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REPORT ON LEGISLATION BY THE COMMITTEE ON SEX AND LAW[1]

A.4272 **M. of A. Gunther**
S.8 **Sen. Hannon**

AN ACT to amend the executive law, in relation to reasonable accommodations for pregnant women

THIS BILL IS APPROVED

The New York City Bar Association's Committee on Sex and Law supports A.4272/S.8 ("the Bill"), which would amend New York State's Executive Law to require the provision of reasonable accommodations for pregnant women in the workplace, absent undue hardship on the employer. This bill is essential to achieve the substantive equality envisioned by the federal Pregnancy Discrimination Act ("PDA"). Specifically, the failure of courts to interpret the PDA to require reasonable accommodations for pregnant workers, such as temporary lifting restrictions or more frequent bathroom breaks, has led to a gap in the law that most acutely affects our state's low-wage workers. The New York State Human Rights Law has been similarly construed to exclude pregnant workers from employers' reasonable accommodations obligations. By addressing this gap in the law, the Bill will help pregnant workers keep their jobs by requiring employers to make reasonable medically-necessary accommodations for pregnancy. The Bill will improve economic security and equal opportunity for pregnant workers without unduly burdening employers.

The Bill would amend the New York State Human Rights Law's definition of reasonable accommodation, which is currently limited in its application to individuals with disabilities, to include actions taken by an employer to permit a person with "a pregnancy-related condition" to perform the job.[2] It does not create a new legal framework governing pregnant employees; rather, it simply includes pregnancy-related conditions as conditions for which reasonable

[1] This report was reviewed and approved by the Association's Labor & Employment Law Committee.

[2] N.Y. Exec. Law § 292(21-e). "Pregnancy-related condition" is defined as a "medical condition related to pregnancy or childbirth that inhibits the exercise of a normal bodily function or is demonstrable by medically accepted clinical or laboratory diagnostic techniques; provided, however, that in all provisions of this article dealing with employment, the term shall be limited to conditions which, upon the provision of reasonable accommodations, do not prevent the complainant from performing in a reasonable manner the activities involved in the job or occupation sought or held; and provided further, however, that pregnancy-related conditions shall be treated as temporary disabilities for the purposes of this article."

accommodations must be made. As with reasonable accommodations for disabilities, the pregnancy-related accommodation would only need to permit the employee to "perform in a reasonable manner the activities involved in the job" and would only be required so long as it does not impose an undue hardship on the employer. For instance, a pregnant cashier would need to be accommodated if she requested a stool to sit on during her work shift because the accommodation does not create an undue burden on the employer and, with it, the employee will be able to reasonably perform her job. If, on the other hand, there is no accommodation that will permit the pregnant employee to reasonably perform her job, or if the only available accommodation would impose an undue burden on the employer, then the employee need not be accommodated.

Background – Title VII and the Pregnancy Discrimination Act

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment" or "limit[ing], segregat[ing], or classify[ing] his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee" because of sex.[3] In reaction to the Supreme Court's 1976 *Gilbert* decision,[4] Congress amended Title VII in 1978 by passing the PDA, which made explicit that discrimination on the basis of "pregnancy, childbirth, and related medical conditions" constitutes discrimination on the basis of sex. The PDA clearly aimed to establish Title VII as a robust guarantee of *substantive* equality in the workplace.

The legislative history of the PDA reveals that Congress's intent was not only to overturn *Gilbert*, but also to reject its major premise: that pregnancy classifications were gender neutral, rather than sex-based.[5] Before the PDA's passage, employers frequently excluded pregnant women from the workforce entirely or imposed arbitrary restrictions on the place, time, and manner of their work. Because the Supreme Court narrowly construed the reach of Title VII before the PDA's passage, a policy of terminating an employee when she announced her pregnancy, for example, was not unlawful because such a policy was "gender neutral" – it did not distinguish between genders but between pregnant and non-pregnant persons.

The drafters of the PDA made explicit that such blanket restrictions on employment are unlawful. As the House Report describes, the PDA "[made] clear that distinctions based on

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[3] 42 U.S.C. §2000e-2(a).

[4] Before the enactment of the Pregnancy Discrimination Act, the Supreme Court, in *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), held that an employer's failure to cover pregnancy-related disabilities under its disability benefits plan did not violate Title VII. The Majority decided on the grounds that General Electric's policy covered the same illnesses and conditions for both men and women. Justices Brennan and Stevens dissented from this conclusion, arguing that "it offends common sense to suggest that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related."' *Id*. at 139 (Brennan, J., dissenting). Justice Stevens went on to say that "the rule at issue places the risk of absence caused by pregnancy in a class by itself" and that by definition, "such a rule discriminates on account of sex; *for it is the capacity to become pregnant which primarily differentiates the female from the male*." (Emphasis added.)

[5] *See* Reva B. Siegel, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 Yale L.J. 929, 936 (1985).

pregnancy are *per se* violations of Title VII[.]"[6] The passage of the PDA prohibits such policies by guaranteeing two substantive rights: (1) the right not to be treated adversely because of pregnancy, childbirth, or related medical conditions; and (2) the right to be treated the same as other employees "not so affected but similar in their ability or inability to work."[7]

The Reach of Federal and New York State Anti-Discrimination Laws is Limited

While the PDA broadly protects against traditional pregnancy discrimination that occurs when employers take adverse action against a woman because she is pregnant or make stereotyped assumptions about a pregnant woman's inability to carry out certain tasks, the PDA's reach has proved limited. Rather than ensuring the substantive equality of opportunity in the workplace that it was intended to, the PDA, as construed by courts, provides legal protection "only to the extent a pregnant woman is able to work at full capacity, uninterrupted by the physical effects of pregnancy, childbirth, or related medical conditions."[8] Thus, if a pregnant worker cannot work at full capacity, under current law, she is only entitled to a reasonable accommodation if she can establish that a similarly situated comparator at her workplace was provided with an accommodation – a requirement that has, in reality, proved prohibitively burdensome.[9] Even in the wake of the Supreme Court's recent ruling in *Young v. UPS*[10], it is clear that pregnant workers, particularly the most vulnerable workers, face a difficult and cumbersome path to obtain the relief they need to stay healthy and on the job.[11]

Forcing pregnancy into this narrow comparative rights framework makes it difficult, if not impossible, for pregnant women to find comparators who are similar in their "ability or inability to work." Without a comparator, courts perceive any request for a pregnancy-related accommodation as a request for "special treatment."[12] Under the courts' current analysis, where no such comparator exists (or a policy allowing for such a comparator), the pregnant worker is not entitled to a reasonable accommodation. Without an accommodation, she may not be able to perform the essential functions of her job, and, as a result, can be lawfully terminated. For example, if a pregnant worker needs additional bathroom breaks during her shift, and she cannot establish that a comparator with a similar medical condition requested an accommodation and received it, or should have received it, she is not entitled to the bathroom breaks. If she cannot perform her job without the additional bathroom breaks, she can be lawfully terminated.

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[6] H.R. Rep. No. 95-948, at 3.

[7] 42 U.S.C. § 2000e(k).

[8] Joanna L. Grossman, Gillian L. Thomas, *Making Pregnancy Work: Overcoming the Pregnancy Discrimination Act's Capacity-Based Model*, 21 Yale J. L. & Feminism 15, 18 (2009).

[9] *See Reilly v. Revlon, Inc.*, 620 F. Supp. 2d 524, 545 (S.D.N.Y. 2009) (dismissing Title VII claim where plaintiff, who suffered post-partum depression, failed to offer evidence that she was treated differently from male or non-pregnant female employees who suffered from depression unrelated to pregnancy for extended periods).

[10] 575 U.S. __ (2015).

[11] Dina Bakst, *Peggy Young's Victory is Not Enough*, U.S. News & World Report (March, 26, 2015), *available at* http://www.usnews.com/opinion/economic-intelligence/2015/03/26/peggy-young-supreme-court-victory-is-not-enough-for-pregnant-workers.

[12] *See e.g., Troupe v. May Dep't Stores Co.*, 20 F.3d 734 (7th Cir. 1994) (faulting plaintiff for failing to put forth a "Mr. Troupe" to establish disparate treatment on the basis of pregnancy).

Further, the Americans with Disabilities Act does not require reasonable accommodations for pregnancy. In fact, the implementing regulations of the 2008 ADA Amendments Act explicitly state that pregnancy is *not* a disability for the purposes of the ADA, although certain pregnancy-related disabilities, such as gestational disabilities or preeclampsia, are covered.[13]

The New York State Human Rights Law is similarly limited in that it does not require reasonable accommodations for pregnancy.[14] By contrast, the New York City Human Rights Law was recently expanded by the NYC Pregnant Workers Fairness Act to explicitly require employers to provide reasonable accommodations for employee needs related to pregnancy, childbirth, and related medical conditions.[15] The Bill would make this right explicit for all New Yorkers.

The Impact on New Yorkers

Pregnancy discrimination continues to harm New York women thirty years after the PDA was passed. And the failure by employers to take into account the needs of pregnant workers disproportionately impacts low-wage workers, who are already among the most financially vulnerable in our community. Low-wage workers most commonly work in physically demanding jobs, including the retail, manufacturing, and service industries, in which walking or standing for an entire day's shift is not uncommon. These workers also do not benefit from the employee leave and health benefits found in salaried positions. Employers outside of New York City are not legally required to provide pregnant low-wage workers with the most basic accommodations, such as more frequent bathroom breaks or the ability to sit for short periods of time. Compounding the problem, turnover is common and expected among low-wage workers, leaving employers little incentive to voluntarily accommodate them. Simply put, a cashier is far more likely than an office worker to face a situation in which she is denied a reasonable pregnancy-related accommodation and then terminated for being unable to perform her job without it.[16] Already financially at risk, low-wage pregnant workers face a disproportionate danger of losing their jobs just at the time when they are preparing for an additional family member to support.

Other States' Successes - It's New York's Turn

Eight states, including California, Connecticut, Hawaii, Maryland, Louisiana, New Jersey, West Virginia, Minnesota, Delaware, Illinois, Iowa, and Nebraska require certain private

[13] 29 C.F.R. §1630, App. 1630.2(h).

[14] *See, e.g., Kennebrew v. New York City Housing Authority*, No. 01 Civ. 1654, 2002 WL 265120 at *19, n. 33 (S.D.N.Y. 2002)("…mere pregnancy is not a disability" under the New York State Human Rights law).

[15] N.Y. Admin. Code § 8-107(22).

[16] Joan C. Williams & Penelope Huang, *Improving Work-Life Fit in Hourly Jobs: An Underutilized Cost-Cutting Strategy in a Globalized World*, The Center for Worklife Law (2011), at 16.

employers to provide at least some accommodations for pregnant workers.[17] Alaska and Texas require certain public employers to do so.[18] The proposed bill closely follows the language of the California law, stating that it is unlawful "for an employer to refuse to provide reasonable accommodation for an employee for conditions related to pregnancy, childbirth, or related medical conditions, if she so requests, with the advice of her health care provider."[19] In passing the law, the California legislature recognized the significant need for new legislation. It found that approximately half of the women of reproductive age in the state who become pregnant in any given year would continue to work until delivery.[20] The legislature further concluded that the cost of providing accommodations for pregnant workers would be "de minimis"; it assumed that approximately half of all employers in the state were already making such accommodations and that, in many cases, the accommodations required under the proposed law would result in less disruptive measures such as allowing employees more flexible scheduling and more frequent restroom breaks.[21] In California's experience, the most common accommodations are minor but necessary for pregnant workers to continue performing their jobs: limits on lifting, access to places to sit, and more frequent bathroom breaks.[22] There is no reason to think that New York's experience would be any different.

It is estimated that, nation-wide, two-thirds of first-time mothers work during pregnancy, and 88% of these women work into their last trimester.[23] It is likely that women in New York work through pregnancy at a similar rate. New York should recognize the limitations of existing laws and enact legislation requiring reasonable pregnancy accommodations. We urge the passage of A.4272/S.8.

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[17] *See* Cal. Gov't Code § 12945(a)(3); Conn. Gen. Stat. § 46a-60(a)(7); Haw. Code R. § 12-46-107;Md. Code Ann. State Gov't § 20-609;La. R.S. 23:342(4);N.J. Stat. §§ 10:5-3.1; 10:5-12(s); 2014 WV HB 4284; Minn. Stat. § 181.9414; 19 Del. Code § 711(a); 775 ILCS 5/2-102; *Latham v. ABCM Corporation*, CP# 12-10-60032, DIA No. 12ICR002, January 24, 2013; Nebraska Legislative Bill 627 (approved by Governor on April 13, 2015).

[18] *See* Alaska Stat. § 39.20.520(a); Tex. Local Gov't Code § 180.004(b)(2001).

[19] Cal. Gov't Code § 12945(a)(3)(A).

[20] *See* The California Fair Employment and Housing Commission, Notice of Proposed Rulemaking, (April 16, 2010), p. 566, *available at* http://www.oal.ca.gov/res/docs/pdf/notice/16z-2010.pdf (last visited April 27, 2015).

[21] *See* California Proposed Rulemaking, at p. 566.

[22] *See* S.6273, 235th Session (2012), Sponsor's Memorandum in Support.

[23] U.S. Census Bureau, U.S. Dep't of Commerce, Maternity Leave and Employment Patterns of First-Time Mothers: 1961-2008 4, 6 (2011).