IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DOCKET NO.: 18-14687-A

KIMBERLIE MICHELLE DURHAM,

PLAINTIFF-APPELLANT,

v.

RURAL/METRO CORPORATION,

DEFENDANT-APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
DISTRICT COURT CIVIL ACTION NO.: 4:16-CV-01604-ACA

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel of record for the Appellant hereby certifies the following is a complete list of the trial judges, attorneys, persons, associations of persons, firms, partnerships, corporations (including subsidiaries, conglomerates, affiliates, parent corporations and any publicly held corporation which owns 10% or more of the party's stock), and other identifiable legal entities related to a party that has an interest in this case.

1. Kimberlie Michelle Durham – Appellant
2. Rural/Metro Corporation – Appellee
3. WP Rocket Holdings, Inc. – Appellee is a wholly owned subsidiary of WP Rocket Holdings, Inc.
4. AMR Holdco Inc. - WP Rocket Holdings, Inc. is a wholly owned subsidiary of AMR HoldCo Inc.
5. Emergency Medical Services LP Corporation – AMR HoldCo Inc. is wholly owned by Emergency Medical Services LP Corporation
6. Envision Healthcare Corporation (NYSE: EVHC) – Emergency Medical Services LP Corporation is wholly owned by Envision Healthcare Corporation, a publicly traded corporation (NYSE: EVHC)
7. Honorable Annemarie Carney Axon, United States District Court for the Northern District of Alabama – District Court Judge

8. Heather Newsom Leonard – Counsel for Appellant

9. Gillian Thomas – Counsel for Appellant

10. Lenora M. Lapidus – Counsel for Appellant

11. Randall C. Marshall – Counsel for Appellant

12. Heidi K. Wilbur – Counsel for Appellee

13. Tammy C. Woolley – Counsel for Appellee

14. Kacy L. Coble – Counsel for Appellee

15. Steven W. Moore – Counsel for Appellee

16. The American Civil Liberties Union Foundation

17. The American Civil Liberties Union Foundation of Alabama

18. Heather Leonard, PC

19. Constangy Brooks Smith & Prophete, LLP

Respectfully submitted this the 4th day of February, 2019.

/s/ Heather Newsom Leonard
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STATEMENT REGARDING ORAL ARGUMENT

This case presents important issues concerning the correct application of the Pregnancy Discrimination Act, as interpreted by the Supreme Court in *Young v. United Parcel Service*, 135 S. Ct. 1338 (2015), including three issues of first impression in this Court. Appellant Kimberlie Michelle Durham respectfully requests oral argument, which Appellant believes would assist this Court in the determination of the issues.

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STATEMENT OF JURISDICTION

On September 29, 2016, Kimberlie Michelle Durham ("Durham") filed suit against her former employer, Rural/Metro Corporation ("Rural/Metro"), for pregnancy discrimination. Her claim was brought under Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act ("PDA"). Jurisdiction was based on 42 U.S.C. § 2000e-5(f)(3), 28 U.S.C. § 1331 and § 1343(a)(3).

On October 9, 2018, the district court granted summary judgment as to all claims. *Durham v. Rural/Metro Corp*., No. 4:16-CV-01604-ACA, 2018 WL 4896346 (N.D. Ala. Oct. 9, 2018). This appeal is timely filed because Durham's notice of appeal was filed within 30 days of the final judgment. *See* Fed. R. App. P., Rule 4(a)(1). Durham's jurisdiction is founded upon 28 U.S.C. § 1291. Jurisdiction lies in this Court as this appeal concerns decisions of the United States District Court for the Northern District of Alabama. 28 U.S.C. § 41.

STATEMENT OF THE ISSUES

1. After *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015), when relying on circumstantial evidence to prove a claim of disparate treatment under the Pregnancy Discrimination Act (PDA), does a plaintiff make out a prima facie case of discrimination when she shows that an employer has a policy or practice of accommodating work restrictions arising from an employee's on-the-job injury but does not accommodate medical restrictions arising from an employee's pregnancy?

2. After *Young*, when relying on circumstantial evidence to prove a claim of disparate treatment under the PDA, does an employer's denial of accommodation to a pregnant plaintiff constitute an "adverse employment action" for purposes of the prima facie case?

3. After *Young*, once a plaintiff has made out a prima facie case of discrimination under the PDA for failing to accommodate pregnancy, is denial of summary judgment to the defendant warranted where there is a material question of fact as to whether the employer's legitimate, non-discriminatory reason for denying accommodation of pregnancy is sufficiently strong to justify the burden on the pregnant employee posed by the failure to accommodate?

4. Did the District Court err in granting summary judgment to the Rural/Metro?

SUMMARY OF ARGUMENT

In *Young v. United Parcel Service, Inc.*, the Supreme Court reaffirmed the central purpose of the Pregnancy Discrimination Act: to assure that employers do not single out pregnant workers for unfavorable treatment. To that end, *Young* expressly concluded that the PDA's mandate that employers treat pregnant employees the same as others "similar in their ability or inability to work" applies with equal force where pregnancy necessitates some degree of workplace accommodation. Further – and most pertinent for this case – the *Young* Court found that if an employer grants such accommodations to any non-pregnant employees, regardless of the reason, pregnant workers are entitled to that benefit, too, unless the employer can articulate a "sufficiently strong" reason for denying it.

In the present case, the District Court's grant of summary judgment to Rural/Metro ignored these directives; indeed, under its reasoning, *Young* might as well never have been decided. Critically, the District Court mis-applied *Young*'s prima facie standard by finding that, as a matter of law, employees who receive accommodation for on-the-job injuries are not "similar in their ability or inability to work" to pregnant employees, and therefore, an employer policy favoring such employees is immune from challenge under the PDA. The District Court then compounded its error by ignoring entirely *Young*'s directive that the employer must put forward a reason for denying a pregnant worker accommodation that is "sufficiently strong" to justify the burden on the pregnant worker – which, in

Durham's case, was the deprivation of a paycheck for the duration of her pregnancy. The District Court did not subject Rural/Metro's light duty policy to this scrutiny, even though, after *Young*, that is the probative question at the summary judgment stage.

Finally, the District Court erred in crediting Rural/Metro's purported "legitimate, non-discriminatory" reasons for denying Durham an accommodation even though the company could produce virtually no admissible evidence, documentary or otherwise, in support of those reasons.

All of these errors, alone and in the aggregate, demand reversal. If the District Court's ruling is allowed to stand, employers will have free rein – as they did prior to *Young* – to simply decree certain employees insufficiently "similar" to pregnant workers to allow comparison under the PDA, and thereby justify denying them accommodations they need to stay on the job. *Young* expressly disapproved that unchecked prerogative. This Court should as well.

STATEMENT OF THE CASE

Course of Proceedings and Disposition Below

Appellant Kimberlie Michelle Durham ("Durham") filed suit against Rural/Metro Corporation ("Rural/Metro") on September 29, 2016. (Doc. 1.) Her Complaint alleged claims for employment discrimination arising from Rural/Metro's denying her an alternative work assignment during her pregnancy and instead forcing her to take unpaid leave, thereby constructively discharging her. (*Id.*) The District Court granted summary judgment to Rural/Metro and dismissed Durham's claims on October 9, 2018. (Docs. 55-56.)

Statement of the Facts

Durham began working as an Emergency Medical Technician ("EMT") for Rural/Metro in March 2015. (Doc. 42-1, at 16:21-23).[1] As an EMT, Durham's duties included responding to emergency and non-emergency medical requests, providing basic life support, and transporting sick or injured persons to medical facilities. (Doc. 42-2, at 154:25-162:6 & Ex. 10.)

Durham learned she was pregnant in September 2015 (Doc. 42-1, at 18:16-18), and her health provider directed her not to lift more than 50 pounds. (Doc. 42-1, at 20:21-21:1.) Durham told Mike Crowell ("Crowell"), her manager, that she was pregnant and informed him of her health provider's instruction. (Doc. 42-1, at

[1] That same month, on March 25, 2015, the United States Supreme Court issued its decision in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015).

20:11-21:6; Doc. 42-3, at 30:23-31:12.) Knowing that Rural/Metro maintained a light duty policy, and having seen vacant dispatch positions on the company's job board, Durham requested light duty, or in the alternative, to be moved into a dispatch position. (Doc. 43-2 ¶ 3; Doc. 42-1, at 21:15-16; Doc. 42-3, at 32:10-16.) Crowell refused, telling Durham that Rural/Metro reserved light duty for employees who had experienced on-the-job injuries. (Doc. 43-13; Doc. 43-11; Doc. 42-1, at 22:16-19.) Jennifer Harmon ("Harmon") in the company's Human Resources department, subsequently expressly refused a light duty assignment for Durham because her lifting restriction was not related to an on-the-job injury. (Doc. 42-3, at 36:23-37:08.)

Indeed, it is uncontested that Rural/Metro's policy and practice was, and continues to be, to grant light duty assignments only to employees needing such accommodation due to on-the-job injuries, and to deny such assignments to pregnant employees. (Doc. 43-1 ¶ 6; Doc. 42-2, at 49:02-15, 132:7-132:17, 144:17-145:14.) Discovery confirmed that in just the six months prior to Durham's request, Rural/Metro had assigned to light duty to three employees who had lifting restrictions as a result of occupational injuries: Daniel Trussell, Jimmy McKiven, and Christopher Dubek. (Doc. 43-15; 42-3, at 29:13-22.)

Adding insult to injury, Harmon instructed Crowell that, in addition to denying Durham a light duty position, the company also would not permit her to work as an EMT while her lifting restriction remained in place. (Doc. 42-3, at

69:8-22.) As a result, after September 28, 2015 – when Durham was just 16 weeks pregnant – Rural/Metro did not schedule Durham to work any shifts. (Doc. 43-2 ¶ 9.)

Instead, Crowell – acting at Harmon's direction – told Durham that her only option was to take an unpaid leave of absence. (Doc. 43-13.) Thereafter, on October 6, 2015, Rural/Metro informed Durham she could request such leave under the company's Personal Leave Policy (the "Policy"). (*Id.*) The Policy cautioned, however, that "leave will not be granted for more than 90 days or for the purpose of pursuing another position, temporarily trying out new work, or venturing into business." (Doc. 43-8, at 2 ¶ II(C).) Durham understood the policy to both prohibit her from working at another job and filing for unemployment benefits while she was on her forced leave. (Doc. 42-1, at 24:5-18; Doc. 43-2 ¶ 8.)

Durham subsequently told Harmon that this was her understanding, expressed her concern about being without any income until after she gave birth, and asked if anything else could be done to avoid that predicament. (Doc. 42-1, at 27:16-23; Doc. 43-2 ¶ 8.) Harmon told Durham that the unpaid leave was Durham's only option (*id.*), and indeed, that unpaid leave was "all the company did for pregnant employees." (Doc. 43-13.)

On October 26, 2015, Durham called Crowell to renew her request for light duty or to move to a dispatch position. (*Id.*). Crowell told Durham he would call

her back, but he never did. (*Id.*) When Durham did not hear from Crowell, she sought legal counsel. (Doc. 42-1, at 29:5-7.)

On November 3, 2015, Durham's attorney sent a letter to Rural/Metro communicating Durham's belief she had been constructively discharged, given that she could not work at the company and could not work anywhere else. (Doc. 43-5, Ex. A, at 2.). Rural/Metro did not respond. (Doc. 43-6, at Responses to Requests for Admissions 2-3.)

Durham filed a Charge of Discrimination with the U.S. Equal Employment Opportunity Commission ("EEOC") on November 16, 2015. (Doc. 43-13.) The EEOC sent Rural/Metro notice of the Charge on November 18, 2015. (Doc. 43-12.) Rural/Metro did not submit any response to the EEOC. (Doc. 43-6, Response to Request for Admission No. 5.)

In order to obtain some income during her pregnancy, Durham sought to obtain unemployment compensation benefits. But the company obstructed those efforts, as well: On November 23, 2015, Rural/Metro opposed Durham's application, instead representing to the Alabama Department of Labor that Durham "is currently an active full-time employee, and there has not been any change in the claimant's work hours." (Doc. 43-13.) It further stated, misleadingly, that it was not aware of any changes to Durham's employment that may have caused her to file for unemployment benefits. (*Id.*) The Department of Labor denied Durham's claim. (Doc. 42-1, at 46:01-10.)

By the time Durham gave birth to her son in March 2016, she had been without income for six months. (Doc. 42-1, at 38:02-06.)

ARGUMENT

I. STANDARD OF REVIEW

A district court's ruling on a motion for summary judgment is reviewed *de novo*. *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1265 (11th Cir. 2007). In reviewing the decision, the court "adhere[s] to the same legal standards that bound the district court," *id.* – that is, it may "draw all reasonable inferences that can be sustained by the record," and must evaluate those inferences and the evidence in the light most favorable to the nonmoving party. *Id.* Summary judgment is warranted only where "the record, including pleadings, depositions, answers to interrogatories, admissions on file, and affidavits, fails to disclose any genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Id*. (citing Fed. R. Civ. P. 56(c)).

According to the standards this Court has recognized, Durham's burden in opposing summary judgment is to produce "substantial evidence" creating an inference that Rural/Metro's refusal to accommodate her pregnancy-related lifting restriction was discriminatory. *Hammett v. Paulding Cty., Ga.*, 875 F.3d 1036, 1054 (11th Cir. 2017). "Substantial evidence" is "such relevant evidence as a reasonable person would accept as adequate to support a conclusion." *Ga. Dep't of Educ. v. United States Dep't of Educ.*, 883 F.3d 1311, 1314 (11th Cir. 2018)

(quoting *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005)). Notably, that quantum is "less than a preponderance," *id.*; Durham is not required to present evidence sufficient to secure a jury verdict, but rather, evidence sufficient to create an inference that Rural/Metro violated the Pregnancy Discrimination Act.

Durham has more than met this standard, warranting not only reversal of the District Court's decision below, but also entry of an order denying summary judgment so that this matter may proceed to trial.

II. THE DISTRICT COURT IGNORED *YOUNG* IN THREE CRITICAL RESPECTS AND SHOULD BE REVERSED

Congress enacted the Pregnancy Discrimination Act ("PDA") in 1978 to amend Title VII's definition of what constitutes discrimination "because of sex." *See* 42 U.S.C. §2000e(k). The PDA comprises two clauses: First, it makes explicit that discrimination "because of sex" includes discrimination "because of . . . pregnancy, childbirth, and related medical conditions," and second, it expressly mandates that pregnant workers "be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work." *Id.*

In *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015), the Supreme Court observed that in enacting the PDA, Congress issued a direct rebuke to the Supreme Court's decision in *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), approving an employer's exclusion of pregnant workers from an otherwise

comprehensive temporary disability benefits policy. *Young*, 135 S. Ct. at 1353 (quoting *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-79 n.14 & n.17 (1983) (Congress's "'unambiguou[s]' intent in passing the [PDA] was to overturn 'both the holding and the reasoning of the Court in the *Gilbert* decision'")).

With *Young*, the Supreme Court for the first time addressed the PDA's application in the context of an employee needing some form of job modification due to pregnancy, and concluded the statute's mandate applies with equal force in such circumstances. As described further below, the Court also established new prima facie and pretext standards for such cases that focus the inquiry not on the different reasons why pregnant and non-pregnant workers may need accommodation, but rather, why the employer denies such accommodations to pregnant employees while granting them to others "similar in their ability or inability to work."

In granting summary judgment to Rural/Metro, the District Court ignored this directive, in three pivotal respects – and, by extension, it ignored the PDA's animating purpose of eliminating employers' treatment of pregnancy as *sui generis*. This Court should reverse.

A. *Young* Modified the Prima Facie And Pretext Standards For PDA Claims To Focus The Inquiry On Why the Employer Refuses To Accommodate Pregnant Workers While Granting Accommodations To Others Similar In Their Ability Or Inability To Work

Because the District Court's analysis relied chiefly on reasoning and precedent expressly rejected in *Young*, its errors are best illustrated by reference to the context in which the Supreme Court decided the case.

Young concerned Peggy Young, a UPS driver whose medical provider directed her to avoid heavy lifting during pregnancy. When Young asked UPS to excuse her from that aspect of her job, the company refused, notwithstanding its provision of job accommodations to three other categories of drivers when they were unable to fulfill all of their duties: workers injured on the job; workers with disabilities entitled to accommodation under the Americans with Disabilities Act (ADA); and those who had lost their commercial driver's license – even if the reason was a DUI conviction, rather than a physical impairment. *Young,* 135 S. Ct. at 1346.

After the district court granted summary judgment to UPS, the Fourth Circuit affirmed. It found that the categories of employees to whom the company extended accommodations under its "neutral, pregnancy-blind policy" were insufficiently "similar" to pregnant employees to demand the "same" treatment. *Young v. United Parcel Serv., Inc.*, 707 F.3d 437, 450 (4th Cir. 2013). Observing that pregnant workers were not the only UPS employees denied accommodations

under the company's policy, the court reasoned that to find in Young's favor would amount to preferential treatment of pregnancy. *Id.* at 447-48. The Fourth Circuit relied on a line of decisions that had employed similar reasoning – including one from this Court – all of which approved employer policies that accommodated employees injured on the job, but not pregnant workers. *Id.* (citing *Serednyj v. Beverly Healthcare, LLC*, 656 F. 3d 540, 547, 552 (7th Cir. 2011)) (policy accommodated only workers injured on the job or workers qualifying for accommodation under the ADA); *Reeves v. Swift Transp. Co.*, 446 F. 3d 637, 640, 643 (6th Cir. 2006) (policy reserved accommodations for employees with occupational injuries); *Spivey v. Beverly Enterprises, Inc.*, 196 F. 3d 1309, 1312, 1314 (11th Cir. 1999) (policy accommodated workers with on-the-job injuries); *Urbano v. Continental Airlines, Inc.*, 138 F. 3d 204, 206, 208 (5th Cir. 1998) (same)).[2]

Recognizing the "lower-court uncertainty about interpretation of the [PDA]" as to pregnancy accommodation – and citing the same line of precedent relied upon

[2] The Fourth Circuit further refused to credit the one appellate decision that had rejected the reason for an employee's impairment as an acceptable basis for granting or denying accommodations. *Young*, 784 F.3d at 448-49 (citing *Ensley-Gaines v. Runyon*, 100 F.3d 1220, 1226 (6th Cir. 1996) (reversing summary judgment for employer, finding favorable treatment of employees with on-the-job injuries sufficient to show pregnant plaintiff was treated worse than similarly-situated co-workers for purposes of prima facie case).

by the Fourth Circuit – the Supreme Court granted *certiorari* to resolve the split. *Young*, 135 S. Ct. at 1348 (collecting cases).

The Court reversed. After reaffirming the three-part *McDonnell Douglas* burden-shifting framework for proving PDA disparate treatment claims with circumstantial evidence, the Court then articulated a modified analysis for failure-to-accommodate cases. *Id.* at 1345, 1354 (citing *McDonnell Douglas v. Green*, 411 U.S. 792 (1973)). Under that standard, a plaintiff makes out a prima facie case if she shows that she (1) "belongs to a protected class"; (2) "that she sought accommodation"; (3) "that the employer did not accommodate her"; and (4) "that the employer did accommodate others 'similar in their ability or inability to work.'" *Young*, 135 S. Ct. at 1354.

In so doing, the *Young* Court implicitly overruled the holding of this Court in *Spivey*, as well as the holdings of the Fifth, Sixth, and Seventh Circuits in *Urbano*, *Reeves*, and *Serednyj*, which had deferred to employers' own definitions of which non-pregnant employees are and are not "similar in their ability or inability to work" to pregnant employees.

The Court also offered a new pretext analysis that plaintiffs may rely on when litigating claims under the PDA's second clause. After the employer puts forward "'legitimate, nondiscriminatory' reasons for denying her accommodation," *id.* at 1353, the plaintiff

> may reach a jury on [the issue of pretext] by providing sufficient evidence that the employer's policies impose a *significant burden* on pregnant workers, and that the employer's . . . [stated] reasons are *not sufficiently strong* to justify the burden, but rather – when considered along with the burden imposed – give rise to an inference of intentional discrimination.

Id. at 1354 (emphasis added). Significantly, the Court admonished that, "consistent with the Act's basic objective," this standard will not be satisfied by reference to mere cost or convenience. *Id.* Rather, the twin touchstones of the inquiry are feasibility and fairness: "[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?" *Id.* at 1335.

As outlined below, although the District Court's opinion cited *Young* and purported to follow these standards, it fundamentally misapprehended the opinion's letter and spirit. Indeed, it analyzed the motion for summary judgment as if *Young* never had been decided at all.

B. The District Court Erred By Ignoring *Young* And Finding That, As A Matter Of Law, An Employer's Policy Of Accommodating Workers Injured On the Job But Not Accommodating Pregnant Workers Is Permissible Under The PDA

As the District Court noted, "No one disputes that Rural/Metro accommodates employees who had lifting restrictions imposed due to an on the job injury." (Doc. 55, at 9.) According to *Young*, then, the District Court should have found that Durham satisfied her prima facie burden – including the fourth prong's requirement that she show "that the employer did accommodate others 'similar in their ability or inability to work,'" *Young*, 135 S. Ct. at 1354 – and then turned its analysis to whether Rural/Metro had a "sufficiently strong" reason for denying Durham an accommodation. *Id.*

But the District Court did not follow that explicit roadmap. Instead, it found that employees with occupational injuries "are not valid comparators for Ms. Durham because she did not suffer an on the job injury,"[3] (Doc. 55, at 9), and therefore, Durham could only survive summary judgment by "offer[ing] substantial evidence of employees placed on light duty assignment who were injured *off* the job." *Id.* (emphasis added).[4] And because Durham did not put

[3] This tautology is virtually identical to the Fourth Circuit's reasoning – vacated by the Supreme Court – that Peggy Young was not "similar" to UPS workers injured on the job "because, quite simply, her inability to work [did] not arise from an on-the-job injury." *Young*, 135 S. Ct. at 1348 (quoting *Young*, 784 F.3d at 450-51).

[4] By demanding that Durham put forward "substantial evidence" to satisfy the fourth prong of the prima facie case, the District Court improperly blurred the

forward such evidence, the court concluded that her claim amounted to an improper effort to receive "special" treatment, *id.* at 9, a result not intended by the PDA. *Id.* at 9-10.[5]

The District Court's finding that, as a matter of law, employees who receive accommodation for on-the-job injuries are not "similar in their ability or inability to work" to pregnant employees renders a policy favoring such employees immune from challenge under the PDA, absent evidence of favorable treatment of *additional* categories of non-pregnant employees. This *per se* rule is plainly erroneous under *Young* and demands reversal.

Young expressly rejected the notion that the *reason* non-pregnant employees need accommodation determines whether they are "similar in their ability or inability to work" under the PDA. At the prima facie stage, the Court emphasized that a plaintiff is not required "to show that those whom the employer favored and those whom the employer disfavored were similar in *all* but the protected ways." *Young*, 135 S. Ct. at 1354 (emphasis added). Moreover, the UPS policy at issue in *Young* favored non-pregnant workers needing accommodations for a wide variety

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prima facie and pretext inquiries. In *Young*, the Supreme Court admonished that the prima facie standard is "not intended to be an inflexible rule," "not onerous," and "not as burdensome as succeeding on an 'ultimate finding of fact as to' a discriminatory employment action." 135 S. Ct. at 1353-54 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575-76 (1978)).

[5] In support of this holding, the District Court cited three appellate decisions pre-dating *Young*. (Doc. 55, at 9-10 (and cases cited therein)).

of reasons, including employees injured on the job but also those unable to drive due to non-physical reasons like a DUI conviction, and did not declare any of those workers to be *per se* "dissimilar" to pregnant workers for PDA comparison purposes.

The District Court sought to reconcile its obvious contravention of *Young* by explaining that, while UPS's policy favored *three* categories of workers over pregnant employees – which, in the court's view, made the exclusion of pregnant employees more suggestive of discriminatory intent – Rural/Metro's policy only favored "*one* discrete group of employees." (Doc. 55, at 10 (emphasis added).) But again, nowhere in *Young* did the Supreme Court approve such head-counting. Rather, it premised its reversal of summary judgment solely on its conclusion that "there is a genuine dispute as to whether UPS provided more favorable treatment to *at least some* employees whose situation cannot reasonably be distinguished from [Peggy] Young's." *Young*, 135 S. Ct. at 1355 (emphasis added). It announced no numerical threshold of non-pregnant colleagues "similar in their ability or inability to work" that would or would not support an inference of discrimination.[6] That was precisely the point of the new pretext standard: to shift the inquiry to whether the employer's stated reason for favoring "at least some

[6] Indeed, among the five cases the Court cited as having motivated its granting *certiorari* in *Young*, all but one concerned policies limiting accommodations only to those with occupational injuries. *Young*, 135 S. Ct. at 1348 (collecting cases); *see also supra* at 13.

employees," while disfavoring pregnant workers, was "sufficiently strong" to rebut the inference of intentional discrimination. *Young*, 135 S. Ct. at 1354-55.

Although the District Court's blatant disregard of *Young*'s express terms warrants reversal, it bears noting that since the Supreme Court issued its opinion, another appellate court and the U.S. Equal Employment Opportunity Commission (EEOC), the federal agency tasked with enforcing the PDA, both have considered claims challenging policies identical to Rural/Metro's and found them to satisfy the prima facie standard. *See Legg v. Ulster County*, 820 F.3d 67, 74 (2d Cir. 2016) (plaintiff jail guard challenged refusal to grant her "light duty" where it was undisputed such benefit was granted to guards injured on the job; "These facts are enough, if left unexplained, for a reasonable jury to conclude that it is more likely than not that the policy was motivated by discriminatory intent."); *Elease S., Complainant*, EEOC DOC 0120140731, 2017 WL 6941010, at *5 (Dec. 27, 2017) (pregnant mail carrier at risk of miscarriage denied temporary reassignment to desk work satisfied fourth prong of prima facie case where she presented evidence that her employer accommodated letter carriers who had been injured on the job; "The existence of such a distinction, work-related versus non-work-related injury, does not absolve the [employer]of liability under the *Young* framework.").

The District Court's reasoning, if left undisturbed, will effectively erase *Young* from this Circuit. It will permit employers, once again, to deny accommodations to pregnant workers and force them off the job simply by

decreeing whatever non-pregnant employees it chooses to accommodate insufficiently "similar in their ability or inability to work" to permit comparison under the PDA. That is precisely the opposite of the Supreme Court's intent, and demands reversal.

C. The District Court Also Erred In Disputing That Rural/Metro's Denial of Accommodation To Durham Was An "Adverse Employment Action" Under the PDA

Although the District Court's gross misreading of the fourth prong of the prima facie standard is reason alone for reversal, it committed further error with respect to assessing whether Durham satisfied the standard's third prong – that is, whether she showed she had suffered an "adverse employment action." Such error also demands correction.

Under the prima facie framework laid out in *Young*, an "adverse employment action" is shown when a pregnant plaintiff sought accommodation, but "the employer did not accommodate her." *Young*, 135 S. Ct. at 1354. *Accord Legg*, 820 F.3d at 74; *Elease S.,* 2017 WL 6941010, at *5. Indeed, this Court implicitly affirmed this principle when it recently found that the City of Tuscaloosa's refusal to accommodate a patrol officer's request to be excused from wearing a bulletproof vest – in order to healthfully continue breastfeeding her newborn – was sufficiently "adverse" to support a jury's conclusion that she had been constructively discharged. *Hicks v. City of Tuscaloosa*, 870 F.3d 1253 (11th Cir. 2017).

But the District Court instead limited its analysis only to the original *McDonnell Douglas* framework, opining that Durham had the "initial burden to establish: '(1) she was a member of a protected class, (2) she was qualified to do the job, (3) *she was subjected to an adverse employment action*, and (4) similarly situated employees outside the protected class were treated differently." (Doc. 55, at 7 (quoting *Young*, 135 S. Ct. at 1345) (emphasis added).)

After concluding that Durham satisfied the first two elements, the District Court then observed that it could not "determine as a matter of law" that she had stated an "adverse employment action" because, it could not conclude whether "a denial of a light duty assignment and the denial of a transfer to dispatch . . . by definition, constitute[s] an adverse employment action." (Doc. 55, at 7-8.)[7] Puzzlingly, it then cited a pre-*Young* decision concerning a claim under the Age Discrimination in Employment Act (ADEA). *Id.* (citing *Damon v. Fleming Supermarkets of Florida, Inc.*, 196 F.3d 1354, 1361 11th Cir. 1999), *cert. denied*, 529 U.S. 1109 (2000)).[8]

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[7] The District Court also noted that the parties disputed whether Plaintiff-Appellant "voluntarily abandoned her job" after she was denied accommodation and forced on unpaid leave, whether the terms of Defendant-Appellee's unpaid leave policy "actually precluded [Plaintiff-Appellant] from seeking other employment." *Id.* at 8. In light of these disputes, the District Court, stated, it could not decide the "adverse employment action" issue one way or another. *Id.*

[8] Although the District Court erred in finding that Durham had not, as a matter of law, satisfied the third prong of the *Young* prima facie case, its ruling also flouted Rule 56; if it found a material dispute on this element, it should have permitted a

Although the District Court did not premise its ultimate ruling on this point, this Court should reject the misapplication of this third element of the post-*Young* prima facie case so that future plaintiffs in this Circuit who bring PDA failure-to-accommodate claims are not bound by it.

III. UNDER THE CORRECT *YOUNG* PRETEXT ANALYSIS, DURHAM HAS CREATED A MATERIAL QUESTION OF FACT WARRANTING TRIAL

Having refused to find that Rural/Metro's policy of reserving light duty for workers injured on the job raised an inference of discrimination, the District Court also did not conduct the requisite analysis as to whether the company's justification for the policy, or for otherwise denying Durham an accommodation, was "sufficiently strong" to rebut that inference. Had it done so, according to prevailing standards, it would have found ample questions of material fact warranting denial of summary judgment. Most notably, Rural/Metro could not produce any admissible evidence substantiating its adverse decisions. Even if it had, however, Durham put forward evidence that, coupled with Rural/Metro's discriminatory light duty policy, makes plain the company's hostility to pregnancy, further warranting denial of summary judgment.

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jury to resolve the dispute. As this Court has emphasized, if "the record presents disputed issues of fact, the court may not decide them; rather, [we] must deny the motion and proceed to trial." *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1292 (11th Cir. 2012).

In its brief in support of summary judgment, Rural/Metro identified two purported reasons for refusing to accommodate Durham's pregnancy: (a) its light duty policy applied only to employees with on-the-job injuries (Doc. 41, at 27); and (b) although it had a policy of "consider[ing] other available work options or find[ing] available positions that these employees can be transferred into as possible accommodations, when available," no such options or positions existed during the time Durham needed them. (*Id.*) This includes the dispatch positions Durham averred that she saw on Rural/Metro's job board. (*Id.*, at 28.)[9]

In *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981), the Supreme Court analyzed and clarified the employer's burden of production rests on proffering admissible evidence as opposed to speculation and argument of counsel. The Court explained:

> To accomplish this, the defendant must clearly set forth, through the introduction of admissible evidence, the reasons for the [adverse action]. . . . Placing this burden of production on the defendant thus serves simultaneously to meet the plaintiff's prima facie case by presenting a legitimate reason for the action and to frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext. *The sufficiency of the defendant's evidence should be evaluated by the extent to which it fulfills these functions*.

[9] Rural/Metro also contends that it was justified in firing Durham "after she failed to complete her leave request form or produce any documentation that she could return to work." (Doc. 41, at 28.) This alleged rationale is premised, however, on the contention that failing to accommodate Durham's pregnancy and forcing her on unpaid leave in the first instance can be justified under *Young* and substantiated by admissible evidence – which, as discussed further *infra*, it cannot.

Burdine, 450 U.S. at 255-56 (emphasis added).

Relying on *Burdine*, this Court has laid out several principles by which to assess the sufficiency of an employer's evidence. An employer must be able to provide "evidence that asserted reasons . . . were actually relied on" in making the disputed employment decision; otherwise, the employer's stated reasons "are not sufficient to meet defendant's rebuttal burden." *Increase Minority Participation by Affirmative Change of Today of Nw. Fla., Inc. (IMPACT) v. Firestone*, 893 F.2d 1189, 1194 (11th Cir. 1990) (quotation and citation omitted).[10] *See also Walker v. Mortham*, 158 F.3d 1177, 1181 n.8, 1184 (11th Cir. 1998) (the defendant "must present specific evidence regarding the decision-maker's actual motivations with regard to each challenged employment decision" and "cannot testify in abstract terms as to what *might* have motivated the decision-maker" or otherwise present a "hypothetical reason" for the decision) (emphasis added). Relatedly, an employer "may not satisfy its burden of production by offering a justification which the employer either did not know or did not consider at the time the decision was made." *Turnes v. AmSouth Bank*, 36 F.3d 1057, 1061 (11th Cir. 1994). *See also Burdine*, 450 U.S. at 255 n.9 (employer "cannot meet its burden merely through an answer to the complaint or by argument of counsel"). Finally, the plaintiff must be

[10] In *IMPACT*, this Court rejected an employer's effort to rebut an inference of discrimination in hiring decisions by merely putting forward the personnel records of the successful and unsuccessful applicants and asking that the factfinder deduce for itself that the employer's reasons were non-discriminatory. 893 F.2d at 1194.

given a fair opportunity to cross-examine the defendant's witnesses as to the actual reason which is testified to." *IMPACT*, 893 F.2d at 1194.

Rural/Metro cannot meet these standards. As to its policy limiting light duty to employees injured on the job, Rural/Metro's corporate representative could not explain why the policy made that distinction, and conceded that he could only speculate as to the reason. (Doc. 42-2, at 53:25-54:08.) As to the company's refusal to place Durham in a dispatch position, Durham's supervisor, Mike Crowell, testified that Rural/Metro's Human Resources Director, Minda Corbeil ("Corbeil"), was the decisionmaker. (Doc. 42-3, at 37:19-38:14, 51:09-51:22.)[11] But at her deposition, Corbeil denied making the decision, and could not identify who did. (Doc. 42-4, at 24:2-12). Human Resources manager Jennifer Harmon, testified that she did not know that Durham had requested placement in a dispatch position. (Doc. 43-1 ¶ 3.)

Rural/Metro could not even muster admissible evidence as to who made the decision to deny Durham *any* accommodation during her pregnancy – notwithstanding the company's documented practice, at least when it came to employees injured on the job, of simply finding work for such individuals to

[11] Crowell further testified that, irrespective of whether a dispatch position was vacant at the time of Durham's request, he could have created one for her, and that he informed Corbeil of that fact but Corbeil told him not to. (Doc. 42-3, at 37:19-39:15;Doc. 43-10.)

perform. (Doc. 42-2, at 48:11-49:15; Doc. 42-3, at 38:15-30:05.) Rural/Metro did not retain the records of job openings at the time Durham needed accommodation – whether in dispatch or elsewhere in the company – and its corporate representative was unable to testify whether or not such vacancies existed at that time. (Doc. 42-2, at 122:21-123:06.)

In response to the interrogatory asking Rural/Metro to identify the person or persons who made the decision to deny Durham light duty, Rural/Metro stated it lacked sufficient information to respond. (Doc. 43-9, Interrogatory Answer No. 5.) Durham's supervisor, Crowell, testified that Human Resources manager Harmon made the decision (Doc. 42-3, at 36:23-37:08; 50:21-51:12.), but Harmon, in turn, denied doing so, or knowing who did. (Doc. 43-1¶3). Harmon's supervisor, Human Resources Director Corbeil, testified that she did not make the decision to deny Durham light duty, either, and also did not know who had. (Doc. 42-4, at 24:2-12). Indeed, Corbeil testified she had no memory whatsoever of Durham's need for a pregnancy accommodation or Rural/Metro's denial of it. (*Id*., at 24:13-25:13).[12]

In addition to all of the foregoing, Durham put forward evidence that the company denied her an accommodation despite being aware of her entitlement to such a benefit under the PDA. Rural/Metro's corporate representative testified that

[12] When questioned about emails she sent and received relating to Durham, Corbeil had no memory of the exchanges. (Doc. 42-4, at 27:4-6.)

after the Supreme Court decided *Young*, information about the decision was available in various human resources circles, that it was Rural/Metro's practice to review its policies and practices for compliance with such decisions, and that the company understood the decision to direct that a pregnant employee should not be treated differently than any other employee with a short-term or long-term impairment necessitating an accommodation. (Doc. 42-2, at 30:7-33:12.)

In sum, no witness offered testimony based on personal knowledge as to what motivated Rural/Metro's decision to deny Durham an accommodation during her pregnancy, and no documents supported its contention that there were no dispatch vacancies (or any roles) for her to fill. Rural/Metro thus failed to rebut the presumption of discrimination created by Durham's prima facie case. Moreover, drawing "all reasonable inferences" in the light most favorable to Durham, as is required at summary judgment, *DA Mortg., Inc.*, 486 F.3d at 1265, Durham unquestionably has carried her burden of putting forward "substantial evidence" that Rural/Metro's reasons for denying her accommodation during pregnancy cannot justify the significant burden imposed on her by that denial – namely, loss of a paycheck for the duration of her pregnancy.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed and remanded for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH FED. R. APP. P. 32(a)

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because it contains 6,203 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as calculated by the word-counting feature of Microsoft Office 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P.32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in 14-point Times New Roman.

Dated: February 4, 2019

/s/ Heather Newsom Leonard
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CERTIFICATE OF SERVICE

I hereby certify that on **February 4, 2019,** I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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