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PREGNANCY DISCRIMINATION: PREGNANT WOMEN NEED MORE PROTECTION IN THE WORKPLACE

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In a time where women's rights and feminism are a major focus, there is little attention being drawn to the problem of pregnancy discrimination in the workplace. Forty years have passed since the passage of the Pregnancy Discrimination Act, yet pregnancy discrimination is still very much alive. The Pregnancy Discrimination Act was passed in 1978, after a few noteworthy Supreme Court cases demonstrated a desperate need for legislation that would give pregnant women more protection in the workplace. Even after this legislation passed, there has been a constant battle between women and their employers. Many employers have changed for the better by giving their pregnant employees more protection, but pregnancy discrimination still remains widespread in the workforce. Some employers blatantly discriminate against their pregnant employees. Some pregnant women are fired immediately after telling their employers that they are pregnant. Other women face harsh working environments, as their employers and fellow employees do not give pregnant women the accommodations that they need. It is time that pregnant women and working mothers feel wanted in the workforce by giving them the accommodations that they deserve. This comment will discuss the history of pregnancy discrimination in the workplace, the current state of the law, and solutions to help rid pregnancy discrimination in the workplace.

I. INTRODUCTION

In the wake of the "Me Too" and the "Times Up" movements, women are telling the world that enough is enough.[1] While these monumental movements

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1. David Brancaccio, *40 Years After the Pregnancy Discrimination Act, Pregnant Employees Still Face Workplace Discrimination*, MARKETPLACE (Feb. 28, 2018), https://www.marketplace.org/2018/02/28/business/where-are-we-40-years-after-pregnancy-discrimination-act [hereinafter Brancaccio]. *See generally* ME TOO., https://metoomvmt.org (last visited April 16, 2019) (offering a comprehensive database consisting of organizations "dedicated to providing services and safe spaces for survivors of sexual violence . . . healing stories, as well as articles and a glossary of terms to help give voice to . . . experiences" as well as providing "research studies on sexual violence . . . [and] violence statistics"). *See also* TIME'S UP, https://www.timesupnow.com/about_times_up (last visited Jan. 25, 2019) (providing information about the Time's Up Movement). Time's Up is now a 501(c)(4) organization that works to create solutions to increase women's safety, equity, and power at work. Specifically, Time's Up can be described as the following:

> TIME'S UP is an organization that insists on safe, fair and dignified work for women of all kinds. We want women from the factory floor to the floor of the Stock Exchange, from

have given women the strength and courage to speak out against injustice, there is still more to be done.[2] The Pregnancy Discrimination Act ("PDA") marked a significant shift in the right direction, but the issue of pregnancy discrimination still exists forty years after its passage.[3] While many employers have become more welcoming to pregnant women by providing generous parental leave policies, comfortable on-site rooms for breast feeding, and new programs aimed at retaining mothers, many employers – regardless of size or prestige – still discriminate against pregnant women.[4]

In 2019, gender-based discrimination should be a thing of the past; unfortunately, that is not the case. In a recent article by The New York Times, several women gave testimonials regarding the discrimination they experienced from their employers because of their pregnancies.[5] In one testimonial, a pregnant woman who worked at Wal-Mart asked her supervisor if she could stop lifting heavy trays.[6] Her boss told her that being pregnant was not an excuse because "she had seen Demi Moore do a flip on TV when she was nearly full-term."[7] In another testimonial, a top saleswoman at a large pharmaceutical company was winning awards for her excellent performance until she was fired three weeks before giving birth.[8] In another, a senior employee at the financial giant Glencore was belittled on the trading floor.[9] After she returned from maternity leave, she

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> child care centers to C-suites, from farm fields to the tech field, to be united by a shared sense of safety, fairness and dignity as they work and as we all shift the paradigm of workplace culture. Powered by women, our TIME'S UP™ programming addresses the systemic inequality and injustice in the workplace that have kept underrepresented groups from reaching their full potential. We partner with leading advocates for equality and safety to improve laws and corporate policies; help change the face of corporate boardrooms and the C-suite; and enable more women and men to access our legal system to hold wrongdoers accountable. No more silence. No more waiting. No more tolerance for discrimination, harassment or abuse.

Id.

2. Brancaccio, *supra* note 1.

3. Natalie Kitroeff & Jessica Silver-Greenberg, *Pregnancy Discrimination is Rampant Inside America's Biggest Companies*, N. Y. TIMES (June 15, 2018), https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html [hereinafter Kitroeff]. *See also* 42 U.S.C. § 2000e(k) (2017) (prohibiting discrimination on the basis of pregnancy).

4. *Id. See also* Elizabeth Trompeter, *50 Companies with Great Maternity Leave*, CARE@WORK (July 27, 2016), http://workplace.care.com/50-companies-with-great-maternity-leave (listing fifty companies that provide generous maternity leave policies). Netflix offers the best maternity leave policy, granting pregnant employees fifty-two weeks of maternity leave. *Id.* The Bill and Melinda Gates Foundation ties Netflix with the greatest maternity leave policy at fifty-two weeks, with Etsy, Adobe, Spotify, and Cisco trailing behind with twenty-six-week maternity leave policies. *Id.* Amazon and Apple have unique policies giving pregnant workers eighteen weeks of maternity leave split between four weeks pre-birth and fourteen weeks post-birth. *Id.*

5. *See* Kitroeff, *supra* note 3 (providing testimonials of real women who experienced pregnancy discrimination in the workplace).

6. *Id.*

7. *Id.* In an e-mail to The New York Times, Demi Moore confirmed that a stunt double actually performed the routine. *Id.* She went on to state, "[y]ou would have to be extremely ignorant and inexperienced with pregnancy or just completely uncaring and insensitive to use a moment of comedic entertainment, like my appearance on David Letterman while I was eight and a half months pregnant, to pressure a pregnant woman into doing something that put her or her baby at risk[.]" *Id.*

8. *Id.*

9. *Id.*

was told to pump breast milk in a supply closet, which was filled with recycling bins.[10]

The New York Times did extensive research into pregnancy discrimination by reviewing thousands of public records and court documents, and by interviewing numerous women.[11] The research showed a clear pattern: many companies still systematically discriminate against pregnant women.[12] Pregnant women are constantly passed over for promotions and raises, and many women are fired while they are pregnant.[13] Women who have physically demanding jobs—where they have to lift or move heavy objects—are discriminated against even more blatantly.[14] These women risk losing their jobs simply by asking to lift lighter loads or by asking to take a water break.[15] Women in corporate jobs face discrimination as well, but the discrimination is more subtle.[16] Some employers see pregnant women and mothers as less committed.[17] Some women even say that "getting pregnant is often the moment they are knocked off the professional ladder."[18]

According to the Equal Employment Opportunity Commission ("EEOC"), the government agency tasked with reviewing employment discrimination claims, "[t]he number of pregnancy discrimination claims filed annually with the [EEOC] has been steadily rising for two decades and is hovering near an all-time high."[19] The growth of pregnancy discrimination claims demonstrates a continued need for more vigorous enforcement of the PDA, and for education about how the law affects employees and employers.[20] This also shows that there must be more done to protect women in the workplace.[21]

This comment will examine the history of discrimination against pregnant women in the work force by reviewing noteworthy Supreme Court cases, the history of the EEOC and its guidelines, the passage of the PDA, and the PDA's effect on pregnancy discrimination today.[22] This comment will also discuss solutions which would give pregnant women more protection in the workplace.[23]

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.*
14. *Id.*
15. *Id. See generally* Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015) (describing Peggy Young's case where UPS refused to accommodate her lifting restriction).
16. Kitroeff, *supra* note 3.
17. *Id.*
18. *Id.*
19. *See* Kitroeff, *supra* note 3 (discussing the rise of pregnancy discrimination claims).
20. *Id.*
21. *Id.*
22. *See infra* Parts II-III (discussing the history of the PDA and the EEOC and the effects on pregnant workers today).
23. *See infra* Part III (0) (describing the solutions available to help reduce pregnancy discrimination in the workplace).

Finally, this comment will discuss pregnancy discrimination and the protections that apply to pregnant workers in South Dakota.[24]

II. BACKGROUND

In *Employment Discrimination Law: Cases and Materials on Equality in the Workplace*, Maria Ontiveros et al., states, "[d]iscrimination against pregnant women and women with children has long been among the most serious impediments to gender equality in the workplace."[25] Attitudes towards pregnant women in the workplace have shifted in the last several decades; this is partly because of the passage of the Pregnancy Discrimination Act.[26] The PDA was passed in 1978 as an amendment to Title VII of the Civil Rights Act of 1964.[27] Title VII of the Civil Rights Act of 1964 "prohibits employment discrimination based on race, sex, color, religion and national origin. Title VII applies to private employers, labor unions and employment agencies. The Act prohibits discrimination in recruitment, hiring, wages, assignment, promotions, benefits, discipline, discharge, layoffs and almost every aspect of employment."[28]

Before Congress passed the PDA, the EEOC issued guidelines for employers to follow regarding discrimination in the workplace.[29] The EEOC was established under the authority of the Civil Rights Act of 1964, in order for the EEOC to pursue practice and pattern discrimination law suits with the purpose of eliminating unlawful employment discrimination in the private sector.[30] The EEOC interpreted Title VII to cover pregnancy.[31] In the EEOC's first ever report to Congress, it acknowledged that "policies would have to be devised which afforded female employees reasonable job protection during periods of pregnancy."[32] In the following seven years, "[the] EEOC worked to develop a coherent policy towards pregnancy-orientated employment practices both through the pursuit of its normal adjudicatory functions and by engaging in comprehensive studies[.]"[33]

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24. *See infra* Part III (0) (providing South Dakota's laws on pregnancy discrimination and how they apply to pregnant workers).

25. Maria L. Ontiveros, et al., *Employment Discrimination Law: Cases and Materials on Equality in the Workplace* 441 (9th ed. 2016).

26. *Id.* at 442.

27. *History of the Pregnancy Discrimination Act,* JURIST (Dec. 20, 2014), https://www.jurist.org/archives/feature/background-for-pda/ [hereinafter JURIST].

28. EQUAL EMP. OPPORTUNITY COMMISSION, THE LAW, https://www.eeoc.gov/eeoc/history/35th/thelaw/index.html (last visited Jan. 4, 2019) [hereinafter THE LAW].

29. *See generally* Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103 (1972) (establishing the agency "to prevent any person from engaging in any unlawful employment practice[.]"). *See also* 42 U.S.C. § 2000e-4(a) (giving the EEOC the power to issue guidelines for employers to follow).

30. Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103 (1972).

31. *Id.*

32. Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 155-56 (Brennan, J., dissenting) (quoting EQUAL EMP. OPPORTUNITY COMMISSION, FIRST ANNUAL REPORT TO CONGRESS, Fiscal Year 1965-1966 40 (1967)).

33. *Id.* at 156-57.

Following the EEOC's studies and investigations, the agency released its first formalized, systematic statement on the employment policies that relate to pregnancy and childbirth.[34] The guidelines provided by the EEOC were meant to help employers understand their obligations regarding discrimination in the workplace.[35] The guidelines defined discrimination, gave examples of events that may occur in the workplace, and told employers how to handle the situations to prevent discrimination against their employees.[36]

Before Congress passed the Pregnancy Discrimination Act, a few noteworthy Supreme Court cases, which disagreed with the EEOC's interpretation of Title VII, demonstrated a need for statutory protections for pregnant women against discrimination in the workplace.[37]

A. *GEDULDIG V. AIELLO*

The first case that established a need for statutory protection for pregnant workers was *Geduldig v. Aiello*,[38] a 1974 case from California, where an action was brought to challenge the constitutionality of a disability insurance program that precluded coverage from any work loss due to pregnancy.[39] The litigants sought protection against pregnancy discrimination under the Equal Protection clause of the Fourteenth Amendment and under the statutory protections of the Civil Rights Act of 1964.[40] Unfortunately, neither of those strategies were successful.[41] At the time, the California disability insurance system was funded entirely by the participating employees' wages.[42] Participation in this system was mandatory.[43] Each employee contributed one percent of their salary into this fund so they would be insured against the risk of disability, which could stem from a number of physical or mental illnesses or injuries.[44] Exceptions to the coverage for disabilities limited the number of weeks an individual could be paid for a disability, while also disqualifying disabilities that resulted from an individual's commitment as a drug addict, and "certain disabilities that [were] attributable to

34. *Id.*

35. *See* U.S. EQUAL EMP. OPPORTUNITY COMMISSION, PROHIBITED EMPLOYMENT POLICIES/PRACTICES, https://www.eeoc.gov/laws/practices/ (last visited Jan. 8, 2019) (providing information regarding prohibited employment policies and practices today).

36. *Id.*

37. *See* JURIST, *supra* note 27 (detailing the history of the PDA).

38. 417 U.S. 484 (1974), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (2017), *as recognized in* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669 (1983).

39. *Id.* at 484.

40. *Id.* at 486.

41. *Id.* at 487.

42. *Id.*

43. *Id.*

44. *Id.*

pregnancy."[45] The last exception—disabilities that were attributable to pregnancy—was at issue in *Geduldig*.[46]

The appellants in this case were four women who had, over the course of their employment, paid a sufficient amount into the disability fund and were eligible for the benefits.[47] The appellants' disabilities stemmed from their pregnancies, only one of which was considered a "normal pregnancy," meaning the pregnancy had no medical complications.[48] The Unemployment Insurance Code defined "disability" or "disabled" as the following:

> "Disability" or "disabled" includes both mental or physical illness and mental or physical injury. An individual shall be deemed disabled in any way in which, because of his physical or mental condition, he is unable to perform his regular or customary work. *In no case shall the term "disability" or "disabled" include any injury or illness caused by or arising in connection with pregnancy*[.][49]

Before the District Court's decision was rendered in this case, the California Court of Appeals decided in *Rentzer v. California Unemployment Insurance Appeals Board* that "payment of benefits on account of disability that result[ed] from medical complications arising during pregnancy" was not barred under the Unemployment Insurance Code.[50] The state court construed the statute to "preclude only the payment of benefits for disability accompanying a normal pregnancy."[51]

Due to this decision, it was later decided that the three women whose disabilities were caused by complications outside the realm of a normal pregnancy became entitled to the insurance benefits and have been paid.[52] However, the woman whose disability stemmed from a normal pregnancy was still barred from receiving the insurance benefits.[53] Thus, the issue on appeal, presented through a writ of certiorari, was "whether the California disability insurance program invidiously discriminate[d] against [the appellant] and others similarly situated by not paying insurance benefits for [a] disability that accompanies normal pregnancy and childbirth."[54] In *Geduldig*, the Court ultimately held that denying benefits to pregnant workers was not a violation of equal protection.[55] The majority stated

45. *Id.* at 488-89.
46. *Id.* at 489.
47. *Id.*
48. *Id.*
49. *Id.* (emphasis added).
50. *Id.* at 490 (citing *Rentzer v. California Unemployment Insurance Appeals Board*, 32 Cal.App.3d 604 (1973)).
51. *Id.*
52. *Id.* at 491.
53. *Id.* at 491-92.
54. *Id.* at 492.
55. *Id.* at 497.

that the program treated men and women equally, and therefore did not apply a heightened standard of review.[56]

In a dissenting opinion, Justice Brennan expressed dissatisfaction with the majority's failure to use a higher level of scrutiny in deciding the issue of a gender-based classification.[57] Justice Brennan took particular issue with the difference in treatment between men and women, noting that men could receive full compensation for all of their gender-specific disabilities, while women could not.[58] He also emphasized that the disabilities caused by pregnancy are indistinguishable from the effects of other disabilities because of lost wages and medical expenses for delivery and postpartum care.[59] Justice Brennan made it clear that the dissimilar treatment of men and women, on the basis of gender-specific disabilities, constituted gender discrimination and was in violation of equal protection.[60]

B. *GENERAL ELECTRIC CO. V. GILBERT*

The second case that demonstrated a need for statutory protection for pregnant women in the workplace was *General Electric Co. v. Gilbert.*[61] In this case, a group of female employees brought an action through the EEOC under Title VII of the Civil Rights Act of 1964, alleging that General Electric's disability plan discriminated on the basis of gender by excluding benefits for disabilities that resulted from pregnancy.[62] This case was decided in 1976, a few years after *Geduldig v. Aiello.*[63] The disability plan in *General Electric* was similar to the disability plan in *Geduldig.*[64] The Supreme Court relied on the decision in *Geduldig* in holding that the exclusion of disabilities resulting from pregnancy is not gender discrimination because "pregnancy, though confined to women, is in other ways significantly different from the typical covered disease or disability."[65]

Just like he did in *Geduldig*, Justice Brennan delivered a dissenting opinion where he expressed that women should have more protection in the work force.[66] Justice Brennan pointed out the majority's flawed reasoning for believing that the exclusion of pregnancy-related disabilities is not gender discrimination.[67] The majority argued that "pregnancy is not 'comparable' to other disabilities since it

56. *Id.*
57. *Id.* at 503 (Brennan, J., dissenting).
58. *Id.* at 501.
59. *Id.*
60. *Id.*
61. 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2076, 42 U.S.C. § 2000e(k) (2017), *as stated in* Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983).
62. *Id.* at 125.
63. *Id.*
64. *Id.*
65. *Id.* at 126.
66. *Id.* at 146-47 (Brennan, J., dissenting).
67. *Id.* at 147.

is a 'voluntary' condition rather than a 'disease.'"[68] The majority's reasoning was flawed because General Electric *did* allow benefits for "'voluntary' disabilities, including sports injuries, attempted suicides, venereal disease . . . and elective cosmetic surgery."[69] Justice Brennan also noted that General Electric's plan "insure[d] risks such as prostatectomies, vasectomies, and circumcisions that are specific to the reproductive system of men and for which there exist no female counterparts covered by the plan."[70] Pregnancy was the only gender-specific disability that was excluded from coverage.[71] Additionally, Justice Brennan believed that the majority should have adhered to the EEOC's guidelines, which offered more protection against gender discrimination than Title VII.[72] He also believed that the EEOC's guidelines would help reduce the burden placed on women in the workplace.[73]

C. PASSAGE OF THE PDA

The Supreme Court decisions discussed above revealed a gap in legislation and demonstrated a desperate need for more protection for pregnant women in the workplace.[74] Since the Supreme Court was unwilling to grant these women more protection through judicial action, "[f]eminist leaders and unions campaigned to change the law to protect pregnant women," which resulted in Congress passing the Pregnancy Discrimination Act in 1978.[75]

The PDA amended Title VII of the Civil Rights Act of 1964 to prohibit gender discrimination on the basis of pregnancy.[76] The following language, which is the entirety of the PDA, was added to section 701 of the Civil Rights Act of 1964:

> The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but *similar in their ability or inability to work*[.][77]

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68. *Id.* at 151.
69. *Id.*
70. *Id.* at 152.
71. *Id.*
72. *Id.* at 158-59.
73. *Id.*
74. *See supra* note Part II(A)-(B) (discussing Supreme Court cases that revealed a gap in legislation and demonstrated a need for more protection for pregnant women in the workplace).
75. *See* Kitroeff, *supra* note 3 (discussing the history of pregnancy discrimination). *See* JURIST, *supra* note 27 (detailing the history of the PDA). *See also* THE LAW, *supra* note 28 (describing the history of the law of pregnancy discrimination).
76. Pregnancy Discrimination Act of 1978, Pub. L. 95-555, 92 Stat. 2076.
77. *Id.*

The PDA made it clear that discriminating on the basis of pregnancy or pregnancy related medical conditions was in fact gender discrimination.[78] The PDA also addresses employment benefit plans, ensuring that employers must treat pregnancy the same as other medical conditions.[79] This includes health insurance plans and disability benefits plans, and it covers medical conditions that result from pregnancy, as well as pregnancy itself.[80] The PDA applies to employers with fifteen or more employees and applies to "all aspects of pregnancy and all aspects of employment, including hiring, firing, promotion, health insurance benefits, and treatment in comparison with non-pregnant persons similar in their ability or inability to work."[81] In addition to giving women more protection in the workplace, the PDA ended an era of legal precedent that treated women like their purpose in life was to be a mother first, and a worker second.[82]

Although the passage of the Pregnancy Discrimination Act was a big win for women, the issue was not completely resolved.[83] For years, employers tried to argue that pregnant women did not deserve accommodations because they were similar to workers who were injured off the job.[84] Employers also argued that pregnancy was a voluntary condition, and that covering pregnancy and pregnancy related illnesses would increase their insurance costs.[85] Then came Peggy Young.[86]

D. *YOUNG V. UNITED PARCEL SERVICE*

In 2015, in *Young v. United Parcel Service*, Peggy Young sued the United Parcel Service ("UPS") for discrimination because UPS refused to accommodate her pregnancy-related lifting restriction.[87] Young worked as a part-time driver for UPS, where her responsibilities included pickup and delivery of packages.[88] Once Young became pregnant, her doctor told her that she could not lift more than twenty pounds during the first twenty weeks of her pregnancy, and no more than ten pounds thereafter.[89] UPS had a requirement that the drivers be able to lift

78. *See* Brancaccio, *supra* note 1 (discussing PDA coverage).

79. *Id.*

80. *Id.*

81. U.S. EQUAL EMP. OPPORTUNITY COMMISSION, EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES (Jun. 25, 2015), https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm [hereinafter EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES].

82. Gillian Thomas, *Employees Who Have Babies are Still Getting the Axe*, ACLU (Oct. 31, 2018), https://www.aclu.org/blog/womens-rights/pregnancy-and-parenting-discrimination/employees-who-have-babies-are-still.

83. *See* Kitroeff, *supra* note 3 (providing detailed stories from women who experienced pregnancy discrimination).

84. *Id.*

85. U.S. LEGAL, PDA-HISTORICAL PERSPECTIVE, https://pregnancydiscriminationact.uslegal.com/pda-historical-perspective/ (last visited Jan.1 2019).

86. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338 (2015).

87. *Id.* at 1344.

88. *Id.*

89. *Id.*

packages that weigh up to seventy pounds.[90] Young was informed by UPS that she could not work while she was under a lifting restriction.[91] More specifically, the Capital Division Manager told Young that "she was 'too much of a liability' and could 'not come back' until she 'was no longer pregnant.'"[92] Young was then forced to stay at home during her pregnancy without pay.[93] She eventually lost her employee medical coverage.[94] Young then brought this suit, alleging that UPS refused to accommodate her pregnancy-related lifting restriction.[95] The United States District Court for the District of Maryland granted UPS's motion for summary judgment, which was affirmed by the United States Court of Appeals for the Fourth Circuit.[96] Certiorari was then granted.[97]

UPS refused to accommodate Young, but they accommodated others who had similar restrictions for non-pregnancy related reasons.[98] It accommodated an employee with a ten-pound lifting restriction due to a foot injury, and it accommodated another employee with a ten-pound lifting restriction due to an arm injury.[99] UPS even gave an accommodation to an employee who had his DOT license suspended after a conviction of driving under the influence, yet it refused to give a pregnant woman an accommodation.[100] UPS gave accommodations to many employees who asked, unless it was a pregnant woman.[101] In a deposition of a UPS shop steward, who had worked at UPS for almost a decade, the steward testified that "the only light duty requested [due to physical] restrictions that became an issue at UPS 'were with women who were pregnant.'"[102]

During oral arguments of this case at the Supreme Court of the United States, Justice Ruth Bader Ginsburg challenged UPS's lawyer to cite "a single instance of anyone who needed a lifting dispensation who didn't get it except for pregnant people."[103] The UPS lawyer did not have a response.[104] The Court found that Young had created a genuine issue of material fact as to whether UPS's reasoning

90. *Id.*

91. *Id.*

92. *Id.* at 1346 (citing Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 20, Young v. United Parcel Serv., Inc., No. DKC 08 CV 2586 (D. Md. Sept. 16, 2010)).

93. *Id.* at 1344.

94. *Id.*

95. *Id.*

96. *Id.* at 1347.

97. *Id.* at 1348.

98. *Id.* at 1347.

99. *Id.*

100. *Id.*

101. *See id.* (showing that UPS gave accommodations to many employees that asked unless it was a pregnant woman).

102. *Id.*

103. Transcript of Oral Argument at 46, Young v. United Parcel Serv., Inc. 135 S. Ct. 1338 (2015) (No. 12-1226).

104. *See* Kitroeff, *supra* note 3 (providing a detailed history of pregnancy discrimination).

for refusing to accommodate Young was pretextual.[105] Thus, the judgment was vacated and remanded.[106] The case ultimately ended in a settlement.[107]

E. EEOC GUIDELINES TODAY

Following, and as a direct result of the decision in *Young*, the EEOC issued new guidelines that included pregnancy discrimination.[108] In the most recent EEOC guidelines, the EEOC discussed several statistics that show that pregnancy discrimination is still an issue.[109] The purpose of the guidelines is to "provide[ ] guidance regarding the Pregnancy Discrimination Act and the Americans with Disabilities Act as they apply to pregnant workers."[110] In the years following the enactment of the PDA, "charges alleging pregnancy discrimination have increased substantially. In fiscal year ("FY") 1997, more than 3,900 such charges were filed with the Equal Employment Opportunity Commission and state and local [agencies], [and] in FY 2013, 5,342 charges were filed."[111] In a study done by an outside organization, the effects of pregnancy discrimination were even greater.[112] The findings were as follows:

> In 2008, a study by the National Partnership for Women & Families found that pregnancy discrimination complaints have risen at a faster rate than the steady influx of women into the workplace. This suggests that pregnant workers continue to face inequality in the workplace. Moreover, the study found that much of the increase in these complaints has been fueled by an increase in charges filed by women of color. Specifically, pregnancy discrimination claims filed by women of color increased by 76% from FY 1996 to FY 2005, while pregnancy discrimination claims overall increased 25% during the same time period.[113]

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105. Young, 135 S. Ct. 1338 at 1356.

106. *Id.*

107. *See* Brancaccio, *supra* note 1 (providing information relating to *Young v. UPS*). *See also UPS Settles with Maryland Woman in Pregnancy Discrimination Case*, NBC WASHINGTON (Oct. 2, 2015), https://www.nbcwashington.com/news/local/UPS-Settles-With-Maryland-Woman-in-Pregnancy-Discrimination-Case-330305251.html (describing the aftermath of the *Young v. UPS* decision). The terms of the settlement were not disclosed, but Peggy Young's attorney stated that the change in UPS's policies regarding pregnancy discrimination was an important factor in the resolution of the case. *Id.* UPS's new policy made temporary light duty work available to all of their pregnant employees. *Id.* The policy reflected the pregnancy-specific laws that were enacted in numerous states where UPS conducted business, as well as the new guidelines released by the EEOC. *Id.*

108. EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES, *supra* note 81.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

In a 2013 study, the EEOC reported that pregnancy discrimination complaints increased seventy-one percent from 1992 to 2011.[114] The types of complaints have remained consistent over the past decade.[115] These complaints typically involve termination based on pregnancy, disparate treatment in the workplace, medical examinations that are not job related, and forced leave.[116]

The EEOC created these guidelines to help employers understand their obligations and to help pregnant women understand their rights.[117] The guidelines discuss the extent of the PDA coverage and the Americans with Disabilities Act ("ADA") coverage, as well as give numerous examples regarding what constitutes pregnancy discrimination.[118] These guidelines can be a helpful tool for employers.[119]

F. EFFECTS OF THE PDA TODAY

Although there have been great strides made towards equality for women in the workplace, the fight is not over. The PDA has had success in limiting discrimination in some employment settings, but the PDA does not protect all pregnant women in the workplace.[120]

In an interview with Gillian Thomas, a senior staff attorney at the American Civil Liberties Union's ("ACLU") Women's Rights Project, she stated that pregnancy discrimination is still very common.[121] She said "the top kind of complaint that we get on our intake line and the kinds of discrimination we see range from the most blatant [to very subtle]. You know, you inform your boss of a pregnancy on Monday and you're fired on Tuesday. That still happens."[122] Thomas also explained that pregnancy discrimination is especially prevalent for low-wage workers.[123] This is because low-wage workers typically lack bargaining power with their employers.[124] Thomas also discussed how sex stereotyping is present in the workplace, where she gave an example of how an employer would react to an employee announcing her pregnancy: "[s]o suddenly

114. Nat'l Partnership for Women & Families, *The Pregnancy Discrimination Act at 35 Fact Sheet* (Oct. 2013), http://www.nationalpartnership.org/our-work/resources/workplace/pregnancy-discrimination/the-pregnancy-discrimination-act-at-35.pdf [hereinafter Nat'l Partnership for Women & Families].

115. EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES, *supra* note 81.

116. *Id.*

117. *See id.* (discussing coverage of the PDA and the ADA as well as listing numerous examples regarding what constitutes pregnancy discrimination).

118. *Id.*

119. *See id.* (listing examples that include knowledge of pregnancy, stereotypes and assumptions, unlawful discharge during pregnancy or parental leave, and discrimination based on the intention to become pregnant).

120. *See* Brancaccio, *supra* note 1 (discussing the PDA and its effects on pregnant workers today).

121. *See id.* (providing the transcript of an interview with ACLU Women's Rights Project attorney, Gillian Thomas).

122. *Id.*

123. *Id.*

124. *Id.*

you're not sent on that big business trip that you were going to be on because your employer thinks oh, you'd rather be here at home, you'd rather be resting, it's not safe for you to travel."[125]

When women who work in physically laborious jobs become pregnant, there may be aspects of the job that she may not be able to physically perform.[126] This is the most active area of litigation for pregnancy discrimination claims.[127] This is also the area that most pregnant women have difficulty with.[128] For example, this includes women who work on their feet all day in retail or hospitality, women whose jobs require them to lift heavy objects, or women who work hazardous jobs, like law enforcement officers or fire fighters.[129] These are the situations where women need temporary accommodations in order to ensure a healthy pregnancy.[130] Although the PDA requires employers to give pregnant women the same accommodations as other individuals similar in their ability or inability to work, if an employer is not giving any employees an accommodation then they do not have to give pregnant employees an accommodation.[131]

In another article by The New York Times, women who work in physically demanding jobs told stories about their pregnancies and the aftermath of their employers rejecting their pleas for an accommodation.[132] In one woman's story, she recounts the horror of miscarrying at work because her supervisor would not allow her to lift lighter boxes.[133] She began to bleed regularly at work, occasionally leaving work early to go to the hospital; each time she left early her supervisor wrote her up.[134] As the demerits accumulated, she stopped leaving.[135] She then suffered a miscarriage.[136] In the same warehouse where this woman worked, five other women shared the same experience.[137] They asked countless times to lift lighter loads, three of the women even gave their supervisors a doctor's note recommending that they lift lighter loads.[138] Their supervisors disregarded them, their doctor's notes, and their health and well-being.[139] All five women miscarried.[140]

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125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *See generally* Jessica Silver-Greenberg and 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 (providing stories from women who experienced miscarriages at work in their physically laborious jobs) [hereinafter Greenberg & Kitroeff].
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*

Many would ask why these women did not just quit, but not everyone is afforded the opportunity to leave their job.[141] These women stayed because they needed their jobs to support themselves and their families.[142] To add insult to her injury, once this woman returned to work, after miscarrying her child, her supervisor handed her a three hundred dollar invoice for the ambulance ride that took her to the hospital that day.[143] Another warehouse supervisor told a pregnant woman to get an abortion after she asked to lift lighter loads.[144]

The PDA says that an employer must accommodate a pregnant worker *only* if it is already doing so for other employees who are "similar in their ability or inability to work."[145] In other terms, "companies that do not give anyone a break have no obligation to do so for pregnant women."[146] For most women, working while pregnant is safe, but women who are required to do extensive lifting have an increased risk of miscarrying.[147] Warehouses are among the fastest growing jobs in the nation, employing more than a million Americans.[148] In many warehouses, taking unapproved breaks can result in immediate termination unless the individual is legally protected.[149] The PDA does not guarantee all pregnant women these protections.[150]

G. HOW THE ADA CAN HELP

The ADA can apply to pregnant women; however, pregnancy itself is not a considered a disability under the ADA.[151] Rather, "pregnancy-related impairments" invoke ADA protections for pregnant women.[152] In 2008, Congress amended the ADA to expand the definition of "disability," making it "easier for pregnant workers with pregnancy-related impairments to demonstrate that they have disabilities for which they may be entitled to a reasonable accommodation[.]"[153] It expanded "disability" to clarify that "'physical or mental impairment[s] that substantially limi[t]' an individual's ability to lift, stand, or bend are ADA-covered disabilities."[154]

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141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.*
147. *Id.* "There is a 'slight to modest risk of miscarriage' for women who do extensive lifting in their jobs, according to guidelines published this year by the American College of Obstetricians and Gynecologists." *Id.* "The recommendations are intended to inform doctors about best practices." *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES, *supra* note 81.
152. *Id.*
153. *Id.*
154. Young v. United Parcel Serv., Inc., 135 S. Ct. 1338, 1348 (2015) (quoting ADA Amendments Act of 2008, 42 U.S.C. § 12102(1) (2008)).

The ADA protects individuals from discrimination on the basis of disability, limits employer inquiries into medical history and medical examinations of employees and applicants, and requires employers to reasonably accommodate an employee with a disability.[155] Pregnancy itself is still not protected under the ADA, but pregnant workers are not excluded from the protections of the ADA.[156] Pregnant workers may have impairments related to their pregnancies that qualify as a disability under the ADA.[157] If pregnant workers were afforded the protections that the ADA provides to individuals with a qualifying disability they would be able to receive the accommodations that they need.[158] A few examples of the protections that the ADA could give pregnant workers are "allowing a pregnant worker to take more frequent breaks, to keep a water bottle at a work station, or to use a stool; altering how job functions are performed; or providing a temporary assignment to a light duty position."[159] The ADA only protects a pregnant woman's disabilities if the employer is already giving other employers accommodations based on a temporary disability.[160]

Due to the uncertainties of the protections the PDA and the ADA provide, it is important that pregnant women know their rights when it comes to being discriminated against in the workplace.[161] The EEOC's website defines an individual's rights in the employment setting.[162] One suggestion that Gillian Thomas gave in her interview was that women should inform themselves of their rights and go to their employer with a plan for how to make things work while they are on maternity leave and then a plan on how to reintegrate upon their return.[163] This suggestion of creating a plan for reintegration is made under the presumption that the woman has access to maternity leave.[164] Unfortunately, "only 13 percent of the private workforce in this country has access to paid leave and only 60 percent have access to unpaid leave under the Family [and] Medical Leave Act."[165]

155. EEOC ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES, *supra* note 81.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *See* U.S. EQUAL EMP. OPPORTUNITY COMMISSION, PREGNANCY DISCRIMINATION, https://www.eeoc.gov/laws/types/pregnancy.cfm (last visited Jan. 1, 2019) (informing individuals of pregnancy discrimination and the rights that individuals have in the employment setting) [hereinafter PREGNANCY DISCRIMINATION].

162. *Id.*

163. *See* Brancaccio, *supra* note 1 (discussing ways for women to inform themselves of their rights in the workplace and how to plan for their future).

164. *Id.*

165. *Id.*

H. THE FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act ("FMLA") "entitles eligible employees of covered employers to take unpaid, job-protected leave for specified family and medical reasons with continuation of group health insurance coverage under the same terms and conditions as if the employee had not taken leave."[166] Specifically, the FMLA states the following:

> The Family and Medical Leave Act of 1993, as amended . . . allows eligible employees of a covered employer to take job-protected, unpaid leave, or to substitute appropriate paid leave if the employee has earned or accrued it, for up to a total of 12 workweeks in any 12 months . . . because of the birth of a child and to care for the newborn child, because of the placement of a child with the employee for adoption or foster care, because the employee is needed to care for a family member (child, spouse, or parent) with a serious health condition[.][167]

The purpose of the FMLA is to allow employees to manage a healthy balance between their work and family life.[168] To be eligible for the FMLA, the following requirements must be met: the employee must have been employed with the company for twelve months, the employee must have worked at least 1,250 hours during the twelve month period prior to the start of the FMLA leave, and the employer is one that employs fifty or more employees.[169] Unfortunately, a lot of women do not have access to the FMLA protections because they are not eligible employees under the FMLA.[170]

III. ANALYSIS

A. SOLUTIONS

One way to help reduce pregnancy discrimination in the workplace is to ensure that employers are aware of the obligations they have, and to implement better workplace policies.[171] Adrienne Fox, in the Society for Human Resource

166. U.S. DEP'T OF LABOR, WAGE AND HOUR DIV., FAMILY AND MEDICAL LEAVE ACT, https://www.dol.gov/whd/fmla/ (last visited Jan. 1, 2019); Family and Medical Leave Act, 29 U.S.C. § 2601 (West 2019).

167. 29 C.F.R. § 825.100(a) (2018).

168. 29 C.F.R. § 825.101(a) (2018).

169. 29 C.F.R. § 825.110(a) (2018).

170. *See id.* (providing the requirements for eligibility under the FMLA).

171. Adrienne Fox, *How to Accommodate Pregnant Employees*, SOC'Y FOR HUMAN RESOURCE MGMT. (Feb. 1, 2014), https://www.shrm.org/hr-today/news/hr-magazine/pages/0214-pregnancy-accommodation.aspx.

Management, stated "[e]mployers have a duty to know the law and to follow it."[172] One of the main causes of pregnancy discrimination is lack of knowledge, specifically the lack of knowledge on the part of supervisors and managers.[173] A way to inform lower level employees of their obligations is to "provide regular training on relevant regulations and pregnancy-bias liability, as well as on how to engage in an interactive process once an accommodation request is made."[174] Another method employers can use involves "[e]ngaging in an interactive dialogue with employees to come to a reasonable accommodation [which] shows that employers are making a good-faith effort" in accommodating the employee.[175] Employers should also review relevant federal, state, and local laws and regulations, as well as their own policies so they can stay informed of their obligations.[176]

Another way for employers to be informed is to follow the EEOC's guidelines.[177] The EEOC's guidelines provide best practices for complying with the PDA and addressing pregnancy discrimination.[178] As mentioned above, the EEOC gives examples of situations that may arise regarding pregnant workers and it discusses the best ways to respond to those situations.[179] The EEOC is a great resource that *all* employers should use to implement better workplace policies regarding pregnancy discrimination.[180]

Although employers can help minimize pregnancy discrimination in the workplace, the best way to offer more protection to pregnant women is to give them the same protections that the ADA gives to disabled workers.[181] This can be done by passing a law that would give pregnant women the same protections that the ADA gives to individuals with a qualifying disability, which would require employers to accommodate individuals whose health depends on it.[182] Several attempts have been made to enact a federal pregnancy accommodation law, which would give pregnant women the same protections that disabled workers have.[183] To date, none have been enacted into law.[184]

In the 115th Congress, the Pregnant Workers Fairness Act was introduced.[185] The bill was introduced on May 11, 2017, and there has been no action since.[186]

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172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.*
177. *See* PREGNANCY DISCRIMINATION, *supra* note 161 (providing employers with best practices on avoiding pregnancy discrimination).
178. *Id.*
179. *See supra* Part II(0) (discussing the EEOC today and the examples that the EEOC provides for employers to help them understand their obligations and to help pregnant women understand their rights).
180. *See id.* (providing employers with best practices on avoiding pregnancy discrimination).
181. *See* Brancaccio, *supra* note 1 (discussing solutions to help minimize pregnancy discrimination).
182. *Id.*
183. *Id.*
184. *Id.*
185. Pregnant Workers Fairness Act of 2017, H.R. 2417, 115th Cong. (2017).
186. *Id.*

Sponsored by Representative Jerrold Nadler of New York, the purpose of this bill was "[t]o eliminate discrimination and promote women's health and economic security by ensuring reasonable workplace accommodations for workers whose ability to perform the functions of a job are limited by pregnancy, childbirth, or a related medical condition."[187] Specifically, the bill declares that it is an unlawful employment practice to:

> (1) not make reasonable accommodations to known limitations related to pregnancy, childbirth, or related medical conditions of a job application or employee, unless such covered entity can demonstrate that the accommodations would impose an undue hardship on the operation of the business of such covered entity; (2) require a job applicant or employee affected by pregnancy, childbirth, or related medical conditions to accept an accommodation that such applicant or employee chooses not to accept, if such accommodation is unnecessary to enable the applicant or employee to perform her job; (3) deny employment opportunities to a job applicant or employee, if such denial is based on the need of the covered entity to make reasonable accommodations to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee or applicant; (4) require an employee to take leave, whether paid or unpaid, if another reasonable accommodation can be provided to the known limitations related to the pregnancy, childbirth, or related medical conditions of an employee; or (5) take adverse action in terms, conditions, or privileges of employment against an employee on account of the employee requesting or using a reasonable accommodation to the known limitations related to the pregnancy, childbirth, or related medical conditions of the employee.[188]

This bill looked very promising, but with no action being taken, it is not very useful. In order to give women more protection, there must be action and advocates pushing the Pregnant Workers Fairness Act through. "In every congressional session since 2012, a group of lawmakers has introduced a bill that would do for pregnant women what the Americans with Disabilities Act does for individuals with a qualifying disability: require employers to accommodate those whose health depends on it. The legislation has never had a hearing."[189] The Pregnant Workers Fairness Act would "bring the nation closer to ending discrimination against pregnant [women in the workplace], while [also] strengthening the economic security of working families."[190]

187. *Id.*
188. *Id.* at § 2(1)-(5).
189. Greenberg & Kitroeff, *supra* note 132.
190. Nat'l Partnership for Women & Families, *supra* note 114.

The issue of pregnancy discrimination is bi-partisan.[191] "Everyone cares about pregnancy discrimination."[192] Everyone from women's advocacy groups and feminist groups to anti-abortion groups and faith-based groups want an end to pregnancy discrimination.[193] In fact, many states are paving the way for pregnancy accommodation laws across the nation.[194] In twenty-two states and the District of Columbia, a similar version of the Pregnant Workers Fairness Act has passed and is currently in effect.[195] If every state would pass similar legislation, it would be a huge step for equality in the work force.

B. PREGNANCY DISCRIMINATION IN SOUTH DAKOTA

Currently, South Dakota does *not* provide additional protection for pregnant workers, meaning South Dakota does not specifically require employers to accommodate pregnancy or medical conditions resulting from pregnancy.[196] South Dakota also does not grant women the affirmative right to breastfeed at work.[197] Under South Dakota and Federal law, pregnancy is treated like any other temporary disability.[198] If other employees are given accommodations when disabled, then a pregnant employee must also be given an accommodation.[199] In other words, if an employer does not give any employees accommodations, then they do not have to give pregnant workers an accommodation.[200]

Pregnancy discrimination is still occurring in South Dakota. In 2010, Siouxland Oral Maxillofacial Surgery Associates, L.L.P. of Sioux Falls, South

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191. Ashley Fetters, *Everyone Cares About Pregnancy Discrimination*, THE ATLANTIC (Aug. 3, 2018), https://www.theatlantic.com/family/archive/2018/08/everyone-cares-about-pregnancy-discrimination/566717/.

192. *Id.*

193. *Id.*

194. *Id.*

195. Alaska, California, Colorado, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Minnesota, Nebraska, Nevada, New Jersey, New York, North Dakota, Rhode Island, Texas, Utah, Vermont, Washington, and West Virginia have adopted pregnancy accommodation laws. *See, e.g.*, ALASKA STAT. ANN. § 39.20.520 (West 2018); CAL. GOV'T CODE § 12945(3)(A) (West 2018); COLO. REV. STAT. ANN. § 24-34-402.3 (West 2018); CONN. GEN. STAT. ANN. § 46a-60(a)-(b) (West 2019); DEL. CODE ANN. tit. 19, § 711(a)(3) (West 2019); D.C. CODE ANN. § 32-1231.01 to .02 (West 2019); HAW. ADMIN. CODE § 12-46-107; 775 ILL. COMP. STAT. ANN. 5/2-102 (West 2018); LA. STAT. ANN. § 23:342 (West 2018); MD. CODE ANN. STATE GOV'T. § 20-609 (West 2018); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 2018); MINN. STAT. ANN. § 181.9414 (West 2018); NEB. REV. STAT. ANN. § 48-1107.2 (West 2018); NEV. REV. STAT. ANN. §§ 613.4353-4383 (West 2017); N.J. STAT. ANN. § 10:5-12 (West 2019); N.Y. EXECUTIVE LAW §§ 296(3)(a) (McKinney 2019); N.D. CENT. CODE ANN. § 14-02.4-03 (West 2018); tit. 28 R.I. GEN. LAWS ANN. § 28-5-7.4 (West 2018); TEX. LOC. GOV'T CODE ANN. § 180.004 (West 2017); UTAH CODE ANN. § 34A-5-106 (West 2018); VT. STAT. ANN. tit. 21, § 495k (West 2018); WASH. REV. CODE ANN. § 43.10.005 (West 2018); W. VA. CODE ANN. § 5-11B-1 to -7 (West 2018).

196. *See* S.D.C.L. § 20-13-10 (2016 & Supp. 2018) (defining an employer's unfair or discriminatory practices, which does not include accommodations for pregnancy or breastfeeding).

197. *Id.*

198. S.D. DEP'T. OF LABOR & REG., DIVISION OF HUMAN RIGHTS: PREGNANCY, https://dlr.sd.gov/human_rights/pregnancy.aspx (last visited Jan. 8, 2019).

199. *Id.*

200. *Id.*

Dakota paid $118,775 to settle a pregnancy discrimination case.[201] The EEOC's lawsuit stated that an employee of Siouxland was fired days after they found out about her pregnancy, and a few months later, they refused to hire another woman for a position that she was qualified for after learning she was pregnant.[202] A jury trial was held in 2007, where the jury found that Siouxland had intentionally discriminated against these two women because of their pregnancies and they were awarded $21,098 in lost earnings.[203] In 2009, the Eighth Circuit Court of Appeals upheld the jury verdict and additionally held that the jury should have been instructed on punitive damages.[204] Punitive damages are available when "it is proven that the employer engaged in discrimination with malice or reckless indifference to the civil rights of the claimant."[205] As a result of this decision, the case was remanded to the federal district court in Sioux Falls where a second trial was supposed to be held on punitive damages.[206] Before the trial began, Siouxland settled with the two women.[207]

As part of the settlement, Siouxland agreed to provide training for their employees and supervisors on gender and pregnancy discrimination.[208] The EEOC attorney in this case stated that "the evidence the EEOC presented at trial showed that the decision makers at Siouxland knew that their actions were illegal."[209] Another EEOC attorney discussed the significant increase of pregnancy discrimination in recent years "where women are fired, not hired, or treated differently solely because they are pregnant."[210] She stated that they were "pleased with the result in this case, which sen[t] a powerful message to employers that this kind of discrimination can be very costly for them."[211]

Several years later, in 2017, the South Dakota legislature attempted to pass a bill that would have given pregnant women and breastfeeding mothers more accommodations in the workplace.[212] House Bill 1120, similar to the legislation that has passed in twenty-two other states, would have required employers to provide much needed support for pregnant women and new parents.[213] Specifically, the bill would have required the following:

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201. Press Release, U.S. EQUAL EMP. OPPORTUNITY COMMISSION, Sioux Falls Oral Surgery Pays $118,775 to Settle EEOC Pregnancy Discrimination Case (June 22, 2010), https://www.eeoc.gov/eeoc/newsroom/release/6-22-10.cfm. *See generally* EEOC v. Siouxland Oral Maxillofacial Surgery Associates, L.L.P., 578 F.3d 921 (8th Cir. 2009) (providing information on the case and its subsequent settlement).

202. *EEOC*, 578 F.3d at 923.

203. Press Release, *supra* note 201.

204. EEOC v. Siouxland Oral Maxillofacial Surgery Associates, L.L.P., 578 F.3d 921, 929 (8th Cir. 2009).

205. Press Release, *supra* note 201.

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. H.B. 1120, 92nd Sess. Legis. Assemb. (S.D. 2017).

213. *Id.*

> Any employer with fifty or more employees shall make reasonable accommodations for any employee related to pregnancy, childbirth, or a related condition. The term, reasonable accommodations, includes more frequent or longer breaks, time off to recover from childbirth, adjustment of seating, temporary transfer to a less strenuous or hazardous position, job restructuring, private nonbathroom space for breastfeeding, assistance with manual labor, modified work schedules, or any other reasonable request directly related to pregnancy, childbirth, or a related condition.[214]

Unfortunately, this bill was not signed into law.[215]

A South Dakota lawmaker, during a hearing of the House Commerce and Energy Committee, made remarks that suggested if a woman did not like the treatment she was receiving regarding her pregnancy, she should just quit and find a new job.[216] That is not a practical solution to pregnancy discrimination in the workplace. The purpose of the PDA is to eliminate pregnancy discrimination and the purpose of the bill that was proposed was to give women more protection and more accommodations in the workplace.[217] Employers need to be held responsible for their treatment of their employees.[218] The burden should not be placed on pregnant workers to find a new job because of their employer's mistreatment.[219]

This bill would have been a step in the right direction for South Dakota. Pregnancy accommodation laws give pregnant workers crucial protections to ensure that the women's pregnancies remain healthy while also ensuring job security.[220] These laws are passing in states around the country with bipartisan support, and in several cases, with unanimous support.[221] South Dakota should be next.

In light of the attempted passage of a pregnancy accommodation law in South Dakota, it appears that South Dakota has recently taken several steps backwards, as legislators recently introduced a bill that would require breastfeeding mothers to breastfeed in a "discreet or modest manner."[222] This shows that South Dakota is moving away from the support of new mothers.[223] In order for South Dakota to effectively protect all of its citizens, South Dakota should pass a pregnancy

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214. *Id.*

215. *Id.*

216. Kasandra Brabaw, *Legislators Just Blocked a South Dakota Bill That Would Protect Pregnant Employees,* REFINERY29 (Feb. 13, 2017), https://www.refinery29.com/en-us/2017/02/140680/south-dakota-bill-pregnant-employees [hereinafter Brabaw].

217. *See* 42 U.S.C. § 2000e(k) (2017) (explaining the purpose of the PDA). *See also* H.B. 1120, 92nd Sess. Legis. Assemb. (S.D. 2017) (explaining the purpose of the proposed bill).

218. Brabaw, *supra* note 216.

219. *Id.*

220. Nat'l Partnership for Women & Families, *supra* note 114.

221. *See supra* note 195 (listing the states where pregnancy accommodation laws have been passed).

222. H.B. 1245, 94th Sess. Legis. Assemb. (S.D. 2019).

223. *See id.* (attempting to create a law that would require mothers to breastfeed in a "discreet or modest manner").

accommodation law, and it should not attempt to restrict breastfeeding mothers from doing what is necessary and natural by requiring them to breastfeed in a "modest" manner.

IV. CONCLUSION

In passing the Pregnancy Discrimination Act, Congress intended to prohibit discrimination against women in the workplace. The PDA was intended to give women the right to be financially and legally protected before, during, and after their pregnancies. But the PDA partly failed in this goal because it only prohibited discrimination and did not require employers to provide accommodations. While the PDA has helped many women across the nation, there are still many pregnant women and mothers who are discriminated against or mistreated by their employers.

Pregnancy for many women in the workforce can cause anxiety, economic distress, and even physical harm. It has been four decades since the Pregnancy Discrimination Act passed, yet pregnancy discrimination remains distressingly common. Women should not fear their pregnancies because they are afraid of repercussions at work. We live in a world in which pregnancy is a normal condition of employment, but not all employers have caught up to this. It is time that pregnant workers receive the protection and accommodations that they deserve.

The best way to achieve this goal is to implement pregnancy accommodation laws in every state. The reasoning behind implementing pregnancy accommodation laws is clear—women deserve more protection in the work force. Employers need to be more educated on their obligations, they need to implement better workplace policies, and every state in this country needs to enact a pregnancy accommodation law. Hopefully, with a rise of state pregnancy accommodation laws a federal counterpart will follow. Pregnancy accommodation laws will provide more protection for pregnant women in the work force, just like the Pregnancy Discrimination Act did forty years ago.