# 17-5075

# United States Court of Appeals

## For the Tenth Circuit

WHITNEY M. LACOUNT,

*Plaintiff-Appellant,*

*v.*

SOUTH LEWIS SH OPCO, LLC,
d/b/a THE VILLAGES AT SOUTHERN HILLS,

*Defendant-Appellee*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

**BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION FOUNDATION; AMERICAN CIVIL LIBERTIES UNION OF OKLAHOMA; CENTER FOR WORKLIFE LAW; 9TO5, NATIONAL ASSOCIATION OF WORKING WOMEN; A BETTER BALANCE; CALIFORNIA WOMEN'S LAW CENTER; COALITION OF LABOR UNION WOMEN; EQUAL RIGHTS ADVOCATES; FAMILY VALUES @ WORK; GENDER JUSTICE; LEGAL AID AT WORK; LEGAL MOMENTUM; LEGAL VOICE; NATIONAL EMPLOYMENT LAW PROJECT; NATIONAL ORGANIZATION FOR WOMEN FOUNDATION; NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES; NATIONAL WOMEN'S LAW CENTER; OKLAHOMA EMPLOYMENT LAWYERS ASSOCIATION; PLAINTIFF EMPLOYMENT LAWYERS ASSOCIATION; SOUTHWEST WOMEN'S LAW CENTER; WOMEN EMPLOYED; WOMEN'S LAW CENTER OF MARYLAND, INC.; and WOMEN'S LAW PROJECT IN SUPPORT OF PLAINTIFF-APPELLANT WHITNEY M. LACOUNT**

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## CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel of record certifies that none of the *amici curiae* is a nongovernmental entity with a parent corporation or a publicly held corporation that owns 10 percent or more of its stock. This representation is made in order that the judges of this Court may evaluate possible disqualification or recusal.

Dated: November 13, 2017

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## SUMMARY OF ARGUMENT

In *Young v. United Parcel Service, Inc.*, the Supreme Court reaffirmed the central purpose of the Pregnancy Discrimination Act: to assure that employers do not force women out of the workforce due to pregnancy. The liability standards announced in *Young* specifically sought to place pregnant women who need workplace accommodations due to pregnancy on equal footing with other employees who require accommodations at work for other reasons. The District Court's decision in the present case misinterpreted and misapplied those standards by imposing an unfounded pleading standard that would in effect prevent many – if not most – women facing pregnancy discrimination from pursuing their claims in court.

The District Court demanded that Appellant Whitney M. LaCount ("Appellant" or "LaCount") provide in her initial pleadings a level of specificity about other individuals whom her employer accommodated that goes beyond what *Young* demands even at the post-discovery, summary judgment stage. At the same time, the District Court ignored allegations that would be sufficient to raise an inference of discrimination under the summary judgment standard articulated by the Court in *Young*. Specifically, the court dismissed the facially discriminatory accommodation policy of the Appellee ("Appellee" or the "Villages") as irrelevant and discounted the significance of a statement expressing explicit bias by the

decision-maker who forced LaCount out on the unpaid leave that ultimately resulted in her termination.

These errors demand reversal. If the District Court's ruling is allowed to stand, the courthouse doors will be closed to countless women who are forced off the job solely because of pregnancy. Such a result is fundamentally at odds with the Supreme Court's mandate in *Young* – and by extension, the letter and the spirit of the Pregnancy Discrimination Act.

## INTERESTS OF *AMICI CURIAE*[1]

*Amici* are a coalition of 23 civil rights groups and public interest organizations committed to preventing, combating, and redressing sex discrimination and protecting the equal rights of female workers in the United States. More detailed statements of interest are contained in the accompanying appendix.

*Amici* have a vital interest in ensuring that the Pregnancy Discrimination Act is interpreted so as to fulfill, not impede, the law's promise of equal employment opportunity for women affected by "pregnancy, childbirth, and related medical conditions."

## ARGUMENT

### I. The Supreme Court's Ruling in *Young v. United Parcel Service* Reaffirmed the Pregnancy Discrimination Act's Central Purpose of Assuring Employers Do Not Force Women Off the Job Due to Pregnancy

Congress enacted the Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) ("PDA"), to assure that pregnant women can participate in the labor force on an equal footing with other workers. Prior to the PDA's passage, a wide array of employer policies disadvantaged pregnant employees, none more so than policies

[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure and Local Rule 29.1, counsel for *amici curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

that forced women to stop working when they became pregnant, regardless of their capacity to work. *See, e.g.*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 634-35 (1974) (forcing pregnant teachers to take unpaid leave five months before they were due to give birth, with no guarantee of re-employment); *EEOC v. Chrysler Corp*., 683 F.2d 146, 147 (6th Cir. 1982) (requiring pregnant women to take leave in the fifth month of pregnancy); *Clanton v. Orleans Parish Sch. Bd.*, 649 F.2d 1084, 1086-87 (5th Cir. 1981) (placing teachers on leave in the beginning of the sixth month of their pregnancy); *Condit v. United Air Lines, Inc.*, 631 F.2d 1136, 1137 (4th Cir. 1980) (requiring that flight attendants "shall, upon knowledge of pregnancy, discontinue flying"); *Harriss v. Pan Am. World Airways, Inc*., 649 F.2d 670, 673 (9th Cir. 1980) (same); *Burwell v. Eastern Air Lines, Inc*., 633 F.2d 361, 363 (4th Cir. 1980) (same).

In enacting the PDA, Congress recognized that workers with other impairments did not suffer such systemic discrimination, or the resulting economic disadvantage. *See, e.g.*, S. Rep. No. 95-331, at 4 (1977) ("[T]he bill rejects the view that employers may treat pregnancy and its incidents as *sui generis*, without regard to its functional comparability with other conditions. . . . 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."); H.R. Rep. No. 95-948, at 4 (1978) ("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."). Indeed, the PDA was intended as a direct rebuke to the Supreme Court's conclusion, in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), that an employer's exclusion of pregnancy from an otherwise comprehensive temporary disability benefit policy was not discrimination "because of sex." *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 677-78 (1983).

Thus, the PDA amended Title VII not only to make explicit the fact that discrimination "because of sex" included discrimination "because of . . . pregnancy, childbirth, and related medical conditions," but also to expressly mandate, by a second clause, that pregnant workers "be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k). *See also Cal. Federal Sav. and Loan Ass'n v. Guerra*, 479 U.S. 272, 285 (1987) ("By adding pregnancy to the definition of sex discrimination prohibited by Title VII, the first clause of the PDA reflects Congress' disapproval of the reasoning in *Gilbert*. . . . [and] the second clause was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied."), citing *Newport News*, 462 U.S. at 678-79 n.14 & n.17.

By 2014, though, these bedrock principles of the PDA had become muddied with respect to women's right to "accommodation" of their pregnancy-related needs. Several appellate courts had deemed pregnant women insufficiently "similar" to various categories of non-pregnant workers to warrant being treated the "same." Indeed, in the decision that ultimately was reversed by the Supreme Court in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015), the Fourth Circuit refused to find Peggy Young, a pregnant UPS delivery driver with a lifting restriction, "similar" to three separate categories of workers, to whom the company granted job modifications when they were unable to fulfill all of their duties as drivers: workers entitled to accommodation under the Americans with Disabilities Act (ADA); those injured on the job; and those who had lost their commercial driver's license – even if the reason was a DUI conviction, rather than a physical impairment. *See Young v. United Parcel Serv., Inc.*, 784 F.3d 192, 196 (4th Cir. 2013).

Recognizing the "lower-court uncertainty about interpretation of the [PDA]" as to pregnancy accommodation, the Supreme Court granted *certiorari*. *Young*, 135 S. Ct. at 1348 (collecting cases). In its resulting opinion, the Court reaffirmed the three-part *McDonnell Douglas* burden-shifting framework applicable to disparate treatment cases that rely on circumstantial evidence. *Id.* at 1345, citing *McDonnell Douglas Corp. v. Green*, 93 S. Ct. 1817 (1973). It then articulated a modified

*McDonnell Douglas* analysis for PDA cases arising out of the statute's second clause, aimed at fulfilling the PDA's animating principle of "respond[ing] directly to *Gilbert*" – that is, assuring that an employer not "treat pregnancy less favorably than diseases or disabilities resulting in a similar inability to work." *Id.* at 1353. First, a plaintiff makes out a prima facie case if she shows that she (1) "belongs to the protected class"; (2) "that she sought accommodation"; (3) "that the employer did not accommodate her"; and (4) "that the employer did accommodate others 'similar in their ability or inability to work.'" *Id.* at 1354. The employer then puts forward "'legitimate, nondiscriminatory' reasons for denying her accommodation," which the plaintiff "may in turn show . . . are in fact pretextual." *Id.*

Applying this framework, the Court reversed the Fourth Circuit's grant of summary judgment. It first went to great lengths to reiterate that the prima facie standard is "not intended to be an inflexible rule," "not onerous," and "not as burdensome as succeeding on an 'ultimate finding of fact as to' a discriminatory employment action." *Id.* at 1353-54 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575-76 (1978)). The Court explained that the prima facie case does not require the plaintiff "to show that those whom the employer favored and those whom the employer disfavored were similar in *all* but the protected ways." *Young*, 135 S. Ct. at 1354 (emphasis added).

The Court also offered an alternate pretext analysis plaintiffs may rely on for claims under the PDA's second clause:

> We believe that the plaintiff may reach a jury on [the issue of pretext] 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.

*Id.* (emphasis added).

Notably, in defining that standard, the Court admonished that, "consistent with the Act's basic objective, [the employer's legitimate, nondiscriminatory] 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." *Id.* Rather, the twin touchstones of this inquiry are feasibility and fairness: "[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?" *Id.* at 1355.

As discussed further below, the District Court misapplied these standards. That it did so at the pleading stage, before LaCount had the benefit of discovery, exponentially magnifies the harm of its error.

## II. LaCount Alleged Facts Sufficient to Raise an Inference of Pregnancy Discrimination

The District Court correctly stated that LaCount is required to do no more at the initial pleading stage than allege facts sufficient to give rise to an inference that she was discriminated against because of her pregnancy (28 Motion to Dismiss Opinion ("MTD Op.") 5/5/2017, *Aplt. Apdx, pp. 9-10*). The court nonetheless dismissed LaCount's claim for failing to allege certain facts that exceed even the factual showing required to prove a prima facie case at the summary judgment stage under *Young*.

The District Court improperly found LaCount was required to identify *specific* individuals granted accommodation, as well as to allege those individuals' *specific* impairments and the *specific* accommodations they received. (*See* Appellant's Brief-in-Chief ("Appellant Br.") at 19-22.) *Young* instructs, however, that Appellee's ("Villages") accommodation policies – on their face – would be sufficient to make a prima facie case of discrimination at the summary judgment stage. *See Young*, 135 S. Ct. at 1353-55. Accordingly, they are certainly sufficient at the initial pleadings stage to raise an inference of discrimination. *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510 (2002) ("The prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement."). The lower court also erred in ruling that employees with disabilities are, *per se*, not "similarly situated" to pregnant workers needing

accommodation, and therefore cannot serve as comparators for purposes of determining whether LaCount was treated worse than other individuals similar in their inability to work. (28 MTD Op. 5/5/2017, *Aplt. Apdx, pp. 10-11*; 32 Motion for Reconsideration Opinion ("Reconsid. Op.") 6/29/2017, *Aplt. Apdx, p. 16*). This section addresses these two errors.

### A. *Young* Contemplates that an Employer's Policy *Alone* May Be Sufficient To Raise an Inference of Discrimination

In *Young*, the Supreme Court clarified that in analyzing claims for failure to accommodate under the PDA's second clause, courts should "consider the extent to which an employer's *policy* treats pregnant workers less favorably than it treats non-pregnant workers similar in their ability or inability to work." *Young*, 135 S. Ct. at 1344 (emphasis added). And indeed, in evaluating whether others similar to Peggy Young in their ability or inability to work had been accommodated, the Court looked to UPS's policy of providing light duty assignments to drivers who were injured on the job, had lost their commercial driver's licenses, or had ADA-qualifying disabilities. *Young*, 135 S. Ct. at 1347. The Court gave no weight to the reasons particular individuals needed an accommodation, focusing solely on the fact that they needed – and were eligible for – a temporary alternative work assignment. *Id.* at 1347, 1355. In one of only three appellate rulings interpreting the PDA after *Young*, the Second Circuit held that the employer's policy of accommodating employees injured on the job was enough, if not adequately

justified, for a reasonable jury to find discriminatory intent behind the employer's failure to accommodate pregnant employees. *Legg v. Ulster Cty.*, 820 F.3d 67, 74 (2d Cir. 2016).

LaCount alleged that Appellee maintained policies of accommodating at least two other categories of workers: individuals with ADA-qualifying disabilities and individuals with "non work-related limitations." (30 Am. Compl. 2/3/2017, *Aplt. Apdx, pp. 30-31*.) (Notably, this designation suggests that a third category – individuals with "*work*-related limitations" – also receive accommodation.) As in *Young* and *Legg* for purposes of summary judgment, these policies alone are sufficient to raise an inference of discriminatory intent at the pleading stage. *Cf. Latowski v. Northwoods Nursing Ctr.*, 549 F. App'x 478, 484 (6th Cir. 2013) (in pre-*Young* decision, reversing summary judgment because employer's stated policy of refusing to accommodate any restrictions stemming from off-the-job injuries or medical conditions was "so lacking in merit" that it created a triable question for a jury).

Inferring discrimination based on employer policies – particularly at the initial pleading stage – makes sense in practice. The burden of identifying specific individual comparators, before discovery, would be an insurmountable one for most PDA plaintiffs. Short job tenure, assignment to an isolated worksite, and relegation to a particular shift, to name just a few variables, prevent plaintiffs from

identifying specific individuals who have received job modifications, let alone for what reason. An employer's obligation to keep confidential its employees' private medical information also prevents plaintiffs' from providing the itemized tally sought by the District Court here. Requiring plaintiffs to allege information about other employees' private human resources matters in a complaint, without the benefit of discovery, would effectively shut the courthouse doors to individuals with valid claims, depriving them of a meaningful opportunity to vindicate their PDA rights, as reaffirmed by *Young*.

### B. Employees Who Qualify for "Reasonable Accommodation" Under the ADA are Appropriate Comparators for Pregnant Workers

The District Court erred when it held that employees with ADA-qualifying disabilities are categorically improper comparators for PDA accommodation cases because "normal" pregnancies are not generally considered disabilities under the ADA. (32 Reconsid. Op. 6/29/2017, *Aplt. Apdx, p. 16*). This finding ignores the long-established principle, confirmed by *Young*, that comparators need not be similar to plaintiffs in "*all* but the protected ways." 135 S. Ct. at 1354 (emphasis added). Comparators must be similar only with respect to their ability or inability *to work*. 42 U.S.C. § 2000e(k); *Young*, 135 S. Ct. at 1354. *See also Gonzales v. Marriott Int'l, Inc.*, 142 F. Supp. 3d 961, 978 (C.D. Cal. 2015) ("other employees with disabilities or medical conditions that require reasonable accommodations" are proper comparators); *Legg*, 820 F.3d at 74 (employees with on-the-job injuries

are proper comparators); *Bray v. Town of Wake Forest*, No. 5:14-CV-276-FL, 2015 WL 1534515, at *6 (E.D.N.C. Apr. 6, 2015) (employees with on the job injuries are proper comparators); *Hicks v. City of Tuscaloosa*, No. 7:13-CV-02063-TMP, 2015 WL 6123209, at *21 (N.D. Ala. Oct. 19, 2015), *aff'd* 870 F.3d 1253 (11th Cir. 2017) (employees given desk jobs "for medically related conditions" were proper comparators for a police officer who could not wear a bulletproof vest, and thus could not perform patrol functions, while pregnant); *Martin v. Winn-Dixie Louisiana, Inc.*, 132 F. Supp. 3d 794, 820 (M.D. La. 2015) (male employee with a back injury caused by a bar fight was a proper comparator).

In *Young* itself, the Court had before it UPS's policy granting accommodations to individuals covered by the ADA. *Young*, 135 S. Ct. at 1354-55. The Court thus could have issued a *per se* rule excluding such individuals as comparators, but did not. Indeed, the *Young* Court found individuals who lost their commercial driver's licenses – including for reasons having nothing to do with a physical impairment, such as a DUI conviction – to be appropriate comparators in concluding that Young created a genuine dispute of material fact as to whether others similar in their ability to work were accommodated. *Young*, 135 S. Ct. at 1355.

Comparing the treatment of pregnant employees to employees with ADA-qualifying disabilities also gives effect to Congress's intent in passing the PDA.

When Congress overturned *Gilbert* with the enactment of the PDA, it "reject[ed] the view that employers may treat pregnancy and its incidents as sui generis, without regard to its functional comparability with other conditions." S. Rep. No. 95-331, at 4 (1977); *see also* H.R. Rep. No. 95-948, at 4 (1978). Evaluating an employer's treatment of employees with ADA-qualifying disabilities, as compared to pregnant employees, fulfills Congress's objective of ensuring employers treat pregnancy the same as other conditions. It properly focuses the inquiry on ability or inability to work, rather than the source or severity of the impairment. It assures that pregnant workers "be accorded the same rights, leave privileges and other benefits, as other workers who are *disabled from working*." S. Rep. No. 95-331, at 4 (1977) (emphasis added); *see also* H.R. Rep. No. 95-948, at 4 (1978).

Finally, employees with ADA-qualifying disabilities must be proper comparators under the *Young* analysis because their exclusion would create an inverse relationship between workplace protections for individuals with ADA-qualifying disabilities and protections for pregnant employees – that is, should protections for the first group increase, protections for the latter necessarily would decrease. Specifically, in 2008 the Americans with Disabilities Act Amendment Act ("ADAAA") greatly expanded the meaning of "disability" under the ADA, so that now more physical and mental impairments qualify as disabilities than in the

past.[2] Pub. L. No. 110-325, 122 Stat. 3553. If the District Court's *per se* rule against ADA comparators is upheld, the universe of possible comparators post-*Young* will be drastically diminished, as many more individuals are now entitled to accommodations under the ADA – thus exacerbating, rather than remedying, the treatment of pregnancy as *sui generis*. *See* Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After Young v. UPS*, 50 UC Davis L. Rev. 1423, 1424 (2017) (an erroneous interpretation that ADA-accommodated employees are not comparators under the PDA would mean 2008 ADA expansion has "perverse effect of decreasing employers' obligations to pregnant employees").

## III. Appellee's Conduct and Policies Reflect Intent to Deny Accommodations to Pregnant Workers

The District Court erred by failing to draw all inferences in LaCount's favor with respect to Human Resources representative Upton's statement that LaCount's lifting restriction made her a "liability" and Upton's failure to consider possible accommodations, as explained in Appellant's Brief-in-Chief. (Appellant Br. at 14-15.) The court also erred in its conclusion that the Villages' written policy of making decisions based on whether there is a "direct threat to the health or safety of the pregnant team member" did not raise an inference of discrimination. As

[2] The alleged discrimination in *Young* occurred prior to the effective date of the ADAAA. *Young*, 135 S. Ct. at 1348.

explained by Appellant, the Villages' policy constitutes direct evidence of discrimination. (Appellant Br. at 26-27.) Upton's statement and response and the Villages' policy are evidence of discrimination for the reasons well-articulated by Appellant, and also because they represent common patterns in the treatment of pregnant women that put them on unequal footing in the workplace – precisely the biased treatment that the PDA was enacted to remedy.

The District Court erred in not recognizing the factual context in which Upton made the "liability" comment: namely, in a conversation occurring just hours after LaCount informed the Villages of her restriction, during which Upton also said the Villages had "no other options" besides forcing LaCount onto unpaid leave – despite not having discussed any potential "options" with her at all. (21 Am. Compl. 2/3/2017, *Aplt. Apdx, p. 29*.) The Villages' failure to even consider how LaCount's lifting restriction might be accommodated should have inured to LaCount's benefit at the motion to dismiss stage, and also was in error.

### A. Appellee's Statements Reflect Improper Consideration of Potential Workplace Risks to Pregnant Workers That Raises an Inference of Discrimination

For generations, putative concern for pregnant employees' safety was used by legislators and employers to justify denying them opportunities on the job, with the consequence of relegating them to second class status in the workplace. *See Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am., UAW v.*

*Johnson Controls*, 499 U.S. 187, 211 (1991), citing *Muller v. Oregon*, 208 U.S. 412 (1908) ("Concern for a woman's existing or potential offspring historically has been the excuse for denying women equal employment opportunities."). It was in part to prevent such "protectionist" policies that the PDA was enacted in 1978. *See Johnson Controls*, 499 U.S. at 205 ("The legislative history confirms what the language of the PDA compels. . . . [E]mployers may not require a pregnant woman to stop working at any time during her pregnancy unless she is unable to do her work.").

In *Johnson Controls*, the Court invalidated the "fetal protection policy" implemented by a battery manufacturer, under which women who could not prove their infertility were barred from holding jobs involving lead, a toxin potentially dangerous to the reproductive system. It ruled that even if the company's policy was genuinely benevolent, it violated the PDA. 499 U.S. at 206 ("[W]omen . . . may not be forced to choose between having a child and having a job. . . . [T]he absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy . . . .").

The history of unequal treatment referenced in *Johnson Controls* was rooted in the Court's own decision issued 83 years earlier. In *Muller v. Oregon*, it upheld a state law limiting the number of hours female laundry workers could work in a day, despite having struck down a few years earlier an analogous statute that

limited the daily hours for male bakers. The disputed law was typical of "protective" legislation enacted in most states during the late nineteenth century and early twentieth century barring women from jobs deemed too dangerous to their reproductive capacities. *See, e.g.*, Mary E. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. Chi. L. Rev. 1220, 1221-22 (1986).

The *Muller* Court reasoned that protecting women's childbearing capacity was a greater societal good than whatever losses an individual female worker might incur under the Oregon law:

> [B]y abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon [a woman's] body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

208 U.S. at 421.

*Muller* was of a piece with other Supreme Court precedent finding women in need of protection from the vagaries of the workplace, *Goesaert v. Cleary*, 335 U.S. 464, 466 (1948) (prohibiting women from tending bar unless their husband or father owned the establishment, so as to "minimize[ ] hazards that may confront a barmaid"), and assigning motherhood a primacy that outweighed any other role. *See, e.g.*, *Hoyt v. Florida*, 368 U.S. 57, 62 (1961) (upholding restrictions on women's jury service because "woman is still regarded as the center of home and family life"); *Bradwell v. Illinois*, 83 U.S. 130, 141 (1948) (Bradley, J.,

concurring) (approving state law forbidding women from practicing law; "The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. . . . The paramount destiny and mission of woman are to fulfil[l] the noble and benign offices of wife and mother.").

In reaching its conclusion in *Johnson Controls*, the Court rejected such paternalism – and reaffirmed female workers' autonomy when it came to their decisions regarding pregnancy:

> It is no more appropriate for the courts than it is for the individual employers to decide whether a woman's reproductive role is more important to herself and her family than [to] her economic role. Congress has left this choice to the woman as hers to make.

499 U.S. at 211.

In light of this precedent, both Upton's statement that LaCount was a "liability" – made immediately following LaCount's request for a lifting accommodation, forcing her to go out on unpaid leave – and the Villages' policy of making accommodation decisions for pregnant workers based on perceived "threats to the health and safety of the pregnant team member" were sufficient, taken either in isolation or together, to raise a plausible claim for relief under the PDA. *See also Latowski*, 549 F. App'x at 484-85 & n.5, citing *Johnson Controls* (reversing summary judgment on PDA claim for refusing to accommodate CNA's lifting restriction where supervisors made statements "reveal[ing] discriminatory

animus against pregnant women," including admonishing plaintiff that the employer "would be liable if something happened to her baby"); *cf. Young*, 707 F.3d at 197 (finding that manager's statement that Peggy Young was "too much of a liability" while pregnant showed unlawful animus).

### B. The District Court Failed to Recognize the Inference of Discriminatory Intent Raised by Appellee's Refusal to Consider Potential Accommodations for LaCount

If mere cost or convenience do not meet the "sufficiently strong" standard for employers at the *pretext* stage, *Young*, 135 S. Ct. at 1354, then an employer's robotic refusal to engage the pregnant worker in a discussion that could lead to a solution (*e.g.*, there are "no other options") certainly raises the inference of discrimination at the initial pleading stage. *See also Legg*, 820 F.3d at 75 (finding insufficiently "strong" the defendant county's defense that it reserved light duty for prison guards injured on the job because state's workers' compensation statute obligated it to pay those officers their full salary; such obligation did not preclude extending same benefit to pregnant workers).

Within hours of learning of LaCount's lifting restriction – which, LaCount alleged, would have impeded her ability to work with just one bedridden resident, a task that could have been assigned to up to five other staff members – Upton declared LaCount a "liability" and decided the Villages had "no other options" than to prohibit her from working. (21 Am. Compl. 2/3/2017, *Aplt. Apdx, p. 29*.) It

made that determination without any apparent investigation into or discussion about whether that single resident could be temporarily re-assigned to one of LaCount's coworkers, whether alternative methods of lifting the patient might have existed – such as through use of a mechanical lift – or whether LaCount could temporarily be tasked with different duties. It simply said "no." Such a knee-jerk response, lacking in any detail as to the reason(s) why "no other options" existed, at the very least raises an inference that the Villages did not even consider accommodating LaCount at all.

The letter and the spirit of the PDA demand more. One need not seek to import from the ADA the requirement of an "interactive process" to understand that the process of identifying an appropriate accommodation necessarily involves some inquiry of and discussion with the pregnant worker.[3] Indeed, cooperative dialogue between employer and employee has long been required by the Supreme Court to avoid escalation of conflicts in myriad contexts, under a wide variety of statutory schemes. *See*, *e.g.*, accommodating religious practice under Title VII, *EEOC v. Abercrombie & Fitch Stores, Inc.*, 135 S. Ct. 2028, 2033 (2015); insulating workers from retaliation for engaging in protected activity under the Fair

[3] That the interactive process arises pursuant to a different statutory scheme, however, does not preclude its application in the PDA context. As outlined *supra*, in *Young*, the Supreme Court characterized ADA-qualifying workers, as well as the other two categories of workers to whom UPS granted modified duty, as potentially presenting "situation[s] [that] cannot reasonably be distinguished from Young's." *Young*, 135 S. Ct. at 1355.

Labor Standards Act, *Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 17 (2011); insulating workers from retaliation for engaging in protected activity under Title VII, *Burlington N. & Santa Fe Railway Co. v. White*, 548 U.S. 53, 68 (2006); encouraging employers to adopt preventive and remedial sexual harassment policies, *Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998). This Court has recognized a similar obligation applies to employers covered by the Family and Medical Leave Act ("FMLA"), requiring them to inform a qualifying employee of her right to job-protected leave once "on notice that the employee might qualify for FMLA benefits, the employer has a duty to notify the employee that FMLA coverage may apply." *Tate v. Farmland Indus., Inc.*, 268 F.3d 989, 997 (10th Cir. 2001).

Requiring employers to engage in discussion with employees to identify solutions to a wide array of thorny workplace issues – including but not limited to potential accommodations of physical impairment – while excusing them from such collaboration when it comes to a pregnant worker's needs is precisely the sort of *sui generis* disadvantage that the PDA is intended to remedy. Given the opportunity of discovery, LaCount would be able to inquire into the process by which the Villages accommodated not only ADA-qualifying workers, but also those with on-the-job injuries as well as "non work-related" reasons for seeking

job modifications – and accordingly compare those practices with the non-consideration given to her request.

Given such a universe of discoverable facts, coupled with the well-settled standard in multiple legal contexts that demands a cooperative dialogue between employers and employees, the Villages' unexplained justification that an accommodation simply was not an "option[ ]" warrants the inference that its reason for denying her any accommodation was due to her pregnancy. To paraphrase the Supreme Court's guiding principle in *Young*, "why, when the employer engaged in dialogue with so many, could it not engage in a dialogue with pregnant women as well?"

## CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

Dated: November 13, 2017

Respectfully submitted,

*s/ Gillian L. Thomas*

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,193 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman type style.

Dated: November 13, 2017

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## CERTIFICATE OF SERVICE FOR ELECTRONIC FILINGS

I hereby certify that on November 13, 2017, I electronically filed the foregoing Brief of *Amici Curiae* American Civil Liberties Union, American Civil Liberties Union of Oklahoma, Center for WorkLife Law, *et al.* in Support of Plaintiff-Appellant Whitney M. LaCount, with the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system. I certify that all participants in this case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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## APPENDIX: INTERESTS OF *AMICI CURIAE*

The **American Civil Liberties Union** (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 1.6 million members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU, through its Women's Rights Project, has long been a leader in legal advocacy aimed at ensuring women's full equality and ending discrimination against women in the workplace, including pregnancy discrimination.

Founded in 1964, the **American Civil Liberties Union of Oklahoma** (ACLU of Oklahoma) is comprised of several thousand members and is the Oklahoma affiliate of the American Civil Liberties Union. The ACLU of Oklahoma is a nonprofit, nonpartisan organization dedicated to advancing and protecting the principles of liberty and equality embodied in the United States Constitution, Oklahoma Constitution, our nation's civil rights laws, and Oklahoma civil rights laws. For decades, ACLU of Oklahoma has defended vigorously the rights of all manner of persons to remain free from discrimination in the home, workplace, and the public square. ACLU of Oklahoma thus maintains a vital interest in ensuring that Oklahomans are not subject to sex discrimination or otherwise treated unequally because of a pregnancy. This necessarily includes a

significant interest in the manner in which the Pregnancy Discrimination Act is interpreted and enforced.

The **Center for WorkLife Law** (WorkLife Law) at the University of California, Hastings College of the Law is a national research and advocacy organization widely recognized as a thought leader on the issues of work-family conflict, work accommodations for pregnant and breastfeeding employees, and family responsibilities discrimination. WorkLife Law collaborates with employers, employees, and lawyers representing both constituencies to ensure equal treatment in the workplace for pregnant women, nursing mothers, and other caregivers.

**9to5, National Association of Working Women** (9to5) is a national membership organization of women in low-wage jobs dedicated to achieving economic justice and ending discrimination. 9to5's members and constituents are directly affected by workplace discrimination, including pregnancy discrimination, and poverty, among other issues. They experience first-hand the long-term negative effects of discrimination on economic well-being, and the difficulties of seeking and achieving redress. 9to5's toll-free Job Survival Hotline fields thousands of phone calls annually from women facing these and related problems in the workplace. The issues of this case are directly related to 9to5's work to end workplace discrimination and our work to promote policies that aid women in their efforts to achieve economic self-sufficiency. The outcome of this case will directly

affect our members' and constituents' rights in the workplace and their long-term economic well-being and that of their families.

**A Better Balance** is a national legal advocacy organization based in New York, NY and Nashville, TN dedicated to promoting fairness in the workplace and helping employees meet the conflicting demands of work and family. Through legislative advocacy, litigation, research, and public education, A Better Balance is committed to helping workers care for their families without risking their economic security. A Better Balance has been actively involved in advancing the rights of pregnant and breastfeeding women in the workplace. The organization runs a legal clinic in which the discriminatory treatment of pregnant women can be seen firsthand.

The **California Women's Law Center** (CWLC) is a statewide, nonprofit law and policy center dedicated to advancing the civil rights of women and girls through impact litigation, advocacy and education. CWLC's issue priorities include gender discrimination, reproductive justice, violence against women, and women's health. Since its inception in 1989, CWLC has placed an emphasis on eliminating all forms of gender discrimination, including discrimination against pregnant and breastfeeding women. CWLC remains committed to supporting pregnancy rights and accommodations in the workplace.

The **Coalition of Labor Union Women** is a national membership organization based in Washington, DC with chapters throughout the country. Founded in 1974 it is the national women's organization within the labor movement which is leading the effort to empower women in the workplace, advance women in their unions, encourage political and legislative involvement, organize women workers into unions and promote policies that support women and working families. During our history we have fought against discrimination in all its forms, particularly when it stands as a barrier to employment or is evidenced by unequal treatment in the workplace or unequal pay.

**Equal Rights Advocates** (ERA) is a national non-profit legal advocacy organization dedicated to protecting and expanding economic and educational access and opportunities for women and girls. Since its founding in 1974, ERA has pursued this mission by engaging in high-impact litigation, legislative advocacy, and other efforts aimed at eliminating discrimination and achieving gender and racial equity in education and employment. ERA attorneys have served as counsel and participated as amicus curiae in numerous cases involving the interpretation and enforcement of Title VII of the Civil Rights Act of 1964 and other laws prohibiting discrimination against women in the workplace, including two pregnancy discrimination cases in which ERA helped to advance principles of interpretation that were later codified in the Pregnancy Discrimination Act of 1978

(PDA), *Geduldig v. Aiello*, 417 U.S. 484 (1974) and *Richmond Unified Sch. Dist. v. Berg*, 434 U.S. 158 (1977), as well as in post-PDA cases, such as *AT&T Corp. v. Hulteen*, 556 U.S. 701 (2009) and *Young v. United Parcel Service, Inc.*, 575 U.S.__, 135 S. Ct. 1338 (2015). Twelve years after helping to pass landmark legislation requiring California employers to provide reasonable accommodations for pregnant workers, ERA released a groundbreaking report that highlights the importance of these protections for working women and families, *Expecting a Baby, Not a Lay-Off: Why Federal Law Should Require the Reasonable Accommodation of Pregnant Workers* (2012). ERA has a strong interest in ensuring that women's employment access and opportunities are adequately protected by a fair application of the Pregnancy Discrimination Act by courts.

**Family Values @ Work** is a national network of 25 state and local coalitions helping spur the growing movement for family-friendly workplace policies such as paid sick days and family leave insurance. Too many people have to risk their job to care for a loved one, or put a family member at risk to keep a job. We're made to feel that this is a personal problem, but it's political – family values too often end at the workplace door. We need new workplace standards to meet the needs of real families today. The result will be better individual and public health, and greater financial security for families, businesses and the nation. Our coalitions represent a diverse, nonpartisan group of more than 2,000 grassroots

organizations, ranging from restaurant owners to restaurant workers, faith leaders to public health professionals, think tanks to activists for children, seniors and those with disabilities.

**Gender Justice** is a non-profit law firm based in the Midwest that eliminates gender barriers through impact litigation, policy advocacy, and education. As part of its mission, Gender Justice helps courts, employers, schools, and the public better understand the role that cognitive bias and unconscious stereotyping plays in perpetuating gender discrimination, and what can be done to limit its harmful effects and ensure equality of opportunity for all. The organization has an interest in protecting and enforcing women's legal rights in the workplace, and in the proper interpretation of the Civil Rights Act of 1964 and the Pregnancy Discrimination Act of 1979. As part of its impact litigation program, Gender Justice acts as counsel in cases involving gender equality in the Midwest region, including providing direct representation of pregnant employees facing discrimination in the workplace and participating as amicus curiae in cases that have an impact in the region.

**Legal Aid at Work** (formerly Legal Aid Society-Employment Law Center) is a public interest legal organization that advances justice and economic opportunity for low-income people and their families at work, in school, and in the community. Since 1970, Legal Aid has represented low-wage clients in cases

involving a broad range of employment-related issues, including discrimination on the basis of race, gender, age, disability, sexual orientation, gender identity, gender expression, national origin, and pregnancy. Legal Aid has extensive policy experience advocating for the employment rights of pregnant workers and new parents. Legal Aid has a strong interest in ensuring that pregnant women are granted the full protections of the Pregnancy Discrimination Act and other anti-discrimination laws.

**Legal Momentum**, *the Women's Legal Defense and Education Fund*, is a leading national non-profit civil rights organization that for nearly 50 years has used the power of the law to define and defend the rights of girls and women. Legal Momentum has worked for decades to ensure that all employees are treated fairly in the workplace, regardless of their gender or sexual orientation. Legal Momentum has litigated cutting-edge gender-based employment discrimination cases, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and has participated as *amicus curiae* on leading cases in this area, including *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993).

**Legal Voice** is a non-profit public interest organization that works to advance the legal rights of women in the Pacific Northwest through public impact

litigation, legislation, and legal rights education. Since its founding in 1978, Legal Voice has been dedicated to protecting and expanding women's legal rights. Toward that end, Legal Voice has pursued legislation and has participated as counsel and as amicus curiae in cases throughout the Northwest and the country, advocating for robust interpretation and enforcement of anti-discrimination and other laws protecting working women. Legal Voice serves a regional expert on the laws and policies impacting women in the workplace, including sex discrimination in the workplace, pregnancy discrimination, caregiver discrimination, and family leave policies.

The **National Employment Law Project** (NELP) is a non-profit legal organization with over 45 years of experience advocating for the employment and labor rights of low-wage and unemployed workers. NELP seeks to ensure that all employees, and especially the most vulnerable ones, receive the full protection of labor and employment laws, including protections against pregnancy discrimination. NELP has litigated and participated as *amicus curiae* in numerous cases in circuit and state and U.S. Supreme Courts addressing the importance of equal access to labor and employment protections for all workers.

The **National Organization for Women (NOW) Foundation** is a 501 (c)(3) entity affiliated with the National Organization for Women, the largest grassroots feminist activist organization in the United States with chapters in every

state and the District of Columbia. NOW Foundation is committed to advancing women's health and reproductive rights, among other objectives, and works to assure that women are treated fairly and equally under the law. Discrimination by employers against pregnant workers is pervasive despite the 1978 Pregnancy Discrimination Act and the U.S. Supreme Court's 2015 decision in *Young v. United Parcel Service, Inc.* Accommodation claims by pregnant workers must not be made onerous and appellate court rulings that instruct lower courts to follow Young's pleading and liability standards are needed. This is particularly important for pregnant workers whose work responsibilities entail physical requirements that may invite temporary work-related limitations that often result in discriminatory treatment by employers.

The **National Partnership for Women & Families** (formerly the Women's Legal Defense Fund) is a national advocacy organization that promotes fairness in the workplace, reproductive health and rights, quality health care for all, and policies that help women and men meet the dual demands of their jobs and families. Since its founding in 1971, the National Partnership has worked to advance women's equal employment opportunities and health through several means, including by challenging discriminatory employment practices in the courts. The National Partnership has fought for decades to combat sex

discrimination, including on the basis of pregnancy, and to ensure that all people are afforded protections against discrimination under federal law.

The **National Women's Law Center** is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's legal rights and opportunities since its founding in 1972. The Center focuses on issues of key importance to women and their families, including economic security, employment, education, health, and reproductive rights, with special attention to the needs of low-income women and women of color, and has participated as counsel or amicus curiae in a range of cases before the Supreme Court and the federal Courts of Appeals to secure the equal treatment of women under the law, including numerous cases addressing the scope of Title VII's protections. The Center has long sought to ensure that rights and opportunities are not restricted on the basis of pregnancy and gender stereotypes, and that all individuals enjoy the protection against such discrimination promised by federal law.

The **Oklahoma Employment Lawyers Association** (OELA) is an organization created for, and dedicated to, advocating on behalf of victims of unlawful employment discrimination. OELA members and their clients act as private attorneys general to vindicate the rights of employees suffering unlawful discrimination and to further the intent anti-discrimination statutes including Title VII and the Americans with Disabilities Act. OELA members have a strong

interest in ensuring courts correctly interpret the U.S. Supreme Court's decision in *Young v. United Parcel Service, Inc.* to effectuate (and not frustrate) the purposes of the Pregnancy Discrimination Act.

**Plaintiff Employment Lawyers Association** (PELA), the Colorado affiliate of the National Employment Lawyers Association, is Colorado's largest professional organization comprised exclusively of lawyers who represent individual employees in employment cases, including cases involving violations of civil rights laws such as the Americans with Disabilities Act and the Pregnancy Discrimination Act. Founded in 1989, PELA is a nonprofit organization created to increase public awareness of the rights of individual employees and workplace fairness. PELA members represent their clients in litigation throughout the State of Colorado and in the Tenth Circuit. Because the employment law established by this Court directly affects many (if not most) of its members' clients, PELA's role as *amicus curiae* in this case is appropriate.

The **Southwest Women's Law Center** is a non-profit policy and advocacy Law Center that was founded in 2005 with a focus on advancing opportunities for women and girls in the state of New Mexico. We work to ensure that women have equal access to quality, affordable healthcare, access to equal pay, and that girls in middle and high school have equal access to sports programs. Accordingly, the

Law Center is uniquely qualified to comment on the decision in *LaCount v. South Lewis SH OPCO, LLC*.

**Women Employed**'s mission is to improve the economic status of women and remove barriers to economic equity. Since 1973, the organization has assisted thousands of working women with problems of discrimination and harassment, monitored the performance of equal opportunity enforcement agencies, and developed specific, detailed proposals for improving enforcement efforts, particularly on the systemic level. Women Employed is committed to protecting fair treatment of all working women, including workers who are pregnant and need an accommodation to allow them to keep working and have healthy pregnancies.

The **Women's Law Center of Maryland, Inc.** is a nonprofit membership organization established in 1971 with a mission of improving and protecting the legal rights of women, especially regarding gender discrimination in the workplace and in family law issues. Through its direct services and advocacy, and in particular through the operation of a statewide Employment Law Hotline, the Women's Law Center seeks to protect women's legal rights and ensure equal access to resources and remedies under the law. The Women's Law Center is participating as an amicus in *LaCount v. South Lewis SH OPCO, LLC* because this brief is in line with the Women's Law Center's mission to eradicate pregnancy discrimination.

The **Women's Law Project** (WLP) is a non-profit public interest law firm with offices in Philadelphia and Pittsburgh, Pennsylvania. Founded in 1974, the WLP is dedicated to creating a more just and equitable society by advancing the rights and status of women through high-impact litigation, advocacy, and education. Throughout its history, the WLP has worked to eliminate sex discrimination by bringing and supporting litigation challenging discriminatory practices prohibited by federal civil rights laws. Through its telephone counseling service and direct legal representation, the WLP assists women who have been victims of pregnancy discrimination, including women who have been denied accommodations in the workplace. The WLP has a strong interest in the proper application of the Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act, to ensure equal treatment in the workplace.