

# Tackling the Challenges of Accommodating Pregnant Workers Under the Pregnancy Discrimination Act and the Americans with Disabilities Act

For years, many employers have typically responded to requests for pregnancy-related accommodations with the mantra, “Pregnant employees are not entitled to accommodations because pregnancy is not a disability under the ADA.” Then came the ADA Amendments Act of 2008 (ADAAA), which, among other things, made it substantially easier for plaintiffs to prove disabilities covered under the ADA. Although employers and their counsel recognized the game-changing potential of the ADAAA, it was unclear whether the changes required pregnancy accommodations. The Equal Employment Opportunity Commission (EEOC) has answered this question, at least from its view, in the affirmative. In December 2012, the commission issued its Strategic Enforcement Plan for Fiscal Years 2013–2016. As one of its three “emerging or developing” issues, the EEOC identified “accommodating pregnancy-related limitations under the [ADAAA] and the Pregnancy Discrimination Act.”

Knowing that the EEOC is poised to devote substantial time and resources to investigating (and litigating) pregnancy-related failure-to-accommodate claims, this article explores how courts have begun to address the issue in the context of pregnancy-related lifting restrictions and what obligations exist for employers to provide accommodations to pregnant employees under federal law.<sup>1</sup>

## No Automatic Right to Accommodations Under the Pregnancy Discrimination Act

In 1978, Congress passed the Pregnancy Discrimination Act (PDA) in response to the Supreme Court’s decision in *General Electric Co. v. Gilbert*.<sup>2</sup> *Gilbert* held that excluding pregnancy and related conditions from employee sickness and accident benefits plans was not unlawful under Title VII. The PDA amended the definitional section of Title VII, adding pregnancy-related discrimination to its general prohibition on sex discrimination.<sup>3</sup>

The PDA “makes clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions.”<sup>4</sup> For the most part, with the notable exception of accommodations for religious practices, Title VII is not a reasonable accommodation law. According to most courts, employer policies that treat pregnant

women the same as similarly situated, nonpregnant employees with respect to accommodation options do not violate the PDA.<sup>5</sup>

The Fourth Circuit recently endorsed the PDA’s lack of accommodation requirements in *Young v. UPS*.<sup>6</sup> The plaintiff worked as a driver for UPS and was responsible for loading cargo and making deliveries. Under UPS’s policy, all drivers (including the plaintiff) had to be able to lift 70 pounds. Once pregnant, however, the plaintiff was limited to lifting no more than 20 pounds. UPS’s policy permitted light-duty assignments when appropriate under the ADA or when necessary due to an on-the-job injury. In the plaintiff’s case, she met neither standard and was not accommodated under UPS’s pregnancy-neutral policy.

In affirming the district court’s grant of summary judgment to UPS on the plaintiff’s PDA direct discrimination claim, the Fourth Circuit followed the majority approach and held that employers do not violate the PDA when treating pregnant employees the same as nonpregnant employees. The court quoted with approval an oft-cited statement from the Seventh Circuit: “The Pregnancy Discrimination Act does not ... require employers to offer maternity leave or take other steps to make it easier for pregnant women to work. Employers can treat pregnant women as badly as they treat similarly affected but nonpregnant employees. ...”<sup>7</sup> The *Young* case is not fully resolved. In April 2013, the plaintiff filed a petition for *certiorari*, and on October 7, 2013, the U.S. Supreme Court asked the solicitor general for his opinion on the matter.

## Pregnancy Accommodation Under the Original ADA

Under the original ADA, pregnancy in and of itself was simply not a disability.<sup>8</sup> But even under the older, narrower standard, courts recognized that pregnancy-related conditions *could* constitute a disability.<sup>9</sup> These cases, however, were rare and required “unusual circumstances.”<sup>10</sup>

## The ADA Amendments Act of 2008 May Change Everything

Then came the ADAAA, which substantially broadened the scope of a disability. The definition of “disability” remained unchanged and is still defined as “a physical or mental impairment that substantially limits one or more major life activities.”<sup>11</sup> But the ADAAA expanded the covered major life activities to include major bodily functions



Roz Fulgoni-Britton and Joel P. Schroeder are attorneys in Faegre Baker Daniels’ nationwide labor and employment law practice. Roz practices out of FaegreBD’s Indianapolis office, and Joel practices out of FaegreBD’s Minneapolis office. The authors would like to thank Danny Lewallen, a law student at the Indiana University McKinney School of Law, and Matt Brown, an associate in FaegreBD’s Indianapolis office, for their excellent assistance with this article. Fulgoni-Britton can be reached at rozlyn.fulgoni-britton@FaegreBD.com, and Schroeder can be reached at joel.schroeder@FaegreBD.com.



as well as activities such as “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”<sup>12</sup> Moreover, the EEOC’s regulations require that “substantially limits” be “construed broadly in favor of expansive coverage.”<sup>13</sup>

As with most new legislation, courts’ interpretation of the ADAAA will determine how expansive a definition will apply. To date, however, very few courts have had the opportunity to apply the amendments to pregnancy accommodation cases. The ones that have done so have signaled that even relatively minor pregnancy-related limitations could require accommodation under the ADAAA. *Accommodations for Pregnant Employees with Serious Complications Continue Under the ADAAA*

Not surprisingly, in light of the ADA’s amendments, courts have provided ADA protection where pregnancy-related limitations are serious, as they did under the original ADA. For example, in *Alexander v. Trilogy Health Services, LLC*,<sup>14</sup> the plaintiff developed preeclampsia, a potentially life-threatening pregnancy complication. Having been suspended and ultimately discharged because of a few absences caused by high blood pressure, the plaintiff sued her employer alleging, among other things, a failure to accommodate under the ADA. Neither her employer nor the court questioned whether her condition qualified as a disability under the ADA. The employer instead argued that the plaintiff never requested an accommodation. But the court disagreed, finding it “clear that Defendant knew Plaintiff was suffering from a disability” because the employer knew she was pregnant, had preeclampsia, and that her absences were related to high blood pressure. Under these facts, in a rare move, the court granted summary judgment in favor of the plaintiff.

Likewise, in *Mayorga v. Alorica, Inc.*,<sup>15</sup> the court denied the

defendant’s motion to dismiss plaintiff’s disability discrimination claims because the plaintiff “alleged sufficient facts to state a facially plausible claim of discrimination based on an actual disability under the ADA.” The plaintiff’s doctor placed her on bed rest for three weeks because of pregnancy-related conditions: “premature uterine contractions, irritation of the uterus, increased heart rate, severe morning sickness, severe pelvic bone pains, severe back pain, severe lower abdominal pain, extreme headaches, and other pregnancy-related conditions.” After the plaintiff’s three-week absence, the defendant terminated her employment. The court explained that the plaintiff’s complaint alleged that she had significant pregnancy-related complications and that her employer fired her because of these impairments. If true, the court held, this could be a cognizable claim under the ADA, so the court allowed the case to proceed to discovery.

#### *Simple Lifting Restrictions May Entitle Pregnant Employees to Accommodations Under the ADAAA*

Of course, not all pregnancies cause such serious and incapacitating (if only temporary) complications. On the other end of the spectrum are pregnancy-related restrictions that limit the type and duration of work that can be performed. Perhaps the most common example is a relatively minor lifting restriction.

With the addition of “lifting” as a specifically enumerated major life activity under the ADAAA, courts have been willing to find that a lifting restriction qualifies employees generally, whether pregnant or not, as disabled (or at least presents a close enough question to survive summary judgment).<sup>16</sup>

At least one court has specifically addressed a pregnancy-related lifting restriction. In *Heatherly v. Portillo’s Hot Dogs, Inc.*,<sup>17</sup> the Northern District of Illinois suggested that even minor, customary pregnancy restrictions might now invoke the ADA’s accommodation

requirements. The plaintiff, a fast food worker, was directed to work “light duty,” refrain from “heavy lifting” and not work more than six- to eight-hour shifts. After submitting a doctor’s note reflecting these limitations, the plaintiff did not work more than seven-and-a-half hours per day. Plaintiff alleged that her employer failed to accommodate her “light duty” restriction because she had to work outside periodically. Later, her doctor advised her to take a leave from work due to pregnancy-related complications, and after the plaintiff used 12 weeks of Family and Medical Leave and an additional three-week personal leave of absence, her employment was terminated because she could not return to work. This case presented a much closer call than *Alexander* and *Mayorga*. The court found the plaintiff created a triable issue of fact as to whether she was disabled under the ADA because she was limited in the major life activity of lifting, which is one of the ADA’s specific additions to major life activities. Although the plaintiff was entitled to the ADA’s protections as a qualified person with a disability, the employer prevailed on summary judgment because the plaintiff did not give her employer evidence of a restriction preventing her from working outside.

A court finding that a plaintiff with a high-risk pregnancy is disabled under the ADA is not groundbreaking.<sup>18</sup> What makes the *Heatherly* decision noteworthy is its finding that the employee’s lifting limitation created a triable issue of fact as to whether she was disabled. This leaves employers to wonder whether, every time a doctor imposes a lifting limitation on a pregnant employee, her employer must treat her as disabled under the ADA and provide reasonable accommodation—and if so, how far the employer must go in accommodating and for how long.

### What These Cases Tell Employers

The cases addressing this issue signal a likely shift in pregnancy discrimination cases under the ADA. Courts have heeded Congress’s direction that the disability determination standard be less demanding and have acknowledged at least some of the EEOC’s guidance on the subject. Courts are broadly interpreting “substantially limits” and “major life activities,” thereby potentially sweeping any pregnant employee with even minor restrictions under the protective wings of the ADA. It is not unusual for physicians to limit their pregnant patients’ lifting, particularly if the patient’s job is physically demanding, whether or not the woman has experienced pregnancy-related complications. If this emerging trend continues, the EEOC and courts may treat every pregnant employee with a lifting restriction (or other minor ailments) as disabled under the ADA. While this article has focused on lifting restrictions because the ADA added lifting as a major life activity and lifting restrictions are common among pregnant women, the same concerns extend to other potentially pregnancy-related restrictions or requests, such as more frequent restroom breaks, staying off her feet, an office near a restroom, and avoiding strong fragrances or chemicals. Employers must therefore seriously consider reasonable accommodations for pregnant employees who are limited in any respect by a treating physician.

### What Does It All Mean?

Although the PDA does not require employers to provide any accommodations to pregnant employees beyond what they provide to similarly situated colleagues, the ADA does require such accommodations if the pregnant employee has any restriction that substantially limits a major life activity. Amendments to the ADA vastly expanded the pool of individuals with disabilities to include those with conditions

that previously would have been too minor or transitory to rise to the level of disabilities. Although pregnancy itself has never been a disability—and still, standing alone, is not—the limits pregnancy places on an individual may qualify that individual as disabled under the ADA. This may be true even if the pregnant employee is only limited in her ability to lift, meaning that employers risk liability when refusing to talk about accommodations with pregnant employees who are not suffering from any serious complication. Employers might even need to initiate the conversation if they become aware of pregnancy-related limitations.

Employers and their counsel should continue to be vigilant when managing pregnant employees. Although the employee’s medical needs may seem unmanageable, if denied they could blossom into a very large problem for the employer. The EEOC’s targeted focus on the issue, coupled with the developing case law, should serve as a warning to employers: be cautious when addressing limitations of pregnant employees and, to minimize risk, err on the side of caution and explore potential accommodations for pregnancy-related restrictions. ☉

### Endnotes

<sup>1</sup>Accommodation obligations that might be available to pregnant women under state law are not discussed in this article.

<sup>2</sup>*General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

<sup>3</sup>See 42 U.S.C. § 2000e(k) (“[W]omen 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.”).

<sup>4</sup>*Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 684 (1983).

<sup>5</sup>*Urbano v. Cont’l Airlines, Inc.*, 138 F.3d 204 (5th Cir.1998); *Serednyj v. Beverly Healthcare, LLC*, 656 F.3d 540 (7th Cir. 2011); *Spivey v. Beverly Enters. Inc.*, 196 F.3d 1309 (11th Cir. 1999).

<sup>6</sup>*Young v. UPS*, 707 F.3d 437 (4th Cir. 2013). The *Young* plaintiff filed her claim before the effective date of the ADA. Because the amendments are not retroactive, the court expressly did not consider how, if at all, the amendments would affect the plaintiff’s reasonable accommodation claim.

<sup>7</sup>*Young*, 707 F.3d at 447 (quoting *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994)).

<sup>8</sup>See, e.g., *Serednyj*, 656 F.3d at 553 (“[P]regnancy, absent unusual circumstances, is not a physical impairment.”); *Selkow v. 7-Eleven, Inc.*, No. 11-456, 2012 WL 2054872, at \*14 (M.D. Fla. June 7, 2012) (“Absent unusual circumstances, pregnancy is not considered a disability—temporary or otherwise—under the ADA. . .”).

<sup>9</sup>See, e.g., *Romanelli v. W. & S. Life Ins. Co.*, No. 06-819, 2007 WL 1231835, at \*3 (M.D. Fla. Apr. 26, 2007) (denying an employer’s motion to dismiss where the plaintiff’s alleged disability was caused by complications of a high-risk pregnancy); *Patterson by Patterson v. Xerox Corp.*, 901 F. Supp. 274, 278 (N.D. Ill. 1995) (denying defendant’s motion to dismiss where a pregnant employee suffered from severe back pain caused by both her pregnancy and the aggravation of a prior back injury).

<sup>10</sup>*Selkow*, 2012 WL 2054872, at \*14.

<sup>11</sup>42 U.S.C. § 12102(1).

<sup>12</sup>42 U.S.C. § 12102(2).

<sup>13</sup>29 C.F.R. § 1630.2(j)(1)(i).

*Immigration System: The Economic Benefits of Providing a Earned Citizenship*, at 11 (Aug. 2013).

<sup>30</sup>See S. 744, 113th Cong. (2013).

<sup>31</sup>See *id.* § 1101 *et seq.* (2013).

<sup>32</sup>See The Executive Office of the President, *Fixing Our Broken Immigration System: The Economic Benefits of Providing a Earned Citizenship*, at 11 (Aug. 2013).

<sup>33</sup>See S. 744, 113th Cong. § 1105 (2013).

<sup>34</sup>See *id.* §§ 3501-3506 (2013).

<sup>35</sup>See *id.* §§ 3101-3204 (2013).

<sup>36</sup>See The White House, Office of the Press Secretary, *Fact Sheet: Fixing Our Broken Immigration System so Everyone Plays by the Rules*, (Jan. 29, 2013).

<sup>37</sup>See generally 8 C.F.R. §274a.2 (2010).

<sup>38</sup>See S. 744, 113th Cong. (2013).

<sup>39</sup>See S. 744, 113th Cong. § 3101 (2013).

<sup>40</sup>*Id.*

<sup>41</sup>*Id.*

<sup>42</sup>*Id.*

<sup>43</sup>*Id.*

<sup>44</sup>*Id.*

<sup>45</sup>*Id.*

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup>*Id.*

<sup>49</sup>*Id.*

<sup>50</sup>*Id.*

<sup>51</sup>*Id.*

<sup>52</sup>See generally American Immigration Lawyer Association/American Immigration Council, *Section-by-Section Summary of S. 744*, at 52-54 (June 24, 2013).

<sup>53</sup>See S. 744, 113th Cong. § 3102 (2013).

<sup>54</sup>*Id.*

<sup>55</sup>See *id.* § 3105 (2013).

<sup>56</sup>See *id.* §§ 3101-3105 (2013).

<sup>57</sup>*Id.*

<sup>58</sup>See Immigration Policy Center, *A Guide to S. 744: Understanding the 2013 Senate Immigration Bill*, (July 10, 2013) available at [www.immigrationpolicy.org/print/special-reports/](http://www.immigrationpolicy.org/print/special-reports/).

<sup>59</sup>Eligibility would be triggered after the Department of Homeland Security certifies that certain enforcement triggers have been satisfied. See Congressional Research Service, *Comprehensive Immigration Reform in the 113<sup>th</sup> Congress: A Short Summary of Senate-Passed S. 744*, at 3 (Aug. 27, 2013).

<sup>60</sup>*Id.*

<sup>61</sup>See *id.* at 4.

<sup>62</sup>*Id.*

<sup>63</sup>*Id.*

<sup>64</sup>See *Priorities Enforcing Immigration Law: Hearing Before the Subcomm. On Homeland Security of the H. Appropriations Comm.*, 111th Cong. (2009) (statement of Marcy M. Forman, Director Office of Investigations, U.S. Immigration and Customs Enforcement).

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>*Id.*

<sup>68</sup>*Id.* at 2.

<sup>69</sup>*Id.* at 2.

<sup>70</sup>*Id.*

<sup>71</sup>*Id.*

<sup>72</sup>*Id.*

<sup>73</sup>*Id.*

<sup>74</sup>*Id.*

<sup>75</sup>*Id.*

<sup>76</sup>*Id.*

<sup>77</sup>See *Illegal Immigration Reform and Immigrant Responsibility Act of 1996*, Pub. L. No. 104-208, 110 Stat. 3009-3546.

<sup>78</sup>Introduction of the Revised Employment Eligibility Verification Form, 78 Fed. Reg. 48, 15030 (Mar. 8 2013).

<sup>14</sup>*Alexander v. Trilogy Health Services, LLC*, No. 11-295, 2012 WL 5268701 (S.D. Ohio Oct. 23, 2012).

<sup>15</sup>*Mayorga v. Alorica, Inc.*, No. 12-21578, 2012 WL 3043021 (S.D. Fla. July 25, 2012).

<sup>16</sup>See, e.g., *Tate v. Sam's East, Inc.*, No. 11-87, 2013 WL 1320634, \*11 (E.D. Tenn. Mar. 29, 2013) (finding a genuine issue of fact as to whether plaintiff was an individual with a disability where the plaintiff was limited to lifting less than 20 to 25 pounds); *Lohf v. Great Plains Mfg., Inc.*, No. 10-1177, 2012 WL 2568170, \*4-6 (D. Kan. July 2, 2012) (finding a genuine issue of fact as to whether the plaintiff was disabled under the ADA where he was limited in his ability to bend, sit or stand for prolonged periods and could not engage in frequent and repetitive lifting of 25 to 30 pounds); *Mills v. Temple Univ.*, 869 F. Supp. 2d 609, 621-22 (E.D. Pa. 2012) (denying employer's motion for summary judgment on plaintiff's failure to accommodate claim where the plaintiff was restricted from lifting more than three

pounds); *Williams v. United Parcel Servs., Inc.*, No. 10-1546, 2012 WL 601867, \*3 (D.S.C. Feb. 23, 2012) (finding a disputed issue of fact as to whether a plaintiff limited to lifting less than 20 pounds qualified as disabled under the ADA); *Farina v. Branford Bd. of Educ.*, No. 09-49, 2010 WL 3829160, \*11 (D. Conn. Sept. 23, 2010) (noting in a pre-amendments case that, under the ADAAA, "it is possible that even a relatively minor lifting restriction could qualify as a disability within the statute."), *aff'd*, 458 F. App'x 13 (2d Cir. 2011).

<sup>17</sup>*Heatherly v. Portillo's Hot Dogs, Inc.*, No. 11-8480, 2013 WL 3790909 (N.D. Ill. July 19, 2013).

<sup>18</sup>The EEOC's guidance on pregnancy discrimination specifically lists gestational diabetes and preeclampsia as impairments that may be considered disabilities, even under the "old" ADA. See Equal Employment Opportunity Commission, *Pregnancy Discrimination*, [www.eeoc.gov/laws/types/pregnancy.cfm](http://www.eeoc.gov/laws/types/pregnancy.cfm).