claims of disparate impact under the Pregnancy Discrimination Act:

Title VII is violated if a facially neutral policy has a disproportionate adverse effect on women affected by pregnancy, childbirth, or related medical conditions and the employer cannot show that the policy is job related for the position in question and consistent with business necessity. Proving disparate impact ordinarily requires a statistical showing that a specific employment practice has a discriminatory effect on workers in the protected group. However, statistical evidence might not be required if it could be shown that all or substantially all pregnant women would be negatively affected by the challenged policy.

The employer can prove business necessity by showing that the requirement is "necessarily to safe and efficient job performance." If the employer makes this showing, a violation still can be found if there is a less discriminatory alternative that meets the business need and the employer refuses to adopt it. The disparate impact provisions of Title VII have been used by pregnant plaintiffs to challenge, for example, weight lifting requirements, light duty limitations, and restrictive leave policies.¹³⁸

Beyond noting that disparate impact claims can be asserted in the context of pregnancy and the types of challenges under the disparate impact theory that plaintiffs affected by pregnancy have sought to make, the EEOC's recent guidance offers little guidance to either employees or employers on what the disparate impact theory might require of employers as far as accommodation of pregnancy and related conditions is concerned.¹³⁹ But a

137. *Id.*

138. U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.003, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (June 25, 2015) (footnotes omitted). The guidance also states in separate sections that policies of restricting light duty assignments and of restricting leave might have a disparate impact and provides examples of such instances.

139. The EEOC's failure in its recent guidance to provide more clarification about the role of the disparate impact theory in challenging pregnancy discrimination and the

study of the requirements of claims of disparate impact in the context of pregnancy suggests that employers might indeed face liability for failing to make accommodations to pregnant employees, even if they do not offer those accommodations to other employees.

A. The Prima Facie Case of Disparate Impact Based on Pregnancy

1. Nature of Required Showing of Disparate Impact

In order for a plaintiff to make out a claim of disparate impact on the basis of pregnancy, she must establish that the employer “uses a particular employment practice that causes a disparate impact on the basis of . . . sex.”¹⁴⁰ Because “on the basis of sex” is expressly defined to include “on the basis of pregnancy, childbirth, and related medical conditions,”¹⁴¹ a woman affected by pregnancy can make out a prima facie case of disparate impact by proving that the challenged employment practice had disproportionately disadvantaged either women in general or pregnant women in particular, because both showings would demonstrate a disparate impact “on the basis of . . . sex” as prohibited by the statute. That is, either a showing that an employer policy disadvantages pregnant women as compared to non-pregnant persons or a showing that the policy disadvantages women as compared to men would make out a cognizable case of disparate impact under Title VII.

At least one court, however, has held that it is not sufficient for a

failure of employers to provide accommodation to the physical aspects of pregnancy is disappointing, particularly in light of the hash that lower courts have made of such claims, as discussed below. This failure is more surprising given that as long ago as 2012, the EEOC was advised that it could play a critical role in providing clarification to this critical issue. In a hearing held on February 15, 2012 to discuss issues concerning pregnancy and caregiver discrimination, the EEOC heard oral testimony and received written testimony about the inconsistency with which the courts had treated claims of disparate impact on the basis of pregnancy and was told that “[t]here’s a great need for Commission guidance regarding disparate impact pregnancy discrimination analysis.” *Unlawful Discrimination Against Pregnant Workers and Works with Caregiving Responsibilities*: Written Testimony of Joan C. Williams, Professor of Law, University of California Hastings Foundation Chair and Director, Center for Work Life Law; Testimony of Emily Martin, National Women’s Law Center (February 15, 2012).

140. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2015). The Supreme Court in *Lewis v. City of Chicago*, 560 U.S. 205, 213 (2010), confirmed that this provision of the statute sets forth the allocation of the burden of proof with respect to disparate impact claims and the “essential ingredients” of such a claim. The Court also noted that if the employer does not plead and prove the elements of the statutory defenses, “the plaintiff wins simply by showing the stated elements.”

141. 42 U.S.C. § 2000e(k) (2015).

144 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

plaintiff to show that an employer's policy causes a disparate impact based on pregnancy, but instead that a plaintiff bringing a claim of disparate impact on the basis of pregnancy must show a disparate impact on the basis of sex: that is, the contention is that it is not sufficient to show that a challenged employment practice disproportionately disadvantages pregnant women as compared to non-pregnant persons, but that the practice must be shown to disadvantage women as compared to men to be cognizable. The United States District Court for the Northern District of Illinois in *United States Equal Employment Opportunity Commission v. Warshawsky & Co.*¹⁴² addressed the claim of the EEOC that the employer's policy of providing no sick leave to employees until they had worked at least one year violated the disparate impact theory. The district court rejected the EEOC's comparison of the proportion of pregnant women discharged because of the policy with the non-pregnant persons discharged under the policy.¹⁴³

The court indicated that the Pregnancy Discrimination Act did not create a cause of action for pregnancy discrimination, but only made clear that discrimination on the basis of pregnancy was a form of sex discrimination.¹⁴⁴ Accordingly, the district court said, the proper comparison was the relative effect of the policy on women and men, not pregnant and non-pregnant persons.¹⁴⁵ That court did, however, recognize that a restrictive leave policy would cause pregnant employees to be discharged at a significantly higher rate than non-pregnant employees precisely because pregnant employees need more time off work than non-pregnant employees.¹⁴⁶ And, the court said, "[b]ecause only women can get pregnant, if an employer denies adequate disability leave across the board, women will be disproportionately affected."¹⁴⁷

The *Warshawsky* court's analysis is subject to challenge. It may be generally true that a policy that falls disproportionately on pregnant women

142. 768 F. Supp. 647 (N.D. Ill. 1991).

143. *Id.* at 658.

144. *Id.* at 656.

145. *Id.* at 651-54.

146. *Id.* at 654. The district court rejected the employer's claim that the proper comparison was between all pregnant first-year employees who needed leave and all non-pregnant first-year employees who needed leave. The court said that such a comparison did not take into account the different impact of the leave policy on pregnant and non-pregnant employees, which is the essence of a disparate impact claim. The court noted that under the employer's theory of the proper comparison, the *Griggs* Court would have compared "all black applicants who did not have a high school diploma and all white applicants who did not have a high school diploma." *Id.* at 652.

147. *Id.* at 654.

2015]

DISPARATE IMPACT AND PREGNANCY

145

will also fall disproportionately on women as a whole, such that a prima facie case of disparate impact can be established in either manner, at least in most instances. But Congress in the Pregnancy Discrimination Act has prohibited discrimination on the basis of pregnancy, not just discrimination on the basis of sex, although, of course, discrimination on the basis of pregnancy is a form of sex discrimination. After all, even under the Court's analysis in *Gilbert*, in which explicit classifications on the basis of pregnancy were not considered to be sex discrimination, a plaintiff could make out a disparate impact claim based on sex in connection with classifications based on pregnancy, as demonstrated by the Court's decision in *Satty*. The Pregnancy Discrimination Act, which was intended to change the rules of *Gilbert*, presumably means that plaintiffs making claims of pregnancy discrimination no longer need to show disparate impact on the basis of sex; it should be enough to show disparate impact based on pregnancy. If the rules were otherwise, this would suggest that while the Pregnancy Discrimination Act altered the rules that apply to disparate treatment claims on the basis of pregnancy, it did not alter the rules that apply to disparate impact claims on the basis of pregnancy. There are no grounds for such a conclusion under either the language or the legislative history of the Act. And, indeed, other courts have recognized that in a disparate impact case under the Pregnancy Discrimination Act, a prima facie case can be made by showing a disparate impact on pregnant women, rather than women in general.¹⁴⁸ The EEOC also appears to take the position in its guidance that the relevant protected group for a disparate impact claim based on pregnancy is women affected by pregnancy, childbirth, or related medical conditions, not women in general.¹⁴⁹

148. See, e.g., *Davidson v. Franciscan Health Sys. of Ohio Valley, Inc.*, 82 F. Supp. 2d 768, 774 (S.D. Ohio 2000). See also *Woodward v. Rest Haven Christian Serv.*, No. 07 C 0665, 2009 WL 703270, at *7 (N.D. Ill. Mar. 16, 2009) (although recognizing the precedent in *Warsawsky* that the proper comparison in a disparate impact case based on pregnancy was between the effect of a policy on men and women, the court noted that instead focusing on the comparative effect of a policy on pregnant and non-pregnant persons "is an arguable position since the PDA defines its protected class as 'women affected by pregnancy, childbirth, or related medical conditions'").

149. U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.003, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (June 25, 2015) ("Title VII is violated if a facially neutral policy has a disproportionate adverse effect on women affected by pregnancy, childbirth, or related medical conditions"; also making reference to a showing that a challenged requirement "disproportionately excludes pregnant applicants" and that a policy "may also have a disparate impact on pregnant workers"). Nor is this position a recently adopted one by the EEOC. In the *Warsawsky* case litigated by the EEOC, the agency took the position that the relevant protected group in a disparate impact claim based on pregnancy was pregnant women and that the relevant statistical comparison was between pregnant and non-pregnant

The term “disparate impact” is not defined in Title VII, so one must look to the tests for establishing disparate impact developed by the courts, which Congress appears to have intended to codify in the statute.¹⁵⁰ In its original disparate impact case, *Griggs v. Duke Power Co.*,¹⁵¹ the Court gave little guidance on how one goes about establishing a claim of disparate impact, instead focusing on the broader questions of whether employment practices not motivated by discriminatory intent were cognizable under Title VII.¹⁵² The Court’s later cases have given somewhat more definition to the requirements for proving disparate impact. In *Albemarle Paper Co. v. Moody*,¹⁵³ the Court referenced the requirement for proving a prima facie case of disparate impact and indicated, in the context of that case, which involved a claim that employment tests had a disparate impact on the basis of race, that such a prima facie case would involve proof that “the tests in question select applicants for hire or promotion in a racial pattern significantly different from that of the pool of applicants.”¹⁵⁴ In *Dothard v. Rawlinson*,¹⁵⁵ a case involving a claim that height and weight restrictions imposed a disparate impact on the basis of gender, the Court focused more on the requirements of a prima facie case of disparate impact. The Court

employees. 768 F. Supp. at 651-53.

150. Although Congress in its “purposes” section of the Civil Rights Act of 1991, Pub. L. No. 102-166, § 3, 105 Stat. 1071 (1991), indicated that it intended to “codify the concepts of ‘business necessity’ and ‘job related enunciated by the Supreme Court in *Griggs v. Duke Power Co.*” and later pre-*Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), cases, and did not expressly indicate an intent to codify the concept of the disparate impact prima facie case, Congress also indicated that one of its purposes was to “confirm statutory authority and provide guidelines for the adjudication of disparate impact suits” under Title VII. Accordingly, it appears that Congress meant to codify in Title VII the concept of disparate impact as developed by the pre-*Wards Cove* cases, except to the extent that the express statutory provisions are inconsistent with that concept.

151. 401 U.S. 424 (1991).

152. The Court in *Griggs* stated broadly that that “[t]he Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation,” *id.* at 431, while focusing very little on the evidence required to show discriminatory operation. The Court cited to the concurring and dissenting opinion to the court of appeals decision, which noted: “No one seriously questions the fact that, in general, whites register far better on the Company’s alternative requirements than blacks. The reasons are not mysterious.” *Griggs v. Duke Power Co.*, 420 F.2d 1225, 1239 n.6 (4th Cir. 1970).

153. 422 U.S. 405 (1975).

154. *Id.* at 425. The *Albemarle* case, however, gave relatively little attention to the requirements of a prima facie case, because the principal issue in that case was the meaning of the requirement that challenged employment practices be “job related.” *Id.* at 408.

155. 433 U.S. 321 (1977).

2015]

DISPARATE IMPACT AND PREGNANCY

147

noted that to make out a prima facie case, a plaintiff “need only show that the facially neutral standards in question select applicants for hire in a significant discriminatory pattern.”¹⁵⁶ The Court rejected the employer’s assertion that generalized national statistics were insufficient to make out a prima facie case and that the required impact had to be shown with respect to actual applicants for the job. The Court reasoned that plaintiffs are not “required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement’s grossly discriminatory impact.”¹⁵⁷

Although Congress in the Civil Rights Act of 1991 expressly rejected the Court’s revision in *Wards Cove Packing Co. v. Atonio*¹⁵⁸ of the burdens of proof for disparate impact claims and its redefinition of the concepts of business necessity, job relatedness, and less discriminatory alternatives,¹⁵⁹ Congress seems to have approved of, and perhaps even codified in Title VII, the standards announced in *Wards Cove* for establishing a prima facie case of disparate impact. In *Wards Cove*, which involved challenges to a range of employment practices on the basis of race, the Court rejected the notion that a general showing of racial disparity in the workplace was sufficient to establish the disparate impact of each of the challenged hiring practices. Instead, the Court indicated that an “integral part” of the plaintiff’s prima facie case was a showing that “it is the application of a specific or particular employment practice that has created the disparate impact under attack.”¹⁶⁰ Section 703(k)(1)(B)(i), added by the Civil Rights Act of 1991, provides that “the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact.” The complaining party is relieved from that burden only if he or she proves that “the elements of a respondent’s decisionmaking process are not capable of separation for analysis,” in which case that decisionmaking process “may be analyzed as one employment practice.”¹⁶¹

In *Lewis v. City of Chicago*,¹⁶² the Court’s most recent case addressing

156. *Id.* at 329.

157. *Id.* at 331.

158. 490 U.S. 642 (1989).

159. With respect to the concept of less discriminatory alternatives, which plaintiffs can prove in order to counter an employer’s showing of business necessity and job relatedness, the Civil Rights Act of 1991 enacted § 703(k)(1)(C), which provides that that showing “shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of ‘alternative employment practice.’” The decision of the Court in *Wards Cove Packing Co. v. Atonio* was issued on June 5, 1989.

160. *Atonio*, 490 U.S. at 657.

161. 42 U.S.C. § 2000e-2(k)(1)(B)(i) (2015).

162. 560 U.S. 205 (2010).

148 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

disparate impact under Title VII, a unanimous Court took an expansive view of what type of employment practice could be challenged under the disparate impact provisions of Title VII. That case involved a challenge to the use of an eligibility list for firefighter candidates, based on the adoption of a cut-off score on an examination that had an admitted disparate impact.¹⁶³ The employer claimed that only the adoption of the cut-off score resulting in the eligibility list could be timely challenged, not the continued use of that eligibility list over the next several years.¹⁶⁴ The Court rejected that argument, noting that Title VII's disparate impact provisions define a *prima facie* case as a showing that an employer "uses" a particular "employment practice" having a disparate impact. The Court noted that the term "employment practice" was broad enough to include not only the adoption of a rule or policy by the employer, but also the continued "use" of that rule or practice.¹⁶⁵ The Court rejected the argument of the employer that this construction of the statute should be rejected because it would mean that employers might face disparate impact suits based on their long-standing practices; the Court concluded that "Congress allowed claims to be brought against an employer who uses a practice that causes disparate impact, whatever the employer's motives and whether or not he has employed the same practice in the past."¹⁶⁶

Although none of the Supreme Court's disparate impact cases have addressed issues of pregnancy discrimination, a number of lower courts have addressed such claims. The approach of those courts have differed on whether women affected by pregnancy can, or at least have, made out claims of disparate impact, even when the challenged employment policies involve issues that are likely to disproportionately affect pregnant women, such as restrictive leave policies,¹⁶⁷ lifting or other heavy physical labor

163. *Id.* at 211.

164. *Id.*

165. *Id.* at 212.

166. *Id.* at 216-17. In reaching this conclusion, the Court indicated that "it is not our task to assess the consequences of each approach and adopt the one that produces the least mischief. Our charge is to give effect to the law Congress enacted." *Id.* at 217.

167. The references in this article to "restrictive leave policies" is intended to convey restrictions on leave that make it difficult or impossible for women affected by pregnancy and childbirth to maintain employment while dealing with the temporary physical incapacities that often accompany pregnancy and childbirth, not to refer to *any* limitation on the leave provided by employers because of pregnancy and childbirth. See *Barrash v. Bowen*, 846 F.2d 927, 931-32 (4th Cir. 1988) (rejecting disparate impact claim by government employee who sought six months of leave in order to breastfeed her child, when she was given six weeks of leave and review of medical evidence submitted by the plaintiff did not indicate that she was incapacitated during the

requirements, or policies that limit accommodation to instances in which an employee has suffered an on-the-job injury.

2. *Disparate Impact Challenges to Restrictive Leave Policies*

The lower courts have taken quite disparate approaches to the question of whether pregnant women can successfully challenge policies that severely restrict the leave that employees can take, such as in the first year of employment,¹⁶⁸ as a violation of the disparate impact theory. Some courts have embraced such claims, while others seem to suggest that the very nature of those claims may be inconsistent with the language and purposes of the Pregnancy Discrimination Act.

The United States Court of Appeals for the District of Columbia Circuit in *Abraham v. Graphic Arts International Union*¹⁶⁹ held that the district court had incorrectly granted summary judgment on the plaintiff's claim of pregnancy discrimination. The plaintiff in that case alleged both disparate treatment and disparate impact; her disparate impact claim was based on her termination because she needed more than the ten days of sick leave granted to temporary employees under the union-employer's allegedly pregnancy-neutral policy. The court of appeals indicated the disparate impact that such a policy would have on women affected by pregnancy:

While a ten-day leave undoubtedly would accommodate a wide range of temporary disabilities, it falls considerably short of the period generally recognized in human experience as the respite needed to bear a child. Thus, while many female as well as male employees could have held a PEP job without any problem at all, any such jobholder confronted by childbirth was doomed to almost certain termination. Oncoming motherhood was virtually tantamount to dismissal, though other indispositions might well and usually would pose no threat to continued

extended leave period sought).

168. Because of the requirements of the Family and Medical Leave Act, 29 U.S.C. §§ 2611-19, which provides leave to employees of a covered employer after the first 12 months of employment and if the employee has worked the requisite number of hours during that year, for not only pregnancy and childbirth but also an employee's own "serious health condition," it is true that many pregnant employees, at least those whose employers are covered by the statute, will no longer need to rely on Title VII to challenge the failure of employers to accommodate pregnant employees with the provision of leave. However, part-time and first-year employees, who are not entitled to leave under the FMLA, may still need to rely on disparate impact challenges to employer restrictive leave policies, as will those employees whose employers are not covered by the Act. And, of course, the FMLA addresses only leave, not other accommodations that may be needed by women during the course of their pregnancies and after childbirth.

169. 660 F.2d 811 (D.C. Cir. 1981).

150 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

employment. In short, a ten-day absolute ceiling on disability leave portended a drastic effect on women employees of childbearing age an impact no male would ever encounter.¹⁷⁰

The court of appeals went on to note that Title VII could be violated “by lack of an adequate leave policy as by unequal application of a policy it does have.”¹⁷¹ The court of appeals therefore remanded to the district court for a determination of whether the employer’s policy was supported by business necessity.¹⁷²

The United States District Court for the Northern District of Mississippi, however, rejected a similar disparate impact claim based on a limited leave policy and its claimed impact on pregnant women in *Stout v. Baxter Healthcare Corporation*.¹⁷³ The plaintiff was terminated when she incurred more than the allowed three absences during her probationary period because she suffered a miscarriage. The district court rejected her disparate impact claim on summary judgment for two reasons. First, the court concluded that the statistical evidence of the disparate impact of the policy was not “sufficiently substantial,” because of the 28 employees who were terminated during the probationary period, while 19 were female, only one other female other than the plaintiff was terminated because of pregnancy.¹⁷⁴ Second, the court concluded that the nature of the plaintiff’s claim, that pregnant probationary employees might have to be accorded leave even if other employees were not, was inconsistent with the Pregnancy Discrimination Act’s mandate that pregnant women be treated the same as other similarly situated persons.¹⁷⁵

Interestingly, the court of appeals in *Stout*¹⁷⁶ seemed to agree that the plaintiff had provided sufficient statistical evidence of impact, seemingly rejecting the district court’s first reason for rejecting the plaintiff’s claim, but adopted the second justification. The court of appeals indicated that the plaintiff was not required to provide statistical evidence to make out a prima facie case if she could establish that all or substantially all pregnant

170. *Id.* at 819.

171. *Id.*; see also *Maganuco v. Leyden Community High School District*, 939 F.2d 440, 445 (7th Cir. 1991) (“This is not to say that a policy which does not provide adequate leave to accommodate the period of disability associated with pregnancy might not be vulnerable under a disparate impact theory of liability under Title VII. Indeed, courts have struck down such policies.”).

172. *Abraham*, 660 F.2d at 819-20.

173. 107 F. Supp. 2d 744 (N.D. Miss. 2000).

174. *Id.* at 746-47.

175. *Id.* at 747.

176. *Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 858 (5th Cir. 2002).

2015]

DISPARATE IMPACT AND PREGNANCY

151

women would be adversely affected by the challenged policy. The court noted that the plaintiff presented expert testimony that no pregnant woman who gives birth would be able to work for at least two weeks, and the court agreed that this evidence would be sufficient under the “all or substantially all” standard.¹⁷⁷ The court indicated that this evidence might well be enough to establish a *prima facie* case of disparate impact if it agreed with the plaintiff’s legal interpretation of the statute.¹⁷⁸ But the court rejected that argument on the ground that the plaintiff could not use that type of evidence to challenge an employer’s limit on absenteeism. The court reasoned:

It is the nature of pregnancy and childbirth that at some point, for a limited period of time, a woman who gives birth will be unable to work. All job requirements, regardless of their nature, affect “all or substantially all pregnant women.” If [the plaintiff’s argument] is taken to its logical extreme, then every pregnant woman can make out a *prima facie* case against her employer for pregnancy discrimination, unless the employer grants special leave to all pregnant employees. This is not the law—the PDA does not require preferential treatment of pregnant employees and does not require employers to treat pregnancy related absences more leniently than other absences.¹⁷⁹

Accordingly, the court of appeals indicated that it would not allow the plaintiff’s evidence to be sufficient to show disparate impact when her only challenge was “that the amount of time of sick leave granted to employees is insufficient to accommodate the time off required in a typical pregnancy,” because that conclusion would be contrary to the language of the statute, which requires only equal treatment. The court indicated that such a construction of the statute would turn it into a “guarantee of medical leave for pregnant employees.”¹⁸⁰

Even if the court’s decision can be read as rejecting only the evidence of impact presented by the plaintiff—in that perhaps such a strict limitation on leave would adversely affect not only pregnant women but a whole range of other employees—the court’s second justification for rejecting the plaintiff’s claim is clearly incorrect. The court’s insistence that the Pregnancy Discrimination Act mandates precisely equal treatment of pregnant women and other employees and therefore cannot be used to challenge such “equal treatment” reflects a profound ignorance of the point

177. *Id.*

178. *Id.*

179. *Id.* at 861.

180. *Id.* at 861-62.

of the disparate impact theory, which makes unlawful even “equal” treatment of protected classes in some instances. The court’s reference to the fact that pregnant women are not entitled to “preferential treatment” also reflects a serious lack of understanding of the disparate impact theory. Pregnant women who seek to challenge the application of a neutral policy to them as a violation of the disparate impact theory are not seeking “preferential treatment,” but instead are challenging the lawfulness of the employer’s policy itself. The black plaintiffs in *Griggs* who challenged the act of the employer in imposing a high school diploma and “intelligence” test requirements on them were not seeking “preferential treatment,” but equal employment opportunities. Pregnant women who challenge restrictive leave policies under the disparate impact theory are also seeking the equal opportunity to maintain their employment even though pregnant, not preferential treatment. And if they are successful in their disparate impact challenge, the employer is not required to treat them “preferentially” by providing them leave when other similarly situated employees are not. The remedy for violation of the disparate impact theory is invalidation of the employer’s unlawful policy.

Perhaps, instead, what the *Stout* court meant is that disparate impact claims are not cognizable under the Pregnancy Discrimination Act at all, because of its language about same treatment, but the court did not say that. In any event, such a conclusion would be at odds with the controlling precedent that such claims are cognizable.¹⁸¹ Or perhaps instead the court was saying that absenteeism policies are not subject to challenge under the disparate impact theory, at least when pregnancy is the ground on which the challenge is made. Not only is such a limitation not supported by the language of Title VII, which extends the scope of the disparate impact theory to employment practices generally, but it would be odd not to allow a disparate impact challenge to an employer’s policy precisely because such a policy has a profound disparate impact on the group seeking the statute’s protection from the policy at issue. That is, this type of reasoning would suggest that pregnant women are not protected from policies that seek to severely limit available leave precisely because of the severe disparate impact that those policies have on them.

The *Stout* court’s reasoning is defective for another reason. While the court may be correct that the recognition of disparate impact claims based on restrictive leave policies may allow pregnant women to make out prima facie cases of disparate impact, this certainly does not mean that all employers will have to guarantee pregnant women medical leave in all circumstances, regardless of the nature of the employer’s business or the

181. See text accompanying *supra* notes 112 – 137.

burden that such a requirement would impose on employers. The *Stout* court was addressing only whether a plaintiff could make out a prima facie case of discrimination; an employer can rebut such a prima facie case by proving that its requirement is job-related and supported by business necessity. Accordingly, an employer with a sufficient job-related justification for denying leave would not violate Title VII, although an employer without such a justification would not be able to enforce its restrictive leave policy.

Other courts seem to have concluded that policies based on absenteeism are not cognizable under the disparate impact theory, at least when those claims assert the disproportionate effects of such policies on pregnant women. In *Dormeyer v. Comercia Bank-Illinois*,¹⁸² the United States Court of Appeals for the Seventh Circuit addressed the issue of whether a woman discharged for absenteeism after she became pregnant, when she claimed that almost half of her absences were attributable to severe morning sickness, had made out a claim of disparate impact. Rather than concluding that she had not shown that the employer's absence policy disparately impacted pregnant women, the court of appeals instead suggested that an employer's absenteeism policy was not subject to challenge under the disparate impact theory at all, even "if it could be shown that the policy weighed more heavily on pregnant employees than nonpregnant ones."¹⁸³ The court indicated that the disparate impact theory was developed for situations in which employers impose eligibility requirements for a job that are "not really necessary," and the court said that the plaintiff's claim did not involve such a situation: "[t]he argument here is not that the employer has adopted rules or practices that arbitrarily exclude pregnant women, but that the employer should be required to excuse pregnant women from having to satisfy the *legitimate* requirements of the job."¹⁸⁴

The error of the *Dormeyer* court's analysis, however, is clear from the most cursory review of its reasoning against the requirements of the disparate impact theory. The court summarily rejected the plaintiff's disparate impact challenge to the employer's absenteeism policy because of its apparent presumption that the employer's absenteeism policy was legitimate, without even addressing whether the policy might have a disparate impact on pregnant women. Instead, if a policy has a disparate impact on women, an employer is required to prove that its policy is legitimate, that is, related to the requirements of the job and supported by

182. 223 F.3d 579, 581 (7th Cir. 2000).

183. *Id.* at 583.

184. *Id.* at 583-84.

business necessity. But the court imposed no such burden on the employer, instead apparently assuming that all attendance policies are legitimate. While many attendance policies will presumably meet the job-related and business necessity standards, some—such as unduly restrictive leave policies that cannot be justified by a job or the employer’s situation—may not. And such a policy that could not be justified by those standards would be exactly the type of policy that “arbitrarily exclude[s] pregnant women,” precisely the type of policy that the court indicated that disparate impact theory was developed to address.¹⁸⁵

The courts that have allowed restrictive leave policies to be challenged as a violation of the disparate impact theory are better reasoned and are more consistent with Supreme Court precedent than those that have not

185. There is another famous, or infamous, decision of the United States Court of Appeals for the Seventh Circuit, also written by Judge Posner, which also suggests that the disparate impact theory cannot be used to challenge lack of accommodations for pregnant women because “properly understood, disparate impact as a theory of liability is a means of dealing with the residues of past discrimination, rather than a warrant for favoritism.” 20 F.3d at 738. That decision is *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734 (7th Cir. 1994), and it contains so many errors of analysis that it might be amusing if it were not cited so often by other courts. First, Judge Posner reaches out to postulate about the purpose of the disparate impact theory in a case in which he acknowledges that the plaintiff only brought a claim of disparate treatment. *Id.* at 736. Second, his suggestion that what he views as the purpose of the disparate impact theory guides how the theory is to be applied and what types of employment practices can be challenged under the theory has been expressly rejected by the Supreme Court. *See Lewis v. City of Chicago*, 560 U.S. 205, 215 (2010) (noting that the Seventh Circuit had refused to allow the plaintiff’s disparate impact claim to proceed because of its view that the disparate impact theory was aimed only at intentional discrimination, the Court said: “But even if the two theories were directed at the same evil, it would not follow that their reach is therefore coextensive. If the effect of applying Title VII’s text is that some claims that would be doomed under one theory will survive under the other, that is the product of the law Congress has written. It is not for us to rewrite the statute so that it covers only what we think is necessary to achieve what we think Congress really intended.”). Third, the court fails to find even an inference of intent to discriminate in the comment, steeped in stereotypical views about pregnant women, of the plaintiff’s supervisor that the plaintiff was being fired because her supervisor did not think that she intended to return to work after she had her baby. *Troupe*, 20 F.3d at 735-37. Fourth, the court fails to draw all inferences in favor of the plaintiff as the non-moving party on summary judgment, instead coming up with its own explanation for why the plaintiff was terminated on the eve of her planned maternity leave. *Troupe*, 20 F.3d at 737-38. Finally, the oft-quoted statement in the opinion to the effect that “[e]mployers can treat pregnant women as badly as they treat similarly situated but nonpregnant employees” in connection with the discussion of the disparate impact theory fundamentally misconceives the very foundations of that theory, which under some circumstances finds a violation of Title VII in such claimed “equal” treatment. A theory that allows a challenge to policies that have a disproportionate and unjustified effect on pregnant women is not “a warrant for favoritism.”

2015]

DISPARATE IMPACT AND PREGNANCY

155

allowed such claims. And while some plaintiffs will fail to make out a prima facie case of disparate impact because of failures of proof,¹⁸⁶ restrictive leave policies that treat pregnant women identically to all other employees may be shown to disproportionately affect women in general and pregnant women in particular, precisely because women affected by pregnancy are likely to need more leave than other employees. It is true, of course, that non-pregnant employees may need leave for injuries and other conditions, but because of the extended nature of pregnancy and childbirth-related disabilities, pregnant women and those affected by childbirth are more likely to run afoul of restrictive leave policies. So, for example, in *United States Equal Employment Opportunity Commission v. Warshawsky & Co.*,¹⁸⁷ during a four year period, the employer discharged 53 employees under its policy of requiring all employees to work one year before being entitled to sick leave. Only three of those employees were male, while 50 were female and 20 were pregnant; during that same period, the employer employed 1,105 female employees and 773 male employees.¹⁸⁸ Accordingly, the district court noted that both pregnant women and women in general were much more likely to be terminated under the employer's policy than were men.¹⁸⁹

3. *Disparate Impact Challenges to Physical Job Requirements*

Another type of employment policy that likely has a disproportionate effect on pregnant women is a policy imposing lifting or other physical requirements on employees, in that pregnant women may be temporarily unable to fulfill those requirements, either because of a high-risk pregnancy, which might require severe restrictions on physical activity by

186. See *Crnokrak v. Evangelical Health Sys. Corp.*, 819 F. Supp. 737, 738-39, 745 (N.D. Ill. 1993) (employee who was replaced while on maternity leave, because her job was given to another employee who threatened to leave if her job was not upgraded, did not state a claim of disparate impact because she did not identify any specific practice that affects women unfavorably and “there is no indication that typical mothers-to-be were burdened significantly by the leave limitations that EHS imposed”); *Davidson v. Franciscan Health Sys. of the Ohio Valley, Inc.*, 82 F. Supp. 2d 768, 774-75 (S.D. Ohio 2000) (employee terminated for exceeding twenty-six weeks of leave under employer's policy did not make out claim of disparate impact based on pregnancy because although 21 women and only one man was terminated under the policy, only one of the 21 women terminated was on medical leave due to pregnancy).

187. 768 F. Supp. 647, 650 (N.D. Ill. 1991).

188. *Id.* at 654.

189. *Id.* at 654-55. The district court measured the impact of the employer's policy under the “eighty percent rule” found in the EEOC Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607.4D, which it described as follows: “the failure of a sex, race or ethnic group to have a success rate which is at least 80% of the rate of the most successful group is considered evidence of adverse impact.” *Id.* at 655.

156 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

pregnant women,¹⁹⁰ or because of physical limitations imposed by pregnancy and childbirth more generally, which might impose restrictions on pregnant women that they not engage in very heavy lifting or very rigorous physical activity, at least at certain periods of their pregnancy or during recovery from childbirth.¹⁹¹

The United States Court of Appeals for the Fifth Circuit in *Garcia v. Woman's Hospital of Texas*¹⁹² considered a claim of disparate impact based on pregnancy brought by a woman who was refused the right to return to work after suffering pregnancy-related complications of chronic vomiting and dehydration because her physician refused to certify that she could “push, pull, lift, and support” over 150 pounds.¹⁹³ The employer cited its policy of disallowing employees on medical leave to return to work with any work restrictions in refusing to allow her to return to work, and then discharged her under another policy providing that employees on medical leave for more than six months were to be discharged. Because the plaintiff was early in her pregnancy when she initially took medical leave and because she was not allowed to return to work, the combination of these two policies resulted in her effective termination.¹⁹⁴ The court of appeals noted that if the plaintiff could establish that the lifting restriction “would cause pregnant women as a group to be forced onto unnecessary

190. For example, the plaintiff in *Young v. United Parcel Service Inc.*, 575 U.S. ___, 135 S. Ct. 1338 (2015), who was pregnant through *in vitro* fertilization and who had suffered a previous miscarriage, was told by her doctor that she should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter.

191. For example, the plaintiff in the case of *Garcia v. Woman's Hosp. of Tex.*, 97 F.3d 810, 811-12 (5th Cir. 1996), was refused permission to return to work after suffering from dehydration and chronic vomiting caused by her pregnancy because her physician refused to certify that she was able to “push, pull, lift, and support over 150 pounds.” For a discussion of the lifting restrictions that may be recommended for pregnant women, as well as other physical requirements that may be difficult for women to perform at some stages of their pregnancy, see Deborah A. Calloway, *Accommodating Pregnancy in the Workplace*, 25 STETSON L. REV. 1, 3-7 (1995); see also Joanna Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L. J. 567, 578-84 (2010) (discussing potential conflicts between pregnancy and the physical demands of certain jobs, including the fact that the Council on Scientific Affairs has issued guidelines suggesting that repetitive lifting of more than 50 pounds should generally be stopped after the twentieth week of pregnancy). The large number of litigated cases involving pregnant women terminated or forced to take leaves of absence because of lifting restrictions imposed by their physicians provides anecdotal evidence of the pervasiveness of such restrictions imposed by the physicians of pregnant women.

192. 97 F.3d 810 (5th Cir. 1996).

193. *Id.* at 811-12.

194. *Id.*

2015]

DISPARATE IMPACT AND PREGNANCY

157

medical leave” and then be terminated, she could establish a prima facie case of disparate impact.¹⁹⁵ The court noted that this showing might be established by statistical evidence of the effect of the policy on pregnant women or, even without statistical evidence, by a showing that “all or substantially all pregnant women would be advised by their obstetrician not to lift 150 pounds.”¹⁹⁶ The court of appeals ultimately upheld the rejection of the plaintiff’s disparate impact claims, however, because the testimony presented by her physician was not that no pregnant woman could lift 150 pounds, but that “she could not accept the potential legal liability associated with saying that any woman could lift 150 pounds, whether pregnant or not.”¹⁹⁷ The court indicated that this testimony was “not an expert opinion about the likely effect of the 150-pound-restriction on all pregnant workers” and therefore was insufficient to establish a prima facie case of disparate impact.¹⁹⁸

The United States District Court for the District of Kansas also held that a plaintiff had not established a prima facie case of disparate impact with respect to the employer’s policy that she be able to lift more than 40 pounds in *Porter v. Kansas*.¹⁹⁹ The plaintiff was a psychiatric aid at a state hospital when she became pregnant. Her initial treating physician indicated that she should not lift more than 40 pounds. Her employer indicated that because of that restriction, she had three options: to request another statement from her doctor, to request a leave of absence, or to sign a statement agreeing to work with a risk of injury; she was told that she could not work with the restriction in place and was sent home. Although she did receive a statement from another doctor indicating that she could do lifting up to 120 pounds, she apparently did not provide that statement to the employer. She was ultimately discharged for failure to return to work.²⁰⁰ The district court concluded that the plaintiff had not made out a prima facie of disparate impact because she had not shown that the employer’s policy had “the effect of discriminating against women, or even pregnant women, as a class” because another pregnant woman had no such doctor’s restriction on heavy lifting during her pregnancy and because the plaintiff was successful in having a new treating physician remove her lifting restriction.²⁰¹ While it may be true that the plaintiff did not present

195. *Id.* at 813.

196. *Id.*

197. *Id.*

198. *Garcia v. Woman’s Hosp. of Tex.*, 143 F.3d 227, 231-32 (5th Cir. 1998).

199. 757 F. Supp. 1224, 1230 (D. Kan. 1991).

200. *Id.* at 1227-28.

201. *Id.* at 1230.

158 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

sufficient evidence of the disproportionate effect on pregnant women of a restriction against heavy lifting—the court gives no indication of the evidence, if any, provided by the plaintiff in support of her claim—the evidence cited by the court with respect to another pregnant woman with no such restriction obviously does not mean that the employer’s policy had no such disparate effect. After all, the Supreme Court in *Griggs* did not conclude that the Duke Power Company’s high school diploma requirement had no disparate impact simply because one of its black employees did have a high school diploma.²⁰²

The result in the *Garcia* case does not suggest that lifting requirements and other demanding physical job requirements do not have a disparate impact on pregnant women, only that the plaintiff in that case suffered a failure in proving the disparate impact of the policy in question. And the justification cited by the *Porter* court for the failure of the plaintiff to make out a prima facie case of disparate impact is patently incorrect, even though it may have been true that the plaintiff in that case did not produce appropriate evidence to establish the disproportionate impact that the employer’s requirement likely had on pregnant women.

4. *Disparate Impact Challenges to Restrictive Accommodation Policies*

Related to, and often operating in concert with, lifting and other demanding physical job requirements are employer policies of providing accommodations to those requirements, often known as “light duty” or “modified duty” positions, for only certain categories of employees, such as employees who have suffered on-the-job injuries or employees who meet other specified conditions, such as qualifying as “disabled” under the law.²⁰³ Even though women affected by pregnancy may be similarly situated to those other employees with respect to their ability to work and therefore could likely perform the modified duties of those positions if given the opportunity, those women are denied the ability to do – and often must take leave or be terminated as a result – merely because the source of their inability to meet those physical requirements differs from those other employees. This favored treatment of employees who meet the employer’s

202. *Griggs v. Duke Power Co.*, 401 U.S. 424, 427 n.2 (1971).

203. The employer in the case of *Young v. United Parcel Serv., Inc.*, 575 U.S. ___, 135 S. Ct. 1338 (2015), had such a policy, allowing several categories of employees to be relieved of some of the tasks of their positions or be placed on light or modified duty; that employer provided some sort of job accommodation to employees injured on the job, employees who had lost their Department of Transportation certification, and employees qualified as “disabled” under the Americans With Disabilities Act, but purportedly refused to provide accommodation to employees who did not fit within one of these categories, including pregnant women.

specified conditions may well have a disparate impact on pregnant women; pregnant women, after all, have not suffered an on-the-job injury and generally have not been considered to meet the requirements of “disability” under the Americans With Disabilities Act.²⁰⁴

The United States District Court for the Eastern District of New York in *Germain v. County of Suffolk*²⁰⁵ refused to grant summary judgment for the employer on a police officer’s Title VII claim that the denial of light-duty assignments to pregnant women because of the employer’s policy that such assignments were limited to persons suffering occupational injuries had a disparate impact on pregnant women.²⁰⁶ In a prior case brought against the same defendant, a jury had concluded that an identical policy by another agency of the defendant county had a disparate impact on pregnant women; that case was ultimately settled by a consent decree, which required, among other things, for the employer to alter its policy.²⁰⁷ In the *Germain* case, the plaintiff sought a light-duty assignment after disclosing her pregnancy, supported by a note from her physician indicating that she would be unable

204. Because pregnancy is a natural condition and not an impairment as such, neither pregnancy nor complications arising from pregnancy have traditionally been considered to qualify as a “disability” and therefore protection has generally not been extended under the Americans With Disabilities Act for pregnancy-related disabilities suffered by pregnant women, even when those conditions are substantially disabling. *See Gorman v. Wells Mfg. Corp.*, 209 F. Supp. 2d 970, 974-76 (S.D. Iowa 2002) (collecting cases and stating that “the majority of federal courts hold that pregnancy-related complications do not constitute a disability under the ADA”). As the Supreme Court recognized in *Young*, the EEOC, as well as others, have taken the position that changes to the ADA made by the ADA Amendments Act of 2008 may require that employers offer accommodations to women disabled by pregnancy. *Young*, 135 S. Ct. at 1348. *See also* U.S. EQUAL EMP. OPPORTUNITY COMM’N, NO. 915.003, ENFORCEMENT GUIDANCE: PREGNANCY DISCRIMINATION AND RELATED ISSUES (July 14, 2014) (indicating that some pregnancy-related complications may be “disabilities” under the ADA, imposing a duty of reasonable accommodation on employers). Whether and the extent to which a duty to accommodate pregnancy exists under the Americans With Disabilities Act is beyond the scope of this article.

205. No. 07-CV-2523, 2009 WL 1514513 (E.D.N.Y. May 29, 2009), later proceeding, 672 F. Supp. 2d 319 (E.D.N.Y. 2009). The same district court in *Lehmuller v. Inc. Vill.*, 944 F. Supp. 1087, 1092 (E.D.N.Y. 1996), also held that a pregnant police officer denied light duty because of the employer’s policy of providing light duty only to officers injured on the job “has shown that the Village adopted a light-duty policy that has an adverse impact on pregnant officers and, therefore, has established a prima facie case of disparate impact discrimination,” but the case contains no discussion of the showing made by the plaintiff.

206. *Germain*, 2009 WL 1514513, at *3-4.

207. *Id.* at *1; *see also* *Lochren v. Cty. of Suffolk*, No. CV 01-3925, 2008 WL 2039458, at *1 (E.D.N.Y. May 9, 2008) (in context of award of attorneys’ fees, court described underlying claim and jury verdict).

160 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

to perform a full-duty assignment. After the denial of her request, she was required to take unpaid leave, resulting in a loss of health care benefits and denial of seniority.²⁰⁸ The employer argued that this policy did not disproportionately affect pregnant women because it was applied consistently to deny light-duty assignments to all non-occupational injuries, but the court rejected that contention.²⁰⁹ Instead of measuring the impact of the policy on pregnant women by comparing the effect of that policy on other persons with non-occupational injuries who sought light-duty, the court said that the proper measurement was the comparative impact of that policy on non-pregnant persons.²¹⁰ The court went on to conclude that the plaintiff had proven a prima facie case of disparate impact because pregnant officers unable to perform full-duty would never be eligible for light duty under the employer's policy, while at least some non-pregnant employees would, those with occupational injuries.²¹¹ The district court's decision does not indicate whether the plaintiff in that case presented any statistical evidence in support of her claim of disparate impact or whether the court presumed disparate impact because "the distinction the Park Department's policy draws between occupational and non-occupational injuries necessarily excludes pregnant women from light-duty."²¹² Because the parties had not developed the issue of whether the employer could demonstrate the business necessity of the practice, the court denied the employer's motion for summary judgment.²¹³ At trial, the jury found that the employer's policy of restricting light-duty assignments to persons with occupational injuries was unlawful because it had a disparate impact on pregnant women.²¹⁴

In contrast to the *Germain* court's willingness to accept the plaintiff's evidence of disparate impact based on the relative effect on pregnant persons and non-pregnant persons in general of the employer's restriction of light duty to those with occupational injuries, the district court in *Woodward v. Rest Haven Christian Services*²¹⁵ held that the plaintiff in that case had not provided sufficient evidence of the disparate impact of the employer's policy restricting light-duty assignments to those who had

208. *Germain*, 2009 WL 1514513, at *1-2.

209. *Id.* at *3.

210. *Id.* at *3-4 ("In the present context, the PDA only requires the Plaintiff to show that nonpregnant Park Department officers similarly unable to perform full-duty assignments were treated more favorably than her.").

211. *Id.* at *4.

212. *Id.* at *3.

213. *Id.* at *4.

214. *Germain v. Cty. of Suffolk*, 672 F. Supp. 2d 319, 321 (E.D.N.Y. 2009).

215. No. 07 C 0665, 2009 WL 703270 (N.D. Ill. March 16, 2009).

2015]

DISPARATE IMPACT AND PREGNANCY

161

suffered an on-the-job injury.²¹⁶ The plaintiff, a nursing assistant at a nursing home, sought light duty pursuant to the direction of her physician during her pregnancy. That request was denied, resulting in her being taken off the work schedule for the duration of her pregnancy. The district court rejected her disparate impact claim, rejecting as insufficient her assertion that the policy had to have a disparate impact on pregnant women because 100 percent of pregnant employees were excluded by the policy, while some non-pregnant employees were provided light duty.²¹⁷ The court said that this evidence was insufficient because the plaintiff had not established that every pregnant employee would need light-duty during her pregnancy and the court indicated that it was “not at liberty to assume this fact.”²¹⁸

The reasoning of the *Woodward* court might be challenged as inconsistent with the instruction of the Supreme Court in *Dothard v. Rawlinson* that plaintiffs are not “required to exhaust every possible source of evidence, if the evidence actually presented on its face conspicuously demonstrates a job requirement’s grossly discriminatory impact.”²¹⁹ That is, one might imagine that in a position with rigorous lifting and other physical requirements, such as nursing positions in nursing homes in which patients need to be lifted and otherwise assisted with daily tasks, most, if not all, pregnant women might require accommodation and seek light-duty assignments if those assignments were known to be available to them. Similar to the situation in *Dothard* in which the Court indicated that requiring information on the height and weight of actual applicants might distort the actual disparate impact of the challenged height and weight restrictions in that case because “of a self-recognized inability to meet the very standards challenged as being discriminatory,”²²⁰ measuring which pregnant women “needed” light-duty assignments by determining who asked for such accommodation or who presented medical certification for such assignments risks distorting the actual disparate impact of such practices. Women who have a physical need for such accommodation might fail to seek accommodation because they know that they do not satisfy the requirements of the employer’s policy and might fear the economic consequences of providing medical documentation that could result in forced leave or even termination.

In *Spivey v. Beverly Enterprises, Inc.*,²²¹ the United States Court of

216. *Id.* at *5.

217. *Id.* at *1, 6.

218. *Id.* at *6.

219. 433 U.S. 321, 331 (1977).

220. *Id.* at 330.

221. 196 F.3d 1309 (11th Cir. 1999).

162 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

Appeals for the Eleventh Circuit rejected as unsubstantiated the disparate impact claim of a pregnant employee who was terminated because the employer refused to provide an accommodation to a lifting restriction imposed by her physician under its modified duty policy, which it made available only to employees who suffered from work-related injuries. Although the court of appeals seemed to suggest that a claim of disparate impact could be made out with respect to the employer's modified duty policy, if it could be shown to have a disproportionate impact on pregnant employees, the court held that the plaintiff had failed to prove that the employer's policy had a disparate impact in practice.²²² The plaintiff in the *Spivey* case suffered a failure of proof, in that instance by not presenting any statistical or other evidence in support of her claim of disparate impact.²²³ The result in this case certainly does not suggest that plaintiffs will not be able to establish, with the proper proof, that policies of restricting light or modified duty assignments to individual with on-the-job or occupational injuries have a disparate impact on women affected by pregnancy and childbirth.

The outcome in the existing cases addressing disparate impact claims based on an employer's restrictive leave policies, lifting or other physical requirements, and policies restricting accommodations, such as light or modified duties, to employees with on-the-job injuries or other categories of employees suggests a reason to be cautious about the potential for women affected by pregnancy and childbirth to be successful in establishing claims of disparate impact on the basis of pregnancy. However, a correct application of the rules of disparate impact developed by the Supreme Court suggests that women affected by pregnancy should, in the proper case, be able to establish a prima facie case of disparate impact on the basis of pregnancy based on the type of employer policies discussed above.²²⁴ To the extent that the claims in existing cases have

222. *Id.* at 1314.

223. *Id.*

224. See, for example, Grossman & Thomas, *supra* note 10, at 43. In that article, the authors provide information about the evidence presented in support of the plaintiffs' disparate impact claims in *Lochren v. Cty. of Suffolk*, No. CV 01-3925, 2008 WL 2039458, at *1 (E.D.N.Y. May 9, 2008), in which the plaintiffs successfully demonstrated that the employer's policy of restricting light duty to employees injured on the job violated the disparate impact theory. The plaintiffs in that case had presented evidence that before the employer implemented its restriction on light duty assignments, pregnant women had "used light duty in statistically significant higher proportions, compared to their total numbers on the force, than the overall force used sick light duty: approximately 6.1 percent of the women on the nearly-2000 officer force used light duty for pregnancy each year, by comparison, slightly over 1.2 percent of the total number of officers used light duty for other off-the-job illnesses and

2015]

DISPARATE IMPACT AND PREGNANCY

163

been unsuccessful, at least some of that failure appears to be attributable to failures of proof, perhaps because those cases were litigated without sufficient knowledge about the requirements of disparate impact claims or without the resources to produce the type of statistical and other evidence necessary to sustain a prima facie case of disparate impact. It may not be a coincidence that at least one of the successful claims of disparate impact based on pregnancy to date was litigated by the EEOC.

B. The Job-Relatedness and Business Necessity of Employer Failures to Extend Accommodations to Pregnant Women

If women affected by pregnancy are successful in establishing that restrictive leave policies and other employer policies that effectively deny accommodation to the physical limitations imposed by pregnancy have a disproportionate negative effect on pregnant women or even women in general, employers maintaining those policies will be required to come forward with justifications for those policies. As is true with its general lack of guidance on how employees might be able to make out prima facie cases of disparate impact based on pregnancy, the EEOC guidance provides little help to employers on how such justification may be established. Rather, the EEOC guidance generally recounts the statutory requirement that Title VII is violated if “the employer cannot show that the policy is job related for the position in question and consistent with business necessity.”²²⁵ Although the guidance gives no indication of what the requirement of job relatedness might mean in the context of an employer policy with a disproportionate effect on pregnant women, the guidance does indicate that the business necessity defense can be met with a showing “that the requirement is ‘necessary to safe and efficient job performance.’”²²⁶

Congress in the Civil Rights Act of 1991, which expressly codified the disparate impact theory in Title VII, did not define the terms “job related” or “business necessity,” other than to make clear that its purpose was “to codify the concepts of ‘business necessity’ and ‘job related’ enunciated by the Supreme Court in *Griggs v. Duke Power Co.* and in the other Supreme Court decisions prior to *Wards Cove Packing Co. v. Atonio.*”²²⁷ A review of those cases demonstrates that those concepts will impose a rigorous burden on employers to justify their practices that disproportionately

conditions each year.”

225. U.S. EQUAL EMP. OPPORTUNITY COMM’N, NO. 915.003, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (June 25, 2015).

226. *Id.*

227. Civil Rights Act of 1991, PUB. L. NO. 102-166, § 3, 105 Stat. 1071 (1991) (citations omitted).

disadvantage women affected by pregnancy by failing to accommodate the temporary physical limitations associated with pregnancy and childbirth.

From the *Griggs* case comes both a definition of “business necessity” and “job related” and an indication that those standards will be enforced with some rigor. In the context of a challenge to a high school diploma and “intelligence test” requirements, the Court declared that an employment practice with a discriminatory impact must be “shown to be related to job performance,” shown “to bear a demonstrable relationship to successful performance of the job[],” or shown to have “a manifest relationship to the employment in question.”²²⁸ The Court rejected the employer’s general claims that these requirements were necessary to improve the quality of the workforce as insufficient and unsubstantiated.²²⁹ The Court in *Albemarle* added that the defense of job relatedness “cannot be proved through vague and unsubstantiated hearsay.”²³⁰ And the Court in *Dothard* rejected as insufficient to prove job relatedness what might have been thought to be a common-sense notion that the challenged height and weight restrictions in that case “have a relationship to strength, a sufficient but unspecified amount of which is essential to effective job performance as a correctional counselor.” Instead, the Court demanded proof of the correlation between the challenged employment practice and the job requirement asserted.²³¹

It is true that the Court in *Wards Cove* sought to soften the burden on employers with respect to the required showings of business necessity and job relatedness, not only by relieving the employer of the burden of persuasion with respect to those defenses,²³² but also by redefining the terms to mean that “a challenged practice serves, in a significant way, the legitimate employment goals of the employer,” with this inquiry requiring more than a “mere insubstantial justification” for use of the practice.²³³ The Court also noted, quite counter-intuitively, that the requirement of business necessity did not impose any requirement that the practice “be ‘essential’ or ‘indispensable’ to the employer’s business.”²³⁴ Of course, not only did the dissenting justices call out the majority’s attempt to misconstrue and alter the Court’s prior precedent on disparate impact,²³⁵ but Congress also soundly rejected those efforts. Whatever the terms “job

228. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

229. *Id.* at 431.

230. *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 428 n.23 (1975).

231. *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977).

232. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659-60 (1989).

233. *Id.* at 659.

234. *Id.*

235. *See id.* at 661-62 (Blackmun, J., dissenting); *id.* at 662-79 (Stevens, J., dissenting).

2015]

DISPARATE IMPACT AND PREGNANCY

165

related” and “business necessity” are intended by Congress to mean, those terms assuredly do not mean what the majority of the Court in *Wards Cove* said they meant.

Because very few lower courts have found the plaintiffs to have established a prima facie case of disparate impact based on pregnancy, the lower courts have had relatively few opportunities to determine what type of showing might meet the requirements of those defenses in the context of employer’s policies that fail to accommodate to the temporary physical limitations associated with pregnancy and childbirth. However, the few instances in which the courts have addressed whether an employer has provided sufficient justification for its practices that disadvantage pregnant women suggest that employers might have difficulty meeting the requirements of job relatedness and business necessity with respect to those practices.

In the case of *United States Equal Employment Opportunity Commission v. Warshawsky & Co.*,²³⁶ the district court rejected the employer’s asserted business justification for its practice of not allowing any leave for illness or disability during the first year of employment, which the court found to have a disparate impact on women because of pregnancy based on the statistical evidence provided by the plaintiff.²³⁷ The employer claimed that its policy was necessary to reward employees for staying with the company for more than one year and to reduce the effects of turnover on the company. The court held that this was an insufficient showing to justify the policy.²³⁸ Interestingly, this case was decided under the standards set forth in *Wards Cove*, which have since been abandoned. If that showing was insufficient even under the softened standards for business necessity and job relatedness from that case, that showing would clearly be insufficient under the more rigorous standards reinstated by the Civil Rights Act of 1991.

There is reason to believe that employers will have difficulty justifying their restrictive leave policies as supported by business necessity and job relatedness. A policy of refusing leave to pregnant employees needed to allow them to deal with the physical limitations imposed by pregnancy and childbirth would not seem to be related to the successful performance of any particular job, at least a job that does not depend on the employees always being present, if such jobs exist. The question is not whether employees need to be present at work in order to do their jobs; for most jobs, they do. The question is whether a requirement of no or very limited

236. 768 F. Supp. 647 (N.D. Ill. 1991).

237. *Id.* at 658.

238. *Id.*

absences, either at any time or during a probationary period, can be said to be necessary for successful performance of the job or necessary to the employer's business, rather than just convenient for the employer. The fact that federal law, by way of the Family and Medical Leave Act, mandates that employers provide leave for a number of purposes, including self-care and family care, to pregnant women and other employees, suggests that the standard of job-relatedness and business necessity for a restrictive leave policy cannot be met in most instances.²³⁹ After all, if employers are legally required to provide leave for some pregnant women and other employees, it will be harder for those employers to argue that providing leave for pregnant women when not mandated by law to do so is inconsistent with business necessity.

Employers may well be able to justify the job relatedness and business necessity of practices and policies that require heavy lifting or impose other physical requirements that disproportionately impact on a temporary basis women affected by pregnancy and childbirth, at least with respect to some jobs with rigorous physical requirements, which likely can be shown to require performance of those functions.²⁴⁰ But, what employers likely will not be able to show to be job related and consistent with business necessity are practices of allowing some employees, but not pregnant women, to be exempted from those functions, such as by the selective application of light or modified duty rules. Employers are likely to seek to justify policies of offering light duty only to employees injured on the job as related to

239. Contrary to the assertion of the district court in *Stout v. Baxter Healthcare Corp.*, 107 F. Supp. 2d 744, 747 (N.D. Miss. 2000), the existence of limitations on the right to unpaid leave provided in the Family and Medical Leave Act to employees who have been employed for at least one year and who worked at least 1,250 hours in that year does not demonstrate the reasonableness, much less the business necessity or job relatedness, of restrictive leave policies. Instead, those limitations are the result of political compromise, rather than an indication that such limitations were necessary or essential to the business interests of employers. See Deborah A. Widiss, Gilbert Redux, *The Interaction of the Pregnancy Discrimination Act and the Amended Americans with Disabilities Act*, 46 U.C. DAVIS L. REV. 961, 1001-02 (2013) (discussing the political compromises that led to the current limitations on unpaid leave under the Family and Medical Leave Act).

240. On the other hand, some employers likely will not be able to show the job relatedness or business necessity of their lifting or other physical requirements. For example, the employer in *Garcia v. Women's Hosp. of Tex.*, 97 F.3d 810, 811-12 (5th Cir. 1996), refused to allow the pregnant plaintiff to return to work after leave for dehydration and chronic vomiting related to her pregnancy because her physician refused to certify that she could "push, pull, lift, and support over 150 lbs.," but the hospital admitted that it did not test the plaintiff or any other applicant before hiring to determine if they could lift that amount and did not test current employees. Based on such evidence, the employer likely would not be able to prove that such a lifting requirement was related to the jobs for which it was hiring or necessary to its business.

seeking to reduce their worker's compensation costs by obtaining work from employees that they are required to compensate by law. However, those considerations are not related to the ability of any employee to perform the functions of the job, which is what the courts have said is meant by being "job related."²⁴¹ Nor would such a reason meet the standards of business necessity—such a reason might reflect convenience or economic efficiency to the employer, but it would not seem to meet the requirement that it be necessary or essential to the employer's business, unless, perhaps, the employer could demonstrate that the only way to preserve light duty jobs for employees injured on the job was to exclude others from those jobs. And, in any event, employers would have to prove that this was true, not merely assert it as a justification for its policy of favoring employees injured on the job.²⁴²

Similarly, the fact that employers are required to provide reasonable accommodation to employees who meet the requirement of disability under the Americans With Disabilities Act and therefore may, at least in some circumstances, be required to extend light or modified duty to those employees suggests that employers may have more difficulty establishing that their failure to extend those accommodations to women affected by pregnancy is job related and consistent with business necessity. That employers are mandated by law to accommodate some employees says nothing about the business necessity or, for that matter, the job relatedness of failing to provide accommodation to others.²⁴³ The lack of a legal

241. See, for example, the claims of the employer in *Lehmuller v. Inc. Vill. of Sag Harbor*, 944 F. Supp. 1087, 1092-93 (E.D.N.Y. 1996), which argued that it offered light duty to employees injured on the job because it was required by law to pay them whether they worked or not. Because the court found that the policy was not consistently applied, it did not have to determine whether such a justification was consistent with business necessity.

242. The court of appeals in *Spivey v. Beverly Enter., Inc.*, 196 F.3d 1309, 1311 n.1 (11th Cir. 1999), explained the employer's policy of restricting modified duty to only employees injured on the job in the following way: "Appellee reserves modified duty for employees with occupational injuries because there are only a limited number of light duty tasks available at any one time. If light duty were made available to all employees without regard to whether the injury was work-related, the light duty 'positions' would be depleted and unavailable when needed by employees with worker's compensation restrictions." Because the court cites no support for this conclusion, it is not clear whether this explanation was given by the employer or divined by the court. In any event, there does not appear to have been any evidence produced to support this statement, at least the court refers to none.

243. Nor does the fact that the Pregnancy Discrimination Act contains no explicit requirement of reasonable accommodation, as does the Americans With Disabilities Act, mean that the Pregnancy Discrimination Act must not be interpreted to mandate accommodation of pregnant women when employer policies that fail to do so cause a disparate impact, on the ground that otherwise the express accommodation requirement

168 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

requirement of accommodation does not suggest that failure to accommodate is necessary to the employer's business. In fact, that employers are able to accommodate some employees without undue hardship²⁴⁴ to the employer's business suggests that it may also be able to accommodate pregnant women consistent with the needs of their business. And, of course, if employers accommodate disabled employees even though the employer could meet the standard of undue hardship, then their accommodation of those employees is voluntary and not mandated by law.

Although involving a claim of disparate treatment rather than disparate impact, the Supreme Court's recent decision in *Young v. United Parcel Service, Inc.* is instructive on what type of showing would likely be insufficient to establish the job relatedness and business necessity of a practice restricting light or modified duty assignments to employees injured on the job, thereby excluding pregnant women from such assignments. The Court indicated that a pregnant woman denied an accommodation provided to other employees can make out a prima facie case of disparate treatment by following the *McDonnell Douglas* proof scheme, creating an inference of intentional discrimination by showing that she sought an accommodation and that the employer did not accommodate her while accommodating others similarly situated with respect to their ability to work.²⁴⁵ Next, the employer must justify its refusal to accommodate the plaintiff by articulating a legitimate, non-discriminatory reason to rebut the inference of intentional discrimination. And, the Court said, when the employer makes such a showing, "that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those . . . whom the employer accommodates."²⁴⁶ As the Court makes clear by turning next to the issue of "pretext,"²⁴⁷ the

of the ADA would be irrelevant or meaningless. Such an argument would be incorrect. While pregnant women are entitled to accommodation only when failure to do so violates either the disparate treatment theory, because the employer intentionally disfavors pregnant women, or the disparate impact theory, because the employer's policies disproportionately disadvantage pregnant women, the disabled are entitled to reasonable accommodation as defined in the ADA regardless of the employer's lack of discriminatory intent to disfavor the disabled or whether the disabled suffer a disparate impact because of the employer's policies.

244. The Americans With Disabilities Act does not require an employer to provide reasonable accommodation to a disabled employee if doing so would construe an "undue hardship on the operation of the business" of the employer. 42 U.S.C. § 12112(b)(5)(A). "Undue hardship" means "an action requiring significant difficulty or expense." 42 U.S.C. § 12111(10).

245. *Young v. United Parcel Serv., Inc.*, 575 U.S. ___, 135 S. Ct. 1338 (2015).

246. *Id.* at 1354.

247. *Id.*

2015]

DISPARATE IMPACT AND PREGNANCY

169

articulation of that sort of justification for the employer's policy is not just a matter of tending to show that the articulated reason is pretextual; instead, such an articulated reason does not even meet the employer's burden of rebutting the plaintiff's inference of discriminatory intent. The Court's reasoning is presumably either that such an articulated reason is not "legitimate" or is not "non-discriminatory."

If the employer's assertions with respect to convenience and cost in extending accommodations to pregnant women that they extend to others is insufficient to rebut the inference of discriminatory intent created by the *McDonnell Douglas* prima facie case, then those assertions clearly will be insufficient, even if proven by evidence, to meet the standards of business necessity and job relatedness required to refute a prima facie of disparate impact. Even when the majority of the Supreme Court in *Wards Cove* sought to blend the disparate treatment and disparate impact theories by causing the job-related and business necessity defenses to claims of disparate impact to resemble the defense of a "legitimate, nondiscriminatory reason to claims of disparate treatment," it was not *easier* to establish a defense to a disparate impact claim than a disparate treatment claim. And Congress rejected the Court's efforts to make it easier for employers to establish the job-related and business-necessity defenses. Accordingly, the showing required by employers to defend against the disparate impact of a challenged practice cannot be less than that required by the Court in the *Young* case to rebut the claim that the employer adopted its practice with an intent to discriminate.

C. Alternative Employment Practices to Failures to Accommodate on the Basis of Pregnancy

Even if employers are able to demonstrate that their practices that disproportionately impact women on the basis of pregnancy are job related and consistent with business necessity, they will be able to lawfully use those practices only if employees fail to establish the existence of alternative practices that would meet the employer's needs, but be less discriminatory, and that the employer refuses to adopt those practices.²⁴⁸

248. 42 U.S.C. § 2000e-2(k)(1)(A)(ii); *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975) ("If an employer does then meet the burden of proving that its tests are 'job related,' it remains open to the complaining party to show that other tests or selection devices, without a similarly undesirable racial effect, would also serve the employer's legitimate interest in 'efficient and trustworthy workmanship.'"). The EEOC in its recent guidance indicates that if the employer succeeds in showing job relatedness and business necessity, "a violation still can be found if there is a less discriminatory alternative that meets the business need and the employer refuses to adopt it." U.S. EQUAL EMP. OPPORTUNITY COMM'N, NO. 915.003, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (June 25, 2015).

170 JOURNAL OF GENDER, SOCIAL POLICY & THE LAW [Vol. 24:1

Congress in the Civil Rights Act of 1991 failed to define precisely what is meant by an “alternative employment practice,” except to apparently reject the gloss on that issue provided by the Court in *Wards Cove*.²⁴⁹ The Court’s cases prior to *Wards Cove* contain very little explanation of this step in the disparate impact analysis. And the lower court cases dealing with disparate impact claims on the basis of pregnancy generally do not reach this step of the disparate impact analysis.²⁵⁰

What the Court in *Wards Cove* said about the third step in the disparate impact analysis is that “any alternative practices which respondents offer up in this respect must be equally effective as petitioners’ chosen hiring procedures in achieving petitioners’ legitimate employment goals” and that “[f]actors such as the cost or other burdens of proposed alternative selection devices are relevant in determining whether they would be equally as effective as the challenged practice in serving the employer’s legitimate business goals.”²⁵¹ But, of course, Congress did not adopt the *Wards Cove* formulation of the “alternative employment practice” test, but instead returned the test to what it had been before that decision. That the plurality decision in *Watson*, decided the year before *Wards Cove*, contained the same formulation as the Court’s decision in *Wards Cove* is irrelevant because the plurality decision was not a decision of the Court and therefore did not articulate “the law.” Accordingly, it would appear that Congress has rejected the *Wards Cove* indication that the alternative practice must be “equally effective,” particularly in terms of cost and convenience to the employer, although Congress did adopt the holding in *Wards Cove* that the employer must refuse to adopt that alternative employment practice in order to be liable.

If an employer is able to establish that its restrictive leave policies and its

249. 42 U.S.C. § 2000e-2(k)(1)(C) provides that the application of the “alternative employment practice” step of the disparate impact analysis “shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of ‘alternative employment practice.’” The *Wards Cove* case was decided June 5, 1989.

250. In one of the few cases to even address the third step of the disparate impact analysis in the context of a pregnancy discrimination claim, *U.S. Equal Emp’t Opportunity Comm’n v. Warshawsky*, 768 F. Supp. 647, 655 (N.D. Ill. 1991), after concluding that the employer had not met the burden of establishing business necessity, the court suggested that alternatives existed in any event because the employer later changed its policy “to a less discriminatory one” by reducing the amount of time employees had to be employed before being eligible for sick leave. This case, decided under the *Wards Cove* formulation of the second and third steps of disparate impact analysis, which have been rejected by Congress, may suggest that it will be even more difficult under present standards for employers to defend their restrictive leave policies.

251. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 662 (1989) (quoting *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 998 (1988)).

2015]

DISPARATE IMPACT AND PREGNANCY

171

restrictions on light and modified duty are job related and consistent with business necessity, in that the requirements of the particular job are inconsistent with the absence of any employee of the length necessary for women to deal with the physical effects of pregnancy and childbirth or that providing accommodations to those women would effectively preclude the employer from being able to provide accommodation to those it is legally compelled to accommodate, it is likely that employees will be unable to establish the existence of less discriminatory alternative employment practices that will still meet the employer's need. However, with respect to lifting or other physical requirements, even if those requirements are found to be job related and consistent with business necessity because related to the requirements of particular jobs and necessary to the operations of the employer, employees may well be able to establish the existence of less discriminatory alternative employment practices, including accommodations provided to women affected by pregnancy similar to those provided to other employees, such as those injured on the job or those for whom the law mandates accommodation. That those accommodations might impose some economic cost or inconvenience on the employer should not be dispositive with respect to whether those alternatives are "equally effective" at meeting the business needs of the employer, because Congress has rejected that limitation on the alternative employment practice step sought to be imposed by the Court in *Wards Cove*.

VIII. CONCLUSION

This Article has demonstrated that while the disparate treatment theory of discrimination may provide assistance to women affected by pregnancy when they are denied work accommodations that employers provide to other employees who are similarly situated with respect to their ability or inability to work, the disparate impact theory may be of greater assistance to women affected by pregnancy who seek accommodation even when the employer does not provide accommodation to others. In addition, the disparate impact theory does not require a showing that the employer intended to discriminate against pregnant women in formulating its policies or rejecting accommodations for pregnant women, while the disparate treatment theory requires such a showing, even if that showing is inferred from the effects of the employer's policy. Accordingly, employers who are found to have unintentionally, although unwisely, failed to extend accommodations to pregnant women will presumably be found not to have violated Title VII with respect to those actions under the disparate treatment theory,²⁵² while they may well be found liable under the disparate

252. The Supreme Court in *Young v. United Parcel Serv., Inc.*, indicated that under the disparate treatment theory, a plaintiff challenging an employer's failure to

impact theory.

This is not to say that disparate impact claims on the basis of pregnancy are without their challenges. Because compensatory and punitive damages are not available for disparate impact violations,²⁵³ women prevailing on such claims will likely not be made whole for the injuries that they have suffered from the employer's unlawful action, even though they will force employers to modify their policies to avoid disproportionately negative effects on women affected by pregnancy. In addition, disparate impact claims generally require evidence, particularly statistical evidence of the disproportionate impact of employer practices, which is often difficult or expensive to obtain.

These challenges associated with disparate impact claims based on pregnancy suggest that the EEOC should play a greater role with respect to issues surrounding claims of disparate impact on the basis of pregnancy. Not only should the EEOC provide better guidance to both employees and employers on the way in which the disparate impact theory might be relevant to challenging employer practices with respect to pregnancy and accommodation of employees, but the EEOC may be particularly well suited to assist employees with bringing such claims because the EEOC may have the resources and the motivation to pursue such claims that individual private litigants and their potential attorneys may lack, because of the greater difficulty and lesser economic rewards of pursuing disparate impact claims. This commitment by the EEOC to assist with such claims would appear to be fully consistent with the Commission's most recent Strategic Enforcement Plan, which identifies as a national priority the involvement of the Commission in "addressing emerging and developing issues," including "accommodating pregnancy-related limitations under the Americans with Disabilities Act Amendments Act (ADAAA) and the Pregnancy Discrimination Act (PDA)."²⁵⁴ The involvement of the EEOC in the litigation of such claims, again consistent with the terms of its

accommodate pregnant women while accommodating others "may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden, but rather—when considered along with the burden imposed—give rise to an inference of intentional discrimination." But reaching the jury does not guarantee that these employees will prevail, because the jury could presumably still conclude that the employer, while not having sufficient justification for its actions, did not intend to discriminate on the basis of pregnancy.

253. 42 U.S.C. § 1981a.

254. U.S. EQUAL EMP. OPPORTUNITY COMM'N, *Strategic Enforcement Plan, FY 2013-2016*, <http://www.eeoc.gov/eeoc/plan/sep.cfm>. pp. 1, 9-10.

2015]

DISPARATE IMPACT AND PREGNANCY

173

Strategic Enforcement Plan,²⁵⁵ could prove invaluable in establishing the invalidity of employer practices that disproportionately impact women affected by pregnancy and childbirth by failing to accommodate them. The resulting restructuring of existing employer policies could fulfill the promise of Title VII to eliminate employment practices that are “fair in form, but discriminatory in operation” and that “operate as ‘built-in headwinds’”²⁵⁶ for women who want nothing more than what men already have, to be able “to have families without losing their jobs.”²⁵⁷

255. *Id.* at 7 (In section on “Litigation Program,” the plan states: “Meritorious cases raising SEP or district priority issues should be given precedence in case selection. Where appropriate, SEP priorities should also be considered in selecting cases for amicus curiae participation.”).

256. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-32 (1971).

257. *Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 289 (1987) (citing *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 159 (1976) (Brennan, J., dissenting)). This is not to say that men never face discrimination in connection with their decision to have families. While men are not impacted by the physical aspects of pregnancy and therefore their jobs generally are not threatened by the very fact of impending or actual fatherhood, men who seek greater involvement in the raising of their children often suffer job detriments, based on stereotypical notions about the “proper” role of men as breadwinner rather than caretakers. See *Unlawful Discrimination Against Pregnant Workers and Works with Caregiving Responsibilities: Written Testimony of Joan C. Williams*, Professor of Law, University of California Hastings Foundation Chair and Director, Center for Work Life Law; Testimony of Emily Martin, National Women’s Law Center, (Feb. 15, 2012) (cataloging cases of caregiver bias against men, including retaliation against men who have taken leave under the Family and Medical Leave Act to care for their newborn children or other family members).