

Issue and Claim Spotting Checklist for Plaintiffs' Counsel

Pregnancy: Failure to Accommodate

This checklist discusses some of the most common scenarios potential plaintiffs bring to plaintiffs' employment lawyers. For each, possible claims are presented, along with suggestions of factual support necessary for each claim. Plaintiffs' lawyers are encouraged to contact the Attorney Network at the Center for WorkLife Law to discuss potential claims or other litigation issues involving pregnancy accommodation cases. Visit Pregnant@Work (pregnantatwork.org) for additional resources on pregnancy accommodation law.

Note: This document is not legal advice. Please contact a lawyer directly if you need legal advice.

1. Allegation: My client was pregnant and had a lifting restriction. Her employer said it could not accommodate her and terminated her instead.

Statute	Claim	Key Facts to Investigate	Notes
ADA	failure to accommodate, if the employee's lifting restriction was due to an impairment that constitutes a disability.	whether the employee had a disability (nature and severity of impairment; extent to which the impairment affected the employee); whether and how the employee requested an accommodation; whether, and to what extent, the employer engaged in an interactive process to determine if a reasonable accommodation existed that would allow the employee to continue to work; and whether in fact reasonable accommodations existed	Note the broadened interpretation of "disability" after the 2008 amendments; many pregnancy-related conditions now meet the definition of "disability."

PDA	failure to treat a pregnant employee the same as nonpregnant employees who are similar in their ability or inability to work; claim could arise with respect to the failure to accommodate and/or the termination, if others are accommodated and/or are permitted to continue to work even if they temporarily cannot do part of their jobs	Whether employer has policy or practice of providing light duty or other accommodations to nonpregnant employees; whether nonpregnant employees who had lifting restrictions were accommodated (reason for lifting restriction does not matter); whether nonpregnant employees who could not do part of their jobs on a temporary basis were permitted to continue to work; reason why the employer is not accommodating the pregnant employee (if the employer has a strong, legitimate reason not based on cost or convenience, need evidence of burden on pregnant employee of nonaccommodation and burden on employer of accommodation); evidence of the number of non-pregnant women who were accommodated with light duty and the number of pregnant women who were not	This is based on the second clause of the PDA (pregnant workers are to be treated the same as other employees who are similar in their ability or inability to work). Note that after <i>Young v. UPS</i> , 1) employers are required to treat pregnant women the same as nonpregnant women unless they have a strong, legitimate reason for the different treatment that outweighs the burden of nonaccommodation on the pregnant employee; and 2) the nonpregnant employees do not have to be similar to the pregnant employee in all respects. Plaintiffs making this claim will use the test established in <i>Young v. UPS</i> : plaintiff was pregnant, she requested an accommodation, her request was denied, and others who were similar in their ability or inability to work were accommodated. The employer then has the opportunity to show that it had a legitimate, non-discriminatory reason – other than cost or convenience - for refusing to accommodate the plaintiff. If it does so, the plaintiff has the opportunity to overcome the stated reason with evidence that the burden that non-accommodation placed on the pregnant employee is significant and the burden outweighs the justification.
PDA	Pregnancy discrimination, alleging employer terminated employee because of her pregnancy	comments showing that termination was due to pregnancy, such as the employer did not want a pregnant employee working for him/her, pregnant employees are absent too much, etc.; pattern of terminating other pregnant employees; abusive treatment of only the pregnant employee; application of work rules more harshly to pregnant	This is based on the first clause of the PDA, which says that discrimination based on pregnancy is discrimination based on sex. All methods for proving Title VII discrimination are available, including direct evidence, stereotyping, harassment, and circumstantial evidence (e.g., disparate treatment, proof that employer's stated reason for action did not actually motivate the action). Claims can also be

		employee; pregnant employee disciplined for things that nonpregnant employees do but are not disciplined for, particularly if it appears that the employer is trying to create grounds for termination; evidence that similarly situated nonpregnant employees were accommodated	made under analogous state anti-discrimination laws.
FMLA	Interference based on failure to notify employee of her right to take leave if she is unable to perform her job	Employee's serious health condition (almost all prenatal conditions will qualify); employer's knowledge of her serious health condition; employer's failure to advise employee of her right to leave	Assumes that employer is covered by the FMLA and that the employee is eligible for FMLA leave. Employee does not have to request leave if the employer knows of her need for leave.
State and local pregnancy accommodation laws	Failure to accommodate	Evidence will vary with terms of particular statute, but commonly: pregnant employee's health care provider imposed a limitation; employee asked for an accommodation due to the limitation; the accommodated requested was reasonable; the employer did not provide the accommodation. In some states, if pregnant employee requests a transfer, she will need evidence that the employer has a policy or practice of transferring nonpregnant employees if they so request.	
	Wrongful discharge, if employer has too few employees to be covered by the ADA or PDA	Evidence that the state has a public policy preventing discrimination against pregnant employees; evidence that pregnant employee was treated differently from nonpregnant employees	Only a handful of states allow wrongful discharge claims to be brought against an employer that is too small to be covered by state or federal anti-discrimination law.

2. Allegation: My client had very bad morning sickness and was out of work for four days and late on three other days. Her supervisor terminated her for violating the attendance policy.

Statute	Claim	Key Facts to Investigate	Notes
FMLA	Interference based on failure to notify employee that her absence was protected by the FMLA	Employee’s FMLA eligibility; employer’s knowledge that she had bad morning sickness; employer’s failure to notify her of her right to leave	Assumes that employer is covered by the FMLA and that the employee is eligible for FMLA leave. Employee does not have to request leave if the employer knows of her need for leave. FMLA provides that absences for prenatal conditions, including morning sickness, are protected by the statute.
ADA	Failure to accommodate, if morning sickness was severe enough to be a disability	Nature of morning sickness (duration, symptoms, effect on employee) and medical treatment for it (medications, hospitalization); whether and how the employee requested an accommodation (note that leave can be a reasonable accommodation under the ADA; other reasonable accommodations could include changing an employee’s work hours so she arrives later, letting her work from home, or letting her have frequent breaks to eat or rest); whether, and to what extent, the employer engaged in an interactive process to determine if a reasonable accommodation existed that would allow the employee to continue to work; and whether in fact reasonable accommodations existed	Severe morning sickness (also called hyperemesis) can last for days or weeks and lead to dehydration and malnutrition. It can require medication and hospitalization. Such morning sickness is an impairment and could limit an employee more than the general population in her major bodily functions (e.g., gastrointestinal) and also in her major life activities (e.g., eating, working, concentrating). It would therefore meet the definition of a disability. Morning sickness that was milder, lasting only a few hours a day or a few days in total, and not requiring medical treatment, likely would not limit the employee with respect to the general population and would not be considered a disability. It is important to plead sufficient facts in the complaint about the nature and severity of the morning sickness and its effects.

PDA	Pregnancy discrimination, if others who were absent for similar amounts of time for a medical reason were not terminated	Whether the employer has allowed nonpregnant employees to be absent from work for several days for a temporary medical condition, such as the flu or recovery from a car accident, and has not terminated them; whether the policy has been changed or amended, and if so, when and why (to ensure it was not changed to affect only the employee)	This is based on the second clause of the PDA (pregnant workers are to be treated the same as other employees who are similar in their ability or inability to work). Note that after <i>Young v. UPS</i> , 1) employers are required to treat pregnant women the same as nonpregnant women unless they have a strong, legitimate reason for the different treatment that outweighs the burden of nonaccommodation on the pregnant employee; and 2) the nonpregnant employees do not have to be similar to the pregnant employee in all respects.
PDA	Pregnancy discrimination, if evidence exists that the termination was because of pregnancy	comments showing that termination was due to pregnancy, such as the employer did not want a pregnant employee working for him/her, pregnant employees are absent too much, etc.; pattern of terminating other pregnant employees; abusive treatment of only the pregnant employee; application of work rules more harshly to pregnant employee; pregnant employee disciplined for things that nonpregnant employees do but are not disciplined for, particularly if it appears that the employer is trying to create grounds for termination; evidence that similarly situated nonpregnant employees were allowed to be absent the same amount of time without penalty; whether the terms of the attendance policy include progressive discipline or other procedures, and whether the employer followed the terms of the policy	This is based on the first clause of the PDA, which says that discrimination based on pregnancy is discrimination based on sex. All methods for proving Title VII discrimination are available, including direct evidence, stereotyping, harassment, and circumstantial evidence (e.g., disparate treatment, proof that employer's stated reason for action did not actually motivate the action). Claims can also be made under analogous state anti-discrimination laws.
State and local pregnancy	Failure to accommodate	Evidence will vary with terms of particular statute, but commonly: pregnant employee's	Note that granting leave is not discretionary under most state pregnancy accommodation

accommodation laws		health care provider recommended she stay home from work; employee notified her employer of the recommendation; and the employer did not provide the necessary leave.	laws; if an employee requests it, she has to be given leave unless it would create an undue hardship for the employer. Additionally, under at least one local law, the request for leave can come from the employee alone and advice of her health care provider is not needed.
	Wrongful discharge, if employer has too few employees to be covered by the ADA or PDA	Evidence that the state has a public policy preventing discrimination against pregnant employees; evidence that pregnant employee was treated differently from nonpregnant employees	Only a handful of states allow wrongful discharge claims to be brought against an employer that is too small to be covered by state or federal anti-discrimination law.

3. Allegation: My client’s doctor put her on bed rest. She said my client could work while lying down, but her supervisor refused to let her work from home. She used up all of her FMLA leave before her baby was born, and she couldn’t return to work so she was terminated.

Statute	Claim	Key Facts to Investigate	Notes
ADA	Failure to accommodate, if the employee had a disability, based on: 1) the refusal to permit telework (if a reasonable accommodation); 2) the termination rather than providing additional leave as a reasonable accommodation; and/or 3) failure to engage in the interactive process.	Employee’s medical condition that led to the order for bed rest (nature and severity of impairment; extent to which the impairment affected the employee); whether and how the employee requested an accommodation; whether, and to what extent, the employer engaged in an interactive process to determine if a reasonable accommodation existed that would allow the employee to continue to work; whether in fact telework would have been reasonable or other reasonable accommodations existed; when	Because the purpose of accommodation under the ADA is to permit the employee to continue to work, leave should be an accommodation of last resort, used only if no other accommodation would be effective. If an employee has a disability that prevents her from returning to work at the expiration of FMLA leave, additional leave may be a reasonable accommodation. To be considered reasonable, leave cannot be indefinite or open-ended. An employee’s health care provider needs to be able to estimate when the employee will be able

		the employee would be able to return to work; whether extended leave would have been a reasonable accommodation	to return to work, and although courts have not set general guidelines for what is a reasonable amount of time, several have held that a few weeks, a few months, and even a year are reasonable. If the estimate turns out to be incorrect, that does not necessarily make leave unreasonable.
FMLA	Interference based on requiring employee to take FMLA leave when an accommodation was available that would have permitted her to continue to work, which interfered with her ability to take FMLA leave when she wanted it for birth and bonding	Whether a reasonable accommodation existed that would have permitted the employee to continue to work; evidence of the employer's decision to place the employee on leave and the employee's objection to being placed on leave; evidence of the employer's decision to terminate the employee	In most circuits, there may be an issue of ripeness of the claim. Some courts have held that FMLA interference claims for involuntary leave cannot be brought until the employee tries to use FMLA leave in the future and is told that she has exhausted it. Note that one of the courts finding an FMLA claim not to be ripe suggested that bringing a "regarded as" claim under the ADA (as discussed in the second row of allegation #4, below) would have been the plaintiff's best avenue for redress. A pregnancy discrimination claim should be similarly availing.
PDA	Disparate treatment, if non-pregnant employees have been allowed to telework and the employer does not have a strong, legitimate reason for not allowing employee to telework	Whether non-pregnant employees have been allowed to telework and, if so, the extent to which their positions, duties, and ability to work were similar to the employee's; evidence of any comments made by the decision maker that indicated discriminatory intent or that the employee's pregnancy was a factor in the decision	Plaintiffs making this claim must establish a prima facie case as announced in <i>Young v. UPS</i> : plaintiff was pregnant, she requested an accommodation, her request was denied, and others who were similar in their ability or inability to work were accommodated. The employer then has the opportunity to show that it had a legitimate, non-discriminatory reason – other than cost or convenience - for refusing to accommodate the plaintiff. If it does so, the plaintiff has the opportunity to overcome the stated reason with evidence that the burden that non-accommodation placed on the pregnant employee is significant and the burden outweighs the justification. Additional pregnancy discrimination claims may

			exist, such as disparate treatment if non-pregnant employees have been given additional leave after the expiration of FMLA leave and have not been terminated.
State and local pregnancy accommodation laws	Failure to accommodate	Evidence will vary with terms of particular statute, but commonly: pregnant employee's health care provider recommended she be on bed rest; employee notified her employer of the recommendation; and the employer did not provide either an accommodation that would allow her to continue to work (telework or something else effective) or any additional leave after the expiration of her FMLA leave for the period when she still could not work.	Note that granting leave is not discretionary under most state pregnancy accommodation laws; if an employee requests it, she has to be given leave unless it would create an undue hardship for the employer. Additionally, under at least one local law, the request for leave can come from the employee alone and advice of her health care provider is not needed.

4. Allegation: My client was in the hospital for a week because of her high risk pregnancy, and her employer terminated her. She was not covered by the FMLA.

Statute	Claim	Key Facts to Investigate	Notes
ADA	Failure to accommodate, based on the employer's failure to provide leave as a reasonable accommodation (if leave would have been reasonable and not an undue hardship)	Employee's medical condition that led to the hospitalization (nature and severity of impairment; extent to which the impairment affected the employee); when the employee would be able to return to work; whether and how the employee requested an accommodation; whether, and to what extent, the employer engaged in an interactive process to determine if leave would be a reasonable accommodation and	To be considered a reasonable accommodation, leave cannot be indefinite or open-ended. An employee's health care provider needs to be able to estimate when the employee will be able to return to work, and although courts have not set general guidelines for what is a reasonable amount of time, several have held that a few weeks, a few months, and even a year are reasonable. If the estimate turns out to be incorrect, that does not necessarily make leave unreasonable.

		whether another accommodation existed that would have allowed the employee to continue to work	
ADA	“Regarded as” having a disability, if employee was treated differently from other similarly situated employees who do not have disabilities and who were allowed to be out of work for a week without being terminated	Evidence of the employer’s perception of the employee as having a disability, such as treating her differently from employees who do not have disabling conditions or making comments about the employee’s availability or ability to work; whether employees who do not have disabilities were allowed to take a week off from work without losing their jobs; evidence of the length of time the disability was anticipated to last and the severity of the disability	The EEOC recommends that all ADA discrimination claims that do not involve claims for accommodation be brought as “regarded as” claims, which do not require the plaintiff to prove that she had a disability but only that the employer regarded her as having one. Note also that for claims brought under the “regarded as” clause, impairments that are both transitory and minor are not considered disabilities. A condition such as a high risk pregnancy may be transitory, but it is unlikely to be deemed to be minor, and thus a “regarded as” claim would most likely be viable.
PDA	Disparate treatment, if non-pregnant employees who were absent for a comparable period of time were not terminated	Evidence that shows a nexus between the absence and the termination, including comments (about absence, availability, ability to work, pregnancy or motherhood), timing, and how similarly situated non-pregnant employees have been treated (for example, if non-pregnant employees have been allowed to take a week’s vacation or have been allowed to be out sick for a week and haven’t been terminated)	Note that this claim would be made under the first clause of the PDA, that the employee was treated differently because she was pregnant. Plaintiffs in this situation may be able to show direct evidence, such as an employer saying that she was terminated because she had a high risk pregnancy. Plaintiffs who do not have direct evidence will most likely use the McDonnell-Douglas burden shifting approach.
PDA	Failure to accommodate, if the employer has accommodated non-pregnant employees who were sick or hospitalized for a comparable period of time, and the employer does not	Evidence that employer knew employee was absent because she was hospitalized, or that employee requested leave while she was in the hospital; whether non-pregnant employees have been given comparable periods of leave for a temporary medical	Note that this claim would be made under the second clause of the PDA, that pregnant employees have to be treated the same as other employees who are similar in their ability or inability to work. Plaintiffs making this claim will use the test

	have a strong, legitimate reason for refusing to accommodate employee	reason and, if so, the extent to which their ability to work were similar to the employee's; evidence about the employer's reason for not providing a week of leave to the employee; evidence of the significance of the burden on employee caused by non-accommodation (termination); evidence of the number of non-pregnant women who were accommodated and the number of pregnant women who were not	established in Young v. UPS: plaintiff was pregnant, she requested an accommodation, her request was denied, and others who were similar in their ability or inability to work were accommodated. The employer then has the opportunity to show that it had a legitimate, non-discriminatory reason – other than cost or convenience - for refusing to accommodate the plaintiff. If it does so, the plaintiff has the opportunity to overcome the stated reason with evidence that the burden that non-accommodation placed on the pregnant employee is significant and the burden outweighs the justification.
State and local pregnancy accommodation laws	Failure to accommodate, based on failure to provide leave	Evidence will vary with terms of particular statute, but commonly: pregnant employee's health care provider hospitalized her; employee notified her employer of the hospitalization; and the employer did not provide an accommodation that would allow her to continue to work (telework or something else effective) or the necessary leave after the expiration of her FMLA leave when she still could not work.	Note that granting leave is not discretionary under most state pregnancy accommodation laws; if an employee requests it, she has to be given leave unless it would create an undue hardship for the employer. Additionally, under at least one local law, the request for leave can come from the employee alone and advice of her health care provider is not needed.

5. Allegation: My client asked her employer to transfer her out of a work area that was hot and filled with chemical fumes because it was making her morning sickness worse and she was afraid it could harm her baby's health. He refused.

Statute	Claim	Key Facts to Investigate	Notes
ADA	Failure to accommodate (if	Employee's medical condition that led to the	Transfer is considered a reasonable

	<p>employee’s morning sickness is severe enough to be considered a disability), based on failure to transfer and failure to engage in an interactive process to determine if a reasonable accommodation exists that will not cause an undue hardship</p>	<p>transfer request (nature and severity of morning sickness; extent to which the morning sickness affected the employee); whether and how the employee requested an accommodation; whether, and to what extent, the employer engaged in an interactive process to determine if leave would be a reasonable accommodation and whether another accommodation existed that would have allowed the employee to continue to work; whether a position is open to which the employee could be transferred and whether the employee is qualified for the position; evidence regarding the employer’s reason for denying the transfer, and its legitimacy</p>	<p>accommodation under the ADA, although it has been called an accommodation “of last resort,” to be used only if other accommodations will not allow the employee to continue to work. The ADA does not require employers to create new positions or displace other employees in order to transfer an employee with a disability. Transfers are required only if a position is open and the employee is qualified for it.</p>
PDA	<p>Failure to accommodate, if the employer has accommodated non-pregnant employees who requested transfers and the employer does not have a strong, legitimate reason for refusing to accommodate employee</p>	<p>Whether non-pregnant employees have been transferred and, if so, the extent to which their ability to work were similar to the employee’s; evidence about the employer’s reason for not transferring employee; evidence of significance of burden on employee caused by non-accommodation; evidence that a suitable position was open and that employee was qualified for it; evidence of the number of non-pregnant women who were accommodated and the number of pregnant women who were not</p>	<p>Plaintiffs making this claim will use the test established in Young v. UPS: plaintiff was pregnant, she requested an accommodation, her request was denied, and others who were similar in their ability or inability to work were accommodated. The employer then has the opportunity to show that it had a legitimate, non-discriminatory reason – other than cost or convenience - for refusing to accommodate the plaintiff. If it does so, the plaintiff has the opportunity to overcome the stated reason with evidence that the burden that non-accommodation placed on the pregnant employee is significant and the burden outweighs the justification.</p> <p>The plaintiff may also have a disparate treatment claim if similarly-situated non-pregnant employees were allowed to transfer, and she has</p>

			<p>evidence that shows a nexus between her pregnancy and the refusal to transfer her.</p> <p>If the refusal to transfer is part of a series of events that appear designed to force the employee to quit, she may also have a claim for pregnancy harassment (hostile work environment).</p>
State pregnancy accommodation laws		Whether the employer has a policy or practice of transferring non-pregnant employees who request it; whether and how the employee requested an accommodation; whether a position is open and whether the employee is qualified for the position; evidence regarding the employer's reason for denying the transfer, and its legitimacy	Most state and local pregnancy accommodation laws require transfers if employers have a policy or practice of transferring non-pregnant employees, and some require it even in the absence of such a policy or practice. Note that laws typically do not require a transfer if the position is already filled, or if the employee does not have the necessary qualifications. Most laws require restoration to the employee's original position or its equivalent after birth.