

Young v. United Parcel Service, Inc.

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Pregnancy Discrimination
after *Young v. UPS* (2015)
Patrick Dull



Agenda

You will meet: Howard W. Smith
Martha Gilbert
Tiffany McFee
Peggy Young
& a whole mess of fish



1.
Congressman Howard W. Smith



“sex”









General Electric v. Gilbert
97 S.Ct. 401 (1976)



Paid absence benefits for all employees,
“excepting therefrom absences due to pregnancy
or resulting childbirth.”

MIKE DeWINE

Gilbert’s holding:

**Discrimination based on pregnancy is
NOT discrimination based on sex.**

MIKE DeWINE

Gilbert’s reasoning:

There is no discrimination because...



***...all men and all women
get identical benefits***

MIKE DeWINE

The *Gilbert* decision led directly to passage of the...

Pregnancy Discrimination Act

(1978)

Mike DiWise

The PDA explicitly rejected both the holding and reasoning of *Gilbert*:

- 1) "Sex" includes pregnancy, childbirth, or related medical conditions, *and*
- 2) Pregnant women shall be treated:
 - "the same" for all employment benefits...
 - as "other persons" who are...
 - "similar in their ability" to work.

Mike DiWise

Graphic illustration of *Gilbert*



The PDA requires pregnant fish to be treated "the same" as non-pregnant fish

Mike DiWise



...to treat "the same" when ALL non-pregnant employees get the benefit

...when SOME get it and SOME don't

MIKE DeWINE

Graphic illustration of this question



Here, pregnant fish are treated "the same" as *some* – but not *all* – non-pregnant fish

MIKE DeWINE

3.

Tiffany McFee



MIKE DeWINE

McFee v. Nursing Care Mgmt.

126 Ohio St. 3d 183 (2010)



Policy provided no leave to anyone until after the first year of employment

Miss DeWine

McFee v. Nursing Care Mgmt.

"[The] policy is 'pregnancy-blind' in that it does not treat employees affected by pregnancy differently from employees not so affected but similar in their ability or inability to work." *McFee*, ¶35
i.e., all employees treated "the same" based upon length of service



Miss DeWine

McFee cont.

...but...

"...when a woman qualifies for leave, the leave provided for childbearing must be reasonable."

McFee, at ¶33

This no longer seems like "pregnancy-blind" treatment

Miss DeWine

Graphic illustration of McFee



Pregnant fish are treated "the same" as non-pregnant fish

MICHAEL DEWINE

4.
Peggy Young



MICHAEL DEWINE

Young v. UPS
135 S.Ct. 1338 (2015)

Reasonable Accommodation in the workplace



Pregnancy-blind policy provides light duty accommodations for many situations
→ but not for pregnancy ←

MICHAEL DEWINE

“treat the same”
+
the **rejection** of *Gilbert*
(both **holding** and **reasoning**)

(equals)

Young v. UPS
MIKE DeWINE



holding in *Young v. UPS*
Despite a “pregnancy-blind” policy,
an employee can prove
intentional discrimination
by convincing the Judge that
– in light of the accommodation of a **large percentage** of non-pregnant employees –
the refusal to accommodate a **large percentage** of pregnant employees
is **intentional**.
MIKE DeWINE

Graphic illustration of Young



**F
I
S
H
Y**

A large percentage of pregnant fish treated differently than a large percentage of non-pregnant fish is...

Mike DeWise

Gilbert after Young?

policy specifically excluded absences related to pregnancy



Gilbert policy was not pregnancy-blind so, per the PDA, it is sex discrimination

Mike DeWise

McFee after Young?

pregnancy-blind policy;
no one gets leave until after 1st year



2/6 (33%)

5/7 (71%)

→ Large % of non-pregnant fish getting leave?
→ Large % of pregnant fish not getting leave?

Mike DeWise

Young after Young?

pregnancy-blind policy:
lots of accommodations; none for pregnancy



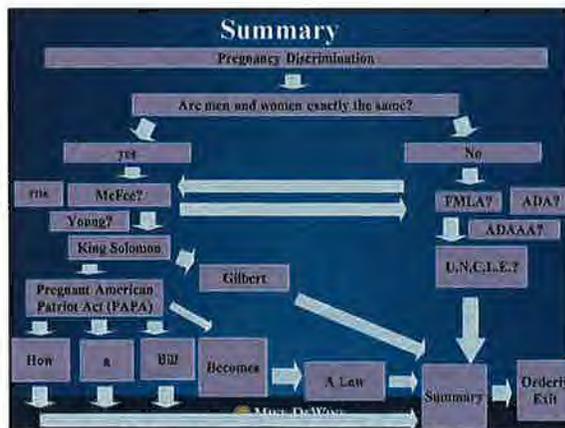
5/5 (100%) 6/7 (86%)

→ Large % of non-pregnant fish getting leave?
→ Large % of pregnant fish not getting leave?

MIKE DeWINE

Questions?

MIKE DeWINE



Real Summary

1. **Howard W. Smith** (*added "sex" to Title VII*)
2. **Martha Gilbert** (*excluded from paid benefits*)
Supreme Court = "pregnancy is not sex"
PDA = "pregnancy is sex": treat "the same"
3. **Tiffany McFee** (*no leave for 1st year*)
"the same" = pregnancy-blind
4. **Peggy Young** (*work accommodations for most*)
"the same" = "a large %" = *may be intentional*

 Mike DeWine


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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

YOUNG *v.* UNITED PARCEL SERVICE, INC.CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT

No. 12–1226. Argued December 3, 2014—Decided March 25, 2015

The Pregnancy Discrimination Act added new language to the definitions subsection of Title VII of the Civil Rights Act of 1964. The first clause of the Pregnancy Discrimination Act specifies that Title VII’s prohibition against sex discrimination applies to discrimination “because of or on the basis of pregnancy, childbirth, or related medical conditions.” 42 U. S. C §2000e(k). The Act’s second clause says that employers must treat “women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.” *Ibid.* This case asks the Court to determine how the latter provision applies in the context of an employer’s policy that accommodates many, but not all, workers with nonpregnancy-related disabilities.

Petitioner Young was a part-time driver for respondent United Parcel Service (UPS). When she became pregnant, her doctor advised her that she should not lift more than 20 pounds. UPS, however, required drivers like Young to be able to lift up to 70 pounds. UPS told Young that she could not work while under a lifting restriction. Young subsequently filed this federal lawsuit, claiming that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. She brought only a disparate-treatment claim of discrimination, which a plaintiff can prove either by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or by using the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U. S. 792. Under that framework, the plaintiff has “the initial burden” of “establishing a prima facie case” of discrimination. *Id.*, at 802. If she carries her burden, the employer must have an opportunity “to articulate some legitimate, non-discriminatory reason[s] for” the difference in treat-

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ment. *Ibid.* If the employer articulates such reasons, the plaintiff then has “an opportunity to prove by a preponderance of the evidence that the reasons . . . were a pretext for discrimination.” *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 253.

After discovery, UPS sought summary judgment. In reply, Young presented several favorable facts that she believed she could prove. In particular, she pointed to UPS policies that accommodated workers who were injured on the job, had disabilities covered by the Americans with Disabilities Act of 1990 (ADA), or had lost Department of Transportation (DOT) certifications. Pursuant to these policies, Young contended, UPS had accommodated several individuals whose disabilities created work restrictions similar to hers. She argued that these policies showed that UPS discriminated against its pregnant employees because it had a light-duty-for-injury policy for numerous “other persons,” but not for pregnant workers. UPS responded that, since Young did not fall within the on-the-job injury, ADA, or DOT categories, it had not discriminated against Young on the basis of pregnancy, but had treated her just as it treated all “other” relevant “persons.”

The District Court granted UPS summary judgment, concluding, *inter alia*, that Young could not make out a *prima facie* case of discrimination under *McDonnell Douglas*. The court found that those with whom Young had compared herself—those falling within the on-the-job, DOT, or ADA categories—were too different to qualify as “similarly situated comparator[s].” The Fourth Circuit affirmed.

Held:

1. An individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework. Pp. 10–23.

(a) The parties’ interpretations of the Pregnancy Discrimination Act’s second clause are unpersuasive. Pp. 12–20.

(i) Young claims that as long as “an employer accommodates only a subset of workers with disabling conditions,” “pregnant workers who are similar in the ability to work [must] receive the same treatment even if still other nonpregnant workers do not receive accommodations.” Brief for Petitioner 28. Her reading proves too much. The Court doubts that Congress intended to grant pregnant workers an unconditional “most-favored-nation” status, such that employers who provide one or two workers with an accommodation must provide similar accommodations to *all* pregnant workers, irrespective of any other criteria. After all, the second clause of the Act, when referring to nonpregnant persons with similar disabilities, uses the open-ended term “other persons.” It does not say that the employer must treat pregnant employees the “same” as “*any* other per-

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sons” who are similar in their ability or inability to work, nor does it specify the particular “other persons” Congress had in mind as appropriate comparators for pregnant workers. Moreover, disparate-treatment law normally allows an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual reason for doing so. See, e.g., *Burdine*, *supra*, at 252–258. There is no reason to think Congress intended its language in the Pregnancy Discrimination Act to deviate from that approach. Pp. 12–14.

(ii) The Solicitor General argues that the Court should give special, if not controlling, weight to a 2014 Equal Employment Opportunity Commission guideline concerning the application of Title VII and the ADA to pregnant employees. But that guideline lacks the timing, “consistency,” and “thoroughness” of “consideration” necessary to “give it power to persuade.” *Skidmore v. Swift & Co.*, 323 U. S. 134, 140. The guideline was promulgated after certiorari was granted here; it takes a position on which previous EEOC guidelines were silent; it is inconsistent with positions long advocated by the Government; and the EEOC does not explain the basis for its latest guidance. Pp. 14–17.

(iii) UPS claims that the Act’s second clause simply defines sex discrimination to include pregnancy discrimination. But that cannot be right, as the first clause of the Act accomplishes that objective. Reading the Act’s second clause as UPS proposes would thus render the first clause superfluous. It would also fail to carry out a key congressional objective in passing the Act. The Act was intended to overturn the holding and the reasoning of *General Elec. Co. v. Gilbert*, 429 U. S. 125, which upheld against a Title VII challenge a company plan that provided nonoccupational sickness and accident benefits to all employees but did not provide disability-benefit payments for any absence due to pregnancy. Pp. 17–20.

(b) An individual pregnant worker who seeks to show disparate treatment may make out a prima facie case under the *McDonnell Douglas* framework by showing that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others “similar in their ability or inability to work.” The employer may then seek to justify its refusal to accommodate the plaintiff by relying on “legitimate, nondiscriminatory” reasons for denying accommodation. That reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those whom the employer accommodates. If the employer offers a “legitimate, nondiscriminatory” reason, the plaintiff may show that it

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is in fact pretextual. The plaintiff may reach a jury on this issue by providing sufficient evidence that the employer's policies impose a significant burden on pregnant workers, and that the employer's "legitimate, nondiscriminatory" 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. The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. This approach is consistent with the longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons, see *Burdine, supra*, at 255, n. 10, and with Congress' intent to overrule *Gilbert*. Pp. 20–23.

2. Under this interpretation of the Act, the Fourth Circuit's judgment must be vacated. Summary judgment is appropriate when there is "no genuine dispute as to any material fact." Fed. Rule Civ. Proc. 56(a). The record here shows that Young created a genuine dispute as to whether UPS provided more favorable treatment to at least some employees whose situation cannot reasonably be distinguished from hers. It is left to the Fourth Circuit to determine on remand whether Young also created a genuine issue of material fact as to whether UPS' reasons for having treated Young less favorably than these other nonpregnant employees were pretextual. Pp. 23–24. 707 F. 3d 437, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed an opinion concurring in the judgment. SCALIA, J., filed a dissenting opinion, in which KENNEDY and THOMAS, JJ., joined. KENNEDY, J., filed a dissenting opinion.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 12–1226

PEGGY YOUNG, PETITIONER *v.* UNITED PARCEL
SERVICE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[March 25, 2015]

JUSTICE BREYER delivered the opinion of the Court.

The Pregnancy Discrimination Act makes clear that Title VII’s prohibition against sex discrimination applies to discrimination based on pregnancy. It also says that employers must treat “women affected by pregnancy . . . the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.” 42 U. S. C. §2000e(k). We must decide how this latter provision applies in the context of an employer’s policy that accommodates many, but not all, workers with nonpregnancy-related disabilities.

In our view, the Act requires courts to consider the extent to which an employer’s policy treats pregnant workers less favorably than it treats nonpregnant workers similar in their ability or inability to work. And here—as in all cases in which an individual plaintiff seeks to show disparate treatment through indirect evidence—it requires courts to consider any legitimate, nondiscriminatory, nonpretextual justification for these differences in treatment. See *McDonnell Douglas Corp. v. Green*, 411 U. S. 792, 802 (1973). Ultimately the court must deter-

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mine whether the nature of the employer's policy and the way in which it burdens pregnant women shows that the employer has engaged in intentional discrimination. The Court of Appeals here affirmed a grant of summary judgment in favor of the employer. Given our view of the law, we must vacate that court's judgment.

I
A

We begin with a summary of the facts. The petitioner, Peggy Young, worked as a part-time driver for the respondent, United Parcel Service (UPS). Her responsibilities included pickup and delivery of packages that had arrived by air carrier the previous night. In 2006, after suffering several miscarriages, she became pregnant. Her doctor told her that she should not lift more than 20 pounds during the first 20 weeks of her pregnancy or more than 10 pounds thereafter. App. 580. UPS required drivers like Young to be able to lift parcels weighing up to 70 pounds (and up to 150 pounds with assistance). *Id.*, at 578. UPS told Young she could not work while under a lifting restriction. Young consequently stayed home without pay during most of the time she was pregnant and eventually lost her employee medical coverage.

Young subsequently brought this federal lawsuit. We focus here on her claim that UPS acted unlawfully in refusing to accommodate her pregnancy-related lifting restriction. Young said that her co-workers were willing to help her with heavy packages. She also said that UPS accommodated other drivers who were "similar in their . . . inability to work." She accordingly concluded that UPS must accommodate her as well. See Brief for Petitioner 30–31.

UPS responded that the "other persons" whom it had accommodated were (1) drivers who had become disabled on the job, (2) those who had lost their Department of

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Transportation (DOT) certifications, and (3) those who suffered from a disability covered by the Americans with Disabilities Act of 1990 (ADA), 104 Stat. 327, 42 U. S. C. §12101 *et seq.* UPS said that, since Young did not fall within any of those categories, it had not discriminated against Young on the basis of pregnancy but had treated her just as it treated all “other” relevant “persons.” See Brief for Respondent 34.

B

Title VII of the Civil Rights Act of 1964 forbids a covered employer to “discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, because of such individual’s . . . sex.” 78 Stat. 253, 42 U. S. C. §2000e–2(a)(1). In 1978, Congress enacted the Pregnancy Discrimination Act, 92 Stat. 2076, which added new language to Title VII’s definitions subsection. The first clause of the 1978 Act specifies that Title VII’s “ter[m] ‘because of sex’ . . . include[s] . . . because of or on the basis of pregnancy, childbirth, or related medical conditions.” §2000e(k). The second clause says that

“women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . .” *Ibid.*

This case requires us to consider the application of the second clause to a “disparate-treatment” claim—a claim that an employer intentionally treated a complainant less favorably than employees with the “complainant’s qualifications” but outside the complainant’s protected class. *McDonnell Douglas, supra*, at 802. We have said that “[l]iability in a disparate-treatment case depends on whether the protected trait actually motivated the employer’s decision.” *Raytheon Co. v. Hernandez*, 540 U. S.

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44, 52 (2003) (ellipsis and internal quotation marks omitted). We have also made clear that a plaintiff can prove disparate treatment either (1) by direct evidence that a workplace policy, practice, or decision relies expressly on a protected characteristic, or (2) by using the burden-shifting framework set forth in *McDonnell Douglas*. See *Trans World Airlines, Inc. v. Thurston*, 469 U. S. 111, 121 (1985).

In *McDonnell Douglas*, we considered a claim of discriminatory hiring. We said that, to prove disparate treatment, an individual plaintiff must “carry the initial burden” of “establishing a prima facie case” of discrimination by showing

“(i) that he belongs to a . . . minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” 411 U. S., at 802.

If a plaintiff makes this showing, then the employer must have an opportunity “to articulate some legitimate, non-discriminatory reason for” treating employees outside the protected class better than employees within the protected class. *Ibid.* If the employer articulates such a reason, the plaintiff then has “an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant [*i.e.*, the employer] were not its true reasons, but were a pretext for discrimination.” *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 253 (1981).

We note that employment discrimination law also creates what is called a “disparate-impact” claim. In evaluating a disparate-impact claim, courts focus on the *effects* of an employment practice, determining whether they are

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unlawful irrespective of motivation or intent. See *Raytheon, supra*, at 52–53; see also *Ricci v. DeStefano*, 557 U. S. 557, 578 (2009). But Young has not alleged a disparate-impact claim.

Nor has she asserted what we have called a “pattern-or-practice” claim. See *Teamsters v. United States*, 431 U. S. 324, 359 (1977) (explaining that Title VII plaintiffs who allege a “pattern or practice” of discrimination may establish a prima facie case by “another means”); see also *id.*, at 357 (rejecting contention that the “burden of proof in a pattern-or-practice case must be equivalent to that outlined in *McDonnell Douglas*”).

C

In July 2007, Young filed a pregnancy discrimination charge with the Equal Employment Opportunity Commission (EEOC). In September 2008, the EEOC provided her with a right-to-sue letter. See 29 CFR §1601.28 (2014). Young then filed this complaint in Federal District Court. She argued, among other things, that she could show by direct evidence that UPS had intended to discriminate against her because of her pregnancy and that, in any event, she could establish a prima facie case of disparate treatment under the *McDonnell Douglas* framework. See App. 60–62.

After discovery, UPS filed a motion for summary judgment. See Fed. Rule Civ. Proc. 56(a). In reply, Young pointed to favorable facts that she believed were either undisputed or that, while disputed, she could prove. They include the following:

1. Young worked as a UPS driver, picking up and delivering packages carried by air. Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment in No. 08–cv–02586 (D Md.), pp. 3–4 (hereinafter Memorandum).
2. Young was pregnant in the fall of 2006. *Id.*, at 15–16.

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3. Young's doctor recommended that she "not be required to lift greater than 20 pounds for the first 20 weeks of pregnancy and no greater than 10 pounds thereafter." App. 580; see also Memorandum 17.
4. UPS required drivers such as Young to be able to "[l]ift, lower, push, pull, leverage and manipulate . . . packages weighing up to 70 pounds" and to "[a]ssist in moving packages weighing up to 150 pounds." App. 578; see also Memorandum 5.
5. UPS' occupational health manager, the official "responsible for most issues relating to employee health and ability to work" at Young's UPS facility, App. 568–569, told Young that she could not return to work during her pregnancy because she could not satisfy UPS' lifting requirements, see Memorandum 17–18; 2011 WL 665321, *5 (D Md., Feb. 14, 2011).
6. The manager also determined that Young did not qualify for a temporary alternative work assignment. *Ibid.*; see also Memorandum 19–20.
7. UPS, in a collective-bargaining agreement, had promised to provide temporary alternative work assignments to employees "unable to perform their normal work assignments due to an *on-the-job* injury." App. 547 (emphasis added); see also Memorandum 8, 45–46.
8. The collective-bargaining agreement also provided that UPS would "make a good faith effort to comply . . . with requests for a reasonable accommodation because of a permanent disability" under the ADA. App. 548; see also Memorandum 7.
9. The agreement further stated that UPS would give "inside" jobs to drivers who had lost their DOT certifications because of a failed medical exam, a lost driver's license, or involvement in a motor vehicle accident. See App. 563–565; Memorandum 8.

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10. When Young later asked UPS' Capital Division Manager to accommodate her disability, he replied that, while she was pregnant, she was "too much of a liability" and could "not come back" until she "was no longer pregnant." *Id.*, at 20.
11. Young remained on a leave of absence (without pay) for much of her pregnancy. *Id.*, at 49.
12. Young returned to work as a driver in June 2007, about two months after her baby was born. *Id.*, at 21, 61.

As direct evidence of intentional discrimination, Young relied, in significant part, on the statement of the Capital Division Manager (10 above). As evidence that she had made out a prima facie case under *McDonnell Douglas*, Young relied, in significant part, on evidence showing that UPS would accommodate workers injured on the job (7), those suffering from ADA disabilities (8), and those who had lost their DOT certifications (9). That evidence, she said, showed that UPS had a light-duty-for-injury policy with respect to numerous "other persons," but not with respect to pregnant workers. See Memorandum 29.

Young introduced further evidence indicating that UPS had accommodated several individuals when they suffered disabilities that created work restrictions similar to hers. UPS contests the correctness of some of these facts and the relevance of others. See Brief for Respondent 5, 6, 57. But because we are at the summary judgment stage, and because there is a genuine dispute as to these facts, we view this evidence in the light most favorable to Young, the nonmoving party, see *Scott v. Harris*, 550 U. S. 372, 380 (2007):

13. Several employees received accommodations while suffering various similar or more serious disabilities incurred on the job. See App. 400–401 (10–pound lifting limitation); *id.*, at 635 (foot injury);

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- id.*, at 637 (arm injury).
14. Several employees received accommodations following injury, where the record is unclear as to whether the injury was incurred on or off the job. See *id.*, at 381 (recurring knee injury); *id.*, at 655 (ankle injury); *id.*, at 655 (knee injury); *id.*, at 394–398 (stroke); *id.*, at 425, 636–637 (leg injury).
 15. Several employees received “inside” jobs after losing their DOT certifications. See *id.*, at 372 (DOT certification suspended after conviction for driving under the influence); *id.*, at 636, 647 (failed DOT test due to high blood pressure); *id.*, at 640–641 (DOT certification lost due to sleep apnea diagnosis).
 16. Some employees were accommodated despite the fact that their disabilities had been incurred off the job. See *id.*, at 446 (ankle injury); *id.*, at 433, 635–636 (cancer).
 17. According to a deposition of a UPS shop steward who had worked for UPS for roughly a decade, *id.*, at 461, 463, “the only light duty requested [due to physical] restrictions that became an issue” at UPS “were with women who were pregnant,” *id.*, at 504.

The District Court granted UPS’ motion for summary judgment. It concluded that Young could not show intentional discrimination through direct evidence. 2011 WL 665321, *10–*12. Nor could she make out a prima facie case of discrimination under *McDonnell Douglas*. The court wrote that those with whom Young compared herself—those falling within the on-the-job, DOT, or ADA categories—were too different to qualify as “similarly situated comparator[s].” 2011 WL 665321, *14. The court added that, in any event, UPS had offered a legitimate, nondiscriminatory reason for failing to accommodate pregnant women, and Young had not created a genuine

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issue of material fact as to whether that reason was pretextual. *Id.*, at *15.

On appeal, the Fourth Circuit affirmed. It wrote that “UPS has crafted a pregnancy-blind policy” that is “at least facially a ‘neutral and legitimate business practice,’ and not evidence of UPS’s discriminatory animus toward pregnant workers.” 707 F. 3d 437, 446 (2013). It also agreed with the District Court that Young could not show that “similarly-situated employees outside the protected class received more favorable treatment than Young.” *Id.*, at 450. Specifically, it believed that Young was different from those workers who were “disabled under the ADA” (which then protected only those with permanent disabilities) because Young was “not disabled”; her lifting limitation was only “temporary and not a significant restriction on her ability to perform major life activities.” *Ibid.* Young was also different from those workers who had lost their DOT certifications because “no legal obstacle stands between her and her work” and because many with lost DOT certifications retained physical (*i.e.*, lifting) capacity that Young lacked. *Ibid.* And Young was different from those “injured on the job because, quite simply, her inability to work [did] not arise from an on-the-job injury.” *Id.*, at 450–451. Rather, Young more closely resembled “an employee who injured his back while picking up his infant child or . . . an employee whose lifting limitation arose from her off-the-job work as a volunteer firefighter,” neither of whom would have been eligible for accommodation under UPS’ policies. *Id.*, at 448.

Young filed a petition for certiorari essentially asking us to review the Fourth Circuit’s interpretation of the Pregnancy Discrimination Act. In light of lower-court uncertainty about the interpretation of the Act, we granted the petition. Compare *Ensley-Gaines v. Runyon*, 100 F. 3d 1220, 1226 (CA6 1996), with *Urbano v. Continental Airlines, Inc.*, 138 F. 3d 204, 206–208 (CA5 1998); *Reeves v.*

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Swift Transp. Co., 446 F. 3d 637, 640–643 (CA6 2006); *Serednyj v. Beverly Healthcare, LLC*, 656 F. 3d 540, 547–552 (CA7 2011); *Spivey v. Beverly Enterprises, Inc.*, 196 F. 3d 1309, 1312–1314 (CA11 1999).

D

We note that statutory changes made after the time of Young’s pregnancy may limit the future significance of our interpretation of the Act. In 2008, Congress expanded the definition of “disability” under the ADA to make clear that “physical or mental impairment[s] that substantially limi[t]” an individual’s ability to lift, stand, or bend are ADA-covered disabilities. ADA Amendments Act of 2008, 122 Stat. 3555, codified at 42 U. S. C. §§12102(1)–(2). As interpreted by the EEOC, the new statutory definition requires employers to accommodate employees whose temporary lifting restrictions originate off the job. See 29 CFR pt. 1630, App., §1630.2(j)(1)(ix). We express no view on these statutory and regulatory changes.

II

The parties disagree about the interpretation of the Pregnancy Discrimination Act’s second clause. As we have said, see Part I–B, *supra*, the Act’s first clause specifies that discrimination “because of sex” includes discrimination “because of . . . pregnancy.” But the meaning of the second clause is less clear; it adds: “[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as *other persons* not so affected but *similar in their ability or inability to work*.” 42 U. S. C. §2000e(k) (emphasis added). Does this clause mean that courts must compare workers *only* in respect to the work limitations that they suffer? Does it mean that courts must ignore all other similarities or differences between pregnant and nonpregnant workers? Or does it mean that courts, when

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deciding who the relevant “other persons” are, may consider other similarities and differences as well? If so, which ones?

The differences between these possible interpretations come to the fore when a court, as here, must consider a workplace policy that distinguishes between pregnant and nonpregnant workers in light of characteristics not related to pregnancy. Young poses the problem directly in her reply brief when she says that the Act requires giving “the same accommodations to an employee with a pregnancy-related work limitation as it would give *that employee* if her work limitation stemmed from a different cause but had a similar effect on her inability to work.” Reply Brief 15. Suppose the employer would not give “*that [pregnant] employee*” the “same accommodations” as another employee, but the employer’s reason for the difference in treatment is that the pregnant worker falls within a facially neutral category (for example, individuals with off-the-job injuries). What is a court then to do?

The parties propose very different answers to this question. Young and the United States believe that the second clause of the Pregnancy Discrimination Act “requires an employer to provide the same accommodations to workplace disabilities caused by pregnancy that it provides to workplace disabilities that have other causes but have a similar effect on the ability to work.” Brief for Petitioner 23. In other words, Young contends that the second clause means that whenever “an employer accommodates only a subset of workers with disabling conditions,” a court should find a Title VII violation if “pregnant workers who are similar in the ability to work” do not “receive the same [accommodation] even if still other non-pregnant workers do not receive accommodations.” *Id.*, at 28.

UPS takes an almost polar opposite view. It contends that the second clause does no more than define sex discrimination to include pregnancy discrimination. See

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Brief for Respondent 25. Under this view, courts would compare the accommodations an employer provides to pregnant women with the accommodations it provides to others *within* a facially neutral category (such as those with off-the-job injuries) to determine whether the employer has violated Title VII. Cf. *post*, at 4 (SCALIA, J., dissenting) (hereinafter the dissent) (the clause “does not prohibit denying pregnant women accommodations . . . on the basis of an evenhanded policy”).

A

We cannot accept either of these interpretations. Young asks us to interpret the second clause broadly and, in her view, literally. As just noted, she argues that, as long as “an employer accommodates only a subset of workers with disabling conditions,” “pregnant workers who are similar in the ability to work [must] receive the same treatment even if still other nonpregnant workers do not receive accommodations.” Brief for Petitioner 28. She adds that, because the record here contains “evidence that pregnant and nonpregnant workers were not treated the same,” that is the end of the matter, she must win; there is no need to refer to *McDonnell Douglas*. Brief for Petitioner 47.

The problem with Young’s approach is that it proves too much. It seems to say that the statute grants pregnant workers a “most-favored-nation” status. As long as an employer provides one or two workers with an accommodation—say, those with particularly hazardous jobs, or those whose workplace presence is particularly needed, or those who have worked at the company for many years, or those who are over the age of 55—then it must provide similar accommodations to *all* pregnant workers (with comparable physical limitations), irrespective of the nature of their jobs, the employer’s need to keep them working, their ages, or any other criteria.

Lower courts have concluded that this could not have

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been Congress' intent in passing the Pregnancy Discrimination Act. See, e.g., *Urbano*, 138 F. 3d, at 206–208; *Reeves*, 466 F. 3d, at 641; *Serednyj*, 656 F. 3d, at 548–549; *Spivey*, 196 F. 3d, at 1312–1313. And Young partially agrees, for she writes that “the statute does not require employers to give” to “pregnant workers all of the benefits and privileges it extends to other” similarly disabled “employees when those benefits and privileges are . . . based on the employee’s tenure or position within the company.” Reply Brief 15–16; see also Tr. of Oral Arg. 22 (“[S]eniority, full-time work, different job classifications, all of those things would be permissible distinctions for an employer to make to differentiate among who gets benefits”).

Young’s last-mentioned concession works well with respect to seniority, for Title VII itself contains a seniority defense, see 42 U. S. C. §2000e–2(h). Hence, seniority is not part of the problem. But otherwise the most-favored-nation problem remains, and Young’s concession does not solve it. How, for example, should a court treat special benefits attached to injuries arising out of, say, extrahazardous duty? If Congress intended to allow differences in treatment arising out of special duties, special service, or special needs, why would it not also have wanted courts to take account of differences arising out of special “causes”—for example, benefits for those who drive (and are injured) in extrahazardous conditions?

We agree with UPS to this extent: We doubt that Congress intended to grant pregnant workers an unconditional most-favored-nation status. The language of the statute does not require that unqualified reading. The second clause, when referring to nonpregnant persons with similar disabilities, uses the open-ended term “other persons.” It does not say that the employer must treat pregnant employees the “same” as “any other persons” (who are similar in their ability or inability to work), nor does it

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otherwise specify *which* other persons Congress had in mind.

Moreover, disparate-treatment law normally permits an employer to implement policies that are not intended to harm members of a protected class, even if their implementation sometimes harms those members, as long as the employer has a legitimate, nondiscriminatory, nonpretextual reason for doing so. See, e.g., *Raytheon*, 540 U. S., at 51–55; *Burdine*, 450 U. S., at 252–258; *McDonnell Douglas*, 411 U. S., at 802. There is no reason to believe Congress intended its language in the Pregnancy Discrimination Act to embody a significant deviation from this approach. Indeed, the relevant House Report specifies that the Act “reflect[s] no new legislative mandate.” H. R. Rep. No. 95–948, pp. 3–4 (1978) (hereinafter H. R. Rep.). And the Senate Report states that the Act was designed to “reestablis[h] the law as it was understood prior to” this Court’s decision in *General Electric Co. v. Gilbert*, 429 U. S. 125 (1976). S. Rep. No. 95–331, p. 8 (1978) (hereinafter S. Rep.). See *Gilbert*, *supra*, at 147 (Brennan, J., dissenting) (lower courts had held that a disability plan that compensates employees for temporary disabilities but not pregnancy violates Title VII); see also *AT&T Corp. v. Hulteen*, 556 U. S. 701, 717, n. 2 (2009) (GINSBURG, J., dissenting).

B

Before Congress passed the Pregnancy Discrimination Act, the EEOC issued guidance stating that “[d]isabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities” and that “the availability of . . . benefits and privileges . . . shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.” 29 CFR §1604.10(b) (1975). Indeed, as early as 1972, EEOC guidelines provided:

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“Disabilities caused or contributed to by pregnancy . . . are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment.” 37 Fed. Reg. 6837 (1972) (codified in 29 CFR §1604.10(b) (1973)).

Soon after the Act was passed, the EEOC issued guidance consistent with its pre-Act statements. The EEOC explained: “Disabilities caused or contributed to by pregnancy . . . for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions.” See §1604.10(b) (1979). Moreover, the EEOC stated that “[i]f other employees temporarily unable to lift are relieved of these functions, pregnant employees also unable to lift must be temporarily relieved of the function.” 29 CFR pt. 1604, App., p. 918.

This post-Act guidance, however, does not resolve the ambiguity of the term “other persons” in the Act’s second clause. Rather, it simply tells employers to treat pregnancy-related disabilities like nonpregnancy-related disabilities, without clarifying how that instruction should be implemented when an employer does not treat all nonpregnancy-related disabilities alike.

More recently—in July 2014—the EEOC promulgated an additional guideline apparently designed to address this ambiguity. That guideline says that “[a]n employer may not refuse to treat a pregnant worker the same as other employees who are similar in their ability or inability to work by relying on a policy that makes distinctions based on the source of an employee’s limitations (e.g., a policy of providing light duty only to workers injured on the job).” 2 EEOC Compliance Manual §626–I(A)(5), p. 626:0009 (July 2014). The EEOC also provided an example of disparate treatment that would violate the Act:

“An employer has a policy or practice of providing

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light duty, subject to availability, for any employee who cannot perform one or more job duties for up to 90 days due to injury, illness, or a condition that would be a disability under the ADA. An employee requests a light duty assignment for a 20-pound lifting restriction related to her pregnancy. The employer denies the light duty request.” *Id.*, at 626:0013, Example 10.

The EEOC further added that “an employer may not deny light duty to a pregnant employee based on a policy that limits light duty to employees with on-the-job injuries.” *Id.*, at 626:0028.

The Solicitor General argues that we should give special, if not controlling, weight to this guideline. He points out that we have long held that “the rulings, interpretations and opinions” of an agency charged with the mission of enforcing a particular statute, “while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.” *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1944). See Brief for United States as *Amicus Curiae* 26.

But we have also held that the “weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors that give it power to persuade, if lacking power to control.” *Skidmore, supra*, at 140. These qualifications are relevant here and severely limit the EEOC’s July 2014 guidance’s special power to persuade.

We come to this conclusion not because of any agency lack of “experience” or “informed judgment.” Rather, the difficulties are those of timing, “consistency,” and “thoroughness” of “consideration.” The EEOC promulgated its 2014 guidelines only recently, after this Court had granted

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certiorari in this case. In these circumstances, it is fair to say that the EEOC's current guidelines take a position about which the EEOC's previous guidelines were silent. And that position is inconsistent with positions for which the Government has long advocated. See Brief for Defendant-Appellee in *Ensley-Gaines v. Runyon*, No. 95–1038 (CA6 1996), pp. 26–27 (explaining that a reading of the Act like Young's was “simply incorrect” and “runs counter” to this Court's precedents). See also Brief for United States as *Amicus Curiae* 16, n. 2 (“The Department of Justice, on behalf of the United States Postal Service, has previously taken the position that pregnant employees with work limitations are not similarly situated to employees with similar limitations caused by on-the-job injuries”). Nor does the EEOC explain the basis of its latest guidance. Does it read the statute, for example, as embodying a most-favored-nation status? Why has it now taken a position contrary to the litigation position the Government previously took? Without further explanation, we cannot rely significantly on the EEOC's determination.

C

We find it similarly difficult to accept the opposite interpretation of the Act's second clause. UPS says that the second clause simply defines sex discrimination to include pregnancy discrimination. See Brief for Respondent 25. But that cannot be so.

The first clause accomplishes that objective when it expressly amends Title VII's definitional provision to make clear that Title VII's words “because of sex” and “on the basis of sex” “include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions.” 42 U. S. C. §2000e(k). We have long held that “a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause” is rendered “superflu-

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ous, void, or insignificant.” *TRW Inc. v. Andrews*, 534 U. S. 19, 31 (2001) (quoting *Duncan v. Walker*, 533 U. S. 167, 174 (2001)). But that is what UPS’ interpretation of the second clause would do.

The dissent, basically accepting UPS’ interpretation, says that the second clause is not “superfluous” because it adds “clarity.” *Post*, at 4–5 (internal quotation marks omitted). It makes “plain,” the dissent adds, that unlawful discrimination “includes disfavoring pregnant women relative to other workers of similar inability to work.” *Post*, at 5. Perhaps we fail to understand. *McDonnell Douglas* itself makes clear that courts normally consider how a plaintiff was treated relative to other “persons of [the plaintiff’s] qualifications” (which here include disabilities). 411 U. S., at 802. If the second clause of the Act did not exist, we would still say that an employer who disfavored pregnant women relative to other workers of similar ability or inability to work had engaged in pregnancy discrimination. In a word, there is no need for the “clarification” that the dissent suggests the second sentence provides.

Moreover, the interpretation espoused by UPS and the dissent would fail to carry out an important congressional objective. As we have noted, Congress’ “unambiguou[s]” intent in passing the Act was to overturn “both the holding and the reasoning of the Court in the *Gilbert* decision.” *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U. S. 669, 678 (1983); see also *post*, at 6 (recognizing that “the object of the Pregnancy Discrimination Act is to displace this Court’s conclusion in [*Gilbert*]”). In *Gilbert*, the Court considered a company plan that provided “nonoccupational sickness and accident benefits to all employees” without providing “disability-benefit payments for any absence due to pregnancy.” 429 U. S., at 128, 129. The Court held that the plan did not violate Title VII; it did not discriminate on the basis of sex because there was “no

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risk from which men are protected and women are not.” *Id.*, at 138 (internal quotation marks omitted). Although pregnancy is “confined to women,” the majority believed it was not “comparable in all other respects to [the] diseases or disabilities” that the plan covered. *Id.*, at 136. Specifically, the majority explained that pregnancy “is not a ‘disease’ at all,” nor is it necessarily a result of accident. *Ibid.* Neither did the majority see the distinction the plan drew as “a subterfuge” or a “pretext” for engaging in gender-based discrimination. *Ibid.* In short, the *Gilbert* majority reasoned in part just as the dissent reasons here. The employer did “not distinguish between pregnant women and others of similar ability or inability *because of pregnancy.*” *Post*, at 2. It distinguished between them on a neutral ground—*i.e.*, it accommodated only sicknesses and accidents, and pregnancy was neither of those. See 429 U. S., at 136.

Simply including pregnancy among Title VII’s protected traits (*i.e.*, accepting UPS’ interpretation) would not overturn *Gilbert* in full—in particular, it would not respond to *Gilbert*’s determination that an employer can treat pregnancy less favorably than diseases or disabilities resulting in a similar inability to work. As we explained in *California Fed. Sav. & Loan Assn. v. Guerra*, 479 U. S. 272 (1987), “the first clause of the [Act] reflects Congress’ disapproval of the reasoning in *Gilbert*” by “adding pregnancy to the definition of sex discrimination prohibited by Title VII.” *Id.*, at 284. But the second clause was intended to do more than that—it “was intended to overrule the holding in *Gilbert* and to illustrate how discrimination against pregnancy is to be remedied.” *Id.*, at 285. The dissent’s view, like that of UPS’, ignores this precedent.

III

The statute lends itself to an interpretation other than those that the parties advocate and that the dissent sets

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forth. Our interpretation minimizes the problems we have discussed, responds directly to *Gilbert*, and is consistent with longstanding interpretations of Title VII.

In our view, an individual pregnant worker who seeks to show disparate treatment through indirect evidence may do so through application of the *McDonnell Douglas* framework. That framework requires a plaintiff to make out a prima facie case of discrimination. But it is “not intended to be an inflexible rule.” *Furnco Constr. Corp. v. Waters*, 438 U. S. 567, 575 (1978). Rather, an individual plaintiff may establish a prima facie case by “showing actions taken by the employer from which one can infer, if such actions remain unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under” Title VII. *Id.*, at 576 (internal quotation marks omitted). The burden of making this showing is “not onerous.” *Burdine*, 450 U. S., at 253. In particular, making this showing is not as burdensome as succeeding on “an ultimate finding of fact as to” a discriminatory employment action. *Furnco, supra*, at 576. Neither does it require the plaintiff to show that those whom the employer favored and those whom the employer disfavored were similar in all but the protected ways. See *McDonnell Douglas*, 411 U. S., at 802 (burden met where plaintiff showed that employer hired other “qualified” individuals outside the protected class); *Furnco, supra*, at 575–577 (same); *Burdine, supra*, at 253 (same). Cf. *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U. S. 133, 142 (2000) (similar).

Thus, a plaintiff alleging that the denial of an accommodation constituted disparate treatment under the Pregnancy Discrimination Act’s second clause may make out a prima facie case by showing, as in *McDonnell Douglas*, that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others “simi-

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lar in their ability or inability to work.”

The employer may then seek to justify its refusal to accommodate the plaintiff by relying on “legitimate, non-discriminatory” reasons for denying her accommodation. 411 U. S., at 802. But, consistent with the Act’s basic objective, that reason normally cannot consist simply of a claim that it is more expensive or less convenient to add pregnant women to the category of those (“similar in their ability or inability to work”) whom the employer accommodates. After all, the employer in *Gilbert* could in all likelihood have made just such a claim.

If the employer offers an apparently “legitimate, non-discriminatory” reason for its actions, the plaintiff may in turn show that the employer’s proffered reasons are in fact pretextual. We believe that the plaintiff may reach a jury on this issue by providing sufficient evidence that the employer’s policies impose a significant burden on pregnant workers, and that the employer’s “legitimate, nondiscriminatory” 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.

The plaintiff can create a genuine issue of material fact as to whether a significant burden exists by providing evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers. Here, for example, if the facts are as Young says they are, she can show that UPS accommodates most nonpregnant employees with lifting limitations while categorically failing to accommodate pregnant employees with lifting limitations. Young might also add that the fact that UPS has multiple policies that accommodate nonpregnant employees with lifting restrictions suggests that its reasons for failing to accommodate pregnant employees with lifting restrictions are not sufficiently strong—to the point that a jury could

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find that its reasons for failing to accommodate pregnant employees give rise to an inference of intentional discrimination.

This approach, though limited to the Pregnancy Discrimination Act context, is consistent with our longstanding rule that a plaintiff can use circumstantial proof to rebut an employer's apparently legitimate, nondiscriminatory reasons for treating individuals within a protected class differently than those outside the protected class. See *Burdine, supra*, at 255, n. 10. In particular, it is hardly anomalous (as the dissent makes it out to be, see *post*, at 8–9) that a plaintiff may rebut an employer's proffered justifications by showing how a policy operates in practice. In *McDonnell Douglas* itself, we noted that an employer's "general policy and practice with respect to minority employment"—including "statistics as to" that policy and practice—could be evidence of pretext. 411 U. S., at 804–805. Moreover, the continued focus on whether the plaintiff has introduced sufficient evidence to give rise to an inference of *intentional* discrimination avoids confusing the disparate-treatment and disparate-impact doctrines, cf. *post*, at 8–10.

Our interpretation of the Act is also, unlike the dissent's, consistent with Congress' intent to overrule *Gilbert*'s reasoning and result. The dissent says that "[i]f a pregnant woman is denied an accommodation under a policy that does not discriminate against pregnancy, she has been 'treated the same' as everyone else." *Post*, at 2. This logic would have found no problem with the employer plan in *Gilbert*, which "denied an accommodation" to pregnant women on the same basis as it denied accommodations to other employees—*i.e.*, it accommodated only sicknesses and accidents, and pregnancy was neither of those. See Part II–C, *supra*. In arguing to the contrary, the dissent's discussion of *Gilbert* relies exclusively on the opinions of the dissenting Justices in that case. See *post*,

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at 6–7. But Congress’ intent in passing the Act was to overrule the *Gilbert majority* opinion, which viewed the employer’s disability plan as denying coverage to pregnant employees on a neutral basis.

IV

Under this interpretation of the Act, the judgment of the Fourth Circuit must be vacated. A party is entitled to summary judgment if there is “no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. Rule Civ. Proc. 56(a). We have already outlined the evidence Young introduced. See Part I–C, *supra*. Viewing the record in the light most favorable to Young, 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 Young’s. In other words, Young created a genuine dispute of material fact as to the fourth prong of the *McDonnell Douglas* analysis.

Young also introduced evidence that UPS had three separate accommodation policies (on-the-job, ADA, DOT). Taken together, Young argued, these policies significantly burdened pregnant women. See App. 504 (shop steward’s testimony that “the only light duty requested [due to physical] restrictions that became an issue” at UPS “were with women who were pregnant”). The Fourth Circuit did not consider the combined effects of these policies, nor did it consider the strength of UPS’ justifications for each when combined. That is, why, when the employer accommodated so many, could it not accommodate pregnant women as well?

We do not determine whether Young created a genuine issue of material fact as to whether UPS’ reasons for having treated Young less favorably than it treated these other nonpregnant employees were pretextual. We leave a final determination of that question for the Fourth Circuit

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to make on remand, in light of the interpretation of the Pregnancy Discrimination Act that we have set out above.

* * *

For the reasons above, we vacate the judgment of the Fourth Circuit and remand the case for further proceedings consistent with this opinion.

It is so ordered.

Young v. United Parcel Service, Inc.

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