THE PREGNANT WORKERS FAIRNESS ACT (H.R. 2694)

LEGAL BACKGROUNDER

Current laws are forcing pregnant workers to make an impossible choice between their paycheck and a healthy pregnancy. The solution, the federal Pregnant Workers Fairness Act, is Long Overdue.

Why is the Pregnancy Discrimination Act inadequate for pregnant workers in need of accommodations?

The Pregnancy Discrimination Act (PDA) of 1978 bans discrimination against pregnant workers and specifies that pregnant workers should be treated the same as those who are "similar in ability or inability to work." This standard places a unique burden on pregnant workers to identify someone else in the workplace who was provided accommodations in order to obtain their own medically necessary accommodation,[1] a burden not placed on workers with disabilities.

Unsurprisingly, this burden is nearly impossible to meet. According to a recent report, "Long Overdue," by A Better Balance, **two-thirds of workers lost their pregnancy accommodation cases post-*Young v. UPS*** — a Supreme Court case many hoped would provide clarity but unfortunately did not. The majority of these losses can be traced to courts' rejection of women's comparators or inability to find a comparator.[2]

Workers, especially low-wage workers, particularly women of color, often do not have access to their co-workers' personnel files. Often, this information is rightly confidential, which again means a pregnant worker would be at a loss. Moreover, they often do not have the bargaining power, resources, or time to even ask.

Women in jobs ranging from nursing[3] to law enforcement[4] and in both the public[5] and private sector[6] were denied accommodations because courts found they could not produce evidence of other similar employees who had been provided accommodations. These cases also spanned the nation, with **women denied accommodations everywhere from Michigan[7] to Tennessee[8] to Pennsylvania[9] to Oklahoma.[10]**

CASSANDRA ADDUCI worked part-time at a warehouse in Tennessee and requested a temporary re-assignment after her doctor told her she should lift no more than 25 pounds. Though the employer had a "Temporary Return to Work" program and Adduci provided the court with a spreadsheet of 261 employees that the company provided with temporary work or light duty assignments, the court, post-*Young*, rejected those employees as valid comparators even though some of those accommodated were part-time, like Adduci, and occupied *the same exact position* as Adduci.[11] In another case out of Florida, a court rejected a firefighter's claim that the city failed to provide her light duty because she could not produce a "nearly identical" comparator.[12]

Why is the Americans with Disabilities Act Amendments Act inadequate for pregnant workers in need of accommodations?

The purpose of the **Americans with Disabilities Act (ADAAA)** is to address instances when a worker with a disability needs an accommodation related to that disability. Pregnancy is not itself a disability under the law,[13] and hence a pregnant worker who has no complications but seeks an accommodation in order to avoid a complication, will not be able to get an accommodation under the ADAAA.

Furthermore, even though Congress expanded the ADA in 2008 and in theory it should provide accommodations for workers with pregnancy-related disabilities, courts have interpreted the ADA Amendments Act in a way that did little to expand coverage even for those pregnant workers with serious health complications.

As one court recently concluded in 2018, "Although the 2008 amendments broadened the ADA's definition of disability, these changes only have had a modest impact when applied to pregnancy-related conditions."[14]

Thus, even in scenarios where pregnant workers have presented very serious complications related to pregnancy, courts have still been unwilling to

recognize those as ADA-qualifying disabilities because the complication did not amount to an "impairment" in the courts' view, and/or their pregnancy complication did not substantially limit a major life activity.[15]

Pregnancy-related complications that did not merit ADAAA protections:

- **High-risk pregnancy:** Shakirat Tomiwa, a pharmacist in Texas, had to undergo two emergency surgeries related to her high-risk pregnancy but the court said she did not have an impairment that constituted a "disability" and dismissed her ADAAA claim.[16]
- **Hyperemesis gravidarum**: Sylvia Wonasue, from Maryland, went to the ER while pregnant and was diagnosed with hyperemesis gravidarum, a severe form of morning sickness, and hypokalemia, a low level of potassium. But the court found she did not have an impairment for purposes of the ADAAA and dismissed her ADAAA claim.[17]
- **Pregnancy-related nausea:** Elizabeth Annobil, from Massachusetts, reported to her supervisor that she suffered from headaches, nausea, and vomiting during her pregnancy but the court found she had "no legal argument as to whether such symptoms differ from normal symptoms of pregnancy and how these complications are disabling" and dismissed her ADAAA claim.[18]
- **Pregnancy-related bleeding at work**: Jennifer Alger**,** from Georgia, experienced "severe complications" and bleeding at work while she was pregnant but the court said she failed to show her complications qualified as a disability and dismissed her ADAAA claim.[19]

Why is the Family and Medical Leave Act inadequate for pregnant workers in need of accommodations?

The **Family and Medical Leave Act (FMLA)** [20] is a federal law that gives covered workers the right to up to 12 weeks of unpaid, job-protected time off to - address their own serious health needs, bond with a new child, care for a seriously ill or injured family member, or address certain military family needs.

Although a very important protection, the FMLA is not the statutory scheme pregnant workers need when they require reasonable accommodations, like a stool to sit on, a water bottle, or light duty, to continue working. The FMLA provides workers with up to twelve weeks of unpaid leave for pregnancy-related illness, recovery from childbirth, and other pregnancy-related incapacity. More than 40 percent of workers are ineligible for FMLA protections and many more cannot afford to take time off unpaid.[21] Workers who are forced to use up their FMLA leave entitlement when forced off the job during pregnancy are then often unable to use its protections to care for their new baby, one of the intended uses of the FMLA.

The Solution Is the Pregnant Workers Fairness Act

The bipartisan **Pregnant Workers Fairness Act** would address this gap in our federal laws and fulfill the intent of the PDA. Specifically, the Pregnant Workers Fairness Act would require employers to make reasonable accommodations for employees who have limitations stemming from pregnancy, childbirth or related medical conditions, unless the requested accommodation would impose an undue hardship on the employer—the same familiar process in place for workers with disabilities. The Pregnant Workers Fairness Act, like the ADAAA, would encourage a productive, informal dialogue between employer and employees. The law would finally ensure that pregnant workers can get the immediate relief they need to remain healthy and on the job. It is long overdue.

For more information see:

- A Better Balance's Congressional Testimony from the Pregnant Workers Fairness Act hearing
- A Better Balance's Report *Long Overdue: It Is Time for the Pregnant Workers Fairness Act*
- A Better Balance Pregnant Workers Fairness Resources page
- A Better Balance Fact Sheet: The Pregnant Workers Fairness Act

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[1] See DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, A BETTER BALANCE, LONG OVERDUE 13 (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf (citing A BETTER BALANCE, PREGNANT AND JOBLESS: THIRTY-SEVEN YEARS AFTER PREGNANCY DISCRIMINATION ACT, PREGNANT WOMEN STILL CHOOSE BETWEEN A PAYCHECK AND A HEALTHY PREGNANCY 5 (2015)).
[2] *Id.* at 13–16 (listing all post-*Young v. UPS* cases wherein courts held employers were permitted to deny pregnant workers accommodations under the Pregnancy Discrimination Act).
[3] *See* Dina Bakst, Congressional Testimony at 15, *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab.*, 116th Cong. (2019) [hereinafter *Bakst Congressional Testimony*], https://edlabor.house.gov/download/10/22/2019/baksttestimony102219 (citing *Luke v. CPlace Forest Park SNF*, 747 Fed. App'x. 978, 980 (5th Cir. 2019); *Turner v. Hartford Nursing and Rehab,* No. 16 Civ. 12926, 2017 WL 3149143, at *6 (E.D. Mich. July 25, 2017)).
[4] *Id.* (citing *Legg v. Ulster Cty.,* No. 1:09-CV-550 (FJS/RFT), 2017 WL 3207754, at *5 (N.D.N.Y. July 27, 2017), *appeal docketed,* No. 17-2861 (2d Cir. Sept. 14, 2017)).
[5] *Id.* (citing, e.g., *Vidovic v. City of Tampa*, No. 8:16-cv-T-17AAS, 2017 WL 10294807, at *9 (M.D. Fla. Oct. 12, 2017); *Diaz v. Florida,* 219 F. Supp. 3d 1207, 1218 (S.D. Fla. 2016)).
[6] *Id.* (citing, e.g., *Swanger-Metcalfe v. Bowhead Integrated Support Servs.*, LLC, No. 1:17-cv-2000, 2019 WL 1493342, at *8 (M.D. Pa. Mar. 31, 2019); *LaCount v. South Lewis SH OPCO*, No. 16-CV-0545-CVE-TLW, 2017 WL 2821814, at *2 (N.D. Okla. June 29, 2017); *Anfeldt v. United Parcel Serv., Inc.,* No. 15 Civ. 10401, 2017 WL 839486, at *3 (N.D. Ill. Mar. 3, 2017)).
[7] *Id.* (citing *Huffman v. Speedway LLC*, 621 Fed. App'x 792, 799 (6th Cir. 2015)).
[8] *Id.* (citing *Adduci v. Fed. Express Corp*., 298 F. Supp. 3d 1153, 1156 (W.D. Tenn. 2018)).
[9] *Id.* (citing *Wadley v. Kiddie Acad. Int'l, Inc.*, No. CV 17-05745, 2018 WL 3035785, at *1 (E.D. Pa. June 19, 2018)).
[10] *Id.* (citing *LaCount v. South Lewis SH OPCO,* No. 16-CV-0545-CVE-TLW, 2017 WL 2821814, at *2 (N.D. Okla. June 29, 2017)).
[11] *Id.* (citing *Adduci*, 298 F. Supp. 3d at 1156).
[12] *Id.* (citing *Vidovic v. City of Tampa*, No. 8:16-cv-T-17AAS, 2017 WL 10294807 (M.D. Fla. Oct. 12, 2017)).
[13] *Id.* (citing, e.g., *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540, 553 (7th Cir. 2011) (citing EEOC guidance, that remains in place to this day in holding "[c]ourts that consider these regulations consistently find that pregnancy, absent unusual circumstances, is not a physical impairment"); *Brown v. Aria Health*, No. CV 17-1827, 2019 WL 1745653, at *4 (E.D. Pa. Apr. 17, 2019) ("A routine pregnancy is not considered a disability within the meaning of the ADA."); *Hannis-Miskar v. N. Schuylkill Sch. Dist.*, No. 3:16CV142, 2016 WL 3965209, at *3 (M.D. Pa. July 22, 2016) ("Because plaintiff fails to assert complications with her pregnancy, she has failed to plead a disability under the ADA."); *Selkow v. 7-Eleven, Inc.*, No. 11-456, 2012 WL 2054872, at *14 (M.D. Fla. June 7, 2012) ("Absent unusual circumstances, pregnancy is not considered a disability . . . ."); *see also* 29 C.F.R. pt. 1630 app. ("Other conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments."). *See also* Dina Bakst, Responses to Questions for the Record at 6, *Long Over Due: Exploring the Pregnant Workers' Fairness Act (H.R. 2694): Hearing Before the Subcomm. on Civil Rights and Human Services of the H. Comm. on Ed. & Lab.*, 116th Cong. (2019) [hereinafter *Bakst Questions for the Record*) (on file with author) (citing *Tomiwa v. PharMEDium Servs.*, LLC, No. 4:16-CV-3229, 2018 WL 1898458, at *5 (S.D. Tex. Apr. 20, 2018) ("Absent unusual circumstances, pregnancy and related medical conditions do not constitute a physical impairment.").
[14] *See Bakst Questions for the Record*, at 6 (citing *Scheidt v. Floor Covering Assocs., Inc.*, No. 16-CV-5999, 2018 WL 4679582, at *6 (N.D. Ill. Sept. 28, 2018) (holding allergies, including rashes and breathing problems, do not constitute a disability that impairs a major life activity).
[15] *Id.* at 7 (citing *Tomiwa v. PharMEDium Servs., LLC*, No. 4:16-CV-3229, 2018 WL 1898458, at *5 (S.D. Tex. Apr. 20, 2018) (dismissing plaintiff's ADAAA claim because, despite the two emergency surgeries she had to undergo for a high risk pregnancy, the court said "[a]bsent unusual circumstances, pregnancy and related medical conditions do not constitute a physical impairment," under the ADAAA *and Colon v. Sabic Innovative Plastics US, LLC*, No. 115CV651MADDJS, 2017 WL 3503681, at *7 (N.D.N.Y. Aug. 15, 2017) ("The only evidence that Plaintiff presented in support of her position that her high-risk pregnancy was a disability is the fact that her doctor diagnosed her with a high risk pregnancy. Plaintiff does not claim that her high-risk pregnancy substantially limited in any way her…major life activity.").
[16] *Id.* at 7. *See also Colon*, 2017 WL 3503681, at *7.
[17] *Id.* (citing *Wonasue v. University of Maryland Alumni Association*, 984 F. Supp. 2d 480, 490 (D. Md. 2013)).
[18] *Id.* (citing *Annobil v. Worcester Skilled Care Ctr., Inc.,* No. CIV.A. 11-40131-TSH, 2014 WL 4657295, at *11 (D. Mass. Sept. 10, 2014)). *See also Llano v. New York City Health & Hosps.* Corp., No. 13 CIV. 5820 RJS, 2014 WL 1302654, at *2 (S.D.N.Y. Mar. 31, 2014) (dismissing plaintiff's ADAAA claim because she could not show nausea "substantially limited one or more major life activities.").
[19] *Id.* (citing *Alger v. Prime Rest. Mgmt*., LLC, No. 1:15-CV-567-WSD, 2016 WL 3741984, at *1 (N.D. Ga. July 13, 2016)). *See also Love v. First Transit, Inc.*, No. 16-CV-2208, 2017 WL 1022191, at *1, (N.D. Ill. Mar. 16, 2017) (dismissing ADAAA claim even though plaintiff experienced bleeding at work and asked for an accommodation to leave work early to go to the hospital).
[20] 29 U.S.C. §§ 2601–2654 (2012).
[21] *See* HELEN JORGENSON & EILEEN APPELBAUM, CTR. FOR ECON. & POLICY RESEARCH, EXPANDING FEDERAL FAMILY AND MEDICAL LEAVE COVERAGE: WHO BENEFITS FROM CHANGES IN ELIGIBILITY REQUIREMENTS? 3 (Feb. 2014), http://cepr.net/documents/fmlaeligibility-2014-01.pdf.