No. 19-

IN THE

Supreme Court of the United States

ERYON LUKE,

Petitioner,

v.

CPLACE FOREST PARK SNF, L.L.C.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The two questions presented are:

1. Whether the analysis applied by the Fifth Circuit as articulated in the Pre-Young decision of *Brady vs. Office of the Sergeant at Arms* 820 F.3d 490 (D.C. Cir. 2008) which recommends that (courts focus on the pretext stage if the employer has identified a nondiscriminatory reason for the employment action) alters the new framework for analyzing claims set forth in Young thereby modifying its holding.

2. Whether who or what constitutes a comparator in the prima facie stage to determine discriminatory animus based upon Congress' language in 42 U.S.C. Section 2000e(K) as articulated in McDonnell Douglas and further defined in Young when referring to "***(as other persons not so affected but similar in the ability or inability to work." More specifically can a pregnant complainant be defined as a comparator to herself to show that her employer's reason for an adverse employment action was pretextual as pronounced in of *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431 (8th Cir. 1987).

The United States Fifth Circuit Court of Appeals affirmed the decision of the District Court for the Middle District of Louisiana dismissing Plaintiff's claim asserted

under Title VII of the Civil Rights Act of 1964 ("Title VII") as amended by the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e(k). The District Court granted Employer's summary judgment holding Plaintiff; hereinafter referred to as Luke, had not established a prima facie case of discrimination under the new standards enunciated in Young vs. United Parcel Services, Inc. 135 S.Ct. 1338 (2015).

The Fifth Circuit, in an unpublished opinion on January 14, 2019, bypassed the issue regarding whether the District Court had altered the Court's prima facie standard enunciated in Young, and affirmed summary judgment on behalf of the employer on the premise that Luke had not contradicted her employer's nondiscriminatory reason for terminating her employment , more specifically that she was not able to perform an essential aspect of her job due to a weight lifting restriction. *Luke vs. CPlace Forest Park SNF*, No. 16-30992 (5th Cir. Jan. 14, 2019) (unpublished) ("Slip op.") at 3-4.

The Fifth Circuit's decision contradicts the new framework set forth regarding failure-to-accommodate claims as set forth in Young. The Fifth Circuit altered the new standard thereby changing the circumstantial evidence framework thus contradicting the Court's holding in Young.

Further the four prong standard based upon the analysis of McDonnell Douglas in determining whether an accommodation shall be granted to pregnant women as required under the Pregnancy Discrimination Act ("PDA") has caused a split between the Fifth and Eighth Circuits; more specifically, as it pertains to and related to ***(as

other persons not so affected but similar in the ability or inability to work." as codified under 42 U.S.C. Section 2000e(K). Issue has arisen regarding interpretation of the type and use of evidence as it pertains to "other". More specifically what and who constitutes comparator evidence pertaining to the identification of an employee "similar in the ability or inability to work". The Fifth Circuit's opinion contradicts the Eighth Circuit's decision pronounced in *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431 (8th Cir. 1987) that held a pregnant woman can be seen as a comparator to herself.

LIST OF PARTIES

Those named below are listed in the caption or listed as attorneys or parties of the matter of Appeal to the United States Fifth Circuit Court of Appeals in the captioned matter.

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In addition, the parties stated above, those named herein below appeared as amicus curiae in support of Petitioner in the appeal to the United States Fifth Circuit Court of Appeal bearing docket number 16-30992 titled Eryon Luke v. CPlace Forest Park SNF, L.L.C. USDC No. 3:13-CV-402

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RELEVANT CASES

Deneen v. Northwest Airlines, Inc., 132 F.3d 431 (8th Cir. 1998)

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

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

Page

TABLE OF CITED AUTHORITIES

Page

CASES:

Page

STATUTES AND OTHER AUTHORITIES:

OPINIONS BELOW

The Initial appeal of this matter to the United States Fifth Circuit Court of Appeal bears docket number 16-30992. The Fifth Circuit vacated the district court's ruling with respect to the PDA claim and remanded the case for consideration in light of *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015).. On remand, the district court again granted summary judgment to the employer., Luke appealed the decision to the Fifth Circuit. Oral argument was held on August 2, 2017. In an unpublished opinion the decision of the United States District Court for the Middle District of Louisiana was upheld by the United State Court of Appeals for the Fifth Circuit cited as *Luke v. CPlace Forest Park SNF*, No. 16-30992 (5th Cir. Jan. 14, 2019) (unpublished) ("Slip op.") at 3-4. An enbanc review was requested on January 28, 2019 and denied on May 16, 2019.

JURISDICTION

The Court's jurisdiction is involved under 28 U.S.C. Section 1254(1). The Fifth Circuit opinion was rendered on January 14, 2019 (See Appendix A). The Petition for En Banc Rehearing was requested on January 28, 2019 and denied on May 16, 2019. (See Appendix D).

RELEVANT STATUTORY PROVISION

The Pregnancy Discrimination Act ("PDA"), 42 U.S.C. Section 2000e(k).

STATEMENT OF THE CASE

A. Petitioner, Eryon Luke's asserts that Defendant *CPlace* Forest Park, SNF, LLC (*CPlace*) doing business as Nottingham Regional Rehab Center violated the Pregnancy Discrimination Act, 42 U.S.C. 2000e(K). Plaintiff/Petitioner Eryon Luke (Luke) was employed by *CPlace* Forest Park SNF, LLC, doing business as Nottingham Regional Rehab Center (defendant or *CPlace*), as a full-time certified nursing assistant (CNA) from October 10, 2011 through May 24, 2012. She learned she was pregnant with twins and soon thereafter, on December 3, 2011, provided her supervisor with a certificate from her doctor stating that she could work with the restriction that she does not lift heavy objects for two weeks. On December 3 and 4, 2011, the supervisor allowed Luke to perform duties that did not require heavy lifting. There was no job description stating a lifting requirement, and CNAs performed many duties that did not require lifting. ROA. 44-2, p.10. All employees were required by the *CPlace*'s written policies to get assistance lifting "heavy loads" and were instructed to "[n]ever lift a resident without assistance." ROA. 44-3, §§ 8.2D, §8.3E. Prior to becoming pregnant, Luke always received assistance with lifting from other employees. ROA. 44-2, p.15. Mechanical lifts and other assistive devices were also available. ROA. 60-2, p.39. *CPlace* had a policy of providing reasonable accommodations to employees who had disabilities, ROA. 44-3, §3.2 ("It is the policy of the company to comply with all relevant and applicable provision [sic] of the Americans with Disabilities Act. …The Company shall strive to make reasonable accommodations for employees when provided proper notice, preferably in writing."). In addition, *CPlace* modified duties to accommodate some CNAs and had light

duty positions that it made available to CNAs. ROA. 45, pp.23, 24, 27; ROA. 84, p.3; ROA. 86-5, p.20. *CPlace* also had the ability to transfer CNAs to positions that did not require lifting within the Nottingham facility or at six or seven sister facilities. ROA. 44-3, p.10; ROA. 43-7, pp.5, 10; ROA. 60-5, p.8; ROA. 60-6, p.46. On December 5, 2011, after Luke had worked for two days with modified duties that did not require heavy lifting, *CPlace*'s human resources manager, Rachel Carcamo, informed Luke that despite her medical release, and despite her supervisor's agreement that she could not continue working without performing heavy lifting, she was being placed on forced leave for two weeks because of her lifting restriction as *CPlace* did not have any light duty "at that time." ROA. 42-4, p.2.Donna Duplantis, the Regional Director of Human Resources for Traditions Senior Management (Traditions has a contract to manage *CPlace*), said *CPlace* assumed that Luke had a "problem pregnancy." ROA. 44-2, p.6 ("A. Because she had such strict lifting restrictions in the beginning of her pregnancy, we decided to assume it was a problem pregnancy. We did not ask her physical [sic] to verify that.").Luke returned to work on December 12, 2011, with another certificate from her doctor clearing her to work without restrictions. ROA. 44-1, p.2. Almost six weeks later, on January 22, 2012, Luke gave the *CPlace* another note from her doctor that stated "no heavy lifting throughout pregnancy" and Luke was again placed on involuntary leave because, she was told, she could not work with a lifting restriction. ROA. 42-4, p.4. A doctor's note provided four days later clarified that the lifting restriction was only for objects heavier than 30 pounds, and Luke could otherwise continue to work. *Id*. *CPlace* nevertheless placed her on leave, despite receiving a letter from Luke's doctor stating that there

was no medical reason for her to be on leave and that she could work normal hours, as long as she did not lift more than 30 pounds. *Id*. As she was filling out paperwork related to her leave, Luke asked Carcamo if there was any other work she could do, but Carcamo said no. ROA. 60-6, pp.44-45. On February 16, 2012, Luke also wrote a letter to *CPlace*, requesting that she be allowed to return as she felt there was sufficient light duty available for her and asking that her supervisors be allowed "to make reasonable adjustments to the type of work I am able to perform." ROA. 42-4, p.33.*CPlace*'s refusal to accommodate Luke with lifting assistance, modification of duties, a designated light duty position, or a transfer was a departure from its treatment of other CNAs. CNAs who needed accommodation in the past had been allowed to work light duty, ROA. 60-5, pp.10 & 11; ROA. 86-5, p. 20, and, in addition to directing other CNAs – including Luke herself when she was not pregnant – to have assistance when lifting, *CPlace* provided modified duties to two CNAs who had uncomplicated pregnancies. ROA. 86-2, pp.2, 4. CNAs were also transferred to positions such as ward clerk, medical records, and activities assistants. ROA. 60-6, p.50. Carcamo provided Luke with a letter stating that her leave expired on May 23, 2012, and she would be terminated effective May 24, 2012. ROA. 42-4, p.35. *CPlace* stated that she was terminated because "there was still no work available within Luke's restrictions." ROA. 42-8, p.6. Luke gave birth to twins on June 21, 2012. ROA. 1-2, p.3.

B. On May 15, 2013, Eryon Luke filed this action in state court, alleging, *inter alia*, that her former employer discriminated against her on the basis of her pregnancy in violation of the Pregnancy Discrimination Act (PDA),

42 U.S.C. § 2000e-k, when it refused to accommodate her lifting restriction and terminated her employment, and that it violated the Louisiana Employment Discrimination Law (LEDL), La. R.S. § 23:342 when it failed to allow her to take leave to which she was entitled and to transfer her to accommodate her pregnancy. ROA. 1-2. The Defendant, *CPlace* Forest Park SNF, LLC, doing business as Nottingham Regional Rehab Center, removed the action to the United States District Court for the Middle District of Louisiana on June 20, 2013. ROA. 1. On November 4, 2014, the district court granted summary judgment to the *CPlace* on the PDA claim and one of the LEDL claims and remanded the remaining LEDL claim to state court. ROA. 32. Luke appealed, and while her appeal was pending, the United States Supreme Court issued a decision in *Young v. United Parcel Service*, *Inc.*, 135 S. Ct. 1338 (2015). This Court vacated the district court's ruling with respect to the PDA claim and remanded the case for consideration in light of *Young*. ROA. 37.On remand, additional discovery was taken and both parties moved for summary judgment. ROA. 42, 44. Luke argued that she had presented evidence that she was pregnant, had sought accommodation, the employer refused to accommodate her, and the employer accommodated others who were similar in their ability to work in satisfaction of the new *prima facie* case established by *Young* for claims alleging failure to accommodate a pregnant employee. ROA. 44. She also argued that her evidence was sufficient to show that the employer's proffered reason for non-accommodation was pretext for discrimination as required by *Young*. Luke offered evidence that she could have performed her job with lifting assistance that the employer made available to all employees, including to Luke herself prior to her pregnancy. Further, a reasonable factfinder could conclude

that the evidence showed that the employer impermissibly assumed that Luke had a "problem pregnancy" and, based on that assumption, denied her accommodations that were provided both to other pregnant employees who did not have complications and to nonpregnant employees. *Id*. The employer argued in its motion that Luke had not shown that others were accommodated, it did not provide employees with light duty at the time that Luke requested light duty, and no light duty positions were available. ROA. 42. *Id*. Each motion was opposed by the other party, presenting arguments similar to the arguments made in their motions. ROA. 48, 60.After hearing oral argument on March 29, 2016, allowing additional discovery, and receiving supplemental memoranda from the parties, ROA. 83, 84, on August 9, 2016, the district court granted the defendant's motion for summary judgment and denied as moot Luke's motion for summary judgment. ROA. 87.

C. On September 2, 2016, Luke timely filed this appeal of the district court's final judgment. ROA. 88. The initial appeal of this matter to the United States Fifth Circuit Court of Appeal bearing docket number 16-30992. While pending appeal, a decision was rendered in *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338 (2015). The Fifth Circuit vacated the district court's ruling with respect to the PDA claim and remanded the case for consideration in light of *Young*. On remand, the district court again granted summary judgment to the employer, holding that Luke had not established a prima facie case of discrimination under the new standards enunciated by *Young* and granting the defendant's motion for summary judgment. Luke appealed the decision to the Fifth Circuit. Oral argument was held on August 2, 2017. In an unpublished opinion of the United State Court of Appeals for the Fifth Circuit cited as *Luke*

v. CPlace Forest Park SNF, No. 16-30992 (5th Cir. Jan. 14, 2019) (unpublished) ("Slip op.") at 3-4, the Fifth Circuit did not address the argument that the district court had altered the *Young* prima facie case, but rather, assumed that Luke had established a prima facie case and then affirmed summary judgment for the employer on the ground that it had a stated a nondiscriminatory reason for terminating Luke's employment, specifically, that she was not able to perform an essential aspect of her job. An enbanc review was requested on January 28, 2019 and denied on May 16, 2019.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit's opinion failed to follow *Young's* new analytic framework and failed to consider the central issue of Young. In its decision, the Fifth Circuit cites *Brady vs. Office of Sergeant at Arms*, 520 F.3d 490, 493-94 (D.C. Cir. 2008) which recommends "that courts focus on the pretext stage if the employer has identified a nondiscriminatory reason for the employment action." *Brady*, supra. a pre-Young decision, is contrary to the new framework created by Young regarding failure-to-accommodate claims. The appeal of the District Court's decision by Luke to the Fifth Circuit was due to the alteration of the new prima facie case standard. The Fifth Circuit did not address the alteration. The Young circumstantial evidence framework required consideration of whether the employer had articulated a "sufficiently strong" reason for refusing Luke's request to accommodate her temporary lifting restriction, despite accommodating non-pregnant employees. The District Court in its ruling that granted *CPlace*'s Motion for Summary Judgment correctly opined: "No pregnant woman should, in 2016, be fired for being

unable to lift more than 30 pounds." (District Court's 2016 ruling); however, as the Fifth Circuit also did, its application and holding of the Court's analytic framework in Young was too narrowly construed.

Young fundamentally changed the way courts analyze claims of refusal to accommodate pregnancy-related limitations brought pursuant to this clause. It created, in effect, a presumption that an employer should modify the job duties of pregnant women if it modifies the job duties of non-pregnant employees who are similar in their ability or inability to work. This presumption is reflected in the new framework announced in the decision for analyzing refusal-to-accommodate claims brought using circumstantial evidence. The Fifth Circuit in its opinion did not follow the standard pronounced in *Young*, supra.

Secondly, *Brady*, supra., cited by the Fifth Circuit recognized that comparator evidence is a viable way to show pretext.

> "Often the employee attempts to produce evidence suggesting that the employer treated other employees of a different race, color, religion, sex, or national origin more favorably in the same factual circumstances. See 1 LEX K. LARSON, EMPLOYMEN DISCIMINATION § 8.04, AT 8-66 (2D ED. 2007) ("In most cases the key to proving pretext is comparative evidence.") *Brady vs. Office of Sergeant at Arms*, 520 F. 3d 490 (D.C. Cir. 2008)

The Fifth Circuit recognized "[Whether the employer engaged in disparate treatment is the question when evaluating whether its nondiscriminatory explanation

should be discredited because it has not been consistently applied. CF. *Rios vs. Rossotti*, 252 F. 3d 375, 381 (5th Cir. 20010 (citing *Price Waterhouse vs. Hopkins*, 490 U.S. 228, 277 (1989) (Ruling of the Fifth Circuit in Luke Decision)

However, the Fifth Circuit refused to consider whether a pregnant woman could be a comparator to herself.

> "Because Luke has not pointed to any other CNAs who were accommodated when they had a similar medical restriction on heavy lifting there is not evidence that would allow a jury to conclude that *CPlace* is insincere when it says that such lifting is an essential part of the job." (Luke decision on appeal)

The Fifth Circuit in its ruling did not acknowledge Luke's evidence as to whether she could be a comparator to herself. Evidence that Luke received lifting assistance prior to her pregnancy was presented. Said evidence was not considered in determining whether *CPlace*'s reason for denying her work was pretextual. In its opinion, the Fifth Circuit stated that no evidence was presented by Plaintiff Luke regarding whether any other employee was given help when lifting, and the Fifth Circuit refused to acknowledge Plaintiff Luke's evidence that she was given lifting assistance prior to pregnancy.

In the Eighth Circuit case of Deneen vs. Northwest Airlines, Deneen brought a disparate treatment case against her employer for pregnancy discrimination. Deneen, a customer service agent, received a weight restriction during her pregnancy not to lift more than seventy-five pounds. Her employer stated she could not

complete the job function of lifting bags onto a conveyor and did not allow her to return to work during her pregnancy.

The Eighth Circuit found that Deneen suffered different treatment after her pregnancy than before and that she was a comparable party to herself. .

When it rendered its decision in this case, the Fifth Circuit had the benefit of, but disregarded the decision of the Eighth Circuit that held a person could be a comparator to herself. The Fifth Circuit's opinion is conflict with the Eight Circuit. The split among the two Circuits that have addressed this issue requires resolution. The ramifications of which circuit is correct will significantly affect the rights of both employee and employer.

I. Review is warranted to resolve whether the analysis applied by the Fifth Circuit articulated in the Pre-Young decision of *Brady vs. Office of the Sergeant at Arms* 820 F.3d 490 (D.C. Cir. 2008) is applicable in light of the more specified framework for reviewing claims set forth in Young thereby altering the holding and standard set forth by the Court.

The second clause of the Pregnancy Discrimination Act (PDA) provides that pregnant employees shall be treated the same as others who are not pregnant but are "similar in their ability or inability to work." 42 U.S.C. § 2000e(k). In granting certiorari in *Young*, the Supreme Court expressly noted the "lower-court uncertainty about interpretation of the [PDA]" as to this clause's applicability in the context of pregnancy accommodation. *Young*, 135 S. Ct. at 1348 (collecting cases). The Court cited a line of

decisions – including one from the Fifth Circuit, *Urbano v. Continental Airlines, Inc.*, 138 F. 3d 204, 206, 208 (5th Cir. 1998) – that had approved employer policies extending accommodations to certain categories of employees, like those injured on the job, but not pregnant workers. *Young* rejected those cases as improperly deferring to employers' own definitions of which employees are and are not sufficiently "similar" to pregnant workers to require equal treatment. Such deference, it concluded, was fundamentally at odds with Congress's intent in enacting the PDA: to end the disparate treatment of pregnancy, as compared to other conditions, that too often resulted in women's exit from the workforce. See, e.g., S. Rep. No. 95-331, at 4 (1977) ("[T]he bill rejects the view that employers may treat pregnancy and its incidents as sui generis, without regard to its functional comparability with other conditions."); H.R. Rep. No. 95-948, at 4 (1978) ("The bill would simply require that pregnant women be treated the same as other employees on the basis of their ability or inability to work.").

To that end, *Young* fundamentally changed the way courts analyze claims of refusal to accommodate pregnancy-related limitations brought pursuant to this clause. It created, in effect, a presumption that an employer should modify the job duties of pregnant women if it modifies the job duties of non-pregnant employees who are similar in their ability or inability to work. This presumption is reflected in the new framework announced in the decision for analyzing refusal to accommodate claims brought using circumstantial evidence.

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 "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 her accommodation. 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. . . .

If the employer offers an apparently "legitimate, nondiscriminatory" 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.

Young, 135 S. Ct. at 1354 (citation omitted).

The Fifth Circuit, however, did not use *Young*'s new analysis. After assuming Luke had presented a sufficient prima facie case, the Fifth Circuit accepted the employer's stated reason for terminating Luke, namely, that she could

not "perform an essential aspect of her job," which it found to be the "ultimate question." Slip op. at 3-4. But *Young* directed that, instead, it should have considered whether Luke's employer had proffered a nondiscriminatory reason for refusing to accommodate her when it did accommodate non-pregnant employees who were similar in their ability to work, and whether the proffered reason was based on something other than the employer's cost or convenience. See *Young*, 135 S. Ct. at 1354 (describing second step of analysis). The Fifth Circuit's deviation from *Young* is underscored by the fact that Peggy Young had a lifting restriction, *Young*, 135 S. Ct. at 1344, and whether she could perform an essential aspect of her job never entered into the Supreme Court's analysis.

The Fifth Circuit's avoidance of the refusal-to-accommodate claim allowed the employer to avoid explaining why it accommodated others but not the pregnant employee – thereby exempting the employer from meeting the second step of the *Young* framework and preventing Luke from challenging its explanation in the third step of that framework. It also allowed the employer to benefit from a fact pattern that it had itself created: the only reason Luke could not perform all of the functions of her job is that the employer refused to accommodate her with lifting assistance or job modification, even though it provided both to other employees. The approach taken in the Fifth Circuit conflicts with the spirit and letter of *Young* in additional ways. It distorted Luke's refusal-to-accommodate claim into a termination claim, even though *Young* made clear that the refusal to accommodate when similarly-abled non-pregnant employees are accommodated is a presumptive violation of the PDA. If allowed to stand, this distortion would allow employers to

insulate themselves from PDA liability by first denying pregnant employees the accommodations they need – regardless of whether they accommodate non pregnant employees who are similar in their ability or inability to work – and then terminating them for not being capable of performing all of their job duties. The conflict with *Young* arises because the panel's opinion deemed the employer's reason for termination to be the "ultimate question" (slip op. at 4) – even though, according to *Young*, the ultimate question is "why, when the employer accommodated so many, could it not accommodate pregnant women as well?" *Id.* at 1355.

If the Fifth Circuit Had Used the Young Analysis, It Would Have Found a Triable Question of Pretext

The Fifth Circuit noted that the employer raised two justifications for its refusal to accommodate Luke: she was unable to perform an essential aspect of her job, and the employer did not offer light duty positions to its nurses. Slip op. at 4. Even if these justifications were found to pass muster under the *Young* analysis – a point Luke strongly disputes – Luke presented sufficient evidence that these justifications were mere pretext for pregnancy discrimination. "[A] plaintiff's prima facie case, combined with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 148 (2002). Luke presented evidence to the district court that the employer's justifications were false. First, Luke presented evidence to dispute the employer's claim that it required employees to be able to lift a specific amount of weight. The evidence included

that the employer had no weight-lifting test for applicants and did not test employees' weightlifting ability. It had no job description or policy stating that employees had to be able to lift a minimum amount of weight. The employer instructed employees not to try to lift heavy patients on their own, and Luke herself had had assistance with lifting prior to becoming pregnant.

Second, Luke presented evidence to the district court that she sought accommodation that included not only light duty but also other job modifications, and she had asked broadly if the employer had any work that she could do. She also presented evidence that the employer accommodated others, including that it had a written policy of providing accommodation to employees who had disabilities, the employer had accommodated nonpregnant employees who needed help with lifting, the employer had transferred employees to available positions that accommodated their medical restrictions, employees helped each other with lifting, and a mechanical lifting device was available. In the face of this evidence, *CPlace*'s justification that it did not offer light duty to CNAs is both disputed and insufficient. In addition to showing that *CPlace*'s proffered justifications were false and that *CPlace* accommodated others who were similar in their ability or inability to work, Luke showed that *CPlace*'s refusal to accommodate her placed a significant burden on her: it resulted in her being forced out on unpaid leave and then terminated. In addition, *CPlace* had several policies and practices that resulted in nonpregnant employees being accommodated, but Luke was the only pregnant employee with medical restrictions who was not accommodated. See *Young*, 135 S. Ct. at 1355 (*Young* presented evidence of several policies of accommodation and argued that taken together, they

significantly burdened pregnant women; Fourth Circuit did not consider the effect of the accommodation policies or the strength of the employer's justifications for each when combined, so remand was appropriate); *Legg v. Ulster County*, 820 F.3d 67, 76 (2d Cir. 2016) (where employer had policies requiring accommodation of certain non-pregnant employees but denied accommodation to the only pregnant employee, it had "undoubtedly imposed a significant burden on its pregnant employees"). This burden was not outweighed by any burden that accommodation would have placed on *CPlace*, and *Luke* therefore, should have been permitted to try her case to a jury.

The District Court's Opinion Affirmed by the Fifth Circuit also Conflicts with Young and Should Have Been Reversed

The *Young* Court held that a plaintiff establishes a prima facie case by showing: (1) she was pregnant, (2) she sought an accommodation, (3) the employer did not accommodate her, and (4) the employer accommodated others who were similar in their ability or inability to work. The district court recited the new prima facie case, but improperly interpreted the fourth element as requiring Luke to present evidence that the accommodation she sought was the same as accommodations the employer had given to other employees. *Id.* This ruling construed the fourth element unduly narrowly and created a more stringent showing than called for by *Young*. Nothing in the fourth element requires plaintiffs to demonstrate that the accommodations sought by pregnant employees are identical to accommodations provided to others. The facts at issue in *Young* best illustrate this principle. There, the Court was presented with an employer's

policies that accommodated workers injured on the job, workers entitled to accommodation under the Americans with Disabilities Act, and workers who were unable to fulfill their job duties as drivers because they had lost their commercial driver's licenses – including due to non medical reasons like DUI convictions. *Young*, 135 S. Ct. at 1347. The Court considered these employees as similar in their ability or inability to work to Peggy Young – who had a lifting restriction during pregnancy – even though for many of them their inability to work as UPS drivers arose from reasons other than a lifting restriction. At no point did the Court limit its consideration of comparators to those who needed the same accommodation as Ms. Young. Putting aside *Young*'s unmistakable lessons, however, the district court's requirement that a plaintiff show that workers "similar in their ability or inability to work" were granted identical accommodations to those she needs ignores the myriad, individualized reasons non-pregnant employees might be unable to perform all their job functions; such reasons implicate not only their distinct physical needs but also, their specific job duties. Narrowing the fourth element in this way plainly contradicts the presumption in *Young* in favor of accommodation of the pregnant employee unless an employer has a "sufficiently strong" nondiscriminatory reason for not providing an accommodation. Granting Petitioner's writ would allow the Court to remedy this confusion and provide critical guidance to the lower courts.

II. Review is necessary to resolve conflict between the Fifth Circuit and Eighth Circuit regarding whether who or what constitutes a comparator in the prima facie stage to determine discriminatory animus based upon Congress' language in 42 U.S.C. Section 2000e(K) as articulated in McDonnell Douglas and further defined in Young when referring to "*(as other persons not so affected but similar in the ability or inability to work." More specifically can a pregnant complainant be defined as a comparator to herself to show that her employer's reason for an adverse employment action was pretextual as pronounced in *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431 (8th Cir. 1987).**

In a pregnancy discrimination case where the plaintiff presented evidence of pregnant comparators, the Eighth Circuit found the evidence relevant to similar issues presented herein decided in *Deneen v. Northwest Airlines, Inc.*, 132 F.3d 431 (8th Cir. 1987). Deneen was pregnant when she was recalled from layoff, and was briefly placed on bed rest shortly before resuming work. The employer rescinded the recall on the assumption that she had pregnancy complications that made her unable to work. Her request for light duty was denied, and she was told that she would be rehired only if she could lift 75 pounds as required by her position. She sued for violation of the PDA, claiming that she had been discriminated against because of her complications. She claimed that the 75-pound lifting requirement that was used to exclude her from her job was not consistently applied, and that she had never been able to lift that much even when not pregnant. Part of her evidence was that two pregnant employees who did not have complications were rehired,

and that they were given light duty when they later had pregnancy-related lifting restrictions. A jury found in her favor. On appeal, the employer challenged as irrelevant her evidence of how the other pregnant employees were treated. The Eighth Circuit rejected the argument, holding that the pregnant comparators were relevant because the "distinguishing feature is not pregnancy alone but Mrs. Deneen's pregnancy-related complication. . . ." *Id.* at 438. It further found that the accommodation of some pregnant employees and not others was "relevant to resolving the question of whether the employer engaged in intentional discrimination and whether the physical requirement of the position is a bona fide occupational qualification." *Id. Luke* submits that these holdings are instructive and persuasive in the present action.

The district court brushed aside *Luke*'s evidence and reliance on *Deneen*, distinguishing that case because Deneen, "unlike Plaintiff," had not been made aware prior to becoming pregnant that she would have to comply with a lifting requirement. ROA. 87, p .4, fn. 3. This ruling is based on faulty factfinding by the district court and accepted by the Fifth Circuit. The district court accepted *CPlace*'s claim that its CNAs had a lifting requirement that *Luke* could not meet, despite *Luke*'s evidence disputing the existence of a lifting requirement (*see* section II.B, *infra*), and the absence of a claim or evidence from *CPlace* that it gave Luke a written job description that contained a lifting requirement. (This makes Luke's case even stronger than Deneen's; Deneen's job description did contain a lifting requirement.) Moreover, *CPlace*'s policies expressly required CNAs to get help to lift patients and heavy objects, ROA. 44-2, pp.14, 15; 44-3 ¶¶8.2, 8.3, and, similar to *Deneen*, *CPlace* did not consistently require

employees to be able to lift heavy amounts as shown by its practice of requiring employees to get assistance with lifting and providing modified work assignments that did not require lifting. Luke submits that the evidence of other pregnant women who did not have pregnancy-related complications but were accommodated with lifting assistance was sufficient to raise a genuine issue of material fact regarding whether *CPlace* discriminated and to cast doubt on *CPlace*'s proffered reason for its actions. Moreover, it raised the inference that *CPlace* did not require all CNAs to be able to engage in heavy lifting, but rather demanded the ability to engage in heavy lifting only from Luke because her pregnancy complications restricted her lifting and *CPlace* could therefore use a lifting requirement to force Luke out of her job. In disregard of the foregoing, the district court appears to have engaged in factfinding by rejecting Luke's evidence and accepting *CPlace*'s evidence as true and appears to have drawn inferences from the evidence in *CPlace*'s favor.

Evidence presented by Luke to make out her prima facie case was proof that *CPlace* had provided accommodations to a non-pregnant, "other" employee: Luke herself. Luke testified that prior to becoming pregnant, she had used a mechanical lift, which she described in her deposition as a lift with an anchor that she used to move a patient to his chair because he was too heavy, and that "most of the time she called in a guy to help her to make sure that the patient wouldn't fall while being moved." ROA. 42-2, pp.24-25. The lifting assistance described by Supervisor Boligny and COO Bridges as being available to all CNAs was also available to Luke. The district court rejected this evidence on the ground that it did not show that *CPlace* afforded accommodation "to others." ROA. 87 at 6. This ruling is erroneous and

reads *Young* unduly narrowly; courts regularly compare the treatment of employees before and after pregnancy to ascertain if pregnancy motivated an employer's actions. *See, e.g., Martin v. Canon Bus. Solutions, Inc.*, 2013 U.S. Dist. LEXIS 129008, at *25–26 (D. Colo. 2013) (plaintiff presented evidence that she received multiple awards as top salesperson but began getting reprimanded only days after she announced her pregnancy); *Hunter v. Mobis Ala., LLC*, 559 F. Supp. 2d 1247 (M.D. Ala. 2008) (evidence showed that employer did not enforce attendance policy until plaintiff became pregnant); *Wilson v. O'Grady-Peyton Int'l (USA), Inc.*, 2008 U.S. Dist. LEXIS 24394, at *27–28 (S.D. Ga. 2008) (employee who alleged she was compensated differently after becoming pregnant could have been a close comparator for herself except for evidence of changed working conditions during the relevant time); *Calabro v. Westchester BMW, Inc.*, 398 F. Supp. 2d 281, 293 (S.D.N.Y. 2005) (plaintiff presented evidence that employer accommodated her before she was pregnant but chose not to do so when she was pregnant).

It can be no different with Luke, who, when she was not pregnant, was an employee not "affected" by pregnancy. Luke's evidence that she was permitted to have assistance with lifting when she was not pregnant, but not when she was restricted from lifting because of pregnancy complications, is strong evidence that *CPlace* accommodated non-pregnant employees in satisfaction of the *prima facie* case and, further, showed that *CPlace*'s actions were impermissibly motivated by Luke's pregnancy and complications.

Thus, certiorari is warranted to resolve a split between the Fifth Circuit and Eighth Circuit regarding who can be classified as comparators.

CONCLUSION

For all the foregoing reasons, petitioner respectfully request that the Supreme Court grant review of this matter.

Respectfully Submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, FILED JANUARY 14, 2019

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-30992

ERYON LUKE,

Plaintiff - Appellant ,

v.

CPLACE FOREST PARK SNF, L.L.C., DOING BUSINESS AS NOTTINGHAM REGIONAL REHAB CENTER,

Defendant - Appellee.

January 14, 2019, Filed

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:13-CV-402

Before DAVIS, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appendix A

The district court granted summary judgment dismissing Eryon Luke's pregnancy discrimination claim. Because Luke has not presented evidence that would allow a jury to discredit the employer's nondiscriminatory reason for firing her, we AFFIRM.

I.

Luke was a Certified Nursing Assistant (CNA) at a skilled nursing rehabilitation center owned by CPlace Forest Park. When she learned that she was pregnant with twins, she told CPlace the good news through a doctor's note. The note informed CPlace that she could continue working only if she did not engage in heavy lifting for two weeks. Luke was given work that did not involve heavy lifting by the weekend shift supervisor for two days, but when the human resource manager returned, the manager sent her home.

About ten days after the first note, Luke presented a second note from her doctor that cleared her for work with no restrictions. She was back on the job for about a month and a half before she presented a second doctor's note that said she should not lift more than thirty pounds for the duration of her pregnancy. CPlace said that it could not abide this, that all the CNAs regularly had to lift more than thirty pounds, and that there was no light duty work available for Luke. As a result, Luke took the pregnancy leave (up to four months) she is entitled to under Louisiana law. LA. STAT. § 23:342(2)(b).

About a month into her leave, Luke wrote a letter to CPlace telling them that she would like to return to work and that she "was able to perform all of my duties except lifting patients." She wrote, "I ask that you work with me and allow my supervisors to make reasonable adjustments to the type of work I am able to perform while under doctor's care."

When four months were up, CPlace told Luke that she was still "unable to return to work" and fired her. She gave birth to her twins one month later.

Luke sued CPlace, but the district court entered summary judgment against her. While her appeal was pending, the Supreme Court decided *Young v. United Parcel Service, Inc.*, 135 S. Ct. 1338, 191 L. Ed. 2d 279 (2015). In light of *Young*, we vacated and remanded for reconsideration by the district court. *Luke v. CPlace Forest Park SNF, L.L.C.*, 608 F. App'x 246 (5th Cir. 2015) (*per curiam*). The district court entered summary judgment again, finding that Luke did not make out a *prima facie* case of discrimination. This appeal followed.

II.

Luke relies only on indirect evidence to support her claim. *Young* authorized use of the *McDonnell Douglas* burden shifting framework to determine when such circumstantial evidence is enough to defeat summary judgment in a case alleging that denial of an accommodation violated the Pregnancy Discrimination Act. *Young*, 135 S. Ct. at 1353-54. The plaintiff bears the

initial burden of making out a *prima facie* case "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.'" *Id.* at 1354 (citing 42 U.S.C. § 2000e(k)). If she does, the "employer may then seek to justify its refusal to accommodate the plaintiff by relying on 'legitimate nondiscriminatory' reasons for denying her accommodation." *Id.* (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973)). If the employer offers that justification, the onus returns to the employee to show that the reasons given by the employer were not its true reasons but a pretext for discrimination. *Id.*; *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143, 120 S. Ct. 2097, 147 L. Ed. 2d 105 (2000).

The parties focus on the first step of this inquiry, as the district court held that Luke could not make out a *prima facie* case. Our review of a summary judgment, however, is not limited to the rationale of the district court and we may affirm on any ground supported by the record. *See Holtzclaw v. DSC Communs. Corp.*, 255 F.3d 254, 258 (5th Cir. 2001). In addition to defending the district court's rationale, CPlace argues that we can affirm on the alternative ground that it offers a nondiscriminatory reason—Luke's inability to perform an essential aspect of her job—that the evidence does not undermine. Because we agree that Luke does not point to any evidence that casts doubt on CPlace's justification, we affirm on that ultimate question without deciding whether she established a *prima facie* case. *See, e.g., Diggs v. Burlington Northern & Santa Fe Ry.*, 742 Fed. Appx. 1, 4 (5th Cir. 2018); *Lay v. Singing River Health Sys.*, 694

F. App'x 248, 254 (5th Cir. 2017); *Easterling v. Tensas Parish Sch. Bd.*, 682 F. App'x 318, 322 (5th Cir. 2017) (all assuming *arguendo* that the plaintiff could establish a *prima facie McDonnell Douglas* case in affirming grants of summary judgment because plaintiff did not offer evidence of pretext); *see also Brady v. Office of Sergeant at Arms*, 520 F.3d 490, 493-94, 380 U.S. App. D.C. 283 (D.C. Cir. 2008) (Kavanaugh, J.) (recommending that courts focus on the pretext stage if the employer has identified a nondiscriminatory reason for the employment action).

CPlace asserts that it fired Luke because being able to lift more than thirty-five pounds was essential to the job so certified nurses could lift residents when needed. It further contends that it did not offer light duty positions to its nurses.

Luke does not point to evidence that casts doubt on this explanation. *See Willis v. Cleco Corp.*, 749 F.3d 314, 318 (5th Cir. 2014). She tries to show that other workers were given accommodations that involved less lifting. But this involved receiving help from coworkers when lifting, and there is no indication that the employer directed these *ad hoc* accommodations. Whether the *employer* engaged in disparate treatment is the question when evaluating whether its nondiscriminatory explanation should be discredited because it has not been consistently applied. *Cf. Rios v. Rossotti*, 252 F.3d 375, 381 (5th Cir. 2001) (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989) (O'Connor, J., concurring) (explaining why statements from nondecisionmakers do not help a plaintiff unless she can show the employer was acting as a cat's paw for that coworker)). More fundamentally, none of the workers who

allegedly received these accommodations were, like Luke, under a doctor's orders not to engage in heavy lifting. Notably, when Luke's doctor cleared her for work after lifting the initial restriction, Luke was allowed to return. It was only after the doctor again restricted her that Luke was not allowed to work. Because Luke has not pointed to any other CNAs who were accommodated when they had a similar medical restriction on heavy lifting, there is not evidence that would allow a jury to conclude that CPlace is insincere when it says that such lifting is an essential part of the job. *Contrast Young*, 135 S. Ct. at 1355 ("[W]hy, when the employer accommodated so many, could it not accommodate pregnant women as well?").

* * *

We AFFIRM the judgment of the district court. We also DENY Luke's motion to file a supplemental brief after oral argument as both parties were afforded the full process of briefing and argument.

APPENDIX B — RULING AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA, DATED AUGUST 9, 2014

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO.: 13-00402-BAJ-EWD

ERYON LUKE

VERSUS

CPLACE FOREST PARK SNF, LLC

August 8, 2016, Decided
August 9, 2016, Filed

RULING AND ORDER

Before the Court are cross-motions for summary judgment filed by Plaintiff Eryon Luke ("Plaintiff') and Defendant CPlace Forest Park SNF, LLC, doing business as Nottingham Regional Rehab Center ("Defendant"). (Docs. 42, 44). Oral argument has been heard, (Doc. 76), and voluminous briefing has been considered, (Docs. 48, 60, 73, 83, 84). For the reasons explained herein, Defendant's **Renewed Motion for Summary Judgment (Doc. 42)** is **GRANTED** and Plaintiff's **Motion for Summary Judgment (Doc. 44)** is **DENIED** as moot.

Appendix B

I. BACKGROUND

On October 10, 2011, Defendant hired Plaintiff to work as a Certified Nursing Assistant ("CNA") at its skilled nursing rehabilitation center. (*See* Doc. 42-8 at ¶ 1); (*See* Doc. 60-7 at ¶ 1). Approximately two months later. Plaintiff learned that she was six weeks pregnant with twins. (*See* Doc. 1-2 at ¶ 4). Plaintiff immediately notified Defendant of her pregnancy by way of a doctor's note. (*Id.* at ¶ 5). The note effectively stated that Plaintiff was a high-risk pregnancy who could only continue to work if she did not engage in any "heavy lifting for two weeks." (*See* Doc. 42-4 at pp. 7-9).

That, according to Defendant, was not possible. (*Id.* at p. 2, ¶ 7). The CNA position, by its very nature, requires heavy lifting, and Defendant did not, at the time, have any light duty positions for Plaintiff to fill. (*Ibid.*). Plaintiff was accordingly told to go home, and not to return until she was permitted, by her doctor, to work as a CNA without restrictions. (Doc. 42-8 at ¶¶ 7-8). Ten days later, Plaintiff was medically cleared to "return to routine work duties." (Doc. 42-4 at p. 10). Plaintiff returned to work as a CNA on December 14, 2011. (Doc. 42-8 at ¶ 8).

On January 26, 2012, Plaintiff presented Defendant with a second doctor's note. (*See* Doc. 42-4 at p. 21). This note prohibited Plaintiff from lifting more than 30 pounds throughout the remainder of her pregnancy. Defendant viewed this restriction as a non-starter. Every CNA was regularly required to lift more than 30 pounds, and there was no light duty for Plaintiff to perform. (Doc. 42-8 at ¶¶ 18-20).

Plaintiff was therefore forced to take leave. She had four months pursuant to La. Stat. Ann. § 23:342. (*Id.* at ¶ 23). Her leave began on January 23, 2012, (*id.* at ¶ 24), and expired on May 23, 2012, (*id.* at ¶ 28). On May 23, 2012, Defendant informed Plaintiff that "there was still" no light duty for her to perform and that unless she could return to full duty "she would be terminated on May 24, 2012." (*Ibid.*). On May 24, 2012, Plaintiff was fired for not being able to lift more than 30 pounds. (*Ibid.*). She was approximately seven months pregnant. Plaintiff gave birth to twins on June 21, 2012. (*Id.* at ¶ 30).

On May 15, 2013, Plaintiff filed this lawsuit alleging, *inter alia*, that Defendant's refusal to accommodate her pregnancy violated Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e(k).[1] (Doc. 1-2 at ¶¶ 6-7).

II. STANDARD OF REVIEW

Pursuant to the Federal Rules of Civil Procedure, "[t]he [C]ourt shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In determining whether the movant is entitled to summary judgment, the Court views the facts in the light most favorable to the non-movant and draws all reasonable inferences in the non-movant's favor. *Coleman v. Houston Independent School Dist.*, 113 F.3d 528, 533 (5th Cir. 1997).

1. This is the only claim currently before the Court. *See* Doc. 37 at pp. 3-4.

Appendix B

After a proper motion for summary judgment is made, the non-movant must set forth specific facts showing there is a genuine issue for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). At this stage, the Court does not evaluate the credibility of witnesses, weigh the evidence, or resolve factual disputes. *Int'l Shortstop, Inc. v. Rally's, Inc.*, 939 F.2d 1257, 1263 (5th Cir. 1991), *cert. denied*, 502 U.S. 1059, 112 S. Ct. 936, 117 L. Ed. 2d 107 (1992). However, if the evidence in the record is such that a reasonable jury, drawing all inferences in favor of the non-moving party, could arrive at a verdict in that party's favor, the motion for summary judgment must be denied. *Int'l Shortstop, Inc.*, 939 F.2d at 1263.

On the other hand, the non-movant's burden is not satisfied by some metaphysical doubt as to the material facts, or by conclusory allegations, unsubstantiated assertions, or a mere scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994). Summary judgment is appropriate if the non-movant "fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In other words, summary judgment will lie only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits if any, show that there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law." *Sherman v. Hallbauer*, 455 F.2d 1236, 1241 (5th Cir. 1972).

III. DISCUSSION

Young v. UPS, 135 S. Ct. 1338, 1353-54, 191 L. Ed. 2d 279 (2015) (abrogating *Urbano v. Continental Airlines, Inc.*, 138 F.3d 204 (5th Cir. 1998)), established a new test by which courts are to analyze failure to accommodate[2] claims brought by pregnant workers who seek to rely upon indirect[3] evidence to establish

2. Defendant asserts that *Young* does not apply to failure to accommodate claims that result in termination. *See* Doc. 42-9 at p. 6 n.8. That argument, however, has already been foreclosed by *Fairchild v. All Am. Check Cashing, Inc.*, 815 F.3d 959. 967 (5th Cir. 2016).

3. Plaintiff asserts, in her motion for summary judgment, that she has presented direct evidence of Defendant's alleged Title VII violation. *See* Doc. 44-2 at pp. 4-6. She has not. *See Lazarou v. Mississippi State Univ.*, 549 F. App'x 275, 278 (5th Cir. 2013) (holding that direct evidence, in the context of Title VII, "includes any statement or document which shows on its face that an improper criterion served as a basis—not necessarily the sole basis, but a basis—for the adverse employment action"); Doc. 42-5 at p. 8 (wherein Defendant's Regional Director of Human Resources, Donna Duplantis, admits that, at all times relevant to this Ruling and Order, Defendant did not have a policy governing employees who could only perform light work). Moreover, Plaintiff's reliance on *Deneen v. Nw. Airlines, Inc.*, 132 F.3d 431 (8th Cir. 1998), and *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643 (8th Cir. 1987), is misplaced. The plaintiff in *Deneen* was an airline customer service agent who, upon learning she was pregnant, was told not to return to work until she was cleared to lift luggage weighing up to 75 pounds. *See Deneen*, 132 F.3d at 434. She, unlike Plaintiff, "had not previously been [made] aware that she would have to comply with any particular lifting requirements" and believed that she could, throughout her pregnancy, fulfill

disparate treatment[4] in violation of Title VII. Under *Young*, the pregnant worker must first make out a prima facie case by establishing: (1) that she belongs to the protected class, (2) that she sought an accommodation,

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"most of" her employment-related obligations. *See id.*; Doc. 60-2 at 117:10-12 (wherein Plaintiff admits that she could not, while pregnant, fulfill her employment-related obligations); Doc. 60-7 at ¶ 18 (wherein Plaintiff admits that her "physical restrictions . . . prevented her from performing the duties of a CNA"). The plaintiff in *Carney* was a houseparent/adult services trainer at an intermediate care facility who, four and a half months into her pregnancy, was involuntarily placed on medical leave based solely upon a doctor's recommendation that she not engage in any "inordinate lifting." *See Carney*, 824 F.2d at 644 n.2, 644-45. She, unlike Plaintiff, did not seek, and in fact asserted that the doctor's recommendation did not warrant, a pregnancy-related accommodation. *See id.* at 645; Doc. 1-2 at ¶ 5 (D) (wherein Plaintiff asserts that, upon learning she was pregnant, she "requested to work at the main nurse's station as a nurse dispatch . . . which required no heavy lifting"). There is furthermore no evidence, as there was in *Carney*, that Defendant accommodated "other employees with similar restrictions . . . ." *See Carney*, 824 F.2d at 645; Doc. 42-4 at ¶ 5 (wherein Defendant's Human Resources Payroll Manager asserts that, at all times relevant to this Ruling and Order, Defendant did not "offer 'light duty' positions to [any of its] employees"); Doc. 60-2 at 85:22-24 (wherein Plaintiff admits that she is unaware of Defendant having ever provided another CNA with her sought-after accommodation).

4. The evidence in the record makes clear that Plaintiff does not seek to raise a claim of disparate impact. *See Stout v. Baxter Healthcare Corp.*, 282 F.3d 856, 860 (5th Cir. 2002) (noting that "[o]rdinarily, a prima facie disparate impact case requires a showing of a substantial statistical disparity between protected and non-protected workers in regards to employment or promotion") (internal quotations and citations omitted).

(3) that the employer did not accommodate her, and (4) that the employer accommodated others similar in their ability or inability to work. *Id.* at 1354. If all four of these elements are met, the employer must articulate at least one legitimate, nondiscriminatory reason for "denying [the pregnant worker] her accommodation." *Ibid.* (internal quotations and citations omitted). If the employer offers a legitimate, nondiscriminatory reason for denying the pregnant worker her accommodation, the pregnant worker must show that the employer's proffered reason is "in fact pretextual." *Ibid.* Where a pregnant worker produces "evidence that the employer accommodates a large percentage of nonpregnant workers while failing to accommodate a large percentage of pregnant workers," summary judgment as to the issue of pretext will not lie.[5] *Ibid.*

A. Plaintiff's Prima Facie Case

Certain elements of this case are undisputed. Plaintiff was, by virtue of her pregnancy, a member of a protected class. 42 U.S.C. § 2000e(k). Plaintiff could not, while pregnant, undertake the lifting required of a CNA. (*See* Doc. 60-2 at 98:9-12, 103:6-105:18, 117:10-12). Plaintiff sought to have Defendant accommodate her with "light duty," *i.e.*, work that would not require her to lift more than 30 pounds. Defendant declined to assign Plaintiff "light duty." (Doc. 42-8 at TJU 18-20). Plaintiff thereafter filed this lawsuit alleging, *inter alia*, that Defendant's refusal to accommodate her violated Title VII of the Civil Rights Act

5. This is, of course, merely one of the ways in which a plaintiff can establish pretext.

of 1964, as amended by the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e(k). (Doc. 1-2 at ¶¶ 6-7).

Plaintiff avers that she "previously worked light duty," (Doc. 60 at p. 4) (citing Doc. 60-2 at 85:22-24), and that there was "ample light duty work" for her to perform, (Doc. 60 at p. 8). Even assuming *arguendo* that is true, Plaintiff has failed to do what *Young* requires. That is, to present evidence that "light duty" was an accommodation that Defendant afforded to *others* similar in their ability or inability to work.

"Light duty" is the only accommodation that Plaintiff sought from Defendant. (Doc. 60-2 at 85:11-89:25). And with respect to that accommodation. Plaintiff has failed to prove her prima facie case. Nonetheless, Plaintiff asserts that her "failure to accommodate claim is broader" than the "light duty" accommodation that she sought. (Doc. 60 at p. 3). Plaintiff believes that she could have continued to work as a CNA throughout her pregnancy if she had been afforded increased "lifting assistance and mechanical lifts." (*Id.* at pp. 4-6). To be clear: Plaintiff never sought either accommodation. But she alleges that they were both afforded to others in violation of Title VII.

It is self-evident that where, as here, Plaintiff sought a specific accommodation, her PDA claim is limited to Defendant's denial thereof. Additionally, the Court notes that with respect to the issue of "lifting assistance and mechanical lifts," Plaintiff relies exclusively[6] upon the

6. The Court further holds that the testimony of Belinda Glynn ("Glynn") is wholly irrelevant to this Ruling and

testimony of other *pregnant* women. (Doc. 84). The PDA does not require that all pregnant women be treated equally. It simply requires that pregnant women not be treated less favorably than those *outside* of their protected class. *See Arizanovska v. Wal-Mart Stores, Inc.*, 682 F.3d 698, 703 (7th Cir. 2012); *Miles v. Dell, Inc.*, 429 F.3d 480, 490 n.7 (4th Cir. 2005); *Lawson v. City of Pleasant Grove*, No. 2:14-CV-0536-JEO, 2016 U.S. Dist. LEXIS 57264, 2016 WL 2338560, at *10 (N.D. Ala. Feb. 16, 2016), *report and recommendation adopted*, No. 2:14-CV-536-KOB, 2016 U.S. Dist. LEXIS 57178, 2016 WL 1719667 (N.D. Ala. Apr. 29, 2016); *Nelson v. Chattahoochee Valley Hosp. Soc.*, 731 F. Supp. 2d 1217, 1230 (M.D. Ala. 2010); *Hobbs v. Ketera Techs., Inc.*, 865 F. Supp. 2d 719, 728 n.4 (N.D. Tex. 2012); *Anderson v. Dunbar Armored, Inc.*, 678 F. Supp. 2d 1280, 1309 (N.D. Ga. 2009); *cf. Newport News Shipbuilding & Dry Dock Co. v. E.E.O.C.*, 462 U.S. 669, 690, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (1983) (noting that the PDA was intended to ensure that "working women are not treated differently *because of pregnancy*") (emphasis added).

B. Final Observations

"The PDA was enacted to overrule the Supreme Court's decision in *General Electric Co. v. Gilbert*, 429 U.S.

Order. Doc. 84 at pp. 6-7. Glynn's testimony is based upon her experience as the Resident Care Director at a facility by the name of Amber Terrace. Doc. 84-3 at 11:4-13:4. Defendant has never owned or operated Amber Terrace. Defendant merely manages "Nottingham Regional Rehabilitation Center pursuant to a Property Management Agreement with LA Management Holdings, LLC." Doc. 47-1 at p. 20.

125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976), which . . . held that excluding pregnancy from a list of nonoccupational disabilities covered by an employer's disability benefits plan did not amount to discrimination on the basis of sex." *Hall v. Nalco Co.*, 534 F.3d 644, 647 (7th Cir. 2008). In doing so, the United States Congress turned pregnant women into a protected class.

Unfortunately, this case highlights a prominent gap in the PDA. As many as 10 percent of pregnancies are considered high-risk.[7] They too deserve to be protected, not merely as a matter of law, but also as a matter of fact. Courts are generally not in the business of making law, and the Court will not venture to do so here. Still, one cannot ignore that "pregnancy, from a biological standpoint, is unlike any other condition and has no equal comparator." Rubeena Sachdev, *How to Protect Pregnancy in the Workplace*, 50 U.S.F. L. Rev. 333, 334 (2016). No pregnant woman should, in 2016, be fired for being unable to lift more than 30 pounds.

IV. CONCLUSION

Accordingly,

IT IS ORDERED that Defendant's **Renewed Motion for Summary Judgment (Doc. 42)** is **GRANTED**, and Plaintiff's Title VII claim, (Doc. 1-2 at ¶¶ 6-7),[8] is

7. Uc Irvine Health, http://www.ucirvinehealth.org/medical-services/raaternity/high-risk-pregnancy/.

8. Both sides seem to suggest that Plaintiff has pled two Title VII claims. *See supra* p. 5 n.3. She has not. Plaintiff's Title

DISMISSED WITH PREJUDICE pursuant to Rule 56.

IT IS FURTHER ORDERED that **Plaintiff's Motion for Summary Judgment (Doc. 44)** is **DENIED** as moot.

IT IS PURTHER ORDERED that Defendant's **Joint Motion to Consolidate (Doc. 74)** is **DENIED** pursuant to 28 U.S.C. § 1367(c)(3).

IT IS FURTHER ORDERED that **Defendant's Motion to Strike Plaintiff's Supplemental Memorandum in Opposition to Defendant's Renewed Motion for Summary Judgment (Doc. 85)** is **DENIED** as moot.

IT IS FURTHER ORDERED that **Plaintiff's Ex Parte Combined Motion to Withdraw/'Strike Previously Filed Pleadings, and Substitute Attached Pleadings for Same (Doc. 86)** is **DENIED** as moot.

Baton Rouge, Louisiana, this 8th day of August, 2016.

/s/ Brian A. Jackson
BRIAN A. JACKSON, CHIEF JUDGE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

VII claim is a single failure to accommodate claim. That claim is **DISMISSED WITH PREJUDICE** pursuant to Rule 56.

APPENDIX C — RULING AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF LOUISIANA, FILED NOVEMBER 4, 2014

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

CIVIL ACTION NO.: 13-00402-BAJ-SCR

ERYON LUKE

VERSUS

CPLACE FOREST PARK, SNF, LLC

November 4, 2014, Decided
November 4, 2014, Filed

RULING AND ORDER

Before the Court is Defendant's **MOTION FOR SUMMARY JUDGMENT (Doc. 10)**, seeking an order dismissing Plaintiff's claims in their entirety, pursuant to Federal Rule of Civil Procedure ("Rule") 56, as well as an order holding Plaintiff liable for attorney's fees. Plaintiff opposes this motion. (Doc. 12). Upon being granted leave, Defendant filed a Reply Brief in support of its Motion for Summary Judgment. (Doc. 22). The Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1367. Additional briefing is not required. Oral argument is not necessary.

Appendix C

I. BACKGROUND

Plaintiff Eryon Luke asserts several discrimination-related claims against Defendant CPlace Forest Park, SNF, LLC d/b/a Nottingham Regional Rehab Center ("Nottingham"), which is owned by Traditions Senior Management. Plaintiff's allegations stem from her fulltime employment at Nottingham as a certified nursing assistant ("CNA") from October 10, 2011 to May 24, 2012. (*See* Doc. 12 at p. 1). As a CNA, Plaintiff's job responsibilities included turning residents in bed, lifting patients from their beds to wheelchairs, pushing residents in wheelchairs, and ensuring that patients did not fall while walking. (Doc. 12 at p. 4).

On December 2, 2011, Plaintiff learned she was six weeks pregnant with twins. (Doc. 1 at ¶ 4). Plaintiff returned to work the next day with a note from her doctor certifying that she was able to work, provided that she did not engage in heavy lifting for two weeks. (*Id.*). On December 3 and 4, Plaintiff's immediate supervisor permitted Plaintiff to do "light duty" work that did not involve heavy lifting. (*Id.* at ¶ 5). On December 5, Plaintiff met with Rachael Carcamo, Human Resources Payroll Manager for Defendant, to discuss Plaintiff's lifting restrictions. (*Id.* at ¶ 6). Plaintiff remained off work until her doctor signed a release removing lifting restrictions on December 12, 2011. (*Id.* at ¶ 7). On January 22, 2012, Plaintiff brought a doctor's note certifying that Plaintiff could not lift more than thirty pounds for the remainder of her pregnancy. (Doc. 12 at p. 5). Plaintiff admitted that she was physically unable to perform her job as a CNA

after her doctor issued these heavy-lifting restrictions. (Doc. 12-1 at pp. 98, 99-100). January 22, 2012 was the last day Plaintiff performed any work at Nottingham. (Doc. 12 at p. 5).

On January 23, 2012, Plaintiff was informed that she needed to pick up paperwork for leave. (*Id.* at ¶ 5(C)). Defendant issued FMLA forms specifying that Plaintiff would take leave from January 23, 2012 to May 23, 2012. (Doc. 12 at p. 6; *see also* Doc. 12-3 at p. 1).

On May 23, Carcamo met with Plaintiff and informed Plaintiff that there was no work available for Plaintiff, subject to Plaintiff's lifting restrictions, and that Plaintiff's employment would be terminated on May 24 if Plaintiff could not return to work then. (Doc. 12 at p. 6). Plaintiff's employment at Nottingham ended on May 24, 2012. (*See* Doc. 12 at p. 1). Plaintiff delivered her twins on June 21, 2012. (Doc. 12 at p. 6).

Plaintiff's Complaint asserts that she was subject to discriminatory employment practices based on her pregnancy, in violation of Title VII of the Civil Rights Act of 1964 ("Title VII") as amended by the Pregnancy Discrimination Act of 1978 ("PDA"), 42 U.S.C. § 2000e(k); the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601, *et seq.*; and the Louisiana Employment Discrimination Law ("LEDL"), La. R.S. 23:301, *et seq.* (Doc. 1). Defendant's Motion for Summary Judgment seeks to dismiss these claims with prejudice and also seeks an order assessing fees against Plaintiff for the frivolous filing of claims under La. R.S. 23:303(B). (Doc. 10). Plaintiff opposes Defendant's Motion. (Doc. 12).

II. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). "[W]hen a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986) (quotation marks and footnote omitted). "This burden is not satisfied with some metaphysical doubt as to the material facts, by conclusory allegations, by unsubstantiated assertions, or by only a scintilla of evidence." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (quotation marks and citations omitted). In determining whether the movant is entitled to summary judgment, the Court "view[s] facts in the light most favorable to the non-movant and draw[s] all reasonable inferences in her favor." *Coleman v. Houston Indep. Sch. Dist.*, 113 F.3d 528, 533 (5th Cir. 1997).

In sum, summary judgment is appropriate if, "after adequate time for discovery and upon motion, [the non-moving party] fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986).

Appendix C

III. DISCUSSION

a. Title VII

Under Title VII, as amended by the PDA, Plaintiff claims that: (1) Defendant unlawfully terminated Plaintiff's employment in May 2012, and (2) Defendant unlawfully prohibited Plaintiff from working regularly after Plaintiff returned from a two-week period of leave in December 2011. (Doc. 1-2 at ¶¶ 6-7).

Title VII prohibits a covered employer from failing or refusing to hire, discharging, or otherwise discriminating against "any individuals . . . because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1). The PDA amended Title VII, clarifying 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 . . . ."

A claim brought under the PDA is analyzed like any other Title VII discrimination claim. *Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 206 (5th Cir. 1998). Where the plaintiff has not presented direct evidence of discrimination, as in this case, we apply the burden-shifting framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973): A plaintiff alleging disparate treatment must establish a prima facie case of discrimination by showing that (1) she is a member of a protected class; (2) she was qualified for the position;

(3) she suffered an adverse employment action; and (4) others similarly situated were treated more favorably. *See Appel v. Inspire Pharms., Inc.*, 428 Fed. Appx. 279, 281 (5th Cir. 2011). After the plaintiff has made her prima facie case, the employer must provide "some legitimate nondiscriminatory reason" for the adverse action taken. *Id.* If the employer provides a nondiscriminatory reason, the burden shifts to the plaintiff to show a genuine issue of material fact that either (1) the employer's proffered nondiscriminatory reason is a pretext for discrimination, or (2) regardless of the nondiscriminatory reason, the discriminatory reason was a motivating factor in the employer's action. *Id.* at 282 (*Alvarado v. Texas Rangers*, 492 F.3d 605, 611 (5th Cir. 2007)).

Here, Plaintiff's claim fails to establish a prima facie case of discrimination, because she has not shown that she was qualified for the position. The Fifth Circuit directly addressed the issue of employee qualifications during pregnancy in *Appel v. Inspire Pharmaceuticals, Inc.*, where the plaintiff Appel failed to establish the second element of a prima facie PDA case because she was physically unable to execute many of her responsibilities that were "essential to proper performance" due to medical complications arising from her pregnancy. 428 F. App'x 279, 283 (5th Cir. 2011). Appel, like Plaintiff in the instant case, argued that there were some aspects of her work she could perform even with medical restrictions. *See id.* at 283. But because Appel could not rebut the fact that she was unable to handle many of the physical responsibilities necessary to do her job properly, the Fifth Circuit affirmed a summary judgment ruling granted on

the basis that Appel could not satisfy the second element of the prima facie case of discrimination. *See id.* at 283-84.

The instant case falls squarely within the ambit of Fifth Circuit precedent. Even if Plaintiff could still accomplish certain aspects of her job while under medical limitations, Plaintiff cannot rebut the fact that she was unable to fulfill several essential physical responsibilities of a CNA once her doctor imposed heavylifting restrictions. The parties do not dispute that CNA job duties include turning residents in bed, lifting patients from their beds to wheelchairs, pushing residents in wheelchairs, and ensuring that patients do not fall while walking. (Doc. 12-1 at pp. 37-39). Under Title VII, Defendant is not under any duty to adjust CNA job duties to accommodate Plaintiff on account of her pregnancy. *See Urbano v. Cont'l Airlines, Inc.*, 138 F.3d 204, 207 (5th Cir. 1998) (affirming the principle that "the PDA does not impose an affirmative obligation on employers to grant preferential treatment to pregnant women").

Plaintiff directs this Court to her deposition testimony, where she states that she had in the past used a mechanical lift for "one guy" and that "most of the time" she sought the assistance of a male employee to ensure that a patient did not fall. (Doc. 12-1 at pp. 39-40). Yet Plaintiff stated multiple times in her deposition that she did not think she could perform her job as a CNA once her doctor ordered her to not lift in excess of thirty pounds during her pregnancy. (Doc. 12-1 at pp. 98-100). Plaintiff conceded that lifting was a "big part" of her CNA responsibilities. (*Id.* at p. 73). Furthermore, the parties do not dispute

that at any given time during Plaintiff's employment at Nottingham, Plaintiff was *solely* responsible for the care of ten to fifteen patients. (*Id.* at pp. 38-39) (emphasis added). Plaintiff has presented no evidence to contradict Defendant's position that heavy lifting was essential to proper performance of CNA duties, even when Plaintiff received help from mechanical lifts and fellow employees.

Plaintiff has raised no genuine dispute as to the fact that she was not qualified to work as a CNA with her medical restrictions and therefore cannot satisfy the second element of her prima facie claim. Plaintiff has no cause of action under Title VII. Accordingly, Defendant's Motion for Summary Judgment is **GRANTED** regarding both Plaintiff's claims under Title VII.

b. FMLA

Under the FMLA, Plaintiff alleges that: (1) Defendant forced Plaintiff to take FMLA leave, preventing her from working; (2) the imposition of leave exhausted the leave time available to Plaintiff upon her children's birth; and (3) Defendant did not reinstate Plaintiff upon her doctor's certification that she was able to return to work with light duty restrictions. (Doc. 1-2 at ¶¶ 10-11).

The FMLA prohibits an employer from interfering with, restraining, or denying the exercise or attempted exercise of an employee's right to take FMLA leave. 29 U.S.C. § 2615(a). To establish a prima facie case of interference, Plaintiff must establish that (1) Plaintiff is an eligible employee, (2) Defendant is an employer subject

to the FMLA, (3) Plaintiff is entitled to leave under the FMLA, (4) Plaintiff gave proper notice of the intent to take leave, and (5) Plaintiff was denied benefits by her employer. *See Spears v. La. Dep't of Pub. Safety & Corr.*, 2 F. Supp. 3d 873, 877-78 (M.D. La. 2014). As to the first prong of this inquiry, an employee is deemed eligible for FMLA benefits from an FMLA-covered employer when she (1) has been employed for at least twelve months, *and* (2) has worked for at least 1,250 hours during the previous twelve-month period. 29 U.S.C. § 2611(2).

Defendant calculated Plaintiff's leave of absence as lasting from January 23, 2012 to May 23, 2012. (Doc. 12 at p. 6). For this period of leave, Rachael Carcamo, Human Resources Payroll Manager for Defendant, completed paperwork using FMLA forms. (Doc. 10-4 at ¶ 19). Defendant acknowledges that it provided this FMLA documentation by mistake. (Doc. 10-5 at p. 9). Plaintiff did not meet the statutory requirement for FMLA leave eligibility at any point while she worked at Nottingham from October 2011 to May 2012. The Court will not conjecture as to how many hours Plaintiff would have worked had she not been forced to take four-month leave in February 2012. *See Buchanan-Rushing v. City of Royse City, Texas*, 794 F. Supp. 2d 687, 696 (N.D. Tex. 2011) (finding that "such a calculation is highly speculative, and lacks support from either the statutory language or the relevant case law"). Regardless, Plaintiff would not have been eligible at the time of her termination because twelve months had not elapsed since her start date at Nottingham. Plaintiff was never entitled to FMLA leave during her employment at Nottingham, so she has no viable claim that her FMLA leave was unlawfully exhausted.

Appendix C

Although Defendant concedes that it erroneously conveyed to Plaintiff that she was being placed on FMLA leave, (Doc. 10-5 at p. 9), the evidence in the record does not support Plaintiff's invocation of the doctrine of equitable estoppel. In the context of FMLA leave, the Fifth Circuit has explained the principle of equitable estoppel:

> [A]n employer who without intent to deceive makes a definite but erroneous representation to his employee that she is an "eligible employee" and entitled to leave under FMLA, and has reason to believe that the employee will rely upon it, may be estopped to assert a defense of non-coverage, if the employee reasonably relies on that representation and takes action thereon to her detriment.

Minard v. ITC Deltacom Commc'ns, Inc., 447 F.3d 352, 359 (5th Cir. 2006). The employee claiming estoppel must have relied on the employer's representations "in such a manner as to change his position for the worse." *Id.* at 359 (*Heckler v. Cmty. Health Servs. of Crawford Cnty., Inc.*, 467 U.S. 51, 59, 104 S. Ct. 2218, 81 L. Ed. 2d 42 (1984)). Plaintiff has not asserted that she in any way changed her position *because of* Defendant's representations that she was entitled to leave under the FMLA. As discussed above, Plaintiff admitted that she was physically unable to perform her job as a CNA after her doctor issued heavy-lifting restrictions for the remainder of Plaintiff's pregnancy. (Doc. 12-1 at pp. 98, 99-100). Plaintiff had no choice but to take leave beginning January 2012, as she was unable to work as a CNA given her medical condition

at that time. Plaintiff cannot, therefore, claim benefits under the FMLA under a theory of equitable estoppel.

Accordingly, because Plaintiff has no standing to sue under the FMLA, Defendant's Motion for Summary Judgment is **GRANTED** with respect to all Plaintiff's claims under the FMLA.

c. LEDL

Finally, under the LEDL, Plaintiff alleges that: (1) Defendant unlawfully denied her the full amount of pregnancy leave to which she was entitled under the state statute, and (2) Defendant refused to transfer Plaintiff to a less strenuous or hazardous position during her pregnancy.

1. Denial of Full LEDL Leave

The LEDL prohibits a covered employer from refusing to allow a female employee to "[t]o take a leave on account of pregnancy for a reasonable period of time, provided such period shall not exceed four months." La. R.S. 23:342(2)(b). The last day Plaintiff performed any work at Nottingham was January 22, 2012. (Doc. 12 at p. 5). Defendant calculated Plaintiff's leave to run from January 23, 2012 to May 23, 2012. (Doc. 12 at p. 6; *see also* Doc. 12-3 at p. 1).

In her complaint, Plaintiff alleges that Defendant violated the LEDL by denying her four months of additional leave beginning May 24, 2012. As discussed

above, Plaintiff was ineligible for FMLA leave. Plaintiff's four months of leave were drawn from her entitlement under the LEDL.[1] As a matter of law, Plaintiff was not entitled to another four months of leave beginning May 24, 2012.

Plaintiff also disputes when her leave began. Plaintiff asserts that she did not receive written notice of her leave until "after February 10, 2012" and that her LEDL leave should be calculated from that point forward, three weeks later. Plaintiff cites no law to support her assertion that her leave should have been calculated from the date she received written notice. Furthermore, the evidence in the record demonstrates Plaintiff's own understanding that her leave began soon after her last day performing work at Nottingham. Plaintiff was informed on January 23, 2012 by Defendant that she would be put on FMLA leave. Plaintiff stated in her deposition, "January 24th is when I left off for FMLA." (Doc. 12-1 at p. 54). FMLA regulations explicitly contemplate that notice of the need to take leave may arise after the actual start of FMLA leave. *See* 29 C.F.R. §825.219 (". . . at the time the employee gives notice of the need for FMLA leave (*or when FMLA leave commences, if earlier*)" (emphasis added). The federal leave regulations are persuasive though not binding here since, as discussed, Defendant mistakenly

1. Even in a hypothetical situation in which Plaintiff had qualified for FMLA leave in addition to LEDL leave, her periods of leave allotted under the two statutes would have run concurrently. "If leave qualifies for FMLA leave and leave under State law, the leave used counts against the employee's entitlement under both laws." 29 C.F.R. §825.701.

characterized Plaintiff's leave as FMLA leave instead of as LEDL leave. But in the absence of Plaintiff citing any law that would counsel against starting the clock on leave the day after Plaintiff's last day at work, Plaintiff has no legitimate claim under the LEDL based on Defendant's calculation of leave dates.

2. Reasonable Accommodation

Plaintiff asserts that Defendant also violated the LEDL by refusing to transfer her to a light-duty position. The LEDL provides that an employer, if requested, must transfer a pregnant employee to "a less strenuous or hazardous position for the duration of her pregnancy . . . where such transfer can be reasonably accommodated." La. R.S. 23:342(4). In helping to define the contours of reasonable accommodation, the statute specifies that "no employer shall be required . . . to create additional employment which the employer would not otherwise have created, nor shall such employer be required to discharge any employee, transfer any employee with more seniority, or promote any employee who is not qualified to perform the job." La. R.S. 23:342(4).

Although Plaintiff's medical restrictions rendered her unqualified for the CNA position, there remains a genuine dispute of fact as to whether Defendant could have reasonably accommodated Plaintiff in another position, with light duty work that did not involve lifting over thirty pounds. Plaintiff asserts that after she notified Defendant of her pregnancy and her doctor's orders in December, she was allowed to take light duty work, helping out other

employees. (Doc. 12-1 at p. 48). Plaintiff further asserts that "Nottingham did have positions that did not require lifting over thirty pounds." (Doc. 12 at p. 6). However, in response, Defendant avers that no vacant positions or positions held by someone with less seniority were available to Plaintiff, (Doc. 10-5 at pp. 14-15), and notes that Plaintiff failed to inquire through discovery whether such positions were available during the relevant time period, (Doc. 22 at p. 4 n.4). Defendant further states that Plaintiff's weekend supervisor allowed Plaintiff to perform work that did not involve heavy lifting the weekend after Plaintiff discovered she was pregnant. (Doc. 10-4 at ¶ 5). Carcamo, on behalf of Defendant, acknowledged that Plaintiff had been given light duty on weekends for a short period of time. (Doc. 12-2 at pp. 15-16). There remains a genuine dispute of material fact as to whether reasonable accommodations could have been made for Plaintiff under the LEDL. Thus, Defendant has not met its burden and summary judgment on this claim is denied.

3. Jurisdiction Over LEDL Claim

In accordance with the rulings above, the LEDL claim under La. R.S. 23:342(4) is the lone remaining claim in this matter. In the absence of a surviving federal claim, and in the interest of fairness to all parties involved and judicial economy, the Court declines to exercise jurisdiction over Plaintiff's remaining state law claim and remands this matter to the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana. *See Enochs v. Lampasas Cty.*, 641 F.3d 155, 161 (5th Cir. 2011); *Beiser v. Weyler*, 284 F.3d 665, 675 (5th Cir. 2002) (noting that where

"no other grounds for federal jurisdiction exist, the court must ordinarily remand the case back to state court"); *Batiste v. Island Records, Inc.*, 179 F.3d 217, 227 (5th Cir. 1999) (citation omitted) (the "general rule" in the Fifth Circuit "is to decline to exercise jurisdiction over pendent state law claims when all federal claims are dismissed or otherwise eliminated from a case prior to trial.").

Accordingly, Defendant's Motion for Summary Judgment is **GRANTED** with respect Plaintiff's claim under La. R.S. 23:342(2)(b) and **DENIED** with respect to Plaintiff's claim under La. R.S. 23:342(4). Plaintiff's claim under La. R.S. 23:342(4) is **REMANDED** to the state court from which it was removed.

d. Attorney's Fees

Defendant seeks an order assessing damages against Plaintiff under the LEDL, which provides: "a plaintiff found by a court to have brought a frivolous claim under this Chapter shall be held liable to the defendant for reasonable damages incurred as a result of the claim, reasonable attorney fees, and court costs." La. R.S. 23:303(B). These penalties may only be assessed with respect to the claims filed by Plaintiff under the LEDL. To analyze the appropriateness of an award of attorney's fees to the Defendant under La. R.S. 23:303(B), the Court applies the standard used for an analogous provision in Title VII, which was articulated by the U.S. Supreme Court in *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S. Ct. 694, 54 L. Ed. 2d 648 (1978). *See Wilson-Robinson v. Our Lady of the Lake Reg'l Med. Ctr., Inc.*,

CIV.A. 10-584, 2013 U.S. Dist. LEXIS 136178, 2013 WL 5372346, at *1 (M.D. La. Sept. 24, 2013). In *Christianburg*, the U.S. Supreme Court held that a district court may exercise its discretion to assess against a plaintiff her opponent's attorney's fees if a plaintiff's claim was "frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so," even if the court did not find the claim made in subjective bad faith. 434 U.S. at 422.

Plaintiff filed two claims under the LEDL, one based on a denial of full LEDL leave under La. R.S. 23:342(2)(b) and the other based on a denial of reasonable accommodation under La. R.S 23:342(4). As the Court found above, the latter claim is meritorious enough to withstand summary judgment, and the Court does not find it to be groundless as to warrant an award of attorney's fees.

As to the former claim, which has been dismissed upon summary judgment, it is important that the Court "resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, [her] action must have been unreasonable or without foundation." *Christiansburg*, 434 U.S. at 421-22. Although the Court does not ultimately find a genuine dispute of material fact regarding the merits of Plaintiff's claim that she was denied the full amount of leave she was due under LEDL, neither does the Court find her arguments unreasonable in light of the record evidence demonstrating that Defendant misrepresented, albeit inadvertently, to Plaintiff that she was entitled to FMLA leave. Defendant is a sophisticated

party who asserts that it has granted pregnancy leave to numerous employees in the past. (Doc. 10-4 at p. 7). By communicating blatantly incorrect information to Plaintiff about the nature of her leave, Defendant itself was the source of many of these disputed legal claims before the Court today. Thus the Court exercises its discretion and declines to award attorney's fees under the LEDL. Accordingly, Defendant's motion to assess attorney's fees against the Plaintiff is **DENIED**.

IV. Conclusion

Accordingly,

IT IS ORDERED that Defendant's **Motion for Summary Judgment (Doc. 10)** is **GRANTED IN PART** and **DENIED IN PART**, consistent with this Order.

IT IS FURTHER ORDERED that Plaintiff's claims under Title VII, the FMLA, and La. R.S. 23:342(2)(b) are **DISMISSED WITH PREJUDICE**.

IT IS FURTHER ORDERED that Plaintiffs La. R.S. 23:342(4) claim is **DISMISSED WITHOUT PREJUDICE** and that this matter is **REMANDED** for consideration by the Nineteenth Judicial District Court, Parish of East Baton Rouge, State of Louisiana.

IT IS FURTHER ORDERED that Defendant's motion that this Court assess damages and fees against Plaintiff pursuant to La. R.S. 23:303(B) is **DENIED**.

Appendix C

Baton Rouge, Louisiana, this 4th day of November, 2014.

/s/ Brian A. Jackson
BRIAN A. JACKSON, CHIEF JUDGE
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

APPENDIX D — DENIAL OF REHEARING OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT, DATED JANUARY 14, 2016

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 16-30992

ERYON LUKE,

Plaintiff-Appellant,

v.

CPLACE FOREST PARK SNF, L.L.C., DOING BUSINESS AS NOTTINGHAM REGIONAL REHAB CENTER,

Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Louisiana

ON PETITION FOR REHEARING *EN BANC*

(Opinion - 1/14/19, 5 Cir., _____,_____F.3d _____)

Before DAVIS, GRAVES, and COSTA, Circuit Judges.

PER CURIAM:

Appendix D

(✓) Treating the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing *En Banc* (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing *En Banc* is DENIED.

( ) Treating the Petition for Rehearing *En Banc* as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5TH CIR. R. 35), the Petition for Rehearing *En Banc* is DENIED.

ENTERED FOR THE COURT

/s/_____
UNITED STATES CIRCUIT JUDGE