



## **The Do's and Don'ts of Litigating Pregnancy and Breastfeeding Accommodation Claims After *Young v. UPS***

### **Presenter Bios**

#### **Galen Sherwin**

Galen Sherwin is a Senior Staff Attorney at the Women's Rights Project of the ACLU, which was founded by Ruth Bader Ginsburg in 1972. She focuses on gender equality in education, and has litigated and conducted advocacy around issues related to sex stereotypes, single-sex education, the rights of pregnant and parenting students, and athletics. She also focuses on pregnancy discrimination and the rights of breastfeeding women in employment.

Sherwin began her career as a legislative aide to a New York State Senator, and then served as President of the New York City Chapter of the National Organization for Women and served on the NOW national board of directors. During law school, she worked at Sanctuary for Families/Center for Battered Women's Legal Services and at the Center for Reproductive Rights. Upon law school graduation, Sherwin clerked for the Honorable Gerard E. Lynch, who was then in the Southern District of New York, and then joined the Center for Reproductive Rights as a Blackmun Fellow, where she focused on protecting minors' rights to reproductive health care and abortion. She went on to join the New York Civil Liberties Union as a Staff Attorney in the Reproductive Rights Project, where she later became the project Director. She joined the ACLU Women's Rights Project in 2009.

Sherwin is a 2003 graduate of Columbia Law School, where she was a Stone Scholar and recipient of the Rosenman Prize for academic excellence in public law, and a 1994 graduate of Yale University, where she was awarded the Steere Prize in Women's Studies.

#### **Gillian Thomas**

Gillian Thomas joined the Women's Rights Project in 2015 and specializes in equal employment opportunity. She previously was a Senior Trial Attorney with the U.S. Equal Employment Opportunity Commission's New York District Office and a Senior Staff Attorney with Legal Momentum (formerly NOW Legal Defense and Education Fund), where she specialized in litigating employment discrimination cases on behalf of women in male-dominated jobs like construction and law enforcement. She also has worked in private practice in New York and Philadelphia firms.

Thomas is the author of *Because of Sex: One Law, Ten Cases, and Fifty Years That Changed American Women's Lives at Work* (St. Martin's Press 2016). Her work has appeared in *The New York Times*, *The Los Angeles Times*, *The Atlantic*, *Slate*, and *The Yale Journal of Law and Feminism*, among other publications. She is a graduate of Yale College and the University of Michigan Law School, where she was a contributing editor of the MICHIGAN JOURNAL OF RACE AND LAW.

### **Stephen Bergstein**

Stephen Bergstein is a partner in the employment law firm of Bergstein and Ullrich, LLP. He received his B.A. from SUNY New Paltz in 1989 and graduated from CUNY Law School in 1993, where he served on the editorial board of the school's law journal. He is admitted to practice in the courts of the State of New York, the Southern, Eastern and Northern Districts of New York, the Second and Third Circuit Courts of Appeal and the United States Supreme Court.

Bergstein has represented scores of plaintiffs in civil rights and employment cases in the state and federal Courts, helping to set important case precedents involving the First Amendment, employment discrimination, sexual and racial harassment, housing discrimination, search and seizure, false arrest, municipal liability and whistleblower protection. He has significant trial and appellate experience. Many of his precedents have attained widespread attention, including *Back v. Hastings-on-Hudson*, 365 F.3d 107 (2d Cir. 2004), which established for the first time that caregiver stereotyping in the workplace violates the civil rights laws. In 2015, Martindale-Hubbell issued Bergstein an AV-rating.

Bergstein is an active member of the New York chapter of National Employment Lawyers' Association. In 2009, Bergstein was elected to the board of directors of NELA/NY, and he co-edits that organization's newsletter. In addition, he maintains a law blog which covers civil rights developments in the United States Court of Appeals for the Second Circuit and other courts. He also lectures on civil rights matters and has been quoted in local and national media on civil rights issues. He regularly provides updates on the civil rights decisions of the Second Circuit Court of Appeals at continuing legal education conferences sponsored by NELA/NY and other bar associations, and he has also lectured on workplace stereotyping and mediation. In addition, Bergstein has lectured before human resources professionals, advising them on the basics of employment law in New York and outlining appropriate ways to comply with the legal requirements governing public and private employees. Over the last 10 years, he has lectured on nearly two dozen occasions on civil rights developments. He also regularly publishes commentary in the New York Law Journal on civil rights developments in the Second Circuit. He returns to his law school each year to lecture students on trial skills.

## **Cynthia Thomas Calvert**

Cynthia Thomas Calvert is a senior advisor to the Center for WorkLife Law and the president of Workforce 21C. She is a lawyer, speaker, writer and consultant who, with Joan C. Williams, pioneered the research behind family responsibilities discrimination (FRD).

Calvert co-authored with Williams and Gary Phelan the only legal treatise on FRD: FAMILY RESPONSIBILITIES DISCRIMINATION (Bloomberg BNA Books 2014 & Supp. 2016). Calvert and Williams have also authored SOLVING THE PART-TIME PUZZLE: THE LAW FIRM'S GUIDE TO BALANCED HOURS (NALP 2004) and FLEX SUCCESS: THE LAWYER'S GUIDE TO BALANCED HOURS (WLL Press 2011). She has led several studies, written numerous reports and articles, and been quoted often in the media. She provides trainings and presentations about FRD, gender equality in the workplace, pregnancy discrimination, non-stigmatized flexible work, and inclusion. Her audiences include lawyers, HR professionals, managers and supervisors, employees, trade organizations, policy makers, and anyone else who will listen.

Calvert practices employment law in the District of Columbia and Maryland. She was a partner at the D.C. litigation firm of Miller, Cassidy, Larroca & Lewin, LLP (now part of Baker Botts LLP). and had her own employment law practice in which she counseled businesses on compliance. She is a graduate of the Georgetown University Law Center.

## **Liz Morris**

Liz Morris is the deputy director of the Center for WorkLife Law and an adjunct law professor at UC Hastings College of the Law. Liz advances workplace gender equality and promotes work-life balance for all people. Her advocacy and research focus on expanding protections for pregnant and breastfeeding employees and students, improving employer scheduling practices to increase work-life stability for hourly workers, and addressing employment discrimination against caregivers and women.

Morris's writing has been featured in *Harvard Business Review*, *Slate Magazine*, and *California Labor and Employment Law Review*, among other publications. She speaks regularly at national conferences and has been quoted by media ranging from The Washington Post and Bloomberg News to Elle. She co-teaches Advanced Employment Law, a course that focuses on caregiver discrimination, gender equity, and social change advocacy.

Prior to joining WorkLife Law, Morris practiced employment and labor law at Leonard Carder, where she represented working people in individual and class action lawsuits challenging unlawful employment practices. She received her J.D. from Stanford Law School and is a graduate of Claremont McKenna College.



## **Pregnancy-Related Conditions as Disabilities under the ADA**

Following passage of the Americans with Disabilities Act Amendments Act of 2008 (“ADAAA”),<sup>1</sup> the legal landscape of pregnancy accommodation has changed dramatically.<sup>2</sup> That the ADAAA has expanded coverage for non-pregnant individuals is beyond dispute: the statutory language of the ADAAA has broadened the term “disability” and makes it unequivocally clear that it should “be construed in favor of broad coverage of individuals.”<sup>3</sup> Under the broadened definition, most pregnancy-related conditions are likely to be considered disabilities the employers will have to reasonably accommodate.

The Pregnancy Discrimination Act (PDA) mandates that pregnant workers be treated the same as other workers with a similar ability or inability to work.<sup>4</sup> This mandate means that pregnant women, who often experience diseases identical to those experienced in the general population, are to be afforded the same accommodations. For example, pregnant women frequently get carpal tunnel syndrome, and should receive the same breaks, job modifications, or supportive devices as non-pregnant employees with the syndrome. Otherwise, a nonsensical result occurs: a worker with carpal tunnel syndrome may qualify for ADA accommodation if the syndrome stems from any condition in the world other than pregnancy, but not if it stems from pregnancy.

In addition, pregnant women often experience symptoms similar or identical to those experienced by non-pregnant workers. For example, if a non-pregnant worker with back problems that prohibits him from lifting more than 20 pounds for several months would have a qualifying disability under the ADA, then the same must be true for a pregnant woman suffering from back pain that requires her to request a lifting restriction. The fact that her back pain and attendant lifting restrictions are a result of pregnancy is irrelevant not only under the PDA, but also under the new statutory scheme created by the ADAAA. The analysis of disability now must focus not on threshold issues of coverage, but rather on the merits of an individual’s claim. The cause of an impairment is irrelevant.

A broad range of pregnancy-related conditions may be covered disabilities because the ADAAA’s implementing regulations make clear that the legal definition of disability should be “inclusive” and generous.<sup>5</sup> Congress achieved this goal in two significant ways. First, Congress eliminated the “duration requirement”: no longer must an impairment be more than temporary or episodic in order to qualify as a disability.<sup>6</sup> The EEOC regulations now expressly state that “[t]he

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<sup>1</sup> Americans with Disabilities Act Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008).

<sup>2</sup> See Margaret Hart Edwards & Joan C. Williams, *Recognizing and Preventing Family Responsibilities Discrimination*, FOR THE DEFENSE 24 (August 2012)

<sup>3</sup> 42 USCS § 12102(4)(a)(2013).

<sup>4</sup> 42 U.S.C. § 2000e(k)(2013).

<sup>5</sup> 29 CFR 1630.2.

<sup>6</sup> 42 USCS § 12102(4)(D).

effects of an impairment lasting or expected to last fewer than six months can be substantially limiting.”<sup>7</sup> This means that a condition likely to subside at or before the end of the pregnancy can be considered a disability. Indeed, the EEOC has already recognized that gestational diabetes may be a qualifying disability under the ADA: “Certain impairments resulting from pregnancy (e.g., gestational diabetes), however, may be considered a disability.”<sup>8</sup>

Second, the ADAAA has eased the standards applied to interpretation of “substantially limits” and “major life activity.” The statute clarifies that substantially limits does not mean “prevents or severely restricts” nor should it “be interpreted strictly to create a demanding standard for qualifying as disabled”.<sup>9</sup> Similarly, “major life activities” are no longer limited to “those activities that are of central importance to daily life”.<sup>10</sup> Rather, the ADA provides a non-exhaustive list of activities, including “performing manual tasks . . . eating, sleeping, walking, standing, lifting, bending . . . breathing . . . concentrating, thinking . . . and working.”<sup>11</sup>

To explore the scope of ADA coverage of conditions common to pregnancy, the Center for WorkLife Law (WLL) created the Pregnancy Accommodation Working Group (PAWG), which brings together lawyers and obstetrician/gynecologists from the University of California, San Francisco (including the head of Obstetrics). PAWG has developed a list of pregnancy-related conditions that may qualify as impairments under the ADA. (See Appendix) Gestational diabetes is, of course, included in this list, in addition to other common pregnancy-related conditions including carpal tunnel syndrome, morning sickness and back pain. Each of these impairments causes symptoms that may substantially limit a major life activity and thus may be considered disabilities. The Appendix also identifies other medical conditions that are frequently considered disabilities that are similar or identical to medical conditions commonly incident to pregnancy. This highlights not only that these pregnancy-related conditions may be covered disabilities, but also that these conditions likely would be covered disabilities *if they were not caused by pregnancy*.

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<sup>7</sup> Id.; 29 CFR 1630.2(j)(9)

<sup>8</sup> Questions and Answers on the Final Rule Implementing the ADA Amendments Act of 2008, EEOC, [http://www.eeoc.gov/laws/regulations/ada\\_qa\\_final\\_rule.cfm](http://www.eeoc.gov/laws/regulations/ada_qa_final_rule.cfm) (last visited Nov. 12, 2013); see also Questions and Answers for Small Businesses: The Final Rule Implementing the ADA Amendments Act of 2008, EEOC, [http://www.eeoc.gov/laws/regulations/adaaa\\_qa\\_small\\_business.cfm](http://www.eeoc.gov/laws/regulations/adaaa_qa_small_business.cfm) (last visited Nov. 12, 2013)

<sup>9</sup> Pub. L. No. 110-325, 122 Stat. 3553, § 2(b) (2008).

<sup>10</sup> *Toyota Motor Mfg., Ky. v. Williams*, 534 U.S. 184, 197 (2002).

<sup>11</sup> 42 U.S.C. § 12102(2)(A) (2013); *see also* 29 C.F.R. § 1630.2(i) (2013).

## Appendix: Some Pregnancy Conditions That Commonly Give Rise to the Need for Workplace Accommodations

This Appendix is part of a forthcoming law review article to be published by the Yale Law & Policy Review, entitled *A Sip of Cool Water: Pregnancy Accommodation after the ADA Amendments Act*, currently available at SSRN: <http://ssrn.com/abstract=2155817> or <http://dx.doi.org/10.2139/ssrn.2155817>.

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| Underlying Conditions                                        | Description                                                                                                                                                                                                                                                                                                                                                                                                                   | Other medical conditions that can produce similar symptoms                                                                                                    | Bodily function affected <sup>1</sup> | Reasonable accommodations <sup>2</sup>                                                                                                                                                           |
|--------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Sub-chorionic hematoma, placental abruption, placenta previa | Uterine or vaginal bleeding in pregnancy is a symptom usually caused by problems with placental attachment that can result in several pregnancy conditions that put women at risk for preterm delivery or miscarriage.                                                                                                                                                                                                        | Menstrual dysfunction (endometrial hyperplasia, anovulation), uterine fibroids, von Willebrand disease, liver, kidney or thyroid disease, cancer <sup>3</sup> | Reproductive                          | Time off for medical appointments; bedrest; move workstation close to restrooms.                                                                                                                 |
| Lumbar lordosis                                              | Pregnant women experience back pain through a variety of mechanisms, including the sway-backed posture (lumbar lordosis) caused by a growing belly and the hormones of pregnancy loosening up the joints, muscle spasms and "Braxton-Hicks" contractions. Pregnancy may also exacerbate pre-existing back problems. Back pain, if severe, can interfere with major life activities (standing, reaching, lifting, or bending). | Back injury, degenerative joint disease, scoliosis, arthritis muscular dystrophy and kidney infection or stones                                               | Musculoskeletal                       | Use of a heating pad, sitting instead of standing, lifting assistance or limitations, using assistive equipment to lift, and modification of the duties of the job, such as temporary light duty |

<sup>1</sup> Both the ADA and its implementing regulations provide a list of some major bodily functions the operation of which is a major life activity. 42 U.S.C. § 12102(2)(B)(2013); 29 C.F.R. § 1630.2(h)(i)(2013).

<sup>2</sup> This section merely provides samples of possible accommodations; the appropriate accommodation in each case will vary depending upon the woman's condition and her job. Another excellent source of suggested accommodations is the Job Accommodation Network, [www.askjan.org](http://www.askjan.org).

<sup>3</sup> *Blood Disorders in Women, Heavy Menstrual Bleeding*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/ncbddd/blooddisorders/women/menorrhagia.html> (last visited June 17, 2013).

| <b>Underlying Conditions</b>                     | <b>Description</b>                                                                                                                                                                                                                                                                                                                         | <b>Other medical conditions that can produce similar symptoms</b>                                                                           | <b>Bodily function affected<sup>1</sup></b> | <b>Reasonable accommodations<sup>2</sup></b>                                                                      |
|--------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------|-------------------------------------------------------------------------------------------------------------------|
| Deep vein thrombosis, pulmonary embolism, stroke | Pregnancy increases women's risk for blood clots, which can occur in the veins of the legs (deep vein thrombosis), lungs (pulmonary embolism) or brain (stroke).                                                                                                                                                                           | Immobility, trauma including broken bones, severe muscle injury, paralysis, hormone replacement therapy, heart disease, cancer <sup>4</sup> | Cardiovascular                              | Modification of work station, breaks for exercise.                                                                |
| Carpal Tunnel Syndrome                           | Tingling, pain, numbness and joint stiffness in hands and wrists is common in late pregnancy due to changes in fluid composition and increased amount of pressure on median nerve in wrist. <sup>5</sup> Carpal tunnel syndrome is an impairment that is much more prevalent in pregnant women than the population generally. <sup>6</sup> | Also common in non-pregnant people who do repetitive small motions with hands/wrists (i.e. typing) or after forearm/wrist injury.           | Musculoskeletal or Neurological             | Occasional breaks from manual tasks or typing and specialized programs that allow for dictation instead of typing |

<sup>4</sup> *Deep Vein Thrombosis (DVT)/Pulmonary Embolism (PE)*, CENTERS FOR DISEASE CONTROL AND PREVENTION, <http://www.cdc.gov/ncbddd/dvt/facts.html> (last visited June 17, 2013).

<sup>5</sup> One court interpreting the ADA has already held that an employee's carpal tunnel syndrome, which impaired his ability to type for more than an hour, combined with several emotional disorders, including anxiety related to his slow typing, created a question of material fact as to his actual disability. *Dentice v. Farmers Ins. Exch.*, No. 10-113, 2012 U.S. Dist. LEXIS 89609, at \*32-34 (E.D. Wis. June 28, 2012).

<sup>6</sup> While up to 62% of pregnant women develop carpal tunnel syndrome due to swelling and fluid retention caused by pregnancy, only 3% of the general population suffers from the condition. *See* Robert H. Ablove, MD & Tova S. Ablove, MD, *Prevalence of Carpal Tunnel Syndrome in Pregnant Women*, WISC. MED. J. 2009, at 194; I Am Pregnant: The Site for Pregnancy and Babies, *Carpal Tunnel Syndrome*, available at <http://www.i-am-pregnant.com/encyclopedia/C/Carpal-Tunnel-Syndrome/> (last visited Dec. 4, 2012); Free MD, *Is Your Hand Numbness Serious?: Carpal Tunnel Syndrome*, available at <http://www.freemd.com/carpal-tunnel-syndrome/incidence.htm> (last updated Dec. 7, 2010).

| <b>Underlying Conditions</b> | <b>Description</b>                                                                                                                                                                                                                                                                                                                                                                           | <b>Other medical conditions that can produce similar symptoms</b>                                                                                                                                  | <b>Bodily function affected<sup>1</sup></b> | <b>Reasonable accommodations<sup>2</sup></b>                                                                                                                                                                                 |
|------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Chronic migraines            | A condition sometimes exacerbated by pregnancy that can be a disability when the headaches reach substantially limiting levels. Migraines can limit major life activities such as seeing, hearing, eating, sleeping, walking, learning, reading, concentrating, thinking, communicating, and working. <sup>7</sup>                                                                           | Menstrual or idiopathic migraines, other forms of chronic headache including post-concussion syndrome, tension-type headache <sup>8</sup> , acute headaches including acute glaucoma, encephalitis | Neurological                                | Changing lighting in the work area, limiting exposure to noise and fragrances, scheduling changes such as flexible schedules or telework (which may include a transfer to a position that provides this kind of flexibility) |
| Dependent edema              | Swelling, especially of feet/ankles, is more common as pregnancy progresses, and becomes worse with standing. This is caused by an increase in the overall volume of fluid in the body, leading to a decrease in protein concentration or oncotic pressure within the circulatory system. This leads to fluid extravasation from blood vessels into the extravascular space.                 | Kidney disease/failure, heart failure, cirrhosis of the liver                                                                                                                                      | Cardiovascular                              | Provide employee with stool or chair to sit on while working; more frequent rest breaks; modification of footwear requirements.                                                                                              |
| Dyspnea                      | Shortness of breath is common due to the partially compensated respiratory alkalosis of pregnancy. Pregnant woman breath more deeply to allow gas exchange for herself, the placenta, and the fetus. Breathing more deeply (increasing “minute ventilation”) increases the pH of her blood (makes it a little more basic). Her kidneys partially compensate by putting more bicarbonate into | Hyperventilation syndrome/panic attacks, asthma, emphysema, chronic bronchitis, cardiovascular disease, or pulmonary embolism                                                                      | Respiratory                                 | Provide employee with stool or chair to sit on while working; more frequent rest breaks.                                                                                                                                     |

<sup>7</sup> Lee v. City of Columbus, 659 F. Supp. 2d 899 (S.D. Ohio August 20, 2009).

<sup>8</sup> Benjamin Gilmore & Magdalena Michael, *Treatment of Acute Migraine Headache*, 83 AM. FAMILY PHYSICIAN 271, 273 tbl. 2 (2011), available at <http://www.aafp.org/afp/2011/0201/p271.pdf>.

| <b>Underlying Conditions</b>   | <b>Description</b>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 | <b>Other medical conditions that can produce similar symptoms</b> | <b>Bodily function affected<sup>1</sup></b> | <b>Reasonable accommodations<sup>2</sup></b>                                                                                                       |
|--------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------|---------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------|
|                                | her urine. This physiology is what makes daily life difficult for pregnant women.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |                                                                   |                                             |                                                                                                                                                    |
| Fatigue                        | A feeling of tiredness or exhaustion or a need to rest because of lack of energy or strength.                                                                                                                                                                                                                                                                                                                                                                                                                                                                      | Anemia, congestive heart failure, lyme disease, cancer            | Neurological or Cardiovascular              | Light duty to avoid strenuous activity, flexible or reduced hours, exemption from mandatory overtime                                               |
| Gastroesophageal reflux (GERD) | Mild to severe heartburn is common in pregnancy, caused by hormones loosening muscle that is supposed to hold stomach contents down.                                                                                                                                                                                                                                                                                                                                                                                                                               | Also seen in nonpregnant patients.                                | Digestive                                   | Allowing for breaks for food as needed; providing space for medications to be stored.                                                              |
| Gestational diabetes           | This is a condition in which the placenta interferes with the body's normal metabolism of glucose. Women with gestational diabetes need to monitor their blood glucose two to six times/day, and some may need to take insulin or oral medication to control blood glucose levels. The resulting high blood glucose levels can cause placental dysfunction, increased fetal growth and post-natal metabolic abnormalities. Complications of uncontrolled gestational diabetes include fetal macrosomia, shoulder dystocia and increased need for cesarean section. | Diabetes                                                          | Endocrine                                   | Permission to take more frequent bathroom breaks, to eat small snacks during work hours, a cot for lying down, and modified schedules <sup>9</sup> |
| Hemorrhoids                    | Pregnancy can cause swelling of rectal veins due to hormonal changes, constipation (more common in pregnancy) and increased pelvic girth/pressure. Hemorrhoids can be painful or even bleed.                                                                                                                                                                                                                                                                                                                                                                       | Also common in nonpregnant people.                                | Cardiovascular                              | Allow women to avoid being in a seated position all day, or to use a special cushion.                                                              |

<sup>9</sup> Interview with Rebecca Jackson, MD, Division Director for the Department of Obstetrics, Gynecology and Reproductive Sciences at San Francisco General Hospital (Nov. 14, 2012).

| <b>Underlying Conditions</b>    | <b>Description</b>                                                                                                                                                                                                                                                                                                                                                                                                                | <b>Other medical conditions that can produce similar symptoms</b>                                                                  | <b>Bodily function affected<sup>1</sup></b> | <b>Reasonable accommodations<sup>2</sup></b>                                                                                                         |
|---------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------|
| Hyperemesis gravidarum          | Pregnant women can have nausea and/or vomiting that limits their ability to work in certain settings/certain times of day. Severe nausea and vomiting in pregnancy can result in weight loss, dehydration, and/or electrolyte imbalance. It occurs most commonly in the first trimester but can extend throughout the entire pregnancy and all day long.                                                                          | Chemotherapy for cancer, hepatitis, vestibulitis, a variety of GI disorders (gastroparesis, dyspepsia, inflammatory bowel disease) | Digestive                                   | Permission to take more frequent bathroom breaks, to eat small snacks during work hours, a cot for lying down, and modified schedules. <sup>10</sup> |
| Hypertension, preeclampsia      | Chronic or pregnancy-induced high blood pressure may endanger both the health of the mother and the fetus. Pregnancy outcomes range from poor fetal growth, fetal distress and intrauterine demise. The mother may experience damage to her kidneys, liver, heart and brain (seizure or stroke). Major life activities impacted include performing manual tasks, walking, standing, lifting, bending, and working. <sup>11</sup>  | Hypertension                                                                                                                       | Cardiovascular                              | Provide a stool or chair for employee to sit on while working; limit lifting and bending requirements; work from home while on bedrest, and leave.   |
| Intrauterine Growth Restriction | Condition in which the fetus is not growing appropriately inside the uterus. There are multiple causes for this, including congenital anomalies, infection in pregnancy, placental attachment disorders, multiple gestation and maternal medical conditions. A related condition is low amniotic fluid or oligohydramnios. Complications include fetal distress, need for early delivery and increased need for cesarean section. |                                                                                                                                    | Reproductive                                | Bedrest; time off for medical appointments.                                                                                                          |

<sup>10</sup> Cf. *Roller v. Nat'l. Processing of America, Inc.*, Case No. 2:12-cv-02746-JWL-KGS (D. Kan.) First Amended Complaint (Feb. 20, 2013), at 4 (alleging pregnant woman with morning sickness was offered a larger wastebasket at her desk in lieu of more frequent bathroom breaks).

<sup>11</sup> See 42 U.S.C. §12102(2)(A)-(B) (2013); 29 C.F.R. §1630.2 (i)(1)(i)-(ii) (2013).

| <b>Underlying Conditions</b>                                                                                       | <b>Description</b>                                                                                                                                                                                                                                                                                                                                                                             | <b>Other medical conditions that can produce similar symptoms</b> | <b>Bodily function affected<sup>1</sup></b> | <b>Reasonable accommodations<sup>2</sup></b>                                                                                           |
|--------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------|---------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------|
| Intrauterine fetal growth restriction, oligohydramnios, risk of preterm labor, preeclampsia, gestational diabetes. | Symptoms common to multiple gestation (twins, triplets, quadruplets or more) put women at risk for many pregnancy complications. Women may go into labor or have an indicated early delivery and have an increased risk for cesarean section. Providers may recommend fetal monitoring in the third trimester.                                                                                 | (See sections pertaining to related conditions, <i>infra.</i> )   | Reproductive                                | (See sections pertaining to related conditions, <i>infra.</i> )                                                                        |
| Perinatal depression                                                                                               | Includes both major and minor depressive disorders that occur during pregnancy or after giving birth. Symptoms include inability to sleep, loss of focus, feelings of helplessness, and thoughts of suicide. Depression may substantially limit major life activities (thinking, sleeping, concentrating, caring for oneself, and interacting with others). <sup>12</sup>                      | Depression                                                        | Neurological                                | Time off to attend therapeutic sessions; temporary transfer to a less distracting environment, telecommuting, and leave. <sup>13</sup> |
| Pre-term labor risk                                                                                                | Pregnant women may develop symptoms that put them at risk for pre-term labor and delivery, including contractions, shortened cervix, advanced cervical dilation early in pregnancy, abnormal vaginal bleeding or preterm premature rupture of membranes. In addition to medical management, recommendations for women at risk range from modified or complete bedrest to inpatient management. | (See sections pertaining to related conditions, <i>infra.</i> )   | Reproductive                                | (See sections pertaining to related conditions, <i>infra.</i> )                                                                        |

<sup>12</sup> *Id.*; see also 42 U.S.C. §12102(2)(A)-(B) (2013); 29 C.F.R. §1630.2 (i)(1)(i)-(ii) (2013).

<sup>13</sup> Mayo Clinic, *Post-Partum Depression: Treatment and Drugs*, available at <http://www.mayoclinic.com/health/postpartum-depression/DS00546/DSECTION=treatments-and-drugs> (last visited Dec. 3, 2012). See also Nancy Schimelpfening, *The Americans With Disabilities Act and You*, available at <http://depression.about.com/cs/disability/a/ada.htm> (last visited May 2, 2013); U.S. Dep't. of Justice, *Manual and Procedures for Providing Reasonable Accommodation* (Oct. 2002), available at <http://www.justice.gov/jmd/eeos/ddaccomprocfinal081502.htm> (last visited May 2, 2013); Business Management Daily, *The ADA Requirements for Accommodating Depression and Psychiatric Disabilities*, available at <http://www.businessmanagementdaily.com/4179/the-ada-requirements-for-accommodating-depression-and-psychiatric-disabilities> (last visited May 2, 2013).

| <b>Underlying Conditions</b>                            | <b>Description</b>                                                                                                                                                                                                                                                              | <b>Other medical conditions that can produce similar symptoms</b>                                                                                                                                                                   | <b>Bodily function affected<sup>1</sup></b> | <b>Reasonable accommodations<sup>2</sup></b>                                                |
|---------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------|---------------------------------------------------------------------------------------------|
| Symphyseal separation (i.e. pubic symphysis separation) | Loosening of the joint on the front of the pelvic bone (pubic symphysis) in preparation for childbirth is caused by pregnancy hormones. This condition can result in severe pelvic pain and limited mobility like with some back problems.                                      | Bladder extrophy, injury (pelvic fracture)                                                                                                                                                                                          | Musculoskeletal                             | Limits on lifting requirements; providing a stool or chair to sit on; more frequent breaks. |
| Syncope or near-syncope                                 | Feeling lightheaded, dizzy or fainting is common in pregnancy due to the increase in proportion of blood volume going to the uterus and fetus. Symptoms can be caused by heat, stress or unusual exertion. The patient may also experience palpitations or a racing heart beat. | Cardiac arrhythmias, low blood pressure, seizure disorders, and “neurocardiogenic or vasovagal syncope, also known as ‘the vapors’                                                                                                  | Cardiovascular                              | Providing a stool or chair to sit on; more frequent breaks.                                 |
| Urinary tract or bladder infection                      | Pregnant women have to urinate frequently. Although this is nearly universal in pregnancy, it can also be a symptom of a bladder infection—which is more common in pregnancy. Urinary frequency can result in poor quality sleep as well.                                       | Benign prostatic hypertrophy (causing overactive bladder symptoms in more than 40 percent of men over the age of 60), prostatitis or bladder infections, and diabetes insipidus. Also seen in non-pregnant urinary tract infections | Genitourinary                               | More frequent bathroom breaks; carrying a bottle of water.                                  |
| Varicose veins                                          | Hormonal changes, increased blood flow and increased resistance in the pelvis can cause swelling and back-filling of veins in the legs. This can be painful and worsen as pregnancy advances and is exacerbated by standing or sedentary positions.                             | Varicose veins are also common in non-pregnant people. Risk factors include family history, obesity and liver disease.                                                                                                              | Cardiovascular                              | More frequent breaks; ability to sit or stand as needed.                                    |

# Pregnancy Discrimination and Accommodation

LITIGATING FAILURE TO ACCOMMODATE CLAIMS



Visit [Pregnant@Work](http://Pregnant@Work.org), [www.PregnantAtWork.org](http://www.PregnantAtWork.org) for more info.

Attorneys who represent pregnant women today have a variety of employee-protective laws at their disposal. But they aren't straightforward. Plaintiffs' lawyers must master the amendment of the Americans with Disabilities Act, the Supreme Court's Pregnancy Discrimination Act decision in *Young v. UPS*, the EEOC's pregnancy discrimination guidance, and state pregnancy accommodation laws.

The Center for WorkLife Law at the University of California, Hastings College of the Law has developed Pregnant@Work, [www.pregnantatwork.org](http://www.pregnantatwork.org), an online resource center with (free) materials for attorneys representing pregnant women seeking accommodations at work, including:

- Legal overview of all federal, state, and local laws concerning pregnancy accommodation
- Comprehensive audio training for plaintiffs' attorneys
- Case list and analyses of major pregnancy accommodation decisions
- Issue spotting checklist

Attorneys representing employees in pregnancy accommodation or family responsibilities discrimination matters may **seek guidance from the experts at WorkLife Law directly**. Send an email to [info@worklifelaw.org](mailto:info@worklifelaw.org) or call 415-565-4640.



## The Do's and Don'ts of Litigating Pregnancy and Breastfeeding Accommodation Claims After *Young v. UPS*

### Resources

#### Federal Statutes

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

Pregnancy Discrimination Act, 42 U.S.C. §2000e(k)

Americans with Disabilities Act, 42 U.S.C. §12101 *et seq.*

Family and Medical Leave Act of 1993, 29 U.S.C. §§2601–2654

Fair Labor Standard Act, Break Time for Nursing Mothers, FLSA nursing mothers: 29 U.S.C. § 207(r)(1)

#### Agency Guidance

EEOC, Enforcement Guidance on Pregnancy Discrimination and Related Issues

[http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm)

EEOC, Enforcement Guidance on Unlawful Disparate Treatment of Workers with Caregiving Responsibilities, <http://www.eeoc.gov/policy/docs/caregiving.html>

EEOC, [Employer Best Practices for Workers with Caregiving Responsibilities](#)

FMLA Regulations, 29 C.F.R. Part 825 (available at [www.ecfr.gov](http://www.ecfr.gov))

Department of Labor, FMLA Notice of Eligibility and Rights & Responsibilities:

<http://www.dol.gov/whd/forms/WH-381.pdf>

Americans with Disabilities Act Regulations, 29 C.F.R. Part 1630 (available at [www.ecfr.gov](http://www.ecfr.gov))

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### **Websites**

Center for WorkLife Law: [www.worklifelaw.org](http://www.worklifelaw.org)

Pregnant@Work: [www.pregnantatwork.org](http://www.pregnantatwork.org)

ACLU, Women's Rights Project: <https://www.aclu.org/issues/womens-rights>

### **General Information: Pregnancy Accommodation**

EEOC, Facts about Pregnancy Discrimination: <http://www.eeoc.gov/facts/fs-preg.html>

Department of Labor, Employment Protections for Workers Who Are Pregnant or Nursing (map and state-specific information): <http://www.dol.gov/wb/maps/>

A Better Balance, State and Local Laws Protecting Pregnant Workers:  
<http://www.abetterbalance.org/web/ourissues/fairness-for-pregnant-workers/310>

Women's Rights Project, ACLU: Map of states' laws: <https://www.aclu.org/maps/delivering-fairness-ending-discrimination-against-pregnant-women-and-moms-work>

Women's Rights Project, ACLU: Pregnancy and parenting discrimination:  
<https://www.aclu.org/pregnancy-and-parenting-discrimination>

Ask JAN (Job Accommodation Network), Accommodation Ideas for Pregnancy:  
<https://askjan.org/soar/other/preg.html>

National Partnership for Women and Families, Reasonable Accommodations for Pregnant Workers: State and Local Laws: <http://www.nationalpartnership.org/research-library/workplace-fairness/pregnancy-discrimination/reasonable-accommodations-for-pregnant-workers-state-laws.pdf>

FAMILY RESPONSIBILITIES DISCRIMINATION by Cynthia Thomas Calvert, Joan C. Williams, and Gary Phelan (Bloomberg BNA 2014 & Supp. 2016)

SHRM, Pregnancy Can Produce Variety of ADA, FMLA Claims (Oct. 9, 2013),  
<http://www.shrm.org/legalissues/federalresources/pages/pregnancy-ada-fmla.aspx>

Williams, *et al.*, *A Sip of Cool Water: Pregnancy Accommodation After the ADA Amendments Act* (Yale Law & Policy Review Fall 2013), <http://worklifelaw.org/wp-content/uploads/2014/07/A-Sip-of-Cool-Water.pdf>

Widiss, Deborah, *The Interaction of the Pregnancy Discrimination Act and the Americans with Disabilities Act after Young v. UPS* (UC Davis L. vol. 50 2017),  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2948666](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2948666)

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### **State and Local Specific Information and Fact Sheets about pregnancy accommodation**

CA: <http://www.dfeh.ca.gov/res/docs/Publications/NOTICE%20A.pdf> ;

<http://www.dfeh.ca.gov/res/docs/Publications/NOTICE%20B.pdf> ;

<http://www.dfeh.ca.gov/res/docs/Publications/Brochures/2015/DFEH-186.pdf>

DC: <http://www.workforce21c.com/dcs-protecting-pregnant-workers-fairness-act/>

IL: [http://www2.illinois.gov/dhr/Publications/Documents/Pregnancy\\_Posting-Igl-ENG14.pdf](http://www2.illinois.gov/dhr/Publications/Documents/Pregnancy_Posting-Igl-ENG14.pdf)

MD: <http://mccr.maryland.gov/cgi->

[script/csNews/news\\_upload/Publications\\_2edb.Pregnancy%20Disability%20-%20Employment%20%28Poster%20Color%29.pdf](http://mccr.maryland.gov/cgi-script/csNews/news_upload/Publications_2edb.Pregnancy%20Disability%20-%20Employment%20%28Poster%20Color%29.pdf)

MN: [http://www.dli.mn.gov/ls/Pdf/pregnancy\\_nursing.pdf](http://www.dli.mn.gov/ls/Pdf/pregnancy_nursing.pdf)

NJ: [http://www.nj.gov/oag/dcr/downloads/fact\\_preg.pdf](http://www.nj.gov/oag/dcr/downloads/fact_preg.pdf)

New York City: <http://www.abetterbalance.org/web/ourissues/fairnessworkplace/286-nycpwfa> ;

<http://www.legalmomentum.org/sites/default/files/reports/NYC%20PWFA%20Fact%20Sheet%20012814%20FINAL%20%282%29.pdf>

WV: <http://www.wvemploymentlawblog.com/2014/05/the-pregnant-workers-fairness-act-west.html>

### **Breastfeeding Resources**

APA guidelines: <http://pediatrics.aappublications.org/content/129/3/e827>

APHA guidelines: <https://www.apha.org/policies-and-advocacy/public-health-policy-statements/policy-database/2014/07/09/15/26/an-update-to-a-call-to-action-to-support-breastfeeding-a-fundamental-public-health-issue>

Surgeon General's Call to Action: <https://www.ncbi.nlm.nih.gov/books/NBK52682/>

Primary Care Interventions to Support Breastfeeding, US Preventive Services Task Force  
Recommendation Statement

<https://www.uspreventiveservicestaskforce.org/Page/Document/UpdateSummaryFinal/breastfeeding-primary-care-interventions>

U.S. Breastfeeding Committee Coalitions Directory: [www.usbreastfeeding.org/coalitions-directory](http://www.usbreastfeeding.org/coalitions-directory)

U.S. Department of Labor [www.dol.gov/whd/nursingmothers/](http://www.dol.gov/whd/nursingmothers/)

DOL "Request for Information": <http://webapps.dol.gov/FederalRegister/PdfDisplay.aspx?DocId=24540>

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HRSA: The Business Case for Breastfeeding

<http://mchb.hrsa.gov/pregnancyandbeyond/breastfeeding/businessmanagers.pdf>

### **Key Cases**

*Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015)

*Legg v. Ulster*, 2016 U.S. App. LEXIS 7589 (2d Cir. 2016)

*Jackson v. J. R. Simplot Company*, 666 Fed. Appx. 739 (10th Cir. 2016)

*LaSalle v. City of New York*, 2015 U.S. Dist. LEXIS 41163 (S.D.N.Y. 2015)

*Bray v. Town of Wake Forest*, 2015 WL 1534515 (E.D.N.C. 2015)

*Sanchez-Estrada v. MAPFRE Praico Ins.*, 2015 WL 5174982 (D.P.R. 2015)

*Martin v. Winn-Dixie La., Inc.*, 2015 U.S. Dist. LEXIS 127415 (M.D. La. 2015)

*Gonzales v. Marriott Int'l, Inc.*, 142 F. Supp. 3d 961 (C.D. Cal. 2015)

*Hicks v. City of Tuscaloosa*, 2015 WL 6123209 (N.D. Ala. 2015)

*Allen-Brown v. District of Columbia*, 2016 U.S. Dist. LEXIS 42840 (D.D.C. 2016)

*Lawson v. City of Pleasant Grove*, 2016 WL 2338560 (N.D. Ala. 2016)

*Luke v. CPlace Forest Park SNF, LLC*, 2016 U.S. Dist. LEXIS 105295 (M.D. La. 2016)

*Boyne v. Town & Country Pediatrics & Family Med.*, 2017 U.S. Dist. LEXIS 17321 (D. Conn. 2017)

*Anfeldt v. UPS*, 2017 U.S. Dist. LEXIS 30150 (N.D. Ill. 2017)

*Taylor v. C&B Piping, Inc.*, 2017 WL 1047573 (N.D. Ala. 2017)

### Breastfeeding cases

*EEOC v. Houston Funding II, Ltd.*, 717 F.3d 425 (5th Cir. 2013)

*EEOC v. Vamco Sheet Metals, Inc.*, 2014 U.S. Dist. LEXIS 77436, (S.D.N.Y. 2014)

*Falk v. City of Glendale*, 2012 U.S. Dist. LEXIS 87278, (D. Colo. 2012)

*Lico v. TD Bank*, 2015 U.S. Dist. LEXIS 70978 (E.D.N.Y. 2015)

*Brooks v. BPM Senior Living Co.*, 2014 Wash. App. LEXIS 582 (Wash. Ct. App. 2014)

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ADA accommodation cases (pre-*Young*)

*Nayak v. St. Vincent Hosp. & Health Care Ctr.*, 2013 U.S. Dist. LEXIS 3273 (S.D. Ind. Jan. 9, 2013)

*Price v. UTi Integrated Logistics*, 2013 U.S. Dist. LEXIS 142974 (E.D. Mo. Oct. 3, 2013)

*Alexander v. Trilogy*, 2012 U.S. Dist. LEXIS 152079 (S.D. Ohio Oct. 23, 2012)

*EEOC v. Midwest Independent Transmission Systems Operator, Inc.*, 2013 Jury Verdicts LEXIS 7378 (S.D. Ind. July 11, 2013)

*Mayorga v. Alorica*, 2012 U.S. Dist. LEXIS 103766 (S.D. Fla. July 25, 2012)

*Heatherly v. Portillo's Hot Dogs, Inc.*, 2013 U.S. Dist. LEXIS 100965 (N.D. Ill. July 19, 2013)

*Turner v. Eastconn Regional Education Service Center*, 2013 U.S. Dist. LEXIS 169785 (D. Conn. Dec. 2, 2013), *aff'd*, 588 Fed. Appx. 41 (2d Cir. 2014)

*Oliver v. Scranton Materials, Inc.*, 2015 U.S. Dist. LEXIS 27121 (M.D. Pa. Mar. 5, 2015)

Frontier Pilots' EEOC charges available here: <https://www.aclu.org/cases/frontier-airlines-eEOC-complaint>