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

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This Article explores judicial responses to miscarriage under federal employment law in the United States. Miscarriage is a common experience. Of confirmed pregnancies, about 15% will end in miscarriage; almost half of all women who have given birth have suffered a miscarriage. Yet, this experience slips through the cracks of every major federal employment law in the United States.

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

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clearly addresses the experience of miscarriage. Moreover, courts and agencies often refuse to interpret these statutes in obvious and reasonable ways to provide meaningful equality to workers when they suffer the common experience of miscarriage.

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

INTRODUCTION

A. Prologue

I have had five miscarriages. They tend to blur together in my head. The one enduring memory, though, is of blood. With one miscarriage, I remember running to the bathroom at work with blood trickling down my legs and having to leave the building quickly to get to the hospital on campus. With another, I remember a river of blood moving and changing shape and expanding across the tiny octagonal tiles of my bathroom floor as I, dizzy and alone, held on to the shower riser to stay steady, fearing I would pass out or die before I could get help.[1]

I remember the waiting. Waiting to know if a pregnancy was succeeding or failing after a "threatened miscarriage."[2] Waiting for the expulsion after the pregnancy had definitively failed. Sometimes a miscarriage comes suddenly and unexpectedly. But most pregnancies do not unravel that way. More commonly, miscarriage is a process, a slow-motion train wreck. In the first trimester of a normal pregnancy, the pregnancy hormone hCG[3] rapidly increases from 0 to up to 288,000, like the tachometer of a race car when the driver floors it.[4] When a

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

2 A threatened miscarriage is defined as "vaginal bleeding in the presence of a viable pregnancy." Christine I. Ekechi & Catriona M. Stalder, *Spontaneous Miscarriage*, *in* DEWHURST'S TEXTBOOK OF OBSTETRICS AND GYNAECOLOGY 559, 560 t.40.1 (D. Keith Edmonds, Christoph Lees & Tom Bourne eds., 9th ed. 2018).

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

4 Specifically, hCG levels typically double every two days, rising from 0 to up to 288,000 milli-international units per milliliter (mIU/mL) in the first trimester. *What Is HCG?*, AM. PREGNANCY ASS'N., https://americanpregnancy.org/getting-pregnant/hcg-levels/ [https://perma.cc/M9ST-F6LV] (last visited Feb. 4, 2022); *see also* Laurence A. Cole, *Pregnancy hCG*, *in* 100 YEARS OF HUMAN CHORIONIC

pregnancy fails, this process reverses, but it takes time for the body to get the message, maybe days—or weeks. Indeed, with the most common form of failed pregnancy, a fertilized egg implants into the uterus but does not develop into an embryo at all, yet the gestational sac and placenta continue to grow and release pregnancy hormones.[5] This all sounds very clinical, but what does it mean for the person who is miscarrying? It is a surreal experience that is hard to describe, this being pregnant but not pregnant. Tired and nauseous but to no good. Sad and worried. Waiting. And the outcome may not be clear until it is over. Not pregnant or maybe pregnant? Waiting. I have to go to work. I have to teach a class. No one knows this is happening inside me.

I remember the kind professionals who thought they were helping but said and did things that increased my suffering. With one miscarriage, my doctor had privileges only at a Catholic-owned hospital. "You have a failed pregnancy. There is no embryo. But unfortunately, I can't schedule you for a D&C[6] until your hCG level drops further, perhaps three to four weeks. Hospital policy."[7] With my last miscarriage, #5, as I lay on the table with my feet in stirrups, having my uterus suctioned, cramping: "You really need to stop trying to get pregnant. You are burdening the health system."

And through all of this, which transpired over about three years, I remember the secrecy, which made these experiences

GONADOTROPIN 199, 204–05 (Laurence A. Cole & Stephen A. Butler eds., 2020) (summarizing the multiple functions of hCG in pregnancy).

5 This is called an anembryonic pregnancy or a "blighted ovum" in medical terminology. Candace Goldstein & Sandra L. Hagen-Ansert, *First-Trimester Complications*, *in* TEXTBOOK OF DIAGNOSTIC SONOGRAPHY 1194, 1198 (Sandra L. Hagen-Ansert, ed. 2018); *see also* Eric R.M. Jauniaux & Joe Leigh Simpson, *Pregnancy* Loss, *in* GABBE'S OBSTETRICS: NORMAL AND PROBLEM PREGNANCIES 615, 616 (Mark Landon et al. eds., 8th ed. 2020) ("[A]lmost all losses are retained in utero for an interval before clinical recognition . . . .").

6 A "D&C" is short for dilation and curettage, a surgical procedure to evacuate the uterus after a failed pregnancy. *See* Ekechi & Stalder, *supra* note 2, at 564. **R**

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

all the more excruciating. I didn't tell anyone. Not my friends, not my parents, certainly not my employer.[8]

B. Miscarriage of Justice

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

8 This is just my story. I recognize that it is partial. No two miscarriages are the same. Of particular relevance to my experience, these were desired pregnancies. Many are not. *See* GUTTMACHER INSTITUTE, UNINTENDED PREGNANCY IN THE UNITED STATES (2019), https://www.guttmacher.org/sites/default/files/fact-sheet/fb-unintended-pregnancy-us.pdf [https://perma.cc/4G6X-2U6W] (estimating that nearly half of pregnancies in the United States are unintended, with 27% "wanted later" and 18% "unwanted"; the figures are significantly higher for low-income women, young women, women who are cohabiting, Black women, and women without a high school degree). For those with unintended pregnancies, a miscarriage is probably a very big relief. Still, I choose to share my story for a few reasons, which I hope are persuasive. First, medical and social science research suggest that many elements of my experience are representative. *See infra* subpart I.A. Second, the stigma surrounding miscarriage, combined with rampant workplace retaliation against individuals who use workplace leave or benefits for pregnancy, have stifled women's willingness to talk about miscarriage. This silence, in turn, distorts policy discussions and law. I share my story in an effort to change the culture of secrecy surrounding miscarriage, which I believe is a collective response to the harms of disclosure. *Cf.* CAROL SANGER, ABOUT ABORTION: TERMINATING PREGNANCY IN TWENTY-FIRST-CENTURY AMERICA (2017) (seeking to "pry open" the silence surrounding abortion so that "women's decisions about whether or not to become mothers will be treated more like those of other adults making significant personal choices"). Finally, adopting one of the methodologies of critical race and feminist theory, I am sharing my story in an effort to "denaturalize legal and social arrangements that conventional forms of scholarship [do] not question." Amna A. Akbar, Sameer M. Ashar & Jocelyn Simonson, *Movement Law*, 73 STAN. L. REV. 821, 876 (2021). Examples of scholarship in this vein include Kathryn Abrams, *Hearing the Call of Stories*, 79 CALIF. L. REV. 971 (1991), Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989), Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986), Verónica C. Gonzales-Zamora, *The COVID Ceiling*, 57 HARV. C.R.-C.L. L. REV. (forthcoming), and PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS 7 (1991) ("Most scholarship in law is rather like the 'old math': static, stable, formal—rationalism walled against chaos. My writing is an intentional departure from that.").

9 Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (codified at 42 U.S.C. §§ 2000e(k), 2000e-2).

10 Family and Medical Leave Act of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601–2654).

Americans with Disabilities Act of 1990 (ADA), as amended by the ADA Amendments Act of 2008,[11] mandates both nondiscrimination and reasonable accommodations for employees with disabilities. The Occupational Safety and Health Act of 1970 (OSH Act) is supposed to ensure that American workplaces are free of recognized hazards that may cause serious physical harm.[12] However, none of these laws clearly addresses the experience of miscarriage as it interfaces with the workplace.[13] Moreover, courts and agencies often refuse to interpret these statutes in obvious and reasonable ways to provide meaningful equality to workers when they suffer the common experience of miscarriage.[14]

Many scholars have examined the limitations of employment law with regard to pregnancy.[15] Others have drawn attention to the health care and tort law rights of people who experience miscarriage and stillbirth[16] or the need for men-

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11 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327; ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified throughout 42 U.S.C., ch. 126).

12 Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651–678).

13 *See infra* Part II.

14 *Id.*

15 *E.g.*, Stephanie Bornstein, *The Politics of Pregnancy Accommodation*, 14 HARV. L. & POL'Y REV. 293 (2020); David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309 (2019); Joanna L. Grossman, *Expanding the Core: Pregnancy Discrimination Law as It Approaches Full Term*, 52 IDAHO L. REV. 825 (2016) [hereinafter Grossman, *Expanding the Core*]; Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567 (2010); L. Camille Hébert, *Disparate Impact and Pregnancy: Title VII's Other Accommodation Requirement*, 24 J. GENDER, SOC. POL'Y & L. 107 (2015); Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371 (2001); Saru M. Matambanadzo, *Reconstructing Pregnancy*, 69 SMU L. REV. 187 (2016); Nicole Buonocore Porter, *Accommodating Pregnancy Five Years After* Young v. UPS*: Where We Are & Where We Should Go*, 14 ST. LOUIS U. J. HEALTH L. & POL'Y 73 (2020); Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 MINN. L. REV. 749 (2018); Reva B. Siegel, *Pregnancy as a Normal Condition of Employment: Comparative and Role-Based Accounts of Discrimination*, 59 WM. & MARY L. REV. 969 (2018); Deborah A. Widiss, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act After* Young v. UPS, 50 U.C. DAVIS L. REV. 1423 (2017); Joan C. Williams, Robin Devaux, Danielle Fuschetti & Carolyn Salmon, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act*, 32 YALE L. & POL'Y REV. 97 (2013). This is just a subset of the vast legal literature on workplace pregnancy discrimination.

16 *E.g.*, Jill Wieber Lens, *Miscarriage, Stillbirth, & Reproductive Justice*, 98 WASH. U. L. REV. 1059 (2021) [hereinafter Lens, *Miscarriage, Stillbirth, & Reproductive Justice*]; Jill Wieber Lens, *Medical Paternalism, Stillbirth, & Blindsided Mothers*, 106 IOWA L. REV. 665 (2021) [hereinafter Lens, *Medical Paternalism*]; Jill Wieber Lens, *Tort Law's Devaluation of Stillbirth*, 19 NEV. L.J. 955 (2019) [hereinafter Lens, *Tort Law's Devaluation of Stillbirth*].

strual justice.[17] This Article is the first to comprehensively examine these issues as they specifically relate to miscarriage and work. In addition to bringing attention to this important issue, which silently affects so many workers, this Article provides an opportunity to challenge the artificial conceptual separation of employment and health law, as well as to consider the problem of pregnancy discrimination through the broader lens of reproductive justice.

Part I of this Article provides a summary of current medical, psychological, and sociological understandings of miscarriage, including its definition, prevalence, risk factors, and broader health and societal impacts. As this Part highlights, a miscarriage does not typically occur in a moment or a day or even a week; it is a physical and emotional event that often lasts several weeks or months, at best, and has long-term impacts on women[18] and people who miscarry. The impact of miscarriage also extends well beyond the individual who physically miscarries to partners and other family members, intended parents who utilize assisted reproductive technologies, and surrogates carrying pregnancies for others. Yet, despite the substantial workplace, health, and societal effects, miscarriage, like other reproductive health matters such as menstruation, pregnancy, and abortion, is shrouded in secrecy. In the words of Meghan Markle, the Duchess of Sussex, who bravely went public about her miscarriage in the middle of the pandemic, "[D]espite the staggering commonality of this pain, the conversation remains taboo, riddled with (unwarranted)

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

18 Not all persons who can become pregnant identify as women. Transgender men and non-binary individuals can become pregnant. Juno Obedin-Maliver & Harvey J. Makadon, *Transgender Men and Pregnancy*, 9 OBSTETRIC. MED. 4, 4–7 (2016). However, because most persons who become pregnant identify as female, and because societal norms and expectations regarding pregnancy are tightly wrapped up with gender, this Article frequently refers to "pregnant women" or "women." This is not to diminish the fact that unique and even worse discriminatory harms are likely to be experienced by transgender and non-binary individuals who become pregnant while working. While these unique harms are beyond the scope of the Article, it is hoped that the analysis presented here will be beneficial to all pregnant workers who experience miscarriage, regardless of how they identify.

shame, and perpetuating a cycle of solitary mourning."[19] This silence has massively distorted how miscarriage is regulated in the workplace.

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

Finally, Part III turns to solutions, inviting introspection and regulatory shifts to include miscarriage in mainstream employment law. Among other reforms, Part III examines the recently passed Pregnant Workers Fairness Act (PWFA), a federal law providing a basic right to reasonable workplace accommodations for normal pregnancy and related medical conditions. It also considers the need for enhanced antiretaliation and privacy protections for employees' medical information when they invoke statutory protections under federal employment discrimination laws, a right to paid sick leave for American workers, and occupational safety standards that would reduce the risk of miscarriage.

I
MISCARRIAGE AND ITS HEALTH, EMOTIONAL, AND SOCIAL IMPACTS

In the United States, a miscarriage is usually defined as the loss of a pregnancy before the twentieth week of preg-

19 Meghan, The Duchess of Sussex, Opinion, *The Losses We Share*, N.Y. TIMES, (Nov. 25, 2020), https://www.nytimes.com/2020/11/25/opinion/meghan-markle-miscarriage.html [https://perma.cc/3F4U-YF7Y].

nancy.[20] The causes of many miscarriages are unknown,[21] as the biological mechanisms explaining miscarriage are not well-understood. Therefore, individuals who experience miscarriage are often left without answers to why a pregnancy failed.

Miscarriage is a very common experience. Although statistics on pregnancy loss vary depending on how pregnancy is diagnosed,[22] researchers estimate that, of confirmed

20 *Miscarriage*, NEW OXFORD AM. DICTIONARY (3d ed. 2010). In contrast, stillbirth is generally defined as pregnancy loss after roughly 20 weeks. *See What Is Stillbirth*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/ncbddd/stillbirth/facts.html [https://perma.cc/8QMU-G6N9] (last updated Sept. 29, 2022). Miscarriage and stillbirth are both pregnancy losses according to the medical literature. *See* Katherine J. Sapra et al., *Signs and Symptoms of Early Pregnancy Loss: A Systematic Review*, 24 REPROD. SCIS. 502, 502 (2017) (defining pregnancy loss as "the spontaneous end of a pregnancy resulting in demise at any point from implantation through delivery"). Many of the shortcomings of federal employment law will be similar for workers who experience a miscarriage and stillbirth, such as lack of protection from discrimination, lack of necessary accommodations and leave, and safety risks to healthy pregnancy. However, the two forms of pregnancy loss differ in crucial respects relevant to this Article's analysis. First, unlike miscarriage, stillbirth often involves labor and a birth. *See* Lens, *Miscarriage, Stillbirth, & Reproductive Justice*, *supra* note 16, at 1074 (explaining that stillbirth involves "birth . . . just like . . . a living child"). This is a difference of consequence in the employment law context, as childbirth is explicitly referenced in the PDA and FMLA. *See infra* notes 56 and 178 and accompanying text. In contrast, miscarriage is not in the text of either statute, placing statutory coverage for miscarriage on more tenuous legal ground. Second, because most miscarriages occur early in pregnancy, they are usually invisible to all but the person miscarrying and perhaps their closest family members. *See infra* subpart II.E. This invisibility raises unique questions regarding an employer's duties under employment discrimination laws when the employer may not know of an employee's health condition. A final difference pertains to scope: Miscarriage is so common that it is almost a part of "normal" pregnancy. *See infra* notes 23–27. In contrast, stillbirth is quite rare, with only 1 in 160 or 0.625% of pregnancies ending in stillbirth each year in the United States. Lens, *Medical Paternalism*, *supra* note 16, at 669. Given these distinctions, this Article focuses mainly on the absence of federal employment protections for miscarriage. In choosing to focus on miscarriage, my intention is not to deny the artificial construction of reproduction as a set of distinct phenomena in both law and medicine. The need to protect the full range of reproductive experiences—including menstruation, fertility, pregnancy, abortion, miscarriage, stillbirth, and birth—and to end the subjugation of women and people with the capacity for pregnancy is urgent. R R R R

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

22 Where pregnancy is diagnosed with sensitive tests measuring serum or urinary hCG concentrations, "preclinical" losses (i.e., very early miscarriages before a person even knows they may be pregnant) are counted, resulting in a rate of about 20%; where pregnancy is diagnosed by visualization via ultrasound, miscarriage rates are lower, about 10%. *See* Allen J. Wilcox et al., *Incidence of Early Loss of Pregnancy*, 319 NEW ENG. J. MED. 189, 191 (1988); Michael J. Zinaman et al., *Estimates of Human Fertility and Pregnancy Loss*, 65 FERTILITY & STERILITY 503, 508 (1996); Xiaobin Wang et al., *Conception, Early Pregnancy Loss, and Time to Clinical Pregnancy: A Population-Based Prospective Study*, 79 FERTILITY & STERILITY 577, 583 (2003); Am. Coll. of Obstetricians and Gynecologists,

pregnancies, about 15% will end in miscarriage.[23] The prevalence of miscarriage is even greater when measured on a per-person basis: according to one recent very large study, nearly half of parous women have experienced at least one spontaneous first-trimester miscarriage.[24] It should be emphasized that these are conservative estimates; the actual incidence of miscarriage is almost certainly higher, for two reasons. First, miscarriage is an understudied phenomenon.[25] Second, miscarriages are commonly managed at home.[26] Underreporting is particularly common among non-white and low-income women who may be wary of "greater surveillance and regulation of their fertility and reproductive autonomy . . . ."[27]

Clinical Practice Bulletin No. 200: Early Pregnancy Loss, 132 OBSTETRICS & GYNECOLOGY e197, e197 (2018) [hereinafter ACOG, *Clinical Management Guidelines for Early Pregnancy Loss*].

23 Adam J. Devall & Arri Coomarasamy, *Sporadic Pregnancy Loss and Recurrent Miscarriage*, 69 BEST PRACTICE & RESEARCH: CLINICAL OBSTETRICS AND GYNECOLOGY 30, 30 (2020) ("[A]pproximately 15% of clinically recognised pregnancies end in a miscarriage . . . ."); Regan & Rai, *supra* note 21, at 840 ("The incidence of clinically recognizable miscarriage in general population studies has been consistently reported as 12–15% . . . ."); Siobhan Quenby et al., *Miscarriage Matters: The Epidemiological, Physical, Psychological, and Economic Costs of Early Pregnancy Loss*, 397 LANCET 1658, 1658 (2021) ("The pooled risk of miscarriage is 15.3% . . . of all recognised pregnancies."). R

24 Judy Slome Cohain, Rina E. Buxbaum & David Mankuta, *Spontaneous First Trimester Miscarriage Rates per Woman Among Parous Women with 1 or More Pregnancies of 24 Weeks or More*, 17 BMC PREGNANCY & CHILDBIRTH 437, 437 (2017) (finding, in a study of more than 50,000 women, that 43% reported having experienced one or more first-trimester spontaneous miscarriages); *see also* Regan & Rai, *supra* note 21, at 840 ("[O]ne in four of all women who become pregnant will experience pregnancy loss."). R

25 *See* ISAAC MADDOW-ZIMET & KATHRYN KOST, GUTTMACHER INST., PREGNANCIES, BIRTHS AND ABORTIONS IN THE UNITED STATES, 1973–2017: NATIONAL AND STATE TRENDS BY AGE—METHODOLOGY APPENDIX 12 (2021), https://www.guttmacher.org/sites/default/files/report_downloads/pregnancies-births-abortions-us-1973-2017-method-appendix.pdf [https://perma.cc/Q9P8-BYNJ] (discussing the "little data available on fetal loss"); Quenby et al., *supra* note 23, at 1664 (asserting that the "data are insufficient" and calling for scientists to "accelerate research, and to improve patient care and policy development" on miscarriage); Editorial, *Miscarriage: Worldwide Reform Is Needed*, 391 LANCET 1597, 1597 (2021) ("[T]he low priority afforded to miscarriage has resulted in a deficiency of high-quality epidemiology [and a lack of clinical] trials . . . . For too long miscarriage has been minimised and often dismissed. The lack of medical progress should be shocking."). R

26 *See* Quenby et al., *supra* note 23, at 1659. R

27 Laura Lindberg & Rachel H. Scott, *Effect of ACASI on Reporting of Abortion and Other Pregnancy Outcomes in the US National Survey of Family Growth*, 49 STUD. FAM. PLAN. 259, 269 (2018) (finding that abortion and miscarriage are underreported in the National Survey of Family Growth (NSFG), the premier survey of fertility behaviors in the United States conducted by the National Center for Health Statistics—especially by non-white and low-income women).

Finally, certain identity and other characteristics increase the risk of pregnancy loss. Older individuals are at higher risk of miscarriage.[28] Black Americans also have a nearly two-fold higher risk of miscarriage compared with whites and a 93% greater hazard for a later miscarriage.[29] Other risks for miscarriage include obesity, prior history of miscarriage, certain health conditions (such as polycystic ovary disease, high blood pressure, and diabetes),[30] smoking and alcohol consumption during pregnancy,[31] exposure to pollution and pesticides,[32] and certain working conditions, such as working night shifts and repeated heavy lifting.[33]

Despite the common experience of miscarriage, public perception differs substantially, perhaps because miscarriage is so shrouded in secrecy. According to a recent survey of more than one-thousand adults in the United States, 55% incorrectly believed miscarriage was "rare" (occurring in 5% or fewer pregnancies).[34] Additionally, "[t]his misperception was more common among men; the odds of men reporting that miscarriages are uncommon was 2.5 . . . that of women."[35]

Most miscarriages occur early in pregnancy and are generally invisible to all but the closest family members.[36] Yet, miscarriage is a "complex biological and psychological event" with significant impacts.[37] A miscarriage "may involve considerable [physical] pain, potentially disturbing images of blood and tissue, . . . hospitalization, and surgery."[38] For many who suffer a miscarriage, it may represent the loss of a desired future child.

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28 *Id.* at 268.

29 Sudeshna Mukherjee, Digna R. Velez Edwards, Donna D. Baird, David A. Savitz & Katherine E. Hartmann, *Risk of Miscarriage Among Black Women and White Women in a US Prospective Cohort Study*, 177 AM. J. EPIDEMIOLOGY 1271, 1273, 1276 (2013).

30 Regan & Rai, *supra* note 21, at 842–45. **R**

31 Quenby et al., *supra* note 23, at 1659. **R**

32 *Id.*

33 *See infra* subpart III.D.

34 Jonah Bardos, Daniel Hercz, Jenna Friedenthal, Stacey A. Missmer & Zev Williams, *A National Survey on Public Perceptions of Miscarriage*, 125 OBSTETRICS & GYNECOLOGY 1313, 1313 (2015).

35 *Id.*

36 Johnna Nynas, Puneet Narang, Murali K. Kolikonda & Steven Lippmann, *Depression and Anxiety Following Early Pregnancy Loss: Recommendations for Primary Care Providers*, 17 PRIMARY CARE COMPANION FOR CNS DISORDERS 1, 2 (2015).

37 Iris M. Engelhard, *Miscarriage as a Traumatic Event*, 47 CLINICAL OBSTETRICS & GYNECOLOGY 547, 547 (2004).

38 *Id.*

It is usually unexpected,[39] and the cause is often unclear,[40] which may threaten a person's "sense of . . . control and trust in [their] procreative ability."[41] Waiting for tissue to pass on its own without medical intervention can take weeks,[42] causing uncertainty and stress.[43] Moreover, this "expectant management" is unsuccessful in 20% of pregnancies, requiring surgery or medication to clear the uterus.[44] Some people who miscarry may develop an infection, bleed heavily, or have preexisting conditions such as anemia or blood-clotting disorders, requiring surgical uterine evacuation, sometimes urgently.[45]

Miscarriage is usually a traumatic event. After a miscarriage, a period of intense emotional distress follows, typically for six to eight weeks.[46] Miscarriage also has potential long-term effects on mental health. Some people who miscarry may continue to experience depressive symptoms for months or years.[47] Individuals without partners, who lack social support,

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39 *Id.*

40 *See* Julia Frost, Harriet Bradley, Ruth Levitas, Lindsay Smith & Jo Garcia, *The Loss of Possibility: Scientisation of Death and the Special Case of Early Miscarriage*, 29 SOC. HEALTH & ILLNESS 1003, 1004 (2007) (discussing the limited medical knowledge about the causes of early pregnancy loss).

41 Engelhard, *supra* note 37, at 547. R

42 COG, *Clinical Management Guidelines for Early Pregnancy Loss*, *supra* note 22, at e199 (stating expulsion can take up to eight weeks). R

43 *See* Rebecca J. Mercier, Katherine Senter, Rachel Webster & Amy Henderson Riley, *Instagram Users' Experiences of Miscarriage*, 135 OBSTETRICS & GYNECOLOGY 166, 168 (2020) (finding in a study analyzing the content of 200 Instagram posts on miscarriage that "[m]any posts described a burden of waiting and uncertainty, such as waiting to see whether human chorionic gonadotropin levels were doubling, whether fetal cardiac activity could be detected on ultrasound scan, or whether medical or surgical intervention would be required").

44 ACOG, *Clinical Management Guidelines for Early Pregnancy Loss*, *supra* note 22, at e199. R

45 *Id.* at e201.

46 Nynas, Narang, Kolikonda & Lippmann, *supra* note 36, at 2; *see also* Olga BA van den Akker, *The Psychological and Social Consequences of Miscarriage*, 6 EXPERT REV. OBSTETRICS & GYNECOLOGY 1, 4 (2011) (discussing that women commonly experience depression, increased anxiety, and grief following a miscarriage); Trevor Friedman & Dennis Gath, *The Psychiatric Consequences of Spontaneous Abortion*, 155 BRITISH J. PSYCHIATRY 810, 812 (1989) (finding that 48% of women suffered from major depressive disorder during the four weeks after having a miscarriage). R

47 Nynas, Narang, Kolikonda & Lippmann, *supra* note 36, at 2–3, 5 (finding that about two-thirds of women report that they are still upset two years after the event and that the experience affected their decisions about subsequent pregnancies); Francine deMontigny, Chantal Verdon, Sophie Meunier & Diane Dubeau, *Women's Persistent Depressive and Perinatal Grief Symptoms Following a Miscarriage: The Role of Childlessness and Satisfaction with Healthcare Services*, 20 ARCHIVE WOMEN'S MENTAL HEALTH 655, 659–61 (2017) (finding that depression and grief are most common in the first six months following a miscarriage, but many women continue to suffer from depression and grief up to three years later). Although still an area of research, the major hormonal changes R

who have a history of mental illness, who have no children, or who have experienced previous miscarriages are at a greater risk of severe psychological distress.[48] Those who conceive through assisted reproduction are also more likely to experience depression and anxiety following a pregnancy loss.[49] Contrary to popular belief, a subsequent pregnancy after a miscarriage is not a protective factor against depression or anxiety,[50] and mood symptoms following a miscarriage do not always resolve with the birth of a subsequent healthy child.[51]

Further, research shows that miscarriage can have emotional impacts on family members and a wide range of individuals well beyond the person who experiences physical pregnancy loss. For example, recent studies have found that when a pregnancy is desired, non-pregnant partners grieve over a miscarriage more than once thought. According to a study of eighty-three miscarrying women and their male partners, "a significant proportion of men demonstrated psychological distress after miscarriage."[52] Miscarriage also represents a significant loss for intended parents utilizing assisted reproductive technologies, whether or not their role is that of a gestational parent.[53] Moreover, research suggests that surrogates also suffer

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experienced during miscarriage are a suspected cause of depression. Elka Serrano & Julia "Jill" K. Warnock, *Depressive Disorders Related to Female Reproductive Transitions*, 20 J. PHARMACY PRAC. 385, 385 (2007).

48 van den Akker, *supra* note 46, at 4; Florence Gressier, Virginie Guillard, Odile Cazas, Bruno Falissard, Nine M-C. Glangeaud-Freudenthal, Anne-Laure Sutter-Dallay, *Risk Factors for Suicide Attempt in Pregnancy and the Post-Partum Period in Women with Serious Mental Illnesses*, 84 J. PSYCHIATRIC RSCH. 284, 286–88 (2017) (finding that among women with mental health issues, those who have previously experienced miscarriage are more likely to attempt suicide during a subsequent pregnancy or postpartum period). **R**

49 CS Cheung, CH Chan & EH Ng, *Stress and Anxiety-Depression Levels Following First-Trimester Miscarriage: A Comparison Between Women Who Conceived Naturally and Women Who Conceived with Assisted Reproduction*, 120 BJOG: INT'L J. OBSTETRICS & GYNAECOLOGY 1090, 1096 (2013).

50 van den Akker, *supra* note 46, at 6. **R**

51 *Id.*

52 GWS Kong, TKH Chung, BPY Lai & IH Lok, *Gender Comparison of Psychological Reaction After Miscarriage—A 1-Year Longitudinal Study*, 117 BJOG: INT'L J. OBSTETRICS & GYNAECOLOGY 1211, 1211 (2010).

53 Those seeking to access procreation through surrogacy face an array of logistical, emotional, legal, and financial obstacles, especially LGBT couples. *See* Judith Stacey, *Gay Parenthood and the Decline of Paternity as We Knew It*, 9 SEXUALITIES 27 (2006) (employing an ethnographic approach to study the paths to surrogacy taken by gay couples in Los Angeles). Intended parents utilizing surrogacy are often intimately involved in the lives of surrogates and are highly invested in becoming parents. *See* Dana Berkowitz & William Marsiglio, *Gay Men: Negotiating Procreative, Father, and Family Identities*, 69 J. MARRIAGE & FAM. 366, 378 (2007); Darren Rosenblum et al., *Pregnant Man?: A Conversation*, 22 YALE J.L. & FEMINISM 207, 208–17 (2010). It should come as no surprise, then, that intended

a number of complex emotional losses after a miscarriage, even if they may "emphatically disclaim any attachment to the fetus they carry,"[54] including loss of attachment to the success of the pregnancy, loss of their relationship with the intended parents, and loss of status in the surrogate community.[55] That is, the emotional experience of reproductive loss spans many reproductive contexts and is not limited to miscarriage's physical aspects.

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

II
MISCARRIAGE AND THE FAILURE OF FEDERAL EMPLOYMENT LAW

A. The Pregnancy Discrimination Act

Congress passed the PDA in 1978 to prevent discrimination on the basis of pregnancy, childbirth, or related medical conditions.[56] The PDA defines sex discrimination under Title VII to include discrimination "because of or on the basis of

parents utilizing surrogacy suffer emotional losses after a failed pregnancy, if not more so than individuals who do not utilize surrogacy to procreate. *See* CHRISTA CRAVEN, REPRODUCTIVE LOSSES: CHALLENGES TO LGBTQ FAMILY-MAKING 74–75 (2019).

54 Zsuzsa Berend, *Surrogate Losses: Understandings of Pregnancy Loss and Assisted Reproduction among Surrogate Mothers*, 24 MED. ANTHROPOLOGY Q. 240, 242 (2010).

55 *Id.* at 240, 242–43, 253–55, 257. Surrogates commonly identify with the intended parent's or parents' grief, yet they are often not treated with much sympathy by anyone except other surrogates. *Id.* at 254–55.

56 Pregnancy Discrimination Act of 1978, Pub. Law No. 95-555, 92 Stat. 2076.

pregnancy, childbirth, or related medical conditions."[57] The PDA forbids discrimination based on pregnancy when it comes to any aspect of employment, including hiring, firing, pay, job assignments, promotions, layoffs, training, fringe benefits (such as leave and health insurance), and any other term or condition of employment.[58] Employers with fifteen employees or more are covered by the provisions provided in the PDA.[59]

In its operation, the PDA works in two ways. First, the PDA prohibits employers from taking an adverse employment action against an employee because of pregnancy, childbirth, or related medical conditions who are capable of performing their job duties.[60] In this sense, the PDA can be understood as a simple nondiscrimination mandate. Second, the PDA requires employers to treat pregnancy, childbirth, and related medical conditions as they do other temporary disabilities.[61] That is, if a pregnant worker is temporarily unable to perform their job due to a medical condition related to pregnancy, the employer must treat them in the same way as it treats other temporarily disabled employees who are similar in their ability or inability to work but unaffected by pregnancy. This provision can be conceptualized as an equal accommodation mandate; that is, employers must accommodate pregnancy, childbirth, and related medical conditions as they do temporary impairments attributable to other causes.[62] Finally, facially neutral policies that fall more harshly on pregnant workers and cannot be justified by business necessity may be vulnerable to disparate impact challenges under the PDA.[63]

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57 *Id.*

58 *Pregnancy Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, https://www.eeoc.gov/laws/types/pregnancy.cfm [https://perma.cc/DD4C-YFUB] (last visited Feb. 5, 2022).

59 *Id.;* 42 U.S.C. § 2000e(b).

60 *Fact Sheet: Pregnancy Discrimination*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Jan. 15, 1997), https://www.eeoc.gov/eeoc/publications/fs-preg.cfm [https://perma.cc/9Q8T-89K6].

61 *Id.*

62 *Id.* As this Article was being prepared for publication, Congress passed the Pregnant Workers Fairness Act (PWFA), which guarantees pregnant workers the right to reasonable accommodation (comparable to the rights of disabled workers under the ADA) when the symptoms of pregnancy interfere with work in a way that can be reasonably accommodated without undue hardship on the employer. *See infra* subpart III.A. The PWFA, which will go into effect on June 27, 2023, alleviates the need for pregnant workers to present comparators to prove pregnancy discrimination when an employer refuses to accommodate pregnancy-related short-term disabilities.

63 Deborah Dinner, *The Costs of Reproduction: History and the Legal Construction of Sex Equality*, 46 HARV. C.R.-C.L. L. REV. 415, 435–40 (2011) (discussing the availability of the disparate impact theory to plaintiffs bringing pregnancy-

How have plaintiffs who have suffered miscarriage fared under the PDA and its various theories of liability? As the following review of PDA decisions demonstrates, courts have not had too much trouble finding PDA violations under the Act's nondiscrimination mandate when a worker suffers a miscarriage and the event has no apparent impact on their work performance. In contrast, courts have had a hard time interpreting and applying the PDA to protect workers from discrimination when a miscarriage necessitates workplace accommodations.

1. *Miscarriage Nondiscrimination Cases Under the PDA*

Plaintiffs suffering miscarriages have fared relatively well in pregnancy nondiscrimination cases under the PDA, especially when there is direct evidence[64] or strong circumstantial evidence of discrimination and the plaintiff demonstrates excellent work performance. These are cases where the plaintiff is seeking nothing more than to be free of the sex-role stereotyping just because they had a miscarriage. For example, in *Gatten v. Life Time Fitness*,[65] the plaintiff, the manager of a spa in a health club, was an excellent employee.[66] She worked at the health club for four years and was promoted to a department head position.[67] She suffered a stillbirth and then two subsequent miscarriages.[68] A few days after the second miscarriage, her employer presented her with the choice of accepting a demotion or resigning.[69] She went on short-term

based sex-discrimination claims under Title VII and the limitations of the theory); Joanna Grossman & Gillian Thomas, *Making Sure Pregnancy Works: Accommodation Claims After* Young v. United Parcel Service, Inc., 14 HARV. L. & POL'Y REV. 319, 342–44 (2020) (discussing the disparate impact theory as an underutilized framework to address failure-to-accommodate pregnancy discrimination); Hébert, *supra* note 15, at 142–63 (examining how the disparate impact theory can mandate that employers provide accommodations to workers affected by pregnancy, whether or not they provide those accommodations to other employees who are temporarily unable to perform their job duties). **R**

64 Direct evidence "refers to evidence that, if believed, would establish a fact at issue without the need to draw any inferences." TIMOTHY P. GLYNN, CHARLES A. SULLIVAN & RACHEL S. ARNOW-RICHMAN, EMPLOYMENT LAW: PRIVATE ORDERING AND ITS LIMITATIONS 577 (4th ed. 2019); *see also* 1 MCCORMICK ON EVIDENCE § 185, at 438 (Robert P. Mosteller ed., 8th ed. 2020). In disparate treatment cases, this is understood to require "a statement by the decision maker that showed he was motivated by illegitimate considerations with respect to the at-issue decision." GLYNN, SULLIVAN & ARNOW-RICHMAN, *supra*, at 577.

65 No. 11-2962, 2013 WL 1331231 (D. Minn. Mar. 29, 2013).

66 *Id.* at *1.

67 *Id.*

68 *Id.* at *1–3.

69 *Id.* at *3.

disability leave for a couple of months and then resigned.[70] In response to her pregnancy discrimination claim, the gym said she was fired because she cried at work too much and talked about her pregnancy losses.[71] The court denied her employer's motion for summary judgment, stating that a reasonable jury could find that her demotion was the result of discriminatory animus.[72]

In *Ingarra v. Ross Education, LLC*,[73] the plaintiff was a dental instructor at a private, for-profit community college focusing on medical education.[74] After a year of employment and receiving a promotion to the position of lead instructor, she suffered a miscarriage at work. The next day, she was demoted from her supervisory position and her schedule was reduced from full time to part time.[75] Subsequently, her supervisor said her fertility hormones were making her "moody" and making her act "weird" and repeatedly pressed Ingarra about her future plans for pregnancy.[76] Ingarra sued under the PDA, claiming she was demoted and ultimately terminated because of her pregnancy and miscarriages despite an excellent work record.[77] On the basis of these facts, she defeated a motion for summary judgment.[78]

Similarly, in *Tuttle v. Advanced Roofing Systems, Inc.*,[79] the court declined to grant the defendant summary judgment on a PDA wrongful termination claim relating to miscarriage.[80] Lindsey Tuttle, a scheduler for a roofing company, was fired for missing just three days of work due to a miscarriage. She reported the reason for her absence to a co-worker and the general manager but not to her new manager, whom she did not know very well.[81] She called the new manager personally on the third day to explain the situation, but he told her she was fired.[82] Tuttle asserted that she had never before been disciplined for work absences and had not witnessed non-preg-

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70 *Id.*
71 *Id.* at *6.
72 *Id.*
73 No. 13-CV-10882, 2014 WL 688185 (E.D. Mich. Feb. 21, 2014).
74 *Id.* at *1.
75 *Id.*
76 *Id.*
77 *Id.* at *3.
78 *Id.* at *6.
79 No. 1:14-CV-01257-TWP-DKL, 2016 WL 8716486 (S.D. Ind. Jan. 15, 2016).
80 *Id.* at *10.
81 *Id.* at *3.
82 *Id.*

nant co-workers being disciplined in similar situations.[83] The court declined to grant the employer summary judgment, explaining that the plaintiff should be able to advance under a pretext theory.[84]

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

2. *Miscarriage Equal Accommodation Cases Under the PDA*

A brief explanation of the leading Supreme Court case addressing the scope of the PDA's protections for pregnancy-related temporary disabilities is required to understand how federal courts have addressed miscarriage accommodations cases under the PDA. In *Young v. United Parcel Service, Inc.*,[85] an employee brought a PDA suit against United Parcel Service (UPS), a multinational package delivery company, when UPS refused to temporarily transfer her to a position that did not require heavy lifting after she became pregnant.[86]

Peggy Young worked as a delivery driver for UPS.[87] After suffering several miscarriages, she became pregnant.[88] Her doctor advised her not to lift more than twenty pounds during her first twenty weeks of pregnancy and no more than ten pounds thereafter.[89] UPS refused to transfer her to an inside job, even though it had provided this accommodation to many non-pregnant workers with disabilities requiring work restrictions similar to hers[90] and even to workers who had lost their federal Department of Transportation (DOT) driving certifications for drunk driving.[91] Specifically, Young showed that UPS

83 *Id.* at *8.
84 *Id.* at *10.
85 575 U.S. 206 (2015).
86 *Id.* at 215 ("The manager . . . determined that Young did not qualify for a temporary alternative work assignment.").
87 *Id.* at 211.
88 *Id.*
89 *Id.*
90 *Id.* at 216–17.
91 *Id.* at 217.

accommodated employees who were injured on the job, had ADA accommodations, and had lost their DOT driving certifications for a host of reasons.[92] "'[T]he only light duty request[s] . . . that became an issue' at UPS 'were with women who were pregnant.'"[93]

Young claimed that this disparate treatment was enough to prove discrimination because the PDA "requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work."[94] UPS maintained that other temporarily disabled employees were not appropriate comparators, because their situations were too different to qualify as "similarly situated" to Young's.[95] Refusing to defer to EEOC guidelines supporting Young's interpretation of the statute,[96] the Supreme Court largely took the side of UPS:

> The problem with Young's approach is that it proves too much. It seems to say that the statute grants pregnant workers a "most-favored-nation" status. As long as an employer provides one or two workers with an accommodation—say, those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked at the company for many years, or those who are over the age of 55—then it must provide similar accommodations to *all* pregnant workers (with comparable physical limitations), irrespective of the nature of their jobs, the employer's need to keep them working, their ages, or any other criteria.[97]

However, the Court ultimately provided a small window of opportunity that would permit Young to prove pregnancy discrimination because she was not treated the same as nonpregnant UPS workers similar in their ability or inability to work. It held that a plaintiff can, as a matter of law, use simi-

92 *Id.*

93 *Id.* at 216–17.

94 *Id.* at 220 (quoting Young's brief).

95 *Id.* at 220, 225.

96 *Id.* at 225 ("The EEOC promulgated its 2014 guidelines only recently, after this Court had granted certiorari in this case. In these circumstances, it is fair to say that the EEOC's current guidelines take a position about which the EEOC's previous guidelines were silent. And that position is inconsistent with positions for which the Government has long advocated. . . . Nor does the EEOC explain the basis of its latest guidance. Does it read the statute, for example, as embodying a most-favored-nation status? Why has it now taken a position contrary to the litigation position the Government previously took? Without further explanation, we cannot rely significantly on the EEOC's determination.").

97 *Id.* at 221.

larly situated non-pregnant employees as comparators to create an inference of pregnancy discrimination.[98] However, if the employer responds to the plaintiff's prima facie case by "offer[ing] an apparently 'legitimate, non-discriminatory' reason for its actions," the plaintiff must "provid[e] sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's 'legitimate, nondiscriminatory' reasons are not sufficiently strong to justify the burden . . . ."[99] According to the Court, a plaintiff can create an issue of material fact as to whether a significant burden exists by demonstrating that the defendant accommodates a "*large percentage*" of non-pregnant workers while failing to accommodate a "*large percentage*" of pregnant workers.[100]

The significant and unjustified burden standard that the majority articulated for evaluating PDA equal accommodation claims such as Young's was unconventional, seeming to blur the distinction between disparate treatment and Title VII's other theories of liability requiring class-wide evidence such as disparate impact[101] and systemic disparate treatment.[102] Assessing this standard in a positive light, one might understand

98 *Id.* at 229. Furthermore, the *Young* Court announced the following modified version of the *McDonnell Douglas* test for establishing a prima facie case of employment discrimination in these cases. The plaintiff must prove: "[i] that she belongs to the protected class, [ii] that she sought accommodation, [iii] that the employer did not accommodate her, and [iv] that the employer did accommodate others 'similar in their ability or inability to work.'" *Id.*

99 *Id.*

100 *Id.* at 229–30 (emphasis added).

101 The disparate impact theory of liability under Title VII was first announced in *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971), and codified by Congress in the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991). According to an EEOC Guidance, unlawful disparate impact exists under the Pregnancy Discrimination Act, 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." EEOC No. 915-003, Enforcement Guidance: Pregnancy Discrimination and Related Issues (June 25, 2015), 2015 WL 4162723, at *19 [hereinafter 2015 EEOC Pregnancy Enforcement Guidance] (footnotes omitted). "Proving disparate impact ordinarily requires a statistical showing that a specific employment practice has a discriminatory effect on workers in the protected group." *Id.*

102 The systemic disparate treatment theory of liability under Title VII aims to thwart widespread employer patterns or practices that fall more harshly on one protected group. *See* Int'l Bhd. Teamsters v. United States, 431 U.S. 324, 359 (1977). Unlike for individual disparate treatment plaintiffs, a systemic disparate treatment plaintiff must make a prima facie showing "that unlawful discrimination has been a regular procedure or policy followed by an employer . . . ." *Id.* at 360. A plaintiff establishing a prima facie case of systemic disparate treatment is often required to use statistics. *Id.* at 339 (stating statistics have and will continue to serve an important role in pattern or practice cases).

it as a recognition by the Court that when an employer unthinkingly adopts accommodation or leave policies that exclude pregnant workers without a good reason, a trier of fact may reasonably conclude that the employer's decision was motivated by sex discrimination, and therefore, that the employer engaged in unlawful disparate treatment. And, indeed, post-*Young*, commentators proposed this optimistic interpretation of the *Young* decision.[103]

However, the Court's hybrid approach would come at a price, which quickly became apparent as lower courts began to apply the test: according to *Young's* logic, individual plaintiffs bringing equal accommodation disparate treatment claims under the PDA might now be required to present class-wide, comparative evidence to reach a jury on the issue of pretext (i.e., the type of evidence normally expected of plaintiffs in disparate impact and systemic disparate treatment cases). Imposing such a heightened evidentiary standard was at odds with the statutory language of Title VII, as amended by the PDA, which includes no language defining the quantum or type of evidence that must be adduced to prove a violation. By increasing the quantum of evidence needed to reach a jury, the standard also departed from the conventional evidentiary rule of civil litigation that the burden of persuasion of fact is generally by a preponderance of the evidence.[104] The principle that no heightened evidentiary standard or particular type of evidence is required to prove disparate treatment discrimination under Title VII has also repeatedly been confirmed by the Supreme Court.[105] Indeed, to illustrate just how out-of-step the

103 *See* Deborah L. Brake, *The Shifting Sands of Employment Discrimination: From Unjustified Impact to Disparate Treatment in Pregnancy and Pay*, 105 GEO. L.J. 559, 571-62 (2017) (arguing that the majority "designed a claim that is more suitable for capturing unconscious or implicit bias than one limited to employer actions based on a deliberate intent to discriminate"); Grossman, *Expanding the Core*, *supra* note 15, at 856 ("This . . . new addition to traditional pretext analysis[ ] forc[es] employers to answer the real question underlying all these cases: why categorically exclude pregnant women from an accommodation that is provided to potentially large numbers of other workers?"); Siegel, *supra* note 15, at 1004 ("Probing an employer's reasons in a balancing framework of this kind may bring to light implicit biases: the employer's judgment that pregnant workers are not worth even modest accommodations may reveal hidden judgments about the competence or commitment of new mothers in the workplace."). R R

104 *See* 2 MCCORMICK ON EVIDENCE § 339, at 770 (Robert P. Mosteller ed., 8th ed. 2020).

105 *See, e.g.*, Desert Palace, Inc. v. Costa, 539 U.S. 90, 99 (2003) (holding that direct evidence is not necessary for a plaintiff to prove a mixed-motive claim of discrimination under section 703(m) of Title VII and that the Court "should not depart from the '[c]onventional rul[e] of civil litigation [that] generally appl[ies] in Title VII cases.'" (alterations in original) (quoting Price Waterhouse v. Hopkins,

Young Court's "significant burden" and "large percentage" tests were, several appellate circuits had adopted the rule prior to *Young* that class-wide or statistical evidence is *inadmissible* in individual disparate-treatment suits.[106]

Although not explicit, *Young*'s standard, in effect, operated as a presumption that an employer's failure to accommodate pregnancy is not sex discrimination, even where it accommodates other temporary disabilities. As others have noted, this presumption seems rooted in the belief that pregnant workers are inauthentic workers.[107] The majority's decision siding with employers who neglect the needs of pregnant workers may also be explained by the sheer number of workers who experience pregnancy,[108] notwithstanding the majority's lip service to the principle that cost considerations may not justify pregnancy discrimination.[109] Or maybe the Justices feared that requiring

490 U.S. 228, 253 (1989))); *Price Waterhouse*, 490 U.S. at 253 ("Only rarely have we required clear and convincing proof where the action defended against seeks only conventional relief . . . ."); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 147 (2000) (rejecting the "pretext plus" doctrine requiring evidence beyond that supporting the plaintiff's prima facie case and holding that evidence that a defendant's explanation for an employment practice is "unworthy of credence" is "one form of circumstantial evidence that is probative of intentional discrimination" and that nothing more is required as a matter of law); Patterson v. McClean Credit Union, 491 U.S. 164, 188 (1989) (stating that the plaintiff "may not be forced to pursue any particular means of demonstrating that the respondent's stated reasons are pretextual"); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (formulating a burden-shifting framework that employees may utilize to prove discriminatory treatment prohibited by Title VII with any type or amount of circumstantial evidence).

106 Laura T. Kessler, *Employment Discrimination and the Domino Effect*, 44 FLA. ST. U. L. REV. 1041, 1114–15 (2017).

107 Grossman, *Expanding the Core, supra* note 15, at 857 ("[T]he disfavored treatment of pregnancy often rests on the devaluation of pregnant employees as future mothers and unreliable workers . . . ."); Siegel, *supra* note 15, at 1003 ("What story about the workplace does UPS's policy of selective accommodation tell? This is *not* a workplace in which pregnancy is a normal condition of employment.").

108 *See* George Gao & Gretchen Livingston, *Working While Pregnant Is Much More Common Than It Used to Be*, PEW RSCH. CTR. (Mar. 31, 2015), https://www.pewresearch.org/fact-tank/2015/03/31/working-while-pregnant-is-much-more-common-than-it-used-to-be/ [https://perma.cc/W4AY-FSJD] ("The data suggest that not only are a higher share of women expecting their first child continuing to work, but they are working longer into their pregnancy."). Although the U.S. Government does not collect data on the percentage of pregnant women who work, the Bureau of Labor Statistics reports that 57.5% of women with a child less than one year old worked in 2021. *Economic News Release: Employment Characteristics of Families*—2021, U.S. BUREAU OF LAB. STATS. (Apr. 20, 2022), https://www.bls.gov/news.release/archives/famee_04202022.htm [https://perma.cc/69ZU-W5YZ].

109 *See* Young v. United Parcel Serv., Inc., 575 U.S. 206, 229 (2015); *cf.* Siegel, *supra* note 15, at 985–86 (positing that lower federal courts' narrow construction of the PDA is driven by cost concerns).

employers to accommodate pregnant workers just as they do temporarily disabled non-pregnant workers would subvert the exclusion of normal pregnancy from the Americans with Disabilities Act.[110] In any case, after *Young*, many lower federal courts applied the *Young* standard so that pregnant employees who experience a temporary disability related to their pregnancies and who seek the same benefits or accommodations as similarly disabled non-pregnant employees (i.e., equal treatment) would need especially strong evidence to overcome a motion for summary judgment.[111]

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110 *See infra* subpart II.C.

111 To be sure, Justice Breyer did not state that class-wide, comparative evidence was required as a matter of law to reach a jury on the question of whether an employer's denial of accommodations for pregnancy-related conditions constituted pregnancy discrimination. Rather, he said, "providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers" "*can* create a genuine issue of material fact . . . ." *Young*, 575 U.S. at 229–30 (emphasis added), suggesting this would be one way, but not the only way, for a plaintiff to reach a jury. Specifically, he wrote for the majority,

> 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. The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. . . . This approach . . . is consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons for treating individuals within a protected class differently than those outside the protected class.

Id. at 229–30 (internal citations omitted).

But, as linguists have noted, in English, "there are really many verbs 'must' and many verbs 'can'," because their meanings are relational. Angelika Kratzer, *What 'Must' and 'Can' Must and Can Mean*, 1 LINGUISTICS & PHILOSOPHY 337, 338 (1977). So, did Justice Breyer mean, *in view of the test announced today that a plaintiff must show a significant, unjustified burden on pregnant workers to demonstrate pretext under the second clause of the PDA*, a plaintiff "can" (i.e., can only) meet this high burden by providing class-wide comparative evidence of differential treatment? Or did he mean, *in view of "the longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons*," *Young*, 525 U.S. at 230, a plaintiff "can" (i.e., may) use class-wide comparative evidence of differential treatment (rather than, for example, direct evidence) for this purpose? With no clear indication of which meaning of "can" Breyer intended (likely a result of a compromise to attract conservative votes), many lower federal courts, already predisposed to deferring to employers on PDA claims, read the majority's language in the restrictive sense to mean "can only." *See, e.g.*, cases collected in note 113, *infra.* After *Young*, pregnant workers denied equal accommodations as non-pregnant workers would need class-wide systemic evidence to prove individual disparate treatment. **R**

Cases in the wake of *Young* suggest that it had mixed consequences for temporarily disabled pregnant workers seeking the same workplace accommodations as non-pregnant disabled workers. In particular, pregnant workers with systemic comparative evidence of sex discrimination were more likely to reach a jury on the question of whether denial of accommodations violated the PDA.[112] But, because few pregnant workers can access such systemic comparative evidence, *Young* did not provide most pregnant workers with a real chance to equally access workplace accommodations for pregnancy-related disabilities under the PDA.[113]

The expectation of class-wide comparative evidence to prove pregnancy accommodation discrimination was especially unavailing for individuals who worked for small employers[114] or in sex-segregated occupations.[115] Even EEOC lawyers, with

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112 For example, in *Legg v. Ulster Cnty.*, 820 F.3d 67 (2d Cir. 2016), the Second Circuit returned to the district court a case involving a corrections officer who was at a high risk for miscarriage yet was refused the benefit of the county jail light-duty policy providing for no inmate contact. *Id.* at 71, 75–76. She went into preterm labor after breaking up a fight in the prison bathroom. Brief of Appellant Annmarie Legg and Special Appendix at 5, Legg v. Ulster Cnty., 820 F.3d 67 (2d Cir. 2016) (Nos. 14-3636(L), 14-3638(XAP), 14-4635(CON)), 2015 WL 458205, at *5; Plaintiffs' Trial Brief at 15, Meadors v. Ulster Cnty., 984 F. Supp. 2d 83 (N.D.N.Y. 2013) (No. 1:09-cv-550 (FJS/RFT)), 2014 WL 4647513. On appeal, applying the rule announced in *Young*, the Second Circuit reversed the trial court's decision to grant summary judgment to the defendant, reasoning that while a "large percentage of non-pregnant employees" were eligible for light duty assignments, the County "categorically denied light duty accommodations to pregnant women." *Legg*, 820 F.3d at 75–76.

113 *See, e.g.*, Santos v. Wincor Nixdorf, Inc., 778 F. App'x 300, 303–04 (5th Cir. 2019) (affirming the district court's grant of summary judgment to the defendant, stating that the plaintiff had failed to identify comparators in her exact same position (relatively new, temp-agency employees in their training period needing to work from home)); Durham v. Rural/Metro Corp., No. 16-CV-01604, 2020 WL 7024892, at *4 (N.D. Ala. Nov. 30, 2020) (rejecting plaintiff's comparators and granting summary judgment for defendant). This analysis of *Young* builds on the work of Joanna Grossman, who has undertaken the definitive assessment of *Young's* impact in PDA accommodation cases, most recently (with ACLU lawyer Gillian Thomas) in *Making Sure Pregnancy Works: Accommodation Claims After* Young v. United Parcel Service, published in the *Harvard Journal of Law and Public Policy*. *See* Grossman & Thomas, *supra* note 63. R

114 *See* HELENE JORGENSEN & EILEEN APPELBAUM, CTR. FOR ECON. & POL'Y RSCH., EXPANDING FEDERAL FAMILY AND MEDICAL LEAVE COVERAGE: WHO BENEFITS FROM CHANGES IN ELIGIBILITY REQUIREMENTS? 9 (2014), https://cepr.net/documents/fmla-eligibility-2014-01.pdf [https://perma.cc/FH83-7YFS] ("Women of childbearing age are disproportionally employed by smaller employers . . . ."); Porter, *supra* note 15, at 105–07 (discussing cases exemplifying the difficulties of those who work for small employers in gathering comparative evidence to prove pregnancy discrimination). R

115 For example, according to labor force statistics from the 2022 U.S. Census Bureau Current Population Survey, 94.3% of childcare workers, 97.4% of preschool and kindergarten teachers, 92.5% of secretaries and administrative assist-

their considerable expertise and resources, had difficulty getting reasonable discovery of the systemic comparative evidence that the Court in *Young* suggested was the best evidentiary route to winning a PDA equal accommodation case.[116] And plaintiffs seemed to lose even when they did access systemic comparative evidence. For example, in a 2018 case in Tennessee, Cassandra Adduci, who had asked her employer, FedEx, for a lighter duty due to her pregnancy, created a spreadsheet of 261 other non-pregnant employees who were given temporary work assignments.[117] The court ruled that not one of those instances was similar enough to her situation to be material to its determination of whether FedEx engaged in pregnancy discrimination.[118]

Moreover, large employers found ways to avoid court precedents that would require them to change their employment policies on pregnancy accommodation post-*Young*. For example, from 2015 to 2019, Amazon routinely fired pregnant warehouse ("fulfillment center") workers who asked for pregnancy-related accommodations, such as more frequent bathroom breaks or fewer continuous hours on their feet.[119] This occurred even though Amazon routinely placed non-pregnant in-

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ants, 90.0% of nursing assistants, 88.1% of maids and housekeeping cleaners, 86.7% of home health aides, and 85.1% of manicurists and pedicurists are women. *See* U.S. BUREAU OF LAB. STATS., LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY (2023), https://www.bls.gov/cps/cpsaat11.pdf [https://perma.cc/43FV-P8DJ]. The lack of comparator problem will be particularly acute for Black women and Latinas who tend to be concentrated in sex-segregated occupations that may pose a risk to healthy pregnancy, such as nursing assistants, home health aides, vocational nurses, agricultural sorters and pickers, maids and housekeepers, childcare workers, and laundry and dry-cleaning workers. *See id.*

116 *See* EEOC v. TriCore Reference Labs, 849 F.3d 929, 933, 935 (10th Cir. 2017) (affirming a district court denial of the EEOC's request for a list of pregnant and non-pregnant employees who had sought or were granted any accommodation in the prior three years as overbroad).

117 Adduci v. Fed. Express Corp., 298 F. Supp. 3d 1153, 1156, 1160 (W.D. Tenn. 2018).

118 *Id.* at 1162, 1163–64; *see also* EEOC v. Wal-Mart Stores East, L.P., 46 F.4th 587, 598–99 (7th Cir. 2022) (affirming summary judgment for defendant even though "Walmart denied light duty to 100 percent of pregnant workers and granted light duty to 100 percent of occupationally injured workers"); Grossman & Thomas, *supra* note 63, at 331 ("[M]any courts continue not only to scrutinize comparator evidence, but also to demand a level of specificity that is not warranted by *Young* and is, in fact, contrary to its directives."). R

119 Letter from Sens. Kirsten Gillibrand, Bernard Sanders, Robert P. Casey, Jr., Richard Blumenthal, Sherrod Brown & Elizabeth Warren to Hon. Charlotte Burrows, Chair, U.S. Equal Emp. Opportunity Comm'n (Sept. 9, 2021), https://www.gillibrand.senate.gov/wp-content/uploads/imo/media/doc/Letter%20to%20EEOC%20Amazon%20Pregnancy%20Accomodations%209.9.21.pdf [https://perma.cc/N3T3-AU8E].

jured workers unable to perform their regular job functions on light duty, with the company logging nearly 25,000 instances of reassignment to light duty following an injury across its facilities since 2017.[120] When pregnant Amazon workers sued Amazon for discrimination,[121] Amazon settled out of court.[122]

Turning now specifically to PDA cases involving discrimination against pregnant workers who are at a high risk of or experience a miscarriage, one can see just how ineffective the PDA has been in addressing this common pregnancy-related medical condition. Besides the need for a temporary restriction on lifting to reduce the risk of miscarriage, as in Peggy Young's case, discussed above, there are two other common scenarios involving miscarriage and the workplace: those involving employees who are advised by their physician to go on bed rest due to a high-risk pregnancy and those where employees need time off to deal with the physical and emotional consequences of a miscarriage. Courts have generally not seen either of these circumstances as falling within the protections of the PDA.

a. *The PDA and Bed Rest*

Bed rest is "probably the most commonly prescribed intervention for preventing miscarriage . . . ."[123] Bed rest is frequently prescribed by doctors for patients who have had previous miscarriages or who show symptoms indicating a risk of miscarriage.[124] Doctors recommend bed rest therapy to treat and prevent a variety of pregnancy complications including "preterm labor, placenta previa or abruption, incompetent cervix, premature rupture of membranes, pregnancy-induced hypertension, multiple gestations, uterine irritability, and fetal growth retardation, as well as bleeding of early pregnancy and

120 *Id.*

121 *Id.*

122 *Id.*; Alfred Ng & Ben Fox Rubin, *Amazon Fired These 7 Pregnant Workers. Then Came the Lawsuits*, CNET (May 6, 2019), https://www.cnet.com/news/features/amazon-fired-these-7-pregnant-workers-then-came-the-lawsuits/ [https://perma.cc/4LFH-8E9F]; Allison Prang, *Senators Seek Investigation of Amazon Over Treatment of Pregnant Workers*, WALL ST. J., https://www.wsj.com/articles/senators-seek-investigation-of-amazon-over-treatment-of-pregnant-workers-11631294571 [https://perma.cc/D7UX-GHBH] (last updated Sept. 10, 2021). And, of course, the most glaring problem is that the PDA "gives employers a lot of latitude to deny accommodations, even ones that are minor and costless, simply by denying them to everyone. *Young* did not—and could not—fix this problem." Grossman, *Expanding the Core*, *supra* note 15, at 859. R

123 Alicia Aleman, Fernando Althabe, José M. Belizán & Eduardo Bergel, *Bed Rest During Pregnancy for Preventing Miscarriage*, 2005.2 COCHRANE DATABASE SYSTEMATIC REVIEWS 1, 3.

124 *Id.*

threatened miscarriage."[125] There is no single definition of bed rest. Treatment varies from resting periodically at home to full-time bed rest in a hospital with monitoring.[126] A widely-cited study from 1994 found that some level of bed rest therapy was recommended in close to 20% of pregnancies at that time,[127] with 11.4% of pregnant women spending at least a week in bed and 12.9% having to stop or reduce work due to bed rest therapy.[128] Although it is hard to quantify how many pregnant women are ordered to bed each year by their doctors, anecdotal evidence suggests bed rest is widely recommended by doctors and practiced by pregnant women.[129]

The PDA offers little job protection to workers with pregnancy complications who are placed on bed rest. In these circumstances, courts often find that the plaintiff's inability to do their job or to demonstrate that other similarly situated employees were treated differently constitutes a legitimate reason for termination. There are many cases in this vein.

For example, in *Spees v. James Marine, Inc.*,[130] the Sixth Circuit affirmed the district court's grant of summary judgment to an employer who terminated an employee as a result of her having to go on bed rest. The plaintiff, Heather Spees, was hired as a welder for JMI, a construction facility building cargo barges, towboats, and drydocks for Kentucky's marine freight transportation industry.[131] Of the 935 labor positions at JMI, only four were held by women, and Spees was the only woman

125 Judith H. Maloni, *Averting the Bed Rest Controversy: Preventative Counseling Can Help Avoid the Issue*, AWHONN LIFELINES, Aug. 1998, at 64.

126 *Bed Rest During Pregnancy*, AM. PREGNANCY ASS'N, https://americanpregnancy.org/healthy-pregnancy/pregnancy-complications/bed-rest-during-pregnant/ [https://perma.cc/PY6A-4VMR] (last visited Apr. 19, 2023); *see also* Maloni, *supra* note 125, at 64 ("There is no standard definition of antepartum bed rest."). **R**

127 Robert L. Goldenberg, Suzanne P. Cliver, Janet Bronstein, Gary R. Cutter, William W. Andrews & Stephen T. Mennemeyer, *Bed Rest in Pregnancy*, 84 OBSTETRICS & GYNECOLOGY 131, 133–34 (1994); *see also* Catherine Bigelow & Joanne Stone, *Bed Rest in Pregnancy*, 78 MT. SINAI J. MED. 291, 292 (2011).

128 *See* Goldenberg, Cliver, Bronstein, Cutter, Andrews & Mennemeyer, *supra* note 127, at 134. **R**

129 *See* Alison Kodjak, *Rethinking Bed Rest for Pregnancy*, NPR (Nov. 26, 2018), https://www.npr.org/sections/health-shots/2018/11/26/669229437/rethinking-bed-rest-for-pregnancy [https://perma.cc/U8Y6-4APZ] ("When NPR asked listeners if they've been on bed rest in the last year, more than 200 women responded in just four days.").

130 617 F.3d 380, 395 (6th Cir. 2010).

131 *Id.* at 384; *see also* AM. WATERWAYS OPERATORS, THE TUGBOAT, TOWBOAT AND BARGE INDUSTRY IN KENTUCKY 1, https://www.americanwaterways.com/sites/default/files/Fact%20Sheet_Kentucky%206-11.pdf [https://perma.cc/AH9X-L2X6] (providing an overview of the tugboat, towboat and barge industry in Kentucky, which "employ[s] 3,000 people").

assigned to her particular facility.[132] Spees's foreman described her as "a good employee" and "a good welder."[133] Like many labor jobs, welding work at JMI was physically demanding, requiring "heavy lifting, climbing up ladders and stairs, maneuvering into barge tanks, and, occasionally, the overhead handling of equipment."[134] In addition, "[t]he summer of 2007 was also particularly hot, with temperatures reaching 100 degrees Fahrenheit or more on multiple occasions" and "welders are exposed to fumes, dust, and organic vapors in the course of their work."[135]

Spees, who had a history of a prior miscarriage, became pregnant after successfully completing her training period.[136] Upon learning of her pregnancy, JMI demoted her to working the night shift in the "tool room," a position that involved physical tasks that were just as demanding as the welding position,[137] was just as hot,[138] "more boring,"[139] and posed scheduling difficulties given Spees's status as a single mother.[140] Spees was advised by two managers to take medical leave, even though, as a new employee, she was ineligible for family and medical leave.[141] Taking their advice, Spees changed obstetricians and then presented a doctor's note stating that she required bed rest due to an incompetent cervix.[142] JMI immediately fired her.[143] She sued under the PDA, and the court held that her termination was "based on a combination of

132 *Spees*, 617 F.3d at 384.

133 *Id.* at 385.

134 *Id.* at 384.

135 *Id.*

136 *Id.* at 385.

137 *Id.* at 385–86.

138 *Id.* at 386.

139 *Id.* at 392.

140 *Id.* at 387.

141 *Id.*

142 *Id.* The facts in this case suggest that JMI's actions were based at least in part on concerns about risks to Spees's fetus. *Id.* at 393 (stating that JMI's night foreman, who was Spees's brother, testified that "he did not want Spees welding 'because she was carrying my niece'"). Although Spees did not raise the argument, firing pregnant workers to protect their fetuses is unlawful sex discrimination under the PDA. *See* International Union, UAW v. Johnson Controls, Inc., 499 U.S. 187, 202–04 (1981) (holding that risk to an employee is something to be weighed by the individual when deciding whether to accept a job and that Title VII's "safety exception" only applies to risks to third parties "indispensable to the particular business at issue"). For a fuller discussion of miscarriage and occupational hazards to pregnancy, including gaps in the OSH Act's regulatory scheme and proposed reforms, see *infra* subparts II.D and III.D.

143 *Spees*, 617 F.3d, at 387.

her being unable to work and her lack of any available medical leave, not upon her pregnancy per se."[144]

Along the same lines, in a case out of the Fifth Circuit,[145] the plaintiff, Heather Appel, began working in sales as a territory manager for a pharmaceutical company in April 2008.[146] In September 2008, Appel was recognized for being a top salesperson.[147] Around the same time, however, she informed the company that she was experiencing a high-risk pregnancy and needed to undergo cerclage, a surgical procedure to sew her cervix closed to prevent a miscarriage.[148] She submitted a doctor's note stating she needed to go on bed rest for the rest of her pregnancy.[149] Her employment was terminated the following day.[150]

Appel argued that her supervisor's statement that "she was fired because he believed Apple [sic] could not perform all the duties in her job description . . . because of complications arising from her pregnancy" showed direct evidence of discrimination based on pregnancy.[151] However, the court determined that the statement was "actually evidence that she was terminated because she was incapable of performing her job functions because of medical complications specific to her pregnancy."[152] The court also held that the plaintiff could not make a prima-facie claim of discrimination based on circumstantial evidence, because she could not show "that she was qualified for the position given the medical restrictions placed by her physician during the high-risk pregnancy."[153] Appel claimed that she was able to maintain sales relationships with doctors using phone and e-mail communications, but the court held that the defendant had demonstrated that face-to-face visits were an essential part of the job.[154]

144 *Id.* at 395.

145 Appel v. Inspire Pharms., Inc., 428 F. App'x 279 (5th Cir. 2011).

146 *Id.* at 281–82.

147 Brief for Appellant at 4, Appel v. Inspire Pharms., Inc., 428 F. App'x 279 (5th Cir. 2011) (No. 10-10960), 2010 WL 5649244, at *4.

148 *Id.* at 5.

149 *Id.* at 4–5.

150 *Id.*

151 *Appel*, 428 F. App'x at 282.

152 *Id.*

153 *Id.*

154 *Id.* at 283; Brief for Appellant at 21, Appel v. Inspire Pharm., Inc., 428 F. App'x 279 (5th Cir. 2011) (No-10960); *see also* Soodman v. Wildman, Harrold, Allen & Dixon, No. 95 C 3834, 1997 WL 106257, at *9 (N.D. Ill. Feb. 10, 1997) (granting summary judgment for employer because employer simultaneously terminated two other employees also on medical leave unrelated to pregnancy) ("[A]n employer must ignore an employee's pregnancy but not her absence from work,

b. *The PDA and Post-Miscarriage Depression*

Given the extensive scientific evidence on the short- and long-term mental health consequences of miscarriage,[155] one would expect that the PDA would prohibit discrimination against (and require equal accommodation of) workers who experience depression, anxiety, or grief after a miscarriage, since these mental health effects are "medical conditions" that are "related" to pregnancy."[156] However, a review of the cases involving mental health symptoms associated with miscarriage and pregnancy shows that plaintiffs may face challenges establishing that they were suffering from a medical condition related to pregnancy, as well as identifying appropriate comparators.

Although not specifically involving miscarriage, the postpartum depression cases are illustrative. In *Hollstein v. Caleel & Hayden, LLC*,[157] the plaintiff, Hollstein, lost her job as an inside salesperson for a cosmetics company after she requested to delay resuming travel following her maternity leave.[158] Before her leave, Hollstein had worked at the company for five years in the customer service department and had been promoted to the inside sales team.[159] While on maternity leave, the company increased the travel requirements for inside sales from one week a quarter to one week a month.[160] After returning to work, she requested to defer her monthly travel for two months due to postpartum depression but was told that the travel was mandatory to keep her position.[161] Understandably, but unfortunately, her email requesting the deferral did not specifically include the words "postpartum depression"; rather, she said she was "not mentally ready to leave her son . . . ."[162] The court found that although "the PDA prohibits employers from discriminating against employees on the basis of conditions related to pregnancy that occur after the actual

unless like absences of nonpregnant employees go unheeded."); Sanchez-Estrada v. MAPFRE Praico Ins. Co., 126 F. Supp. 3d 220, 233–34 (D.P.R. 2015) (granting summary judgment for employer who terminated employee who required bed rest because employee had not properly documented her absences as pregnancy related and had not demonstrated that similarly situated non-pregnant employees were treated differently with regard to absences).

155 *See supra* Part I.

156 *See* 42 U.S.C. § 2000e(k).

157 No. 11-CV-00605-CMA-BNB, 2012 WL 4050302 (D. Colo. Sept. 14, 2012).

158 *Id.* at *4.

159 *Id.* at *1.

160 *Id.*

161 *Id.*

162 *Id.*

pregnancy . . . , there [was] no evidence that Plaintiff was suffering any medical conditions related to her pregnancy" when she lost the inside sales position.[163]

In *Reilly v. Revlon, Inc.*,[164] the court found that the plaintiff did not show a relation between her pregnancy and her termination but acknowledged that "[p]ostpartum depression is a condition related to pregnancy and accordingly falls within the PDA's protections."[165] The court held that because "the PDA only requires that women affected by pregnancy or related medical conditions be treated the same as other persons not so affected but similar in their ability or inability to work[,]" Reilly needed to demonstrate "that she was treated differently from male or non-pregnant female employees who suffered from depression unrelated to pregnancy for extended periods."[166] It held that she had not.[167]

It seems that plaintiffs may occasionally get past summary judgment if they have very strong direct evidence of discrimination, but this is not common. In *Nayak v. St. Vincent Hospital & Health Care Center, Inc.*,[168] the plaintiff was able to defeat her employer's motion for summary judgment when she had direct evidence that her termination was related to her complicated pregnancy and struggle with postpartum depression.[169] Nayak, a second-year OB/GYN resident at St. Vincent Hospital,[170] experienced medical complications during her pregnancy with twins and had to take medical leave to go on bed rest.[171] While out on leave, she lost one of the twins and had to spend the final period of her pregnancy in the hospital.[172] After the birth, she struggled with both postpartum depression and severe pelvic pain.[173] After returning to work, Nayak was told

163 *Id.* at *4.
164 620 F. Supp. 2d 524 (S.D.N.Y. 2009).
165 *Id.* at 544. It seems that many cases where plaintiffs are seeking remedies for being terminated due to postpartum depression are brought under the ADA. However, courts are divided on whether postpartum depression is considered a disability under the ADA. *See infra* section II.C.3.
166 *Reilly*, 620 F. Supp. 2d at 545.
167 *Id.* In this pre-*Young* decision, the court limited comparators to other depressed and non-pregnant employees, seeming to argue that only the narrow category of other depressed persons could be considered similar to Reilly in their ability or inability to work. Reilly, however, was able to defeat summary judgment under the ADA in the same case, which is discussed *infra* section II.C.3.
168 No. 1:12-CV-00817-RLY-DML, 2014 WL 2179277 (S.D. Ind. May 22, 2014).
169 *Id.* at *11–12.
170 *Id.* at *2.
171 *Id.* at *5.
172 *Id.*
173 *Id.*

that others in the program had raised "concerns," including that she "appeared distracted, sad, and tearful."[174] She was placed on probation the following week, and her residency was not renewed for the following year.[175] The court denied St. Vincent's motion for summary judgment, given direct, written evidence of discrimination. Nayak's supervisor's "letter to the American Board of Obstetrics and Gynecology . . . specifically stated that St. Vincent did not renew Plaintiff's contract '*[d]ue to a medically complicated pregnancy . . . .*'"[176]

c. *Summary: The PDA, Miscarriage, and "Unequal" Accommodation*

The cases discussed in this section are just the tip of the iceberg. Because the *Young* Court failed to take a clear stand on pregnant workers' per se right to accommodations under the PDA, *Young*'s utility for workers who miscarry or face a risk of miscarriage has been limited in practice. Workers facing or experiencing miscarriages must go through enormous effort, both within their workplaces and sometimes with the help of lawyers, to convince decisionmakers that they are being treated differently from nonpregnant coworkers without a good justification. For example, if a pregnant employee needs to temporarily switch to a job where they are not standing on their feet all day to mitigate the risk of a miscarriage, or if an employee who suffers a pregnancy-related medical complication suffers a miscarriage requiring time to recover, they must not only have a difficult conversation with their manager. They will also need (if their request is denied, as it often is) to somehow discover what job adjustments other workers who are not pregnant but are "similar in their ability or inability to work" are receiving. This information is often impossible to come by without filing a lawsuit, which could take years to resolve and most certainly will not be concluded before the pregnancy or its medical consequences.

Moreover, the cost-benefit calculus of making these requests (with or without the help of a lawyer) in the miscarriage context is especially dismal. If the pregnancy was intended, the employee risks sharing their future intentions of becoming a parent, opening the door to potential discrimination and retaliation without any immediate benefit of a successful pregnancy and birth.

174 *Id.* at *7.
175 *Id.*
176 *Id.* at *11 (alteration in original).

And even though pregnant workers had a partial victory in *Young v. UPS*, the decision was hardly the course correction that advocates had wished for. The decision did not end the confusion about the meaning and scope of the PDA's equal accommodation provision in the lower federal courts. In particular, what constitutes "similar" remained unanswered by the *Young* decision, leaving lower courts free to scrutinize and reject pregnant workers' comparators even when they could find them. One study found that in the three years after *Young*, in two-thirds of cases courts ruled that the employer was not required to provide the requested accommodation under the PDA.[177]

B. The Family and Medical Leave Act

Congress passed the FMLA in 1993 in order to guarantee employees job-protected leave for certain family and medical leave reasons, including pregnancy, personal or family illness, adoption, and others.[178] Employers with more than fifty employees are bound by the Act.[179] The Act provides a baseline of twelve weeks of unpaid leave for qualified reasons per twelve-

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177 *See* DINA BAKST, ELIZABETH GEDMARK & SARAH BRAFMAN, LONG OVERDUE: IT IS TIME FOR THE FEDERAL PREGNANT WORKERS FAIRNESS ACT 5 (2019), https://www.abetterbalance.org/wp-content/uploads/2019/05/Long-Overdue.pdf [https://perma.cc/L3WU-QV8T]. Perhaps this outcome should not be surprising. The lower courts' inconsistency in application of *Young* was predicted by scholars writing about the decision, critical that "the Court imposed new, subjective requirements on pregnant workers" that "were not defined and will create considerable ambiguity in litigating pregnancy claims . . . ." Lynn Ridgeway Zehrt, *A Special Delivery: Litigating Pregnancy Accommodation Claims After the Supreme Court's Decision in* Young v. United Parcel Service, Inc., 68 RUTGERS U. L. REV. 683, 705 (2016); *see also* Lara Grow, *Pregnancy Discrimination in the Wake of* Young v. UPS, 19 U. PA. J.L. & SOC. CHANGE 133, 156 (2016) (noting that *Young* fundamentally failed to resolve the circuit split regarding how to identify relevant comparators when establishing a prima facie case of disparate treatment under the PDA and thus potentially risked creating even more confusion).

178 29 U.S.C. § 2612(a)(1) ("[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of the birth of a son or daughter of the employee and in order to care for such son or daughter[;] . . . [b]ecause of the placement of a son or daughter with the employee for adoption or foster care[;] . . . [i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition[;] . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee[;] . . . [b]ecause of any qualifying exigency . . . arising out of the fact that the spouse, or a son, daughter, or parent of the employee is on covered active duty . . . in the Armed Forces).

179 29 U.S.C. § 2611(4)(A)(i).

month period.[180] The FMLA does not provide bereavement leave.[181]

1. *The Serious Health Condition Requirement*

In order to obtain FMLA leave for illness, an employee must have a "serious health condition."[182] A serious health condition is defined by the statute and relevant Department of Labor (DOL) regulations as an illness, injury, or impairment that requires inpatient care or continuing treatment by a healthcare provider.[183] "Any period of incapacity due to pregnancy, or for prenatal care" also constitutes a serious health condition.[184] Another DOL regulation on leave for pregnancy or birth clarifies that "[a]n expectant mother may take FMLA leave before the birth of the child . . . if her condition makes her unable to work."[185]

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180 29 U.S.C. § 2612(a)(1).

181 Legislation has been introduced to change this. *See* Sarah Grace-Farley-Kluger Act, S. 2935, 117th Cong. (2021); Sarah Grace-Farley-Kluger Act, H.R. 5031, 117th Cong. (2021). Although beyond the scope of this Article, it is worth noting that that the lack of FMLA coverage following the death of a newborn baby continues to be a problem for employees. *See, e.g.*, Towns v. Kipp Metro Atlanta Collaborative, Inc., No. 1:18-CV-405-MHC-CCB, 2019 WL 5549279, at *7–9 (N.D. Ga. July 30, 2019) (holding that the plaintiff was not entitled to FMLA leave to care for a "newborn daughter" since the child had died and bereavement leave is not covered by the FMLA). However, federal employees gained two weeks of parental bereavement as part of the National Defense Authorization Act for Fiscal Year 2022. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 1111, 135 Stat. 1541, 1953 (2021).

182 29 U.S.C. § 2612(a)(1)(D).

183 29 U.S.C. § 2611(11); 29 C.F.R. § 825.113(a). Inpatient care means an overnight stay in a hospital, hospice, or residential medical care facility, including any period of incapacity, i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, or any subsequent treatment in connection with such inpatient care. 29 C.F.R. § 825.114. Continuing treatment is defined in several ways, including as a period of incapacity for more than three consecutive days that requires ongoing treatment by a health care provider, incapacity due to pregnancy, incapacity due to a chronic health care condition that requires periodic (at least twice a year) health care visits, periodic incapacity due to a long-term condition, and conditions requiring multiple treatments to avoid incapacity. 29 C.F.R. § 825.115(a)–(d).

184 29 C.F.R. § 825.115(b).

185 29 C.F.R. § 825.120(a)(4). Of note, there is a growing movement to include all pregnant individuals in laws protecting pregnancy. *See, e.g.*, Jessica Clarke, *Pregnant People?*, 119 COLUM. L. REV. F. 173, 198 (2019) ("Removing references to 'mothers' and 'women' from pregnancy rules is an urgent project to ensure that pregnant people who do not identify as women have equal access to reproductive health care and workplace accommodations. It is also important to update workplace rules that unfairly assume men do not or should not engage in carework during pregnancy."); Fontana & Schoenbaum, *supra* note 15, at 360 (arguing that rules and policies can be revised to change references to "wom[e]n affected by pregnancy" or "expectant mother[s]" to sex-neutral terms for pregnant individuals). R

The legislative history of the FMLA shows that Congress intended leave to be available to workers who experience miscarriages. Both the House and Senate reports that accompanied the FLMA specifically referred to miscarriages as an example of "serious health conditions" the legislation is intended to cover.[186] Additionally, several organizations provided written statements in congressional hearings leading up to the FMLA referencing the need to protect workers who are at risk of or who experience miscarriages.[187]

Likely due to the clear regulatory language encompassing incapacity due to pregnancy or prenatal care as a serious health condition, there are few reported decisions where a plaintiff could not request FMLA leave for a miscarriage or threatened miscarriage because a court did not consider a miscarriage a "serious health condition." That is, employees who suffer a miscarriage or who are placed on bed rest due to a threatened miscarriage seem to qualify for FMLA leave without issue. Cases primarily revolve around issues that arise after FMLA leave has been granted, such as retaliation for using leave.[188] Pregnant workers also suffer adverse employment consequences such as job loss when medical complications during high-risk pregnancies eat into their FMLA family leave, leaving them short of protected FMLA leave after giving birth.[189]

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186 S. REP. NO. 103-3, at 29 (1993); H.R. REP. NO. 103-8, at 43 (1993).

187 *See, e.g.*, *The Family and Medical Leave Act of 1989: Hearing on H.R. 770 before the Subcomm. on Lab.-Mgmt. Rels. of the H. Comm. on Educ. and Lab.*, 101st Cong. 237, 244 (1989) (statement of Clifford D. Stromberg, Chair, Section of Individual Rights and Responsibilities, American Bar Association (ABA)) (presenting ABA resolution discussing the need for job protection when "a woman must take leave because of temporary disability caused by miscarriage"); *Family and Medical Leave Act of 1987: Joint Hearing before the Subcomm. on Civ. Serv. and the Subcomm. on Compensation & Employee Benefits of the H. Comm. on Post Office & Civ. Serv.*, 100th Cong. 31, 38, 40, 62 (1987) (testimony of Eleanor Holmes Norton, Professor of Law, Georgetown University Law Center and former Chair of the Equal Employment Opportunity Commission, on behalf of thirty-one women's and civil rights groups and unions) (discussing women's risk of job loss when experiencing temporary disability related to "threatened miscarriage"); *Family and Medical Leave Act of 1989: Hearing before the Subcomm. on Children, Family, Drugs & Alcoholism of the S. Comm. on Labor & Human Resources*, 101st Cong. 82, 99, 102 (1989) (statement of Dana Friedman, President, Families and Work Institute, New York, New York) (explaining that flexible benefit plans would not protect a woman who had a miscarriage).

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

189 *See, e.g.,* Grant v. Hosp. Auth. of Miller Cnty., No. 15-CV-201, 2017 WL 3527703, at *3–4 (M.D. Ga. Aug. 16, 2017); Wanamaker v. Town of Westport Bd.

For example, in *Lopez v. City of Gaithersburg*,[190] Jammie Lopez, a police officer, was diagnosed with gestational diabetes and ordered on bed rest due to her high-risk pregnancy and threat of a miscarriage.[191] The police department had a policy of permitting employees to take all of their available paid leave before using FMLA leave so as to maximize protected leave.[192] After Lopez combined her sick leave and FMLA leave in this way to cover the period of bed rest and childbirth recovery, per the departmental policy, she informed the department that she would need to return to the light-duty assignment (which she had previously held during her pregnancy) for one month upon her return to work due to heavy bleeding.[193] Thereupon, the police chief initiated an internal affairs investigation for insubordination, "based on her alleged failure to 'provide proper medical documentation as required by City policy.'"[194] The department also then retroactively designated her period of paid sick leave as FMLA parental leave, leaving her one-week short of the medically necessary leave recommended by her physician,[195] and terminated her for not returning to work a week earlier than she was able to.[196] Based on this record, the Court granted the defendant's summary judgment motion on Lopez's FMLA interference claim,[197] because Lopez "was ultimately allowed significantly more leave time than the 12 week 'substantive floor' guaranteed by the FMLA."[198] In the court's view, the police department's retroactive decision not to follow its own leave stacking policy did not prejudice Lopez. [199] Lopez did prevail on the department's summary judgment motion to dismiss her FMLA retaliation claim, mainly because of Lopez's evidence suggesting that the police chief lied to the city manager when he wrote in a memorandum recommending her ter-

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of Educ., 11 F. Supp. 3d 51, 59 (D. Conn. 2014); Jones v. Elmwood Ctrs. Inc., No. 3:12 CV 3046, 2014 WL 1761567, at *2 (N.D. Ohio Apr. 30, 2014).

190 No. RBD-15-1073, 2016 WL 4124215 (D. Md. Aug. 3, 2016).

191 *Id.* at *1–2.

192 *Id.* at *8.

193 *Id.* at *3, 13.

194 *Id.* at *13.

195 *Id.* at *8.

196 *Id.* at *5.

197 Under section 105 of the FMLA, an employer is prohibited from interfering with, restraining, or denying the exercise of, or the attempt to exercise, any FMLA right. *See* 29 U.S.C. § 2615(a).

198 *Lopez*, 2016 WL 4124215, at *9.

199 *Id.* at *10. This reasoning is flawed, as Lopez would have qualified for more than twelve weeks of job-protected leave had the defendant followed its own policy, which it had said it would apply to her situation before Lopez went on leave.

mination that she had insufficient medical documentation in support of her request for light-duty.[200] As the *Lopez* case illustrates, although a miscarriage qualifies as a serious health condition covered by the FMLA, twelve weeks of leave will often not be sufficient for workers who face medically-complicated pregnancies and need to utilize FMLA leave to mitigate the risk of a miscarriage while pregnant. Moreover, although retaliation against pregnant workers for taking an FMLA leave is common, especially for the many workers like Lopez whose pregnancies do not go according to plan, plaintiffs generally lose these claims when they do not have strong evidence of retaliation like Lopez.[201]

2. *Partner FMLA Miscarriage Claims*

In the last twenty years, there has been increasing research showing that a miscarriage impacts both partners in a relationship. Non-pregnant partners experience grief following their partners' miscarriages that is complicated by their need to be a source of strength and support.[202] A study of men whose partners had experienced pregnancy loss revealed strong emotional reactions following a partner's pregnancy loss, made more difficult when the world that surrounded them discounted their loss.[203] Researchers theorize that the devaluation of men's experiences after a female partner's pregnancy loss is rooted in cultural expectations that "that men remain stoical and strong."[204] Further, because "fathers are not physically involved in the carrying of a child, . . . male attachment is assumed to develop only after a child's birth."[205] Other studies have found that men commonly experience depressive systems in the year following their partner's miscarriage, including "feelings of sadness, loss and helplessness," with the worst

200 *Id.* at *13. Although unstated, it is likely that the court's decision to deny summary judgment on Lopez's FMLA retaliation claim was also influenced by evidence of the police chief's decision to write up Lopez for insubordination in response to her request for a light-duty assignment.

201 For example, in *Daneshpajouh v. Sage Dental Group of Florida, PLLC*, the court ruled that the plaintiff, who claimed that she was terminated for inquiring about FMLA rights while on bed rest from an emergency surgery to save her pregnancy, did not prove retaliation; the close timing between her requesting FMLA leave and termination, alone, was not enough to prove causation. No. 19-CIV-62700-RAR, 2021 WL 3674655, at *5, *18 (S.D. Fla. Aug. 18, 2021).

202 Bernadette Susan McCreight, *A Grief Ignored: Narratives of Pregnancy Loss from a Male Perspective*, 26 SOCIOLOGY OF HEALTH & ILLNESS 326, 337 (2004).

203 *Id.* at 343.

204 *Id.* at 329.

205 *Id.* at 327.

symptoms occurring soon after the loss.[206] Couples that have a miscarriage also have an increased risk of a relationship breakdown, including separation and divorce.[207]

Besides the potential need for time off of work to deal with their own emotional responses to miscarriage, partners may need and want to care for the spouse (or nonmarital partner) who is experiencing a high-risk pregnancy or miscarriage. For example, a national radio news program detailed a typical account of a couple facing the challenges of the wife's high-risk pregnancy and how it "turned [their] family's life upside down."[208] After Margaret Siebers was told by her healthcare team that she should go on bed rest halfway through her pregnancy, she and her husband, Alex, "struggled [to] make ends meet . . . ."[209] Her husband "immediately quit his full time job" to take care of Siebers and their four-year-old daughter. Siebers explains, "I wouldn't even get my own glasses of water. So I like to say that 'I was on bed rest, and he was on house arrest,' because he really couldn't leave either."[210]

The regulations implementing the FMLA state that "[a] spouse is entitled to FMLA leave if needed to care for a pregnant spouse who is incapacitated or if needed to care for her during her prenatal care, or if needed to care for her following the birth of a child if she has a serious health condition."[211]

Courts seem to be relatively sympathetic to husbands who need FMLA leave to care for their wives after a miscarriage. For example, in *Jadali v. Michigan Neurology Associates, P.C.*,[212] the Michigan Court of Appeals considered whether an employer could deduct money for an employee's "lost productivity during his medical absences."[213] The employee had taken ten days off

206 Ingrid H. Lok & Richard Neugebauer, *Psychological Morbidity Following Miscarriage*, 21 BEST PRAC. & RSCH. CLINICAL OBSTETRICS & GYNAECOLOGY 229, 239–40 (2007).

207 Katherine J. Gold, Ananda Sen & Rodney A. Hayward, *Miscarriage and Cohabitation Outcomes After Pregnancy Loss*, 125 PEDIATRICS 1202, 1205–06 (2010).

208 *See* Kodiak, *supra* note 129. **R**

209 *Id.*

210 *Id.* The Siebers' story brings to mind David Fontana and Naomi Schoenbaum's observation that "much prebirth carework does not involve the woman's body at all." Fontana & Schoenbaum, *supra* note 15, at 310. **R**

211 29 C.F.R. § 825.120(a)(5). This regulation was amended in 2015 "to make references to husbands and wives and mothers and fathers gender neutral where appropriate so that they apply equally to opposite-sex and same-sex spouses." *See* Definition of Spouse Under the Family and Medical Leave Act, 80 Fed. Reg. 9,989, 9,995 (Feb. 25, 2015).

212 No. 297975, 2011 WL 6848356 (Mich. Ct. App. Dec. 29, 2011).

213 *Id.* at *11.

following his wife's miscarriage.[214] The defendant conceded the validity of taking such time off under the FMLA, and the court also acknowledged that the plaintiff had taken time off to care for a spouse with a "serious health condition."[215] The court held that a jury could determine that a financial penalty for taking leave was interference prohibited by the FMLA.[216] The Department of Labor, in educational materials about the FMLA, concurs: "A father can use FMLA leave for the birth of a child and to care for his spouse who is incapacitated (due to pregnancy or child birth)."[217] This is consistent with other FMLA cases involving male caregivers who take leave after the birth of a child; courts generally look quite favorably upon married fathers who are discriminated against because they take family leave to care for a partner after the birth of a child,[218] so long as the father is actually providing care.[219]

3. *The FMLA and Post-Miscarriage Depression*

Workers who experience depression after a miscarriage (or who are covered employees caring for such a person) should be protected by the FMLA, as the FMLA implementing regulations state that a serious health condition includes "[a]ny period of incapacity due to pregnancy,"[220] "even though the employee or the covered family member does not receive treatment from a health care provider . . . ."[221]

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214 *Id.* at *4.

215 *Id.* at *11.

216 *Id.*

217 *Frequently Asked Questions and Answers About the Revisions to the Family and Medical Leave Act*, U.S. DEP'T OF LAB., https://www.dol.gov/whd/fmla/finalrule/NonMilitaryFAQs.htm [https://perma.cc/5TWE-HF54] (last visited Jan. 13, 2022).

218 For example, in *Meyer v. Town of Wake Forest*, the court held that a jury could reasonably find a new father lawfully used FMLA leave to care for his wife and newborn baby on trips to the beach and state fair, because there is no geographical limitation to activities covered by the FMLA. No. 5:16-CV-348-FL, 2018 WL 4689447, at *6, *7–8 (E.D.N.C. Sept. 28, 2018). *Cf.* Blohm v. Dillard's Inc., 95 F. Supp. 2d 473, 480–81 (E.D.N.C. 2000) (holding that a father who verbally informed his supervisor of his intent to take FMLA leave a month before his child's birth and was then demoted and ultimately terminated for missing work for the birth of his child raised a genuine issue of material fact sustaining his claims of FMLA interference and retaliation).

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

220 29 C.F.R. § 825.115(b).

221 29 C.F.R. § 825.115(f).

However, pregnant workers who experience depression due to a miscarriage face practical barriers to accessing FMLA leave. Most people who miscarry do not freely talk about the experience, as it is too personal.[222] Depression is a health condition that is also culturally embedded with shame in our society.[223] Thus, the experience of depression after a miscarriage is like a double whammy of shame that may deter employees from seeking FMLA leave despite incapacity.[224] Without giving proper notice to their employers about the their mental health condition, employees who experience depression after a miscarriage are likely to be unprotected by the FMLA.[225] For example, in *Maitland v. Employease, Inc.*,[226] the court awarded the employer summary judgment because the employee had not adequately informed her employer that she qualified for FMLA leave for a serious health condition.[227] The court found that, even though the plaintiff was diagnosed with depression,

222 *See infra* subpart II.E.

223 *See* REBECCA L. COLLINS, EUNICE C. WONG, JENNIFER L. CERULLY, DANA SCHULTZ & NICOLE K. EBERHART, RAND CORP., INTERVENTIONS TO REDUCE MENTAL HEALTH STIGMA AND DISCRIMINATION: A LITERATURE REVIEW TO GUIDE EVALUATION OF CALIFORNIA'S MENTAL HEALTH PREVENTION AND EARLY INTERVENTION INITIATIVE 3 (2012) ("Mental illness stigma is common in the United States. . . . In 2006, nearly one in three U.S. adults endorsed the view that schizophrenia and depression are a result of 'bad character' . . . .").

224 Mild depression is also underdiagnosed generally, especially among Black and Latina women who face structural barriers to accessing mental health care. *See, e.g.*, MICHAEL E. THASE & SUSAN S. LANG, BEATING THE BLUES: NEW APPROACHES TO OVERCOMING DYSTHYMIA AND CHRONIC MILD DEPRESSION 5 (2004) (reporting that dysthymia (mild depression) "is one of the most underrecognized and undertreated mood disorders . . . ."); Sandraluz Lara-Cinisomo, Crystal T. Clark & Jayme Wood, *Increasing Diagnosis and Treatment of Perinatal Depression in Latinas and African American Women: Addressing Stigma Is Not Enough*, 28 WOMEN'S HEALTH ISSUES 201, 201 (2018) (reporting that rates of diagnosis and treatment for perinatal depression continue to be low among Latinas and Black women); Kay Matthews, Isabel Morgan, Kelly Davis, Tracey Estriplet, Susan Perez & Joia A. Crear-Perry, *Pathways to Equitable and Antiracist Maternal Mental Health Care: Insights from Black Women Stakeholders*, 40 HEALTH AFFS. 1597, 1597 (2021); Jamila K. Taylor, *Structural Racism and Maternal Health Among Black Women*, 48 J.L. MED. & ETHICS 506, 506 (2020). *See generally* UNEQUAL TREATMENT: CONFRONTING RACIAL AND ETHNIC DISPARITIES IN HEALTH CARE (Brian D. Smedley, Adrienne Y. Stith & Alan R. Nelson eds., 2003) (documenting racial and ethnic disparities in health care and exploring how persons of color experience the health care environment); Juanita J. Chinn, Iman K. Martin & Nicole Redmond, *Health Equity Among Black Women in the United States*, 30 J. WOMEN'S HEALTH 212 (2021) (examining the "structural contributors to social and economic conditions that create the landscape for persistent health inequities among Black women").

225 Under FMLA regulations, an employee must provide the employer with advance notice before an FMLA leave is to begin or "as soon as practicable" in certain cases, such as changed circumstances or a medical emergency. 29 C.F.R. § 825.302(a)–(b).

226 No. 1:05-CV-0661, 2006 WL 3090120 (N.D. Ga. Oct. 13, 2006).

227 *Id.* at *14–16.

her generalized statements to her employer about her "psychological[ ] stress[ ]" and "severe fatigue" did not provide sufficient notice that she had a serious health condition.[228]

The culture of secrecy surrounding both miscarriage and mental illness may explain why few recent reported cases involve FMLA claims involving depression following miscarriage exist. That is, miscarriage related depression is a serious health condition covered by the FMLA, but employees are unlikely to seek FMLA leave for this common condition in the first place.

C. The Americans with Disabilities Act

1. *"Normal" Pregnancy and the ADA*

Congress passed the ADA in 1990 "[t]o establish a clear and comprehensive prohibition of discrimination on the basis of disability."[229] The ADA provides employees with a covered disability the right to reasonable accommodations that do not impose undue hardship.[230] An EEOC interpretive guidance

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228 *Id.* at *16; *see also* Gay v. Gilman Paper Co., 125 F.3d 1432, 1433–36 (11th Cir. 1997) (finding no violation of the FMLA when the plaintiff's husband told the plaintiff's employer that the plaintiff was "in the hospital" and "having some tests run" when the plaintiff had actually been hospitalized for a nervous breakdown because "[w]hen notice of a possible serious medical condition is deliberately withheld and false information is given, it cannot be said that an employee has been terminated in violation of the FMLA"); *cf.* Collins v. NTN-Bower Corp., 272 F.3d 1006, 1007–09 (7th Cir. 2001) (holding that periodic episodes of depression affecting 10% to 20% of the plaintiff's working days may be a serious health condition covered by the FMLA, but merely stating that one is "sick" when explaining an absence from work is not enough to trigger FMLA protections).

229 Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327 (codified throughout 42 U.S.C., ch. 126). The Act defines disability as either "(A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment . . . ." 42 U.S.C. § 12102(1).

230 42 U.S.C. § 12112. Commentators have unsuccessfully made various arguments over the years for interpreting the Act to cover pregnancy. *See, e.g.*, Colette G. Matzzie, *Substantive Equality and Antidiscrimination: Accommodating Pregnancy Under the Americans with Disabilities Act*, 82 GEO. L.J. 193 (1993) (arguing that absence of an explicit statutory exclusion and Congress's broad remedial purpose in passing the ADA support including pregnancy in its coverage); Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 443 (2012) (arguing that, because the ADAAA includes workers with temporary physical limitations comparable to pregnancy, courts should conclude that the ADA extends to pregnancy).

excludes pregnancy from coverage,[231] and most courts have likewise interpreted the ADA to exclude "normal" pregnancy.[232]

After a series of Supreme Court cases narrowing the ADA's definition of disability,[233] Congress passed the Americans with Disabilities Act Amendments Act of 2008 ("ADAAA") with the purpose of "restor[ing] the intent and protections of the Americans with Disabilities Act of 1990."[234] The ADAAA clarified that "the definition of disability in this Act shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act."[235] And, indeed, the ADAAA resulted in more ADA claims surviving mo-

231 29 C.F.R. pt. 1630, App'x § 1630.2(h) ("[C]onditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments. However, a pregnancy-related impairment that substantially limits a major life activity is a disability under the first prong of the definition.").

232 *See* Young v. United Parcel Serv., Inc., 707 F.3d 437, 443 (4th Cir. 2013) ("With near unanimity, federal courts have held that pregnancy is not a 'disability' under the ADA." (citation omitted)), *vacated on other grounds*, U.S. 206, 229 (2015); *see also* Bradley A. Areheart, *Accommodating Pregnancy*, 67 ALA. L. REV. 1125, 1134 (2016) (noting that courts have excluded pregnancy from the ADA's coverage "on the rationale that pregnancy is 'normal' and 'healthy'—i.e., it is not the result of a physiological disorder and thus is categorically not an impairment or disability"); Sheerine Alemzadeh, *Claiming Disability, Reclaiming Pregnancy: A Critical Analysis of the ADA's Pregnancy Exclusion*, 27 WIS. J.L. GENDER & SOC'Y 1, 6 (2012) (discussing pre-ADAAA decisions holding that pregnancy is not a disability).

233 *See* Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 196–97 (2002) (holding that the terms "substantial" and "major life activities" in the ADA's definition of disability "need to be interpreted strictly to create a demanding standard for qualifying as disabled"); Sutton v. United Air Lines, Inc., 527 U.S. 471, 488–89 (1999) (holding that a person is disabled "is to be determined with reference to corrective measures," such that if a person's disability may be corrected or controlled with medication or a medical device, for example, they are not disabled under the ADA); *id.* at 489 (interpreting the "regarded as" definition of disability to only apply if the employer regarded the individual as having an impairment that substantially limits major life activities). As a result of federal courts' narrow interpretation of the ADA, "[p]eople with a variety of serious physical or mental impairments, ranging from AIDS, to cancer, to bipolar disorder, have been found not to have disabilities under the ADA." Alex B. Long, *Introducing the New and Improved Americans with Disabilities Act: Assessing the ADA Amendments Act of 2008*, 103 NW. L. REV. COLLOQUY 217, 218 (2008).

234 ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (codified throughout 42 U.S.C., ch. 126).

235 *Id.* at § 3. The ADAAA also expanded the intended scope of disability stating that "(C) [a]n impairment that substantially limits one major life activity need not limit other major life activities in order to be considered a disability[;] (D) [a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active[; and] (E)(i) [t]he determination of whether an impairment substantially limits a major life activity shall be made without regard to the ameliorative effects of mitigating measures . . . ." *Id.*

tions to dismiss and for summary judgment based on the plaintiff not meeting the Act's definition of disabled.[236]

However, despite the ADAAA clarification that the definition of disability under the ADA should be construed broadly, courts have still found pregnancy not to be a disability, reasoning that pregnancy is not the result of a physiological disorder[237] or that its complications have only temporary effect.[238] An examination of cases decided both before and after Congress amended the ADA reveals that the ADAAA did not result in a substantial change in how courts analyze miscarriage under the ADA.

2. *The ADA and Miscarriage*

Before the passage of the ADAAA, courts were split on whether miscarriage constituted a disability under the ADA.[239] Some judges were quite skeptical of this idea, viewing miscar-

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236 Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2070–71 (2013).

237 Cox, *supra* note 230, at 445 (identifying the largest barrier to courts recognizing pregnancy as a disability under the ADA as "the assumption that the ADA only encompasses medically diagnosed disorders"); Widiss, *supra* note 15, at 1434 (showing how courts view pregnancy accommodation needs as related to pregnancy itself, and not a complication or impairment arising from pregnancy); Williams, Devaux, Fuschetti & Salmon, *supra* note 15, at 141 (noting that the idea that normal pregnancy conditions are not impairments continues to limit the applicability of the ADAAA to pregnancy). *But see* Porter, *supra* note 15, at 84–92 (presenting a more optimistic view of the ADAAA's impact on ADA pregnancy accommodation cases, at least where plaintiffs could secure good lawyers familiar with the ADA). Commentators predicted that the ADAAA's expanded coverage of disabilities would indirectly help pregnant workers access workplace accommodations for pregnancy complications by creating more comparators for plaintiffs in pregnancy discrimination cases under the PDA. *See* Widiss, *supra* note 15, at 1434, 1439; Williams, Devaux, Fuschetti & Salmon, *supra* note 15, at 113. However, unfortunately, courts continued to scrutinize and distinguish plaintiffs' comparative evidence notwithstanding the ADAAA's expanded coverage. *See supra* section I.B.1. R R R R R R

238 Mary Ziegler, *Choice at Work:* Young v. United Parcel Service*, Pregnancy Discrimination, and Reproductive Liberty*, 93 DENV. L. REV. 219, 269 (2015) (citing Serednyj v. Beverly Healthcare, LLC, 656 F.3d 540, 554–56 (7th Cir. 2011)).

239 *Compare* Conley v. United Parcel Service, 88 F. Supp. 2d 16, 19 (E.D.N.Y. 2000) ("In the present case, the Plaintiff alleges that her miscarriage constitutes a 'disability.' However, the Plaintiff does not articulate any 'major life activity' that her miscarriage 'substantially limited.' Any limitations on the Plaintiff's activities . . . were of short duration . . . ."), *with* Spees v. James Marine, Inc., 617 F.3d 380, 396–97 (6th Cir. 2010) ("[W]e must analyze Spees's claims pursuant to the earlier version [of the ADA] . . . because the amendments to the ADA do not apply retroactively. . . . There . . . appears to be a general consensus that an increased risk of having a miscarriage at a minimum constitutes an impairment falling outside the range of a normal pregnancy.").

riage as a trivial event or just part of normal pregnancy rather than a protected disability.[240]

Subsequent to the passage of the ADAAA, it does not seem as though courts are any more likely than before the amendments to read the ADA broadly to cover miscarriage. For example, in *Serednyj v. Beverly Healthcare, LLC*,[241] a pregnant nursing home activity director who had a history of a prior miscarriage and began experiencing pregnancy complications, including spotting and cramping, was denied a light duty work assignment and ultimately fired from her job.[242] In affirming the district court's grant of summary judgment against Serednyj, the Seventh Circuit held that pregnancy-related complications that do not last a minimum of six months are not covered by the ADA.[243]

Along the same lines, in *Love v. First Transit*,[244] the plaintiff's case did not survive summary judgment because she was unable to show she suffered pregnancy complications that imposed a substantial limit on her major life activities.[245] The plaintiff, a customer service representative at a call center,[246] had been dismissed from her job after missing just part of one day of work due to a miscarriage.[247] In determining that the miscarriage was not a covered disability, the court reasoned that although "an impairment lasting or expected to last fewer than six months" may be a disability under ADAAA regulations, "[p]laintiff does not cite any case law holding that an impairment lasting less than a day can qualify as a 'substantial limit' on major life activities."[248] Similarly, in *Adirieje v. ResCare,*

240 *E.g.*, *Conley*, 88 F. Supp. 2d at 19.

241 656 F.3d 540 (7th Cir. 2011), *abrogated by* Young v. United Parcel Serv., Inc., 575 U.S. 206 (2015).

242 *Id.* at 543–47.

243 *Id.* at 555–56.

244 No. 16-CV-2208, 2017 WL 1022191 (N.D. Ill. Mar. 16, 2017).

245 *Id.* at *6.

246 *Id.* at *1.

247 *Id.*

248 *Id.* at *5–6 (quoting 29 C.F.R. § 1630.2(j)(1)(ix)). The court also relied on the EEOC's post-ADAAA enforcement guidance advising that "pregnancy itself is not an impairment within the meaning of the ADA, and thus is never on its own a disability." *Id.* at *4–5; *see also* Richardson v. Chicago Transit Auth., 292 F. Supp. 3d 810, 815 (N.D. Ill. 2017) (explaining that "conditions, such as pregnancy, that are not the result of a physiological disorder are also not impairments" (citation omitted)). Nicole Porter has argued that the plaintiff in this case (and others like hers) "would have . . . better luck arguing that [their] major bodily function of reproduction was substantially limited [by a medical condition]." Porter, *supra* note 15, at 92. **R**

Inc.,[249] the court found that a month of intermittent cramping and a subsequent miscarriage did not qualify as a disability under the ADA.[250]

As these decisions illustrate, workers who miscarry or at risk of miscarrying will have difficulty getting protection under the ADA unless they have evidence of more long-lasting complications or effects of miscarriage.[251]

3. *The ADA and Post-Miscarriage Depression*

The text of the ADA makes no reference to the duration of an impairment or disability. Moreover, although Congress in its legislative history made clear that the ADA was not expected to apply to "trivial" impairments,[252] it did not suggest any minimum length of time for an impairment be a disability. Yet, from the beginning, courts interpreted the ADA so that temporary, relatively minor mental health conditions were not covered. Thus, courts consistently found that situational, temporary depression caused by major life events was not a disability under the ADA.[253] Likewise, an early (1997) EEOC enforcement gui-

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249 No. 1:18-CV-01429-TWP-DLP, 2019 WL 4750037 (S.D. Ind. Sept. 30, 2019).

250 *Id.* at *7–9 (determining that even if the plaintiff's cramps and miscarriage were "a pregnancy related complication," there was "no evidence that her cramps limited her ability to work or other major life activities," her miscarriage resulted in only about six hours of hospitalization, and "[s]he was released to return to work without any restrictions three days after the hospital visit").

251 *See, e.g.*, *Wadley v. Kiddie Acad. Int'l, Inc.*, No. 17-05745, 2018 WL 3035785, at *5 (E.D. Pa. June 19, 2018) (holding that a plaintiff with a medical history of prior a miscarriage and chronic urinary tract infections that increased her risk of pregnancy loss alleged enough facts to state a disability under the ADA and survive summary judgment).

252 *See* S. Rep. No. 101-116, at 21 (1989) ("Persons with minor, trivial impairments, such as a simple infected finger are not impaired in a major life activity."); H.R. Rep. No. 101-485, pt. 2, at 52 (1990) ("A person with a minor, trivial impairment . . . is not impaired."). This point was also emphasized by thirteen of the seventeen Republicans members of the House of Representatives Judiciary Committee in the legislative history of the ADAAA. *See* H.R. Rep. No. 110-730, pt. 2, at 30 (2008) ("[W]e want to make clear that we believe that the drafters and supporters of this legislation, including ourselves, intend to exclude minor and trivial impairments from coverage under the ADA, as they have always been excluded."). For a full list of the House Judiciary Committee members in 2008, see the National Archives record of the 2008 U.S. House of Representatives, Committee on the Judiciary, https://www.webharvest.gov/congress110th/20081212012537/http://judiciary.house.gov/about/members.html [https://perma.cc/ZUP4-E9QC] (last visited Feb. 17, 2022).

253 *See, e.g.*, Ramirez v. New York City Bd. of Educ., 481 F. Supp. 2d 209, 213, 218 n.10, 219–20 (E.D.N.Y. 2007) (holding a teacher who was absent for nearly a third of the school year due to several ailments, including depression that worsened when a student hit him on the head with a newspaper, was not a qualified individual under the ADA, reasoning that the teacher's ailments were temporary

dance on psychiatric disabilities stated that: An impairment is "not substantially limiting if it lasts for only a brief time or does not significantly restrict an individual's ability to perform a major life activity."[254]

There are no reported decisions directly addressing ADA claims based on depression following miscarriage, likely because of the stigma associated with depression and mental illness,[255] culture of secrecy surrounding miscarriage,[256] and risk of retaliation for seeking workplace accommodations due to miscarriage.[257] But cases on postpartum depression and depression generally are instructive.

Before the passage of the ADAAA, courts were almost uniformly unwilling to find that a short-term episode of depression qualified as a disability under the ADA. For example, in *Sanders v. Arneson Products*,[258] the Ninth Circuit held that a temporary cancer-related psychological disorder lasting three and a half months was not sufficient to constitute a disability under the ADA.[259] Similarly, in *Morales-Pabon v. Morovis Community Health Center*,[260] the district court held that an employee's temporary depression and anxiety did not constitute a disability within the meaning of the ADA.[261]

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and did not substantially limit his ability to teach); Ogborn v. United Food & Com. Workers, Loc. No. 881, No. 98 C 4623, 2000 WL 1409855, at *4, *7 (N.D. Ill. Sept. 25, 2000) (finding that an employee who suffered from situational depression for "two months or less" after learning of his wife's extramarital affairs was not a qualified person with a disability under the ADA); Mescall v. Marra, 49 F. Supp. 2d 365, 367, 372–76 (S.D.N.Y. 1999) (finding that an employee suffering from panic attacks, depression, and dermatological symptoms associated with work-related stress was not disabled under the ADA, because the employee's mental condition was temporary, and she had no impairments once she began working under a different supervisor).

254 EEOC No. 915.002, Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities (Mar. 25, 1997), https://www.eeoc.gov/laws/guidance/enforcement-guidance-ada-and-psychiatric-disabilities [https://perma.cc/6PP5-6TNJ].

255 *See* COLLINS, WONG, CERULLY, SCHULTZ & EBERHART , *supra* note 223, at 3 ("In 2006, nearly one in three U.S. adults endorsed the view that schizophrenia and depression are a result of 'bad character' . . . ."); *cf. also* Patrick W. Corrigan, Scott B. Morris, Patrick J. Michaels, Jennifer D. Rafacz & Nicolas Rüsch, *Challenging the Public Stigma of Mental Illness: A Meta-Analysis of Outcome Studies*, 63 PSYCHIATRIC SERVS. 963, 967 (2012) ("[E]mployers who endorse stigma may be less likely to hire people with mental illness . . . ."). **R**

256 *See infra* subpart II.E.

257 *Id.*

258 91 F.3d 1351 (9th Cir. 1996).

259 *Id.* at 1354.

260 310 F. Supp. 2d 411 (D.P.R. 2004).

261 *Id.* at 416; *see also* cases collected *supra* note 253. **R**

After the enactment of the ADAAA, courts seem more willing to find that mental disabilities are covered by the statute.[262] Yet, there is still substantial uncertainty as to Congress's intent to expand the Act's coverage to temporary disabilities, such as depression following a miscarriage. The ADAAA explicitly provides in its statutory language that individuals cannot be protected as a person "regarded as" disabled if their impairment is transitory (lasting six months or less) and minor.[263] Whether this exclusion applies to individuals seeking accommodations for actual disabilities is unclear from the statute itself, as Congress was silent on that question. In post-ADAAA regulations, the EEOC has taken the position that this limitation does not apply to persons who are seeking accommodations based on actual disabilities.[264] And the EEOC's post-ADAAA enforcement guidelines on pregnancy discrimination even include depression as an example of a pregnancy-related impairment that should qualify as a disability under the ADA, as amended.[265] But, federal courts (including the Supreme Court) have shown that they have no reservations rejecting the EEOC's regulations and interpretive guidances when deciding cases under the ADA.[266] Consistent with this lack of deference, post-ADAAA, some courts have continued to cite pre-ADAAA precedents excluding temporary or situational depres-

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

263 42 U.S.C. § 12102(3)(B). The ADA includes three alternative definitions of "disability" covering different scenarios in which disability discrimination may occur. The three definitions are a person with an "actual" disability, "record of" a disability, and a person whose is "regarded as" a person with a disability by their employer. 42 U.S.C. § 12102(1).

264 Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended, 76 Fed. Reg. 16978, 17001 (Mar. 25, 2011) (codified as amended at 29 C.F.R. § 1630.2(j)(1)(ix)).

265 2015 EEOC Pregnancy Enforcement Guidance, *supra* note 101, at *19–20 ("[A] number of pregnancy-related impairments that impose work-related restrictions will be substantially limiting, even though they are only temporary . . . . [E]xamples include pregnancy-related . . . depression (affecting brain function)."). R

266 Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1937 (2006) (explaining that the "EEOC receives remarkably little respect from the Court"); *see also* Lisa Eichhorn, *The* Chevron *Two-Step and the* Toyota *Sidestep: Dancing Around the EEOC's "Disability" Regulations Under the ADA*, 39 WAKE FOREST L. REV. 177, 177 (2004) ("Although the EEOC's [ADA] regulation is the product of a valid rulemaking process and is entitled to a high degree of deference under settled administrative law principles, the Supreme Court, in *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*, . . . applied the Court's own, narrower, interpretation . . . .").

sion from the Act's protections, even where the plaintiff's claim is not brought under the "regarded as" prong.[267]

On the other hand, other courts have found that temporary or situational depression can be a disability.[268] Still, plaintiffs seem to fare better on this type of claim if their symptoms are severe and relatively long lasting. For example, in *Reilly v. Revlon, Inc.*,[269] the court found that the plaintiff's postpartum depression that resulted in her "two-week hospitalization" and five months of "significant limitations in her ability to sleep, eat, think and concentrate, taken, collectively create an issue of fact as to whether her postpartum depression rises to the level of an emotional or mental illness . . . ."[270] The court denied the employer's motion for summary judgment.[271] Along the same lines, in *Hostettler v. College of Wooster*,[272] the Sixth Circuit determined that the plaintiff was disabled under the ADA despite the episodic nature of her postpartum depression, because "when [plaintiff] was experiencing her depression and anxiety she was substantially limited in her ability to care for herself, sleep, walk, or speak, among others."[273] Further, the plaintiff was experiencing postpartum panic attacks, "during which she would have difficulty breathing, thinking, and even walking."[274] The plaintiff had been fired when she could not immediately come back to work full time after a maternity leave due to postpartum depression.[275]

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267 *See, e.g.*, Seibert v. Lutron Elecs., 408 Fed. App'x 605, 608 (3d Cir. 2010) (holding that the plaintiff's depression, "induced by specific, non-recurring events," was temporary and thus not a disability within the meaning of the ADA); MacEntee v. IBM, 783 F. Supp. 2d 434, 443 (S.D.N.Y. 2011) ("Courts in this circuit have found that depression may qualify as a disability for purposes of the ADA, 'provided that the condition is not a "temporary psychological impairment"' . . . ." (internal citations omitted)), *aff'd*, 471 Fed. App'x 49 (2d Cir. 2012).

268 *See, e.g.*, Moore v. CVS Rx Servs., Inc., 142 F. Supp. 3d 321, 344 (M.D. Pa. 2015) (finding that "pregnancy-related complications, such as round-ligament syndrome and postpartum depression, constitute 'disabilities' as contemplated by the ADA, even if pregnancy is not a qualifying disability"), *aff'd*, 660 Fed. App'x 149 (3d Cir. 2016). However, of note, the parties stipulated as to this issue in this case. *Id.*; *cf.* Nagle v. E. Greenbush Cent. Sch. Dist., No. 1:16-CV-00214, 2018 WL 4214362, at *16 (N.D.N.Y. Feb. 21, 2018) (holding that facts showing premature labor resulting in hospitalization were sufficient to raise a triable issue of fact as to whether Plaintiff was disabled).

269 620 F. Supp. 2d 524 (S.D.N.Y. 2009).

270 *Id.* at 539–40.

271 *Id.* at 541.

272 895 F.3d 844 (6th Cir. 2018).

273 *Id.* at 854.

274 *Id.* at 850.

275 *Id.* at 851. The Sixth Circuit reversed the district court's grant of summary judgment to the employer and remanded on the question of whether her need to

In sum, depending on the severity of the depression (and length of symptoms), the ADAAA could make it more likely that employees who are terminated or denied accommodations for depression following a miscarriage and sue will at least get past the defendant's motion for summary judgment. Congress did, after all, intend to restore the ADA to its original purpose and has directed courts to construe the definition of disability under the ADA "in favor of broad coverage."[276] But, the results overall, have been mixed for individuals with depression. Some courts persist in clinging to the pre-ADAAA narrow definition of disability in ADA cases involving depression, especially if the depression is not long lasting or severe. Because it cannot yet be said that there has been a sea change in judicial interpretation with regard to whether episodic or situational depression related to a traumatic life event counts as a disability under the ADA, individuals affected by depression related to miscarriage are not clearly protected by the statute.

4. *The ADA and Bed Rest*

Like the depression cases, courts are not consistently inclined to find that a threatened miscarriage or other pregnancy complications necessitating bed rest are covered by the ADA. Largely, this depends on how long the bed rest lasts.

In two cases, plaintiffs survived motions for summary judgment when they had experienced adverse employment actions after using ADA leave for bed rest lasting approximately two to three months. A district court in Tennessee denied summary judgment against a plaintiff who received a poor performance review after she went on bed rest.[277] The employer claimed that the poor review was based on performance problems unrelated to the plaintiffs' ADA leave, but the court considered the nature of the comments on the review and the temporal proximity of the plaintiff's leave and performance enough to survive summary judgment.[278] A district court in D.C. held that a plaintiff who was disabled during a period of prescribed bed rest and subsequently terminated "suffered the consequences of that alleged discriminatory act," because the delay "[did] not

work part time for two additional months made her "otherwise qualified" for her job, or not, under the ADA. *Id.* at 848.

276 42 U.S.C. § 12102(4)(A).

277 Meachem v. Memphis Light, Gas & Water Div., 119 F. Supp. 3d 807, 811, 819–821 (W.D. Tenn. 2015), *aff'd sub nom.* Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595 (6th Cir. 2018).

278 *Id.* at 820–21.

vitiate what was, at the time it occurred, an allegedly unlawful act."[279]

Conversely, a district court in Georgia held that a two-week period of pregnancy-related bed rest did not qualify as a disability.[280] The plaintiff worked as a successful bartender at a restaurant.[281] Due to severe pregnancy complications, she experienced bleeding at work and had to end her shift early and go to the hospital.[282] After returning from two weeks of doctor-recommended bed rest, the defendant assigned the plaintiff to work at a less popular restaurant location, which reduced her income, and ultimately terminated her.[283] Although the plaintiff prevailed on her Title VII and FMLA claims, she did not win her ADA claim; the court held that she did not "show her pregnancy-related complications constituted a disability under the ADA."[284]

D. The Occupational Safety and Health Act

Low-income women and women of color are more likely to work in industries and job settings involving taxing physical labor, such as in warehouses,[285] food processing plants,[286] low-paid service jobs,[287] agriculture,[288] nursing and retire-

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

280 Alger v. Prime Rest. Mgmt., LLC, No. 1:15-CV-567-WSD, 2016 WL 3741984, at *8 (N.D. Ga. July 13, 2016).

281 *Id.* at *1.

282 *Id.*

283 *Id.* *1–2.

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

285 *See, e.g.*, Ellen Reese, *Gender, Race, and Amazon Warehouse Labor in the United States*, *in* THE COST OF FREE SHIPPING: AMAZON IN THE GLOBAL ECONOMY 102, 107 (Jake Alimahomed-Wilson & Ellen Reese eds., 2020) (describing Amazon's female workers as "mostly women of color").

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

287 *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STATS., https://www.bls.gov/cps/cpsaat10.pdf [https://perma.cc/LFB9-WGDH] (last updated Jan. 25, 2023) (reporting that almost one-quarter (24.4%) of Black women were employed in service jobs in 2022 compared with less than one-fifth (18.6%) of White women).

288 AMANDA GOLD, WENSON FUNG, SUSAN GABBARD & DANIEL CARROLL, FINDINGS FROM THE NATIONAL AGRICULTURAL WORKERS SURVEY (NAWS) 2019–2020: A DEMOGRAPHIC AND EMPLOYMENT PROFILE OF UNITED STATES FARMWORKERS 4, 10 (2022), https://www.dol.gov/sites/dolgov/files/ETA/naws/pdfs/

ment homes,[289] and as home-health aides.[290] These jobs and work environments often entail long hours standing on one's feet; lifting heavy boxes; lifting, transferring or wheeling bodies; working in extreme heat or cold; and working night shifts[291]—all conditions that can increase the risk of miscarriage.[292] Yet, when employers deny employee requests for light duty or other

NAWS%20Research%20Report%2016.pdf [https://perma.cc/GYT7-F34A] (reporting that one-third of the U.S. crop labor force is female and 78% Hispanic).

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

290 *Id.*

291 *See, e.g.*, Reese, *supra* note 285, at 112. According to Reese, Amazon warehouse workers on the night shift explained some of their challenges as follows: **R**

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

Id. at 112.

292 *See* sources cited *infra* notes 309–318 and accompanying text. Of relevance here: **R**

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

Nina Banks, *Black Women's Labor Market History Reveals Deep-Seated Race and Gender Discrimination*, ECON. POL'Y INST. (Feb. 19, 2019), https://www.epi.org/blog/black-womens-labor-market-history-reveals-deep-seated-race-and-gender-discrimination/ [https://perma.cc/8CQE-47YW]. For a discussion of enslaved women's experiences of miscarriages and stillbirths due to overwork on plantations, see LORETTA J. ROSS & RICKIE SOLINGER, REPRODUCTIVE JUSTICE: AN INTRODUCTION 19–20 (2017).

accommodations, the law generally does not provide much protection to pregnant workers.

In a 2018 report, *The New York Times* reviewed thousands of legal documents and court records of pregnant workers whose pregnancies resulted in miscarriages or premature labor, all because their requests for temporary modifications to their jobs were rejected.[293] For example, Ceeadria Walker, a Black woman, was a warehouse worker at XPO Logistics, a global provider of transportation and contract logistics company.[294] XPO is one of the largest providers of last-mile shipping for heavy goods in North America—arranging the home delivery of heavy goods that typically require assembly or installation, such as washing machines, refrigerators, exercise equipment, and home entertainment systems.[295] Walker often worked twelve-hour shifts at XPO's Memphis warehouse.[296] When she became pregnant, "she gave her supervisor a doctor's letter from OB/GYN Centers of Memphis saying she should not lift more than fifteen pounds."[297] She asked to "reduce the hours on her feet" and "to be assigned to an area handling lighter items."[298] Her supervisor ignored her request. Rather, he regularly sent her to a conveyor belt where she spent her days "hoisting 45-pound boxes."[299] Walker thought about leaving.[300] But "[she] couldn't just quit [her] job"—she needed the money.[301] One day, after a long shift of handling "hundreds" of these heavier boxes, Walker miscarried.[302] "This was going to be my first," she told *The New York Times*.[303] Five workers had suffered miscarriages at the same warehouse since 2014 after being refused light duty work.[304]

293 Jessica Silver-Greenberg & Natalie Kitroeff, *Miscarrying at Work: The Physical Toll of Pregnancy Discrimination*, N.Y. TIMES (Oct. 21, 2018), https://www.nytimes.com/interactive/2018/10/21/business/pregnancy-discrimination-miscarriages.html [https://perma.cc/NUU4-7UP5].

294 *Id.*; *About Us*, XPO LOGISTICS, https://www.xpo.com/about-us/ [https://perma.cc/A5RA-C6K5] (last visited Feb. 5, 2022).

295 *About Us*, *supra* note 294. R

296 Silver-Greenberg & Kitroeff, *supra* note 293. R

297 *Id.*

298 *Id.*

299 *Id.*

300 *Id.*

301 *Id.*

302 *Id.*

303 *Id.*

304 *Id.*

The story of Patty Hernandez, a former packer at Amazon's OAK4 fulfillment center in Tracy, California,[305] is also emblematic of this situation. When Hernandez learned she was pregnant, she submitted a doctor's note and repeatedly asked Amazon for lighter duty. Amazon denied her request[306] and continued to assign her to lift bins filled with merchandise that weighed up to fifty pounds during her ten-hour shifts.[307] Hernandez miscarried at seven weeks.[308]

According to the Center for Disease Control's National Institute for Occupational Safety and Health (NIOSH),[309] as well as guidelines published by the American College of Obstetricians and Gynecologists (ACOG),[310] there is an increased risk of miscarriage for pregnant workers who do extensive lifting in their jobs. Meta-analyses of studies measuring the effect of occupational lifting on pregnancy outcomes reach a similar conclusion.[311] Pregnant workers are also at a greater risk of musculoskeletal injuries from lifting and prolonged standing and are at a greater risk of falling.[312] Accordingly, the ACOG

305 Lauren Kaori Gurley, *Amazon Denied a Worker Pregnancy Accommodations. Then She Miscarried.*, VICE (July 20, 2021), https://www.vice.com/en/article/g5g8eq/amazon-denied-a-worker-pregnancy-accommodations-then-she-miscarried [https://perma.cc/KW4U-5MAS].

306 *Id.*

307 *Id.*

308 *Id.*

309 *Physical Job Demands—Reproductive Health*, NAT'L INST. FOR OCCUPATIONAL SAFETY & HEALTH, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/niosh/topics/repro/physicaldemands.html [https://perma.cc/WL65-YPF8] (last updated June 2, 2022) (warning that heavy lifting, standing for long periods of time, or bending a lot during pregnancy "could increase your chances of miscarriage, preterm birth, or injury during pregnancy").

310 Comm. on Obstetric Practice, Am. Coll. of Obstetricians and Gynecologists, *ACOG Committee Opinion No. 733: Employment Considerations During Pregnancy and the Postpartum Period*, 131 OBSTETRICS & GYNECOLOGY e115, e119 (2018), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2018/04/employment-considerations-during-pregnancy-and-the-postpartum-period.pdf [https://perma.cc/Y2DZ-7J2M] [hereinafter ACOG, *Employment Considerations*].

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

312 *See* ACOG *Employment Considerations*, *supra* note 310, at e120; Bulent Cakmak, Ana Paula Ribeiro & Ahmet Inanir, *Postural Balance and the Risk of Falling During Pregnancy*, 29 J. MATERNAL-FETAL & NEONATAL MED. 1623, 1625 **R**

adopted the National Institute of Occupational Safety and Health's recommended limitations for lifting by pregnant workers.[313] These recommendations, for example, state that pregnant workers in the early gestation period (defined as less than twenty weeks) who have a long-duration, heavy lifting pattern should not lift greater than thirteen pounds, almost one-fourth the weight of the forty-five pound boxes that Ceeadria Walker was ordered to lift during her long shifts at the XPO warehouse.[314]

Dehydration and overheating are also a risk for pregnant workers during physical activity,[315] yet individuals who work in industries involving physical labor often work in unairconditioned conditions, such as warehouses.[316] For example, investigative reporting found that workers routinely fainted at the XPO and other similar warehouses from overwork, dehydration, and heat.[317] There is also an association between miscarriage and night shift work.[318]

(2016). A large study of 3,997 pregnant women found the overall fall rate during pregnancy was 26.8%, and of the women in this study who were employed and fell at work, the occupations with the highest rates of falling were "food service, other service (such as beauticians and housecleaners), and teaching and childcare"; this was due to slippery floors, moving at a hurried pace, and carrying an object or child. Kari Dunning, Grace LeMasters, Linda Levin, Amit Bhattacharya, Toni Alterman & Kathy Lordo, *Falls in Workers During Pregnancy: Risk Factors, Job Hazards, and High Risk Occupations*, 44 AM. J. INDUS. MED. 664, 667–68 (2003).

313 *See* ACOG, *Employment Considerations*, *supra* note 310, at e121 (citing Leslie A. MacDonald et al., *Clinical Guidelines for Occupational Lifting in Pregnancy: Evidence Summary and Provisional Recommendations*, 209 AM. J. OBSTETRICS & GYNECOLOGY 80 (2013)). ACOG has repeated its support of these guidelines in its most recent recommendations on exercise during pregnancy. *See* Comm. on Obstetric Practice, Am. Coll. of Obstetricians and Gynecologists, *ACOG Committee Opinion No. 804: Physical Activity and Exercise During Pregnancy and the Postpartum Period*, 135 OBSTETRICS & GYNECOLOGY e178, e184–e185 (2020), https://www.acog.org/-/media/project/acog/acogorg/clinical/files/committee-opinion/articles/2020/04/physical-activity-and-exercise-during-pregnancy-and-the-postpartum-period.pdf [https://perma.cc/YD63-E9MZ] [hereinafter ACOG, *Physical Activity and Exercise*]. **R**

314 ACOG, *Employment Considerations*, *supra* note 310, at e121. **R**

315 *See* ACOG, *Physical Activity and Exercise*, *supra* note 313, at e180 ("During exercise, pregnant women should stay well hydrated, wear loose-fitting clothing, and avoid high heat and humidity to protect against heat stress, particularly during the first trimester."). **R**

316 *See* Silver-Greenberg & Kitroeff, *supra* note 293 (noting that there is no airconditioning on the floor of the XPO warehouse and that temperatures can rise past 100 degrees); *see also* discussion of welder Heather Spees's work conditions, *supra* notes 130–138 (describing sweltering working conditions). **R**

317 Silver-Greenberg & Kitroeff, *supra* note 293. **R**

318 *See* ACOG, *Employment Considerations*, *supra* note 310, at e119; Luise Moelenberg Begtrup et al., *Night Work and Miscarriage: A Danish Nationwide Register-Based Cohort Study*, 76 OCCUPATIONAL ENV'T MED. 302, 302 (2019). In this study of 22,744 pregnant Danish women, which tracked their work schedules and **R**

Despite extensive research establishing a link between physically demanding work and miscarriage, the most important federal law governing occupational health and safety in the United States does not protect pregnant workers from work conditions that increase their risk of miscarriage or provide a remedy when they do. Congress passed the Occupational Safety and Health Act (OSH Act) in 1970 to ensure employees of a work environment free of recognized hazards.[319] Unfortunately for pregnant workers, the OSH Act, in practice, mainly regulates occupational hazards that were common when the American economy primarily consisted of industrial jobs occupied by men, such as exposure to toxic chemicals, excessive noise, electrical hazards, and mechanical dangers.[320]

The OSH Act regulates workplace safety in two ways. First, it establishes a minimum general duty that applies to all covered employers. However, the scope of this duty is extremely narrow; employers must only ensure their workplaces "are free from recognized hazards that are causing or are likely to cause death or serious physical harm to . . . employees."[321] Second, the OSH Act authorizes the Occupational Safety and Health Administration (OSHA) to set specific workplace safety and health standards.[322] However, the "need for substantial scien-

hospital admissions for miscarriage using government databases, women who had worked two or more night shifts during the previous week had a 32% increased risk of miscarriage compared with women who did not work nights. *Id.*

319 Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (codified at 29 U.S.C. §§ 651–678).

320 John D. Meyer, Melissa McDiarmid, James H. Diaz, Beth A. Baker & Melissa Hieb, ACOEM Task Force on Reproductive Toxicology, *Reproductive and Developmental Hazard Management*, 58 J. OCCUPATIONAL & ENV'T. MED. e94, e94 (2016) ("Industrial exposure limits promulgated for most chemical agents by the US Occupational Safety and Health Administration (OSHA) . . . have in most cases been established without considering protection from adverse reproductive or developmental health effects."); Christopher Cole, *Lawmaker Worried By Nail Salon Chemicals Calls OSHA Reg Process 'Unacceptable,'* INSIDEOSHAONLINE (May 12, 2015), https://insideosha.com/daily-news/lawmaker-worried-nail-salon-chemicals-calls-osha-reg-process-unacceptable [https://perma.cc/7RR2-83RM] (noting that most of OSHA's permissible exposure limits were set in 1971 and have not been updated, exposing some women who become pregnant, like those working in nail salons, to chemicals that appear to increase the odds of miscarriage and developmental issues in children).

321 29 U.S.C. § 654(a)(1). To establish a violation of this general duty clause, OSHA must prove that (1) the employer failed to furnish a workplace free of a hazard, and its employees were exposed to that hazard; (2) the hazard was recognized; (3) the hazard was causing, or was likely to cause, death or serious physical harm; and (4) a feasible method existed to correct the hazard. Nat'l Realty & Constr. Co. v. Occupational Safety & Health Review Comm'n, 489 F.2d 1257, 1265–67 (D.C. Cir. 1973).

322 29 U.S.C. § 655.

tific support in a world of scientific uncertainty, combined with challenges by industry, other procedural hurdles, and resistance or delays within OSHA itself has resulted in few permanent standards actually being promulgated."[323] Further, there is no private cause of action for employees who allege they are injured at work due to an OSH Act violation; rather, OSHA inspectors from the federal agency issue citations for violations of specific standards or the general duty clause.[324] OSHA maintains about 2,000 inspectors who are "responsible for the health and safety of 130 million workers (employed at more than 8 million worksites), [which] translates into about one inspector for every 59,000 workers."[325] "[G]iven OSHA's limited resources, few doubt that the agency never uncovers many violations,"[326] including the type of physical harms that pregnant workers experience due to work conditions causing risks to pregnancy.

E. Special Legal Obstacles Related to Miscarriage and Employment

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

Studies show that pregnant women and their partners are not comfortable talking about miscarriage and have difficulty sharing the news with others.[327] Most people do not share news of their pregnancies until after the first trimester, "so keeping a miscarriage a secret seems a natural extension of the

323 *See* GLYNN, SULLIVAN & ARNOW-RICHMAN, *supra* note 64, at 879. **R**

324 *Id.* at 891.

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

326 GLYNN, SULLIVAN & ARNOW-RICHMAN, *supra* note 64, at 893. **R**

327 Jennifer J. Bute & Maria Brann, *Co-Ownership of Private Information in the Miscarriage Context*, 43 J. APPLIED COMMC'N RSCH. 23, 24 (2015).

pregnancy secret."[328] One study revealed that most couples perceive a "societal-level rule" that miscarriage should be "ke[pt] behind closed doors."[329] Another study described the decision to keep a miscarriage secret as "so automatic as to be involuntary."[330] This difficulty is amplified when news of the pregnancy has not been shared publicly.[331] And when news of the loss is shared, those with intended pregnancies who miscarry report feeling a lack of support or understanding by extended family and community, reinforcing the "social norms that undermine the expression of grief surrounding perinatal loss."[332]

In addition to these cultural taboos surrounding miscarriage, employees are often scared to tell their employers that they are pregnant and wait as long as possible to share the news.[333] A 2011 study revealed that many pregnant employees hide their pregnancies out of fear of negative attitudes, discrimination, and invasive advice and questions.[334] A 2018 study commissioned by Bright Horizons, the largest U.S. provider of employer-sponsored childcare in the United States,[335] found that 21% of working mothers "would be worried to tell their boss they are expecting a child . . . ."[336] These fears are ra-

328 Emily T. Porschitz & Elizabeth A. Siler, *Miscarriage in the Workplace: An Authoethnography*, 24 GENDER, WORK & ORG. 565, 571 (2017).

329 Jennifer J. Bute, Maria Brann & Rachael Hernandez, *Exploring Societal-Level Privacy Rules for Talking About Miscarriage*, 36 J. SOC. & PERS. RELATIONSHIPS 379, 386 (2017).

330 Porschitz & Siler, *supra* note 328, at 575. **R**

331 Bute, Brann & Hernandez, *supra* note 329, at 390–91. **R**

332 Ariella Lang, Andrea R. Fleiszer, Fabie Duhamel, Wendy Sword, Kathleen R. Gilbert & Serena Corsini-Munt, *Perinatal Loss and Parental Grief: The Challenge of Ambiguity and Disenfranchised Grief*, 63 OMEGA—J. DEATH & DYING 183, 192 (2011); *cf.* CRAWFORD & WALDMAN, *supra* note 17, at 18–23 (discussing the stigmatization and shame surrounding menstruation). **R**

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

334 Gatrell, *supra* note 333, at 166 (describing pregnant employees' strategy of "secrecy and silence, in which pregnancy was kept secret for as long as possible and not discussed at work, and its physical manifestations—nausea, an expanding waistline and the threat of breaking waters and leaking breasts—were concealed"). **R**

335 *Who We Are*, BRIGHT HORIZONS, https://www.brighthorizons.com/who-we-are [https://perma.cc/EUD8-24KZ] (last visited Feb. 1, 2022).

336 BRIGHT HORIZONS, MODERN FAMILY INDEX 2018, at 9, https://www.brighthorizons.com/-/media/BH-New/Newsroom/Media-Kit/MFI_2018_Report_FINAL.ashx [https://perma.cc/7GA7-CAAQ] (showing an increase in this fear from 12% in 2014 to 21% in 2018).

tional considering the prevalence of workplace pregnancy and sex discrimination.[337] Empirical research demonstrates that pregnant women are less likely to be hired[338] or promoted,[339] are viewed negatively by supervisors and co-workers,[340] and

337 NAT'L P'SHIP FOR WOMEN & FAMS., THE PREGNANCY DISCRIMINATION ACT: WHERE WE STAND 30 YEARS LATER 2 (2008), http://go.nationalpartnership.org/site/DocServer/Pregnancy_Discrimination_Act_-_Where_We_Stand_30_Years_L.pdf [https://perma.cc/49ET-SC77] (documenting a 65% increase in pregnancy discrimination complaints between 1992 and 2007); Katie Sear & Dori Goldstein, *ANALYSIS: Pregnancy Bias Suits Keep Rising Amid Pandemic*, BLOOMBERG L. (Jan. 29, 2021), https://news.bloomberglaw.com/bloomberg-law-analysis/analysis-pregnancy-bias-suits-keep-rising-amid-pandemic [https://perma.cc/SKZ8-RGQV] (reporting that federal pregnancy discrimination suits rose 67% from 2016 to 2020, with a 16% jump from 2019 to 2020).

338 *E.g.*, Whitney Botsford Morgan, Sarah Singletary Walker, Michelle (Mikki) R. Hebl & Eden B. King, *A Field Experiment: Reducing Interpersonal Discrimination Toward Pregnant Job Applicants*, 98 J. APPLIED PSYCH. 799, 799 (2013) (finding that the same woman applying for retail jobs experienced more rudeness and hostility when she was wearing a pregnancy prosthesis than when she was not visibly pregnant); Michelle R. Hebl, Eden B. King, Peter Glick, Sarah L. Singletary & Stephanie Kazama, *Hostile and Benevolent Reactions Toward Pregnant Women: Complementary Interpersonal Punishments and Rewards that Maintain Traditional Roles*, 92 J. APPLIED PSYCH., 1499, 1509 (2007) (finding that pregnant job applicants experience more interpersonal hostility than their non-pregnant counterparts); Barbara Masser, Kristen Grass & Michelle Nesic, *'We Like You, But We Don't Want You'—The Impact of Pregnancy in the Workplace*, 57 SEX ROLES, 703, 709 (2007) (finding that pregnant workers were rated warmer and more competent, yet simultaneously experienced lower salary and fewer hiring recommendations than non-pregnant candidates); Jennifer DeNicolis Bragger, Eugene Kutcher, John Morgan & Patricia Firth, *The Effects of The Structured Interview on Reducing Biases Against Pregnant Job Applicants*, 46 SEX ROLES, 215, 223 (2002) (finding that identically-qualified pregnant job applicants were rated significantly lower in hiring recommendations).

339 *E.g.*, Jane A. Halpert, Midge L. Wilson & Julia L. Hickman, *Pregnancy as a Source of Bias in Performance Appraisals*, 14 J. ORG. BEHAV. 649, 655 (1993) (finding, in an experimental study, that pregnant workers with identical qualifications and demonstrating identical behaviors as non-pregnant workers consistently received more negative performance appraisals, especially by male reviewers); *cf.* Madeline E. Heilman & Tyler G. Okimoto, *Motherhood: A Potential Source of Bias in Employment Decisions*, 93 J. APPLIED PSYCH. 189, 196 (2008) (finding demonstrated bias against mothers in job promotion decisions, both in anticipated competence assessments and in screening recommendations).

340 *E.g.*, Laura M. Little, Virginia Smith Major, Amanda S. Hinojosa & Debra L. Nelson, *Professional Image Maintenance: How Women Navigate Pregnancy in the Workplace*, 58 ACAD. MGMT. J., 8, 33 (2015) (discussing strategies employed by pregnant workers to avoid stigmatization at work, including concealing their pregnancies, working harder, shortening their leaves, and not requesting accommodations); Morgan, Walker, Hebl & King, *supra* note 338, at 800, 803 (finding that managers display more interpersonal hostility toward pregnant (vs. non-pregnant) job applicants); Hebl, King, Glick, Singletary & Kazama, *supra* note 338, at 1509 (finding in an experimental study that ostensibly pregnant women encountered greater interpersonal hostility than non-pregnant women when applying for both retail and traditionally masculine jobs). R R

receive lower salaries than non-pregnant applicants and employees.[341]

There is also an additional risk of disclosing a miscarriage: the risk of prosecution. Since the late 1960s, a faction of the anti-abortion movement in the United States has been working to define embryos and fetuses as persons.[342] According to the ideology of fetal personhood, pregnant people can be policed and punished for actions they take or do not take.[343] Experts and women's rights organizations have documented thousands of such prosecutions of pregnant women in the past several decades.[344] Historically, those targeted in these cases have been women of color and low-income women.[345]

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341 *E.g.*, Masser, Grass & Nesic, *supra* note 338, at 709 (finding that pregnancy triggers salary penalties); *cf.* Shelley J. Correll, Stephen Benard & In Paik, *Getting a Job: Is There a Motherhood Penalty?*, 112 AM. J. SOC. 1297, 1316 (2007) (finding that mothers are penalized on a host of measures, including recommended starting salary). **R**

342 MARY ZIELGER, AFTER ROE: THE LOST HISTORY OF THE ABORTION DEBATE 89, 164–65 (2015); Michele Goodwin, *Pregnancy and the New Jane Crow*, 53 CONN. L. REV. 543, 563–64 (2021); Jeannie Suk Gersen, *How Fetal Personhood Emerged as the Next Stage of the Abortion Wars*, NEW YORKER (June 5, 2019), https://www.newyorker.com/news/our-columnists/how-fetal-personhood-emerged-as-the-next-stage-of-the-abortion-wars [https://perma.cc/R4L9-UJMP].

343 Feminist scholars have written extensively on the law's role in defining how women should mother, beginning with expectations about their behavior during pregnancy. *E.g.*, Dara E. Purvis, *The Rules of Maternity*, 84 TENN. L. REV. 367, 367–68 (2017) ("Rule 1 begins in pregnancy, with the message that 'your body is your child's vessel.' During pregnancy, women are counselled that doctor knows best."); Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 384 (1996) ("In a variety of settings law has regulated women's decisions about maintaining their connections with children. Thus restrictions on the employment of pregnant women, of women who might become pregnant, or of women with children already, have been perfectly legal for most of this century.").

344 *E.g.*, Wendy A. Bach, *Prosecuting Poverty, Criminalizing Care*, 60 WM. & MARY L. REV. 809, 812–17 (2019) (documenting 124 prosecutions for "fetal assault" in Tennessee from 2014 to 2016); Lynn M. Paltrow, *Constitutional Rights for the "Unborn" Would Force Women to Forfeit Theirs*, MS. (Apr. 15, 2021), https://msmagazine.com/2021/04/15/abortion-constitutional-rights-unborn-fetus-14th-amendment-womens-rights-pregnant/ [https://perma.cc/T4WU-87LX] (reporting more than 1,000 prosecutions nationwide from 2006–2020 for pregnancy-related offenses documented by the nonprofit organization National Advocates for Pregnant Women); Grace Elizabeth Howard, The Criminalization of Pregnancy: Rights, Discretion, and the Law 64–65, 68–70 (2017) (Ph.D. dissertation, Rutgers University), https://rucore.libraries.rutgers.edu/rutgers-lib/55493/PDF/1/play/ [https://perma.cc/YJ5Y-335N] (documenting 182 cases in South Carolina, 501 cases in Alabama, and 99 cases in Tennessee of "arrests involving maternally mediated fetal harm" from 1973 to 2015).

345 MICHELE GOODWIN, POLICING THE WOMB: INVISIBLE WOMEN AND THE CRIMINALIZATION OF MOTHERHOOD 4–5, 7–8, 11, 147 (2020); DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 3–4 (1997); Bach, *supra* note 344, at 851; Priscilla A. Ocen, *Birthing Injustice: Pregnancy as a Status Offense*, 85 GEO. WASH. L. REV. 1163, 1198–1214 (2017). **R**

Now that the Supreme Court has reversed *Roe v. Wade*,[346] the risk of criminal prosecution is palpable for all pregnant people. As Greer Donley and Jill Wieber Lens, two experts in the law of abortion and stillbirth, highlight, "The line between abortion and pregnancy loss has always been blurry."[347] The symptoms of an incomplete self-managed abortion—bleeding, cramping—and an incomplete miscarriage are "the exact same."[348] The medications and procedures to manage miscarriage and abortion are also largely indistinguishable.[349] In a post-*Roe* world, individuals who experience miscarriage are at risk of getting caught in the net of abortion law enforcement; only a few state codes explicitly exclude people who experience miscarriages and abortions from criminal prosecution.[350] Most state laws are either silent on the issue or so ambiguous that they create the risk of prosecution.[351] Still other state laws

346 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242 (2022).

347 Greer Donley & Jill Wieber Lens, Opinion, *Why Do We Talk About Miscarriage Differently From Abortion?*, N.Y. TIMES (Aug. 2, 2022), https://www.nytimes.com/2022/08/02/opinion/abortion-miscarriage-roe-dobbs.html [https://perma.cc/HM6B-3TVV].

348 Greer Donley & Jill Wieber Lens, *Abortion, Pregnancy Loss, & Subjective Fetal Personhood*, 75 VAND. L. REV. 1649, 1707 (2022).

349 *Compare* ACOG, *Clinical Management Guidelines for Early Pregnancy Loss*, *supra* note 22, at e200–02 (discussing misoprostol-based medical management and surgical uterine evacuation by curettage or suction aspiration to treat miscarriage), *with* Am. Coll. of Obstetricians and Gynecologists, *Clinical Practice Bulletin No. 225: Medication Abortion Up to 70 Days of Gestation*, 136 OBSTETRICS & GYNECOLOGY e31, e31–e32 (2020) (discussing misoprostol-only and misoprostol-mifepistone-based medical abortion and uterine aspiration abortion). *See also* Donley & Lens, *supra* note 348, at 1666 ("[W]hen missed or incomplete miscarriages occur, patients are offered the same procedures and medications that are used for abortion."). R R

350 *E.g.*, COLO REV. STAT. § 18-3.5-102(2) ("Nothing in this article shall permit the prosecution of a woman for any act or any failure to act with regard to her own pregnancy."); ARK. CODE § 5-61-304(c)(1) ("This section does not authorize the charging or conviction of a woman with any criminal offense in the death of her own unborn child . . . .").

351 For example, many states protect individuals from prosecution who obtain or seek to obtain an abortion. *E.g.*, ALA. CODE § 26-23H-5 ("No woman upon whom an abortion is performed or attempted to be performed shall be criminally or civilly liable."); ARIZ. REV. STAT. § 36-2324B ("A pregnant woman on whom an abortion is performed, induced or attempted . . . may not be prosecuted for conspiracy to commit any violation of this article."). Yet, these laws are silent with regard to individuals who self-manage their own abortions, creating the risk of prosecution. State laws that criminalize those who self-manage abortions but not those who obtain abortions with the assistance of a medical provider arguably violate equal protection guarantees of federal and state constitution(s). Denying the ability to self-mange one's own medical care also potentially violates other constitutional provisions, such as the right to bodily integrity and freedom from compelled speech. *See* Yvonne Lindgren, *When Patients Are Their Own Doctors:* Roe v. Wade *in An Era of Self-Managed Care,* 107 CORNELL L. REV. 151, 217 (2021). However, these legal theories remain largely untested.

may arguably criminalize self-managed abortions.[352] While the routine criminalization of miscarriage will be logistically challenging, since most miscarriages are managed at home[353]—and perhaps politically infeasible in many states—in the current dystopian legal environment in which every person with a uterus is potentially a criminal, the traditional secrecy and shame surrounding miscarriage is only bound to intensify. The specter of prosecution of employers who "aid and abet" abortions by providing employees time off or other forms of assistance after a miscarriage is also now not beyond the pale.[354]

Given the toxic mix of cultural secrecy surrounding miscarriage, fear of employment discrimination or retaliation for disclosing a miscarriage—and the (now ever-more-present) risk of being prosecuted for a failed pregnancy—it should not be surprising that individuals who experience miscarriages typically never tell their employers.[355] This secrecy, which itself is

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352 *See* Laura T. Kessler, *Utah Abortion Law Post*-Dobbs, White Paper for the National Association of Criminal Defense Lawyers (July 7, 2021), https://www.nacdl.org/getattachment/437de371-7b2b-4bc5-b690-f50a32ba38d2/utah-statutory-framework-070722.pdf [https://perma.cc/B64C-Y5WQ] (discussing provisions in Utah law providing for the potential criminalization of self-managed abortions).

353 Quenby et al., *supra* note 23, at 1659. **R**

354 *See* Kessler, *supra* note 352 (discussing Utah's "aiding and abetting" law); **R** TEX. HEALTH & SAFETY CODE §171.208(a)(2) ("Any person, other than an officer or employee of a state or local governmental entity in this state, may bring a civil action against any person who: knowingly engages in conduct that aids or abets the performance or inducement of an abortion, including paying for or reimbursing the costs of an abortion through insurance or otherwise, if the abortion is performed or induced in violation of this subchapter, regardless of whether the person knew or should have known that the abortion would be performed or induced in violation of this subchapter."); Memorandum from the Okla. Att'y Gen. to All Okla. Law Enf't Agencies (Aug. 31, 2022), https://www.ok.gov/cleet/documents/Memo%20to%20Law%20Enforcement%20Following%20Dobbs%20(8.31.22).pdf [https://perma.cc/7DAD-AY5Y] (stating that "Oklahoma law prohibits aiding and abetting the commission of an unlawful abortion, which may include advising a pregnant woman to obtain an unlawful abortion"); *cf.* Caroline Kitchener, Joanna Slater & Arelis R. Hernández, *Texas Man Sues Women He Says Helped His Ex-Wife Obtain Abortion Pills,* WASH. POST (Mar. 10, 2023), https://www.washingtonpost.com/politics/2023/03/10/texas-abortion-lawsuit/ [https://perma.cc/SP62-ZT5G].

355 *E.g.*, Porschitz & Siler, *supra* note 328, at 573 (explaining that authors **R** "never considered revealing" their miscarriages at work); Emily Kane Miller, *Fighting the Silence Around Miscarriage—With a Greeting Card*, Daily Beast, https://www.thedailybeast.com/fighting-the-silence-around-miscarriagewith-a-greeting-card [https://perma.cc/J7G7-BVWG] (last updated Apr. 14, 2017) ("The nasty hush that comes rushing in after a miscarriage blocks our path to the people we rely on in all other aspects of life."); Katy Lindemann, *The 12-Week Pregnancy Rule Makes the Pain of Miscarriage Worse*, GUARDIAN (Oct. 7, 2019), https://www.theguardian.com/commentisfree/2019/oct/07/12-week-pregnancy-rule-miscarriage-shame-failure [https://perma.cc/Z7SV-YX9E] ("Most [miscarriages] will be suffered in silence, because it's considered so socially unacceptable to

a product of socio-legal dynamics, in turn, creates additional barriers[356] to obtaining workplace protections from discrimination, necessary work accommodations, and safe work working conditions.[357]

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

A. The Pregnant Workers Fairness Act

To provide more robust protection to pregnant workers, between 1990 and 2021, thirty states and five localities enacted laws called "pregnant workers fairness acts" that require

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reveal that you're pregnant before 12 weeks—let alone that you were pregnant, but now you're not."); Katherine Hobson, *People Have Misconceptions About Miscarriage, and that Can Hurt*, NPR (May 8, 2015), https://www.npr.org/sections/health-shots/2015/05/08/404913568/people-have-misconceptions-about-miscarriage-and-that-hurts [https://perma.cc/W53J-LVRE] (explaining that secrecy around miscarriage perpetuates myths and isolates women from support).

356 Particularly problematic in this regard is that employers' duties under employment discrimination laws are limited when they do know of an employee's protected status. *See, e.g.*, Prebilich-Holland v. Gaylord Ent. Co., 297 F.3d 438, 444 (6th Cir. 2002) ("[T]he employee bears the burden of demonstrating that the employer had actual knowledge of her pregnancy at the time that the adverse employment action was taken."); Geraci v. Moody-Tottrup, Int'l, Inc., 82 F.3d 578, 581 (3d Cir. 1996) (stating that a court "cannot presume that an employer most likely practiced unlawful discrimination when it did not know that the plaintiff even belonged to the protected class"); Lambert v. McCann Erickson, 543 F. Supp. 2d 265, 277 (S.D.N.Y. 2008) ("Plaintiff must also be able to point to some admissible evidence from which a rational jury could infer that the employer knew that the plaintiff was pregnant."); Maitland v. Employease, Inc., No. 1:05-CV-0661, 2006 WL 3090120, at *16 (N.D. Ga. Oct. 13, 2006) (awarding the employer summary judgment because the plaintiff had not adequately informed her employer that she qualified for FMLA leave for a serious health condition); *see also* Americans with Disabilities Act of 1990, 42 U.S.C. § 12112(b)(4)–(5) (covering "known" disabilities).

357 Of course, the collateral damage of *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), is seismic, reaching well beyond employment law and potentially impacting access to contraception; treatment of miscarriage, ectopic pregnancy, and infertility; and the right to travel, engage in private, consensual sex acts, and marry a person of a different race or the same sex. *See* Lisa H. Harris, *Navigating Loss of Abortion Services—A Large Academic Medical Center Prepares for the Overturn of* Roe v. Wade, 386 NEW ENG. J. MED. 2061, 2061–64 (2022); I. Glenn Cohen, Judith Daar & Eli Y. Adashi, *What Overturning* Roe v. Wade *May Mean for Assisted Reproductive Technologies in the US*, 328 JAMA 15, 15–16 (2022); Donley & Lens, *supra* note 348; David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 COLUM. L. REV. 1 (2023); Cass R. Sunstein, Dobbs *and the Travails of Due Process Traditionalism* (manuscript at 4), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4145922 [https://perma.cc/JN23-GKR6]; Jessica Winter, *The Dobbs Decision Has Unleashed Legal Chaos for Doctors and Patients*, NEW YORKER (July 2, 2022), https://www.newyorker.com/news/news-desk/the-dobbs-decision-has-unleashed-legal-chaos-for-doctors-and-patients [https://perma.cc/7FHJ-N22W]. R

reasonable accommodations for pregnant workers without the need to identify any comparators.[358] A federal version of this law, the Pregnant Workers Fairness Act (PWFA), was first introduced in 2012 by Congressman Jerrold Nadler (D-NY)[359] and reintroduced in every Congress since then.[360] In December 2023, Congress finally enacted the PWFA as part of an omnibus spending bill.[361] The federal PWFA solidifies the groundwork laid by the states and creates a much-needed uniform federal standard. The PWFA requires employers covered by Title VII to provide "reasonable accommodations to the known limitations related to the pregnancy, childbirth, [and] related medical conditions" of qualified employees unless such "accommodations would impose an undue hardship on the operation of the business" of the employer.[362] Modeled largely on the corresponding definition in the ADA, a qualified employee under the PWFA is "an employee or applicant who, with or without reasonable accommodation, can perform the essential functions of the employment position," with specified excep-

358 *State Pregnant Workers Fairness Laws*, A BETTER BALANCE, https://www.abetterbalance.org/resources/pregnant-worker-fairness-legislative-successes/ [https://perma.cc/U2RG-9ZPK] (last updated Jan. 30, 2023) (displaying an interactive map with information on what protections each of the thirty states and five municipalities provide). Note, however, that some of these states limit protection to public employees. *E.g.*, ALASKA STAT. § 39.20.520; TEX. LOC. GOV'T CODE ANN. § 180.004.

359 Pregnant Workers Fairness Act, H.R. 5647, 112th Cong. (2012). For background on the PWFA, see Alisha Haridasani Gupta & Alexandra E. Petri, *There's a New Pregnancy Discrimination Bill in the House. This Time It Might Pass*, N.Y. TIMES (Mar. 4, 2021), https://www.nytimes.com/2021/03/04/us/pregnancy-discrimination-congress-women.html [https://perma.cc/VNL7-FNLF].

360 H.R. 1975, 113th Cong. (2013); S. 942, 113th Cong. (2013); H.R. 2654, 114th Cong. (2015); S. 1512, 114th Cong. (2015); H.R. 2417, 115th Cong. (2017); S. 1101, 115th Cong. (2017); H.R. 2694, 116th Cong. (2019); H.R. 1065, 117th Cong. (2021); S. 1486, 117th Cong. (2021); S. 4431, 117th Cong. (2022).

361 Consolidated Appropriations Act of 2023, H.R. 2617, 117th Cong., Div. II, §§ 101–109.

362 *Id.* at § 103(1).

tions.[363] Even during the Trump Presidency, bills proposing the PWFA had significant bipartisan support.[364]

Assuming courts do not undermine the new law, the PWFA should resolve much of the uncertainty generated by the Court's decision in *Young v. UPS*.[365] Under *Young*, pregnant workers had to discover what accommodations an employer gave to others, which was often difficult, even in the context of litigation where there was a right to discovery.[366] Second, employers only had a duty to provide accommodations similar to what they offered to non-pregnant workers. In essence, there was no affirmative duty to accommodate a pregnant worker under the PDA, even if it was possible. The PWFA makes it crystal clear that employers are obligated to make reasonable accommodations for pregnancy and related conditions, including miscarriage.

However, while the PWFA will go a long way toward addressing the systemic injustices experienced by workers who are affected by miscarriage, it does not fully address the gaps in federal law that permit workers who miscarry to suffer silently, experience employment discrimination, lose desired

363 *Id.* at § 102(6). Specifically, the PWFA makes it an unlawful employment practice to, among other things: (1) fail to "make reasonable accommodations to the known limitations" of such employees unless the accommodation "would impose an undue hardship" on an entity's business operation; (2) "require a qualified employee affected by [such condition] to accept an accommodation other than any reasonable accommodation arrived at through an interactive process . . . ;" (3) deny employment opportunities based on the need of the entity to make such reasonable accommodations to a qualified employee; (4) require such employees to take paid or unpaid leave "if another reasonable accommodation can be provided;" or (5) "take adverse action in terms, conditions, or privileges of employment against a qualified employee . . . requesting or using" such reasonable accommodations. *Id.* at § 103.

364 *See Roll Call 195: Bill Number H.R. 2694*, CLERK OF THE U.S. HOUSE OF REPRESENTATIVES (Sept. 17, 2020), https://clerk.house.gov/Votes/2020195 [https://perma.cc/DW9Q-44KE] (reporting all 266 Democrats and 103 Republicans voting yea, compared to only 72 Republicans and 1 Independent voting nay). An identical version of this bill, introduced in 2019, was criticized by the National Women's Law Center as "one step forward and two steps back for pregnant workers," because the Republican version still limits accommodations to those received by non-pregnant workers "in work that is performed under similar working conditions," rather than establishing a right to an accommodation for pregnancy outright like the ultimately enacted version of the PWFA. NAT'L WOMEN'S L. CTR., WORKPLACE JUSTICE: THE PREGNANCY DISCRIMINATION AMENDMENT ACT: ONE STEP FORWARD AND TWO STEPS BACK FOR PREGNANT WORKERS 1–2 (2019), https://nwlc.org/wp-content/uploads/2019/10/PDAA-One-Step-Forward-Two-Steps-Back-2019-v5.pdf [https://perma.cc/F8A8-VPY9].

365 *See supra* section II.A.2.

366 *See supra* note 116 and accompanying text. Of note, even the EEOC with its highly-skilled lawyers was not able to successfully employ civil discovery to generate comparative evidence in the case discussed. **R**

pregnancies, or lose income, among other harms, especially low-income workers in physically demanding jobs. Patching the holes in the PDA is not enough. As the next subparts discuss, enhanced antiretaliation and privacy protections, a guaranteed right to paid sick leave for American workers, and occupational safety standards that reduce the risk of miscarriage are also necessary to address the unique vulnerabilities facing workers affected by miscarriage.

B. Enhanced Antiretaliation and Privacy Protections

Many women and people who miscarry do not feel comfortable sharing their pregnancy status and miscarriages with employers, given the prevailing stigma many attach to pregnancy, disability, and women's bodies and with sexuality more generally.[367] This need for privacy is particularly acute for the most vulnerable workers, as outing oneself comes with a risk of workplace retaliation, including job loss, or even prosecution for harming a fetus.[368]

In order for employees affected by the life-disrupting event of a miscarriage to have an opportunity to access the protections intended by Congress when it enacted the PDA, ADA, FMLA, and OSH Act, these laws must include enhanced privacy and antiretaliation provisions. Such reforms could be enacted by Congress via the legislative process or through judicial interpretations consistent with the clear and broad protective purpose of these statutes, as indicated by both Congress and the EEOC.[369]

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367 *See supra* subpart II.E.

368 *Id.*

369 A detailed analysis of the statutory language, regulatory gaps, and legal doctrines that contribute to the culture of secrecy surrounding pregnancy loss and, therefore, frustrate pregnant worker's access to employment rights is beyond the scope of this Article. However, ripe for rigorous critical appraisal is federal courts' (including the Supreme Court's) narrow interpretation of the antiretaliation provisions of Title VII, the FMLA, and ADA. *See, e.g.*, Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 362–63 (2013) (holding that Title VII retaliation claims are subject to "but-for" sole causation standard); Nathan v. Great Lakes Water Auth., 992 F.3d 557, 571 (6th Cir. 2021) (holding that FMLA retaliation claims are subject to *Nassar*'s but-for sole causation standard). The weak or nonexistent privacy protections of health information provided by Title VII, the PDA, PWFA, FMLA, and ADA are also to blame. The author provides a comprehensive, critical analysis of the absence of privacy protections for health information in these laws in a future companion piece. *See* Laura T. Kessler, *Reproductive Justice at Work: Employment Law After* Dobbs v. Jackson Women's Health Organization, CORNELL L. REV. (forthcoming) (working title).

C. Paid Personal and Sick Leave

Having access to paid sick and personal leave is important for workers affected by miscarriage for a number of reasons. First, the FMLA only guarantees a right to unpaid leave.[370] Therefore, many eligible workers simply cannot afford to take it.[371] The ability to use accrued sick leave to replace pay while taking an FMLA or other leave is a crucial benefit for making the protections of the FMLA and other federal employment statutes accessible to lower-wage workers who experience a miscarriage or who have family members in these circumstances. Second, although sick and personal leave are best suited for relatively short-term impacts of miscarriage and do not address the long-term physical and mental health effects, which are common,[372] these types of leave can at least protect the most vulnerable workers who can lose their job for missing even a day of work.[373] As such, sick and personal leave can fill in the gaps when the impact of miscarriage does not rise to the level of a serious health condition under the FMLA or a disability under the ADA. Another benefit is that employers may be less likely to require employees to divulge private medical information to use intermittent sick or personal leave, which would protect the privacy of those affected by miscarriage.[374] Finally, gender-neutral policies, such as paid sick leave, are less subject to criticisms about "special treatment" for pregnant women and thus more likely to gain widespread public support. Paid sick and personal leave could also benefit trans and non-binary pregnant workers who do not easily fit within employers' and judges' vision of those the PDA is intended to protect. There-

370 *See supra* subpart II.B.

371 *See, e.g.*, Elise Gould, *Providing Unpaid Leave Was Only the First Step; 25 Years After the Family and Medical Leave Act, More Workers Need Paid Leave*, ECON. POL'Y INST. (Feb. 1, 2018), https://www.epi.org/blog/providing-unpaid-leave-was-only-the-first-step-25-years-after-the-family-and-medical-leave-act-more-workers-need-paid-leave/ [https://perma.cc/DF3P-97HC] (reporting that about 45% of "FMLA-eligible workers did not take leave because they could not afford unpaid leave," and that among workers who took FMLA leave, about one-third "cut their time off short due to cover lost wages"); Julie Ajinkya, *Who Can Afford Unpaid Leave?*, CTR. FOR AM. PROGRESS (Feb. 5, 2013), https://www.americanprogress.org/article/who-can-afford-unpaid-leave/ [https://perma.cc/6PT6-9HCF] ("[N]early half of workers who qualify for [FMLA] leave but do not take it say they are unable to for financial reasons, and two-thirds of those who do take leave report experiencing financial difficulties as a result.").

372 See *supra* Part I for a discussion of the health effects of miscarriage.

373 *See, e.g.*, Love v. First Transit, Inc., No. 16-CV-2208, 2017 WL 1022191, at *1 (N.D. Ill. Mar. 16, 2017) (recounting the facts of a call center worker fired for missing less than a day of work when she was experiencing a miscarriage).

374 See *supra* subpart II.E for a discussion of the cultural norm of secrecy surrounding miscarriage.

fore, while not a stand-alone solution to the challenges faced by pregnant workers who experience a miscarriage or who are a risk of miscarrying,[375] having access to paid sick leave and personal days is an important supplement to the rights afforded by the PDA (as amended by the PWFA), FMLA, and ADA, especially for low-wage workers.

Sadly, however, low-wage workers are least likely to have paid sick or personal leave. Only eleven countries do not provide guaranteed paid sick leave, and the United States is one of them.[376] Faced with the health and labor crisis caused by the COVID-19 pandemic, Congress enacted emergency federal legislation that provided enhanced sick leave benefits, but these benefits were temporary, and most have expired.[377] Despite lacking a federal right to paid sick leave, almost 80% of workers in the United States had access to paid sick leave as of March 2021.[378] But a closer look reveals a correlation between income and paid sick leave: while 95% of workers in the top 10% earnings bracket receive sick pay, only 35% of workers in the bottom 10% bracket have access to sick pay,[379] a disparity that had already been exacerbated by the pandemic.[380] Somewhat

375 Another limitation is that many employers do not permit employees to use sick leave to care for others. *See, e.g.*, Johnson v. Univ. of Iowa, 431 F.3d 325, 330–32 (8th Cir. 2005) (holding that a policy allowing birth mothers and adoptive parents of both sexes, but not birth fathers, to use accrued sick leave for absences after the birth or adoption of a child, is not sex discrimination). So, again, sick leave is not a comprehensive solution to the current gaps in legal protection for individuals affected by miscarriage, particularly partners and intended parents, but as I argue here, it is an important supplement.

376 *Protecting Health During COVID-19 and Beyond: Where Does the U.S. Stand Compared to the Rest of the World on Paid Sick Leave?*, WORLD POL'Y ANALYSIS CTR. (May 2020), https://www.worldpolicycenter.org/protecting-health-during-covid-19-and-beyond-where-does-the-us-stand-compared-to-the-rest-of-the-world-on-paid-sick-leave-0 [https://perma.cc/8K63-NQ5K]; *Paid Sick Leave to Protect Income, Health and Jobs Through the COVID-19 Crisis*, OECD (July 2, 2020), https://www.oecd.org/coronavirus/policy-responses/paid-sick-leave-to-protect-income-health-and-jobs-through-the-covid-19-crisis-a9e1a154/ [https://perma.cc/G9XG-GD6Z] (noting that South Korea is the only other OECD member who does not mandate paid sick leave).

377 *Paid Leave in the U.S.*, KFF (Dec. 17, 2021), https://www.kff.org/womens-health-policy/fact-sheet/paid-leave-in-u-s/#footnote-543162-1 [https://perma.cc/K38C-62WL]; *Paid Sick Leave*, NCSL (July 21, 2020), https://www.ncsl.org/research/labor-and-employment/paid-sick-leave.aspx [https://perma.cc/5XZL-MWWQ].

378 *The Economics Daily: Paid Sick Leave Was Available to 79 Percent of Civilian Workers in March 2021*, U.S. BUREAU OF LAB. STAT. (Oct. 12, 2021), https://www.bls.gov/opub/ted/2021/paid-sick-leave-was-available-to-79-percent-of-civilian-workers-in-march-2021.htm [https://perma.cc/3UKX-U7K7].

379 *Id.*

380 Editorial Board, *A Pandemic Shows Why the United States Should Not Be One of Only 11 Nations Without Paid Sick Leave*, WASH. POST (Jan. 15, 2022),

alleviating the lack of coverage, fourteen states now guarantee paid sick leave, as well as Washington D.C. and more than twenty cities and counties.[381] Further, Maine and Nevada recently enacted general paid leave laws that workers may use for any purpose, including sickness.[382] The specifics of these laws vary by state, such as differences in waiting periods before accruing leave and exemptions for small employers of different sizes, but most provide thirty to forty hours of leave per year.[383]

Since at least 2004, many bills have been introduced in Congress that would address some of the problems caused by insufficient paid sick leave in the United States. These proposed laws include the Family and Medical Insurance Leave Act,[384] which would create a national family and medical leave insurance fund to provide workers with up to twelve weeks of partial income when they take time off for their own serious health conditions (including pregnancy-related health conditions and childbirth) or for the serious health conditions of qualified family members, among other benefits, and the Healthy Families Act,[385] which mandates that employers with more than fifteen employees provide paid sick days for all employees. A Republican proposal is the Strong Families Act,[386] which would provide tax credits to employers that offer paid leave to employees on FMLA leave. Finally, President Biden's Build Back Better Act[387] would mandate four weeks of paid family and medical leave starting in 2024 as part of a $2 trillion economic relief package. But while the spending legislation passed the House of Representatives in November 2021,[388] it stalled and died in the Senate when one Republican refused to support the package.[389]

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https://www.washingtonpost.com/opinions/2022/01/15/pandemic-shows-why-united-states-should-not-be-one-only-11-nations-without-paid-sick-leave [https://perma.cc/PG56-9REQ].

381 *See Paid Leave in the U.S.*, *supra* note 377. **R**

382 *Id.*

383 *Id.*

384 H.R. 804, 117th Cong. (2021); S. 248, 117th Cong. (2021).

385 H.R. 2465, 117th Cong. (2021); S. 1195, 117th Cong. (2021).

386 H.R. 3595, 115th Cong. (2017); S. 1716, 115th Cong. (2017).

387 *See* H.R. 5376, 117th Cong. (2021).

388 Emily Cochrane & Jonathan Weisman, *House Narrowly Passes Biden's Social Safety Net and Climate Bill*, N.Y. TIMES (Nov. 21, 2021), https://www.nytimes.com/2021/11/19/us/politics/house-passes-reconciliation-bill.html [https://perma.cc/P5UG-8JAE].

389 *Joe Manchin Kills the Build Back Better Act, Joe Biden's Ambitious Legislative Package*, ECONOMIST (Dec. 19, 2021), https://www.economist.com/united-states/2021/12/19/joe-manchin-kills-the-build-back-better-act-joe-bidens-ambitious-legislative-package [https://perma.cc/A2TS-ZEUW].

As a recent student note on paid sick leave correctly asserts, "[t]he United States needs a national paid sick day standard to protect all working people."[390] While individuals who experience miscarriage or whose family members are affected by miscarriage are not unique in this regard, such a development is an important component of any response to the common experience of miscarriage.[391]

D. Occupational Safety and Health Protections

Dangerous work conditions that increase the risk of miscarriage can conceivably be perceived as a harm within the jurisdiction of OSHA. This idea has received very little attention, likely due to the fear that protecting workers from workplace hazards threatening pregnancy will feed into the fetal personhood movement[392] that underlies efforts to end the constitutional rights to contraception and abortion. Another possible reason for this neglect is the success of the feminist argument in the 1980s that workplace fetal protection policies were designed to drive women out of higher paid blue-collar industrial jobs dominated by men.[393] These fetal protection policies broadly excluded women from jobs that exposed them to hazardous chemicals, such as lead.[394] As the Supreme Court concluded with little difficulty in the seminal case of *International Union, UAW v. Johnson Controls, Inc.*,[395] sex-

390 Dylan Karstadt, Note, *Too Sick to Work? Defending the Paid Leave Movement and the New Jersey Paid Sick Leave Act*, 44 SETON HALL LEGIS. J. 145, 174 (2020).

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

392 *See* discussion *supra* note 342 and accompanying text; *see also* Lens, *Miscarriage, Stillbirth, & Reproductive Justice*, *supra* note 16, at 1077–78 (arguing that supporting women through pregnancy loss has been largely absent from the reproductive justice movement due to the perceived risks of validating the concept of fetal personhood so central to anti-abortion ideology). **R** **R**

393 *See* Mary E. Becker, *From* Muller v. Oregon *to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1236–41 (1986).

394 *Id.* at 1259 & n.174.

395 499 U.S. 187 (1991). Johnson Controls had adopted a fetal protection policy that broadly excluded women under age seventy from jobs that exposed them to lead unless they could show they were sterilized. *Id.* at 192. Virginia Green, then fifty years old, was out of a job on Johnson Controls' battery assembly line she had held for eleven years due to the policy; other women decided to be sterilized to keep their jobs, as they needed the income. David L. Kirp, *Fetal Hazards, Gender Justice, and the Justices: The Limits of Equality*, 34 WM. & MARY L. REV. 101, 104–06 (1992). These women sued Johnson Controls for sex discrimination and won. *Johnson Controls*, 499 U.S. at 211.

based fetal protection policies are suspect on their face.[396] However carefully crafted, scientifically grounded occupational safety standards, such as those NIOSH has issued concerning heavy or repeated lifting while pregnant,[397] seem less likely to carry the political and legal risks of sex-based workplace rules of the past,[398] which were blatantly based on stereotypes about women as inauthentic workers[399] and flawed scientific information.[400]

Workplace hazards and conditions that increase the risk of miscarriage are consistent with the language of the statute that established OSHA. Although there is no evidence that Congress contemplated pregnancy risks when it sought to regulate workplace safety in 1970, this argument has not stopped the Supreme Court from expanding the coverage of other major federal employment statutes. For example, there is no evidence that Congress had disparate impact,[401] sexual harassment,[402] same-sex sexual harassment,[403] or sexual-orientation and sexual-identity discrimination[404] in mind when it sought to regulate employment discrimination, yet the Court has equated these types of discrimination with discrimination outlawed by Title VII. Indeed, as Anita Bernstein pointed out many years ago when arguing that the OSH Act should cover sexual harassment:

> [A] statutory reference to the "psychological factors involved" in occupational safety and health is more than exists in the Civil Rights Act of 1964 to support the sex-discrimination paradigm. The official purpose of OSHA is to address the problem of workplace health and safety, nothing narrower

396 *Johnson Controls*, 499 U.S at 197 ("The bias in Johnson Controls' policy is obvious. Fertile men, but not fertile women, are given a choice as to whether they wish to risk their reproductive health for a particular job.").

397 *See Physical Job Demands—Reproductive Health*, *supra* note 309. **R**

398 The fact that men can now become pregnant further undermines the argument that workplace safety rules aimed at reducing miscarriage risk would reinforce gender-based stereotypes. *See* Obedin-Maliver & Makadon, *supra* note 18. **R**

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

400 Moreover, establishing and enforcing occupational safety standards for pregnancy might, in turn, promote new expectations about workplace safety for all workers, leading to similar safety standards for non-pregnant workers. For example, the regulation of heavy lifting could reduce all workers' risks for musculoskeletal injuries.

401 Griggs v. Duke Power Co., 401 U.S 424, 432 (1971).

402 Burlington Indus. v. Ellerth, 524 U.S. 742, 764–65 (1998); Faragher v. Boca Raton, 524 U.S. 775, 780 (1998).

403 Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 79–80 (1998).

404 Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020).

> than that. The agency, founded only in 1973 and altered several times by political forces since then, does not have a long heritage of only one approach to regulation that would make it unable to function in this new domain. Case law, moreover, supports a broad mandate.[405]

A great deal of theorizing and advocacy has wrongly conceptualized pregnancy and work as separate and independent of one another: Work is public and pregnancy is private. Work is where individuals go without their bodies or families; pregnancy concerns sex, family, and bodies. Some of the myths that sustain this false divide are: Work is paid; pregnancy is unpaid. Employment law and health law are separate fields. And so on. Thus, the focus has been on legal reforms that would adjust work to "accommodate" the experience of pregnancy, which often translates into calls for time off for pregnant workers experiencing complications. But, as subpart II.D of this Article demonstrates, for many workers, especially the most marginalized workers in physically strenuous occupations, work itself can be hazardous to a successful pregnancy and a risk factor for miscarriage. These workers need more than pregnancy leave; they need safe work environments. That is, any agenda addressing miscarriage and the workplace must include a more diverse group of pregnant workers. Toward that end, it is time for states and OSHA to tackle the issue of occupational safety for pregnant workers.

The clinical practice guidelines that ACOG has developed for lifting while pregnant,[406] and which OBGYN doctors refer to when they recommend light duty for their pregnant patients, are based on the OSHA NIOSH occupational standards for lifting during pregnancy.[407] That is, occupational safety standards are already presently the basis for the vast majority of workers' requests for light-duty work assignments under the PDA and PWFA, as reflected in the doctors' notes that workers present to their employers. While it is heartening to know that OSHA occupational safety standards are indirectly seeping into workplace practices via the medical profession, a legal regime

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405 Anita Bernstein, *Law, Culture, and Harassment*, 142 U. PA. L. REV. 1277, 1292–93 (1994) (internal citations to the OSH Act omitted). Catharine MacKinnon also briefly floated this idea in her influential book, *Sexual Harassment of Working Women*. *See* CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION 159 n.48 (1979).

406 ACOG, *Employment Considerations*, *supra* note 310. **R**

407 *Compare id.* at e121 fig.1 (setting out recommended weight limits for lifting at work during pregnancy), *with* MacDonald et al., *supra* note 313, at 84 fig.2 (demonstrating that the ACOG standards are copied directly from the NIOSH standards, including the illustrations). **R**

whose enforcement depends on individual workers requesting leave or accommodations (which are often denied) when work poses a risk of miscarriage is a highly inefficient and ineffective means of ensuring occupational safety for pregnant workers. Why not simply regulate occupational risks for pregnant workers directly?

Toward that end, OSHA should prioritize hazardous work conditions such as heavy and repetitive lifting, standing on one's feet for many hours without breaks, working in very hot environments, and night-shift work, which are linked to an increased risk of miscarriage. OSHA's regulatory approach, whereby inspectors visit a worksite and impose citations with fines attached, can readily be applied to these types of physical work requirements. OSHA has experience in regulating these types of physical hazards, as well as chemical risks to pregnancy and reproductive health.[408] Therefore, its inspectors and experts should be prepared to act in this area. This could be achieved outright by OSHA, or through OSHA-approved state plans.[409] Ideally, it would make more sense to have a set of permanent, national standards on work and pregnancy safety, which would promote predictability, uniformity, and consistency in how workers must be treated throughout the country.[410] However, given that OSHA is so under-resourced and limited in its regulatory capacity, it may make sense to

408 *See Reproductive Hazards*, OCCUPATIONAL SAFETY & HEALTH ADMIN. https://www.osha.gov/reproductive-hazards [https://perma.cc/4BBK-W368] (last visited May 19, 2022) (noting that OSHA has standards specific to chemicals such as lead and other chemicals that are known to have an adverse effect on the reproductive system); *Controlling Occupational Exposure to Hazardous Drugs*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/hazardous-drugs/controlling-occex [https://perma.cc/6FKN-GVRZ] (last visited May 19, 2022) ("Due to the reproductive and developmental toxicity profile of many HDs [(hazardous drugs)] . . . [o]rganizations should establish a mechanism by which those workers who are actively trying to conceive, are pregnant, or are breast-feeding can request alternative duty or protective reassignment.").

409 OSHA allows states to run their own state occupational safety plans if approved by OSHA and if the state plans provide at least as generous coverage as federal OSHA standards. 29 U.S.C. §§ 667(c)(2), 672. For a description of the rather complicated federal-state partnership for regulating occupational safety set by the OSH Act, see Secunda, *supra* note 325, at 890–96. R

410 OSHA has, in the past, endorsed promulgating national standards on reproductive risks in various areas. *See, e.g.*, *Women in the Construction Workplace: Providing Equitable Safety and Health Protection*, OCCUPATIONAL SAFETY & HEALTH ADMIN. https://www.osha.gov/advisorycommittee/accsh/products/1999-06-01#ergonomics [https://perma.cc/ATS4-FPUG] (last visited May 19, 2022) ("OSHA should adopt standards . . . to protect all workers of childbearing capacity and pregnant construction workers.").

start with state plans.[411] Presently, more than half of U.S. states have OSHA-approved plans in place for other kinds of work hazards;[412] some states address reproductive health in their state plans or other directives.[413] However this is approached, it is time to start a national movement for occupational safety for pregnant workers.

CONCLUSION

Miscarriage is a consequential life event experienced by up to one-fourth of pregnant people and affecting hundreds of thousands of American workers. Despite this, none of the federal employment laws passed by Congress to protect workers from pregnancy discrimination, provide job-protected leave for serious illness, or reasonable disability accommodations adequately accounts for miscarriage. Even worse, the conditions of work itself can place a desired pregnancy at risk, especially for low-income and minority pregnant workers in occupations involving strenuous physical tasks, such as childcare, warehouse picking and packing, mail delivery, food processing, farm work, and home health and nursing care. Yet, our country's federal employment laws do not sufficiently regulate these occupational pregnancy risks, whether through a right to leave, light-duty work accommodations, or occupational safety rules. The PWFA is an excellent first step to address these shortfalls

411 Because OSHA has not broadly regulated in this area, states would be free to adopt further regulation beyond what is required by OSHA's general duty clause. Presently, OSHA's existing standards relevant to reproductive health cover only radiation and toxic and hazardous substances exposure. *See Reproductive Hazards: Standards*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/reproductive-hazards/standards [https://perma.cc/U5MS-GKCA] (last visited May 19, 2022).

412 *State Plans*, OCCUPATIONAL SAFETY & HEALTH ADMIN., https://www.osha.gov/stateplans/ [https://perma.cc/CZR9-RZLB] (last visited Feb. 24, 2022) (reporting that there are twenty-eight OSHA-approved workplace safety and health programs operated by individual states or U.S. territories). State plans tend to be more innovative and responsive to workplace hazards than the OSHA's directives. For example, California's state-approved OSHA plan comprehensively addresses workplace violence in health care. CAL. CODE REGS. tit. 8, § 3342 (Employers must keep violent incident logs, report violent incidents to the California state OSHA, have a workplace violence prevention plan, and implement training provisions for the plan for employees, among other measures.).

413 *E.g.*, SHARON L. DROZDOWSKY & STEPHEN G. WHITTAKER, WASH. STATE DEP'T OF LAB. & INDUS., WORKPLACE HAZARDS TO REPRODUCTION AND DEVELOPMENT: A RESOURCE FOR WORKERS, EMPLOYERS, HEALTH CARE PROVIDERS, AND HEALTH & SAFETY PERSONNEL, TECH. REP. NO. 21-3-1999, at 37–39 (1999) (discussing the requirements of Washington State's occupational safety standards and best practices to prevent reproductive and developmental hazards in the workplace, including identifying and eliminating (or reducing) risk, job rotation or transfer, employee orientation and training, and employee counseling).

in federal law, but it is not anywhere near enough. Therefore, a more comprehensive approach is required. This includes enhanced antiretaliation and privacy protections, access to paid sick and personal leave, and occupational safety standards that reduce the risk of miscarriage for American workers. For there to be reproductive justice, workers affected by miscarriage are owed more than "accommodation."