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Nicole Buonocore Porter

William & Mary Law School, nbporter@wm.edu

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MOTHERS WITH DISABILITIES IN THE WORKPLACE POST-PANDEMIC & POST-*DOBBS*

NICOLE BUONOCORE PORTER*

I. Introduction

As an employment discrimination scholar, many years ago I began noticing similarities between employees with disabilities and workers with caregiving responsibilities. Specifically, both groups of workers might occasionally have difficulty meeting their employers' expectations for their jobs.¹ This difficulty could be related to *how* the job is done or (more frequently) *when* and *where* the job is done.² When this difficulty arises, these workers might request modifications of how, when, and where the work is performed. Even if the employer provides these accommodations, these workers often suffer from what I call "special treatment stigma,"³ which results from their employers' and coworkers' resentment for requesting and (sometimes) receiving what is often seen as special (and possibly undeserved) treatment.⁴ I have discussed these similarities at length⁵ despite the fact that these two groups of workers might not share many other characteristics.

But what if they do? Specifically, what if an employee with a disability *also* has caregiving responsibilities? I explored this intersection of identities in a 2018 article, *Mothers with Disabilities*.⁶ As that article explained:

* Rita Anne Rollins Professor of Law, William & Mary Law School. Many thanks to Professor Robyn M. Powell and the *Oklahoma Law Review* for inviting me to participate in this symposium. Thanks also to the participants at the *Rewriting the Script: Challenging Ableism and Advancing Justice in Sexuality, Reproduction, and Parenting for Disabled People* symposium. And thanks to Bryan Lammon, for everything else.

1. Nicole Buonocore Porter, *Mutual Marginalization: Individuals with Disabilities and Workers with Caregiving Responsibilities*, 66 FLA. L. REV. 1099, 1104–08 (2014) [hereinafter Porter, *Marginalization*].

2. NICOLE BUONOCORE PORTER, *THE WORKPLACE REIMAGINED: ACCOMMODATING OUR BODIES AND OUR LIVES 1* (2023) [hereinafter PORTER, REIMAGINED].

3. Nicole Buonocore Porter, *Special Treatment Stigma After the ADA Amendments Act*, 42 PEPP. L. REV. 213, 233–34 (2016) [hereinafter Porter, *Stigma*] (describing special treatment stigma); Nicole Buonocore Porter, *Accommodating Everyone*, 47 SETON HALL L. REV. 85, 96–106 (2016) [hereinafter Porter, *Everyone*].

4. Porter, *Stigma*, *supra* note 3, at 235–39; Porter, *Everyone*, *supra* note 3, at 104–05.

5. Porter, *Everyone*, *supra* note 3, at 90–107; PORTER, REIMAGINED, *supra* note 2, at 93–102. *See generally* Porter, *Marginalization*, *supra* note 1.

6. Nicole Buonocore Porter, *Mothers with Disabilities*, 33 BERKELEY J. GENDER L. & JUST. 75 (2018) [hereinafter Porter, *Mothers*].

Mothers with disabilities are doubly marginalized in the workplace—they are marginalized because they have disabilities, and because they very likely have caregiving responsibilities for their children. Some of this marginalization is based on the stereotypes attributed to these various identities, other parts of it stem from the fact that workplaces are structured around an able-bodied, masculine norm. This makes it difficult for mothers with disabilities to manage their disabilities, their workplace responsibilities, and their caregiving obligations.⁷

Moreover, because gender norms have caused and continue to cause women to take on the vast majority of caregiving responsibilities for children,⁸ a mother with a disability might be forced to seek accommodations for *both* her disability and her caregiving responsibilities.⁹ This reality magnifies the effects of special treatment stigma on these workers.

Between when I wrote *Mothers with Disabilities* and Fall 2023, two major developments have occurred that justify revisiting this topic. The first is the COVID-19 pandemic, which dramatically changed all aspects of our work lives and home lives. The second is the Supreme Court's landmark decision in 2022, *Dobbs v. Jackson Women's Health Organization*,¹⁰ which overturned a woman's constitutional right to have an abortion. Both of these developments have unique, sometimes conflicting effects on mothers with disabilities.

Accordingly, this Article explores the workplace effects of the pandemic and the *Dobbs* decision on mothers with disabilities. Drawing on my prior work, Part II describes the workplace experience of mothers with disabilities.

7. *Id.* at 76.

8. Rona Kaufman Kitchen, *Eradicating the Mothering Effect: Women as Workers and Mothers, Successfully and Simultaneously*, 26 WIS. J.L. GENDER & SOC'Y 167, 198 (2011) (stating that mothers still do the majority of caregiving, even if they work outside the home); Katherine Lease, Note, *A Reasonable Solution for Working Parents: Expanding Reasonable Accommodation Under the Americans with Disabilities Act to Parents of Children with Disabilities*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 709, 717 (2019); Nancy Rothbard, Lily Brown & Pilar Gonalons-Pons, *How Have Women in the Workplace Fared, Three Years into the Pandemic?*, PENN TODAY (Mar. 20, 2023), <https://penntoday.upenn.edu/news/how-have-women-workforce-fared-three-years-pandemic> (noting that women do the majority of care work); see also Nicole Buonocore Porter, *Working While Mothering During the Pandemic and Beyond*, 78 WASH. & LEE L. REV. ONLINE 1, 3 (2021) [hereinafter Porter, *Working*] (noting the fact that much of the gender pay gap is based on the fact that women often take on more caregiving responsibilities).

9. Porter, *Mothers*, *supra* note 6, at 76.

10. 597 U.S. 215 (2022).

Part III explores how the pandemic affected mothers with disabilities and speculates about these effects going forward. Part IV discusses the possible effects from the *Dobbs* decision—including how the drastically diminished right to an abortion will affect women with disabilities both in general and in the workplace specifically. Finally, Part V attempts to end on a positive note—how we might find the silver lining from the clouds of the pandemic and the *Dobbs* decision.

II. Mothers with Disabilities

Although intersectionality theory¹¹ asserts that subordination is not just a sum of its parts—i.e., you cannot understand the experience of a Black woman by simply adding up the subordination experienced by Black people and the subordination experienced by women¹²—it is helpful to understand the oppression experienced by workers with each identity before discussing the intersectional disadvantage of the two identities.

A. People with Disabilities in the Workplace

Volumes have been written about the disadvantages that people with disabilities experience and about the U.S. laws that have been enacted to ameliorate these disadvantages. This discussion provides a brief snapshot of the experience of people with disabilities in the workplace and the primary statute that protects them.

The Americans with Disabilities Act (“ADA”) was passed in 1990 with overwhelming (and unprecedented) support.¹³ Yet, by almost all accounts, the ADA has not lived up to its potential.¹⁴ Scholars agree that the ADA has not meaningfully improved the employment rate of people with disabilities,

11. Intersectionality began in the late 1980s when Black feminist scholar Kimberlé Crenshaw started critiquing much of the feminist scholarship that seemed to assume that all women experience subordination in the same way. See generally Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL FORUM 139.

12. *Id.* at 155; see also Anita Silvers, *Reprising Women’s Disability: Feminist Identity Strategy and Disability Rights*, 13 BERKELEY J. GENDER & L. 81, 87 (2013) (arguing that it is not possible to dissect how women with disabilities experience oppression based on their gender versus their disability).

13. RUTH COLKER, *THE DISABILITY PENDULUM: THE FIRST DECADE OF THE AMERICANS WITH DISABILITIES ACT* 5–6 (2005).

14. Nicole Buonocore Porter, *Explaining “Not Disabled” Cases Ten Years After the ADAAA: A Story of Ignorance, Incompetence, and Possibly Animus*, 26 GEO. J. ON POVERTY L. & POL’Y 383, 386 (2019).

and some scholars argue that the rate has actually decreased since the ADA's passage.¹⁵ A 2014 report states that workforce participation for people with disabilities was 30.2% compared to 77.2% for people without disabilities.¹⁶ This lower employment rate is partially to blame for the fact that people with disabilities disproportionately live in poverty.¹⁷

Several reasons have been posited for the low employment rate of people with disabilities after the passage of the ADA. First, there is some evidence that employers have misperceptions about the competency of people with disabilities, and there is also evidence of stigma and outright prejudice against people with disabilities.¹⁸ Second, and perhaps more likely, employers are often less willing to hire people with disabilities because of the perceived costs of accommodating them.¹⁹

The ADA requires employers to provide reasonable accommodations to qualified employees with disabilities unless such accommodations cause the employer an undue hardship.²⁰ Although the ADA does not define "reasonable accommodation," it does provide some examples, including making facilities accessible, modifying job tasks, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, and the provision of qualified readers and interpreters.²¹ Undoubtedly, some of these accommodations, such as hiring interpreters, can be quite expensive.²² Yet, on a grand scale, the belief that providing accommodations to people with disabilities is costly has been thoroughly debunked—studies indicate that the "majority of accommodations cost less than \$500, [and] no more than 5% of accommodations cost more than \$5,000."²³ But employers do not necessarily

15. LISA SCHUR ET AL., *PEOPLE WITH DISABILITIES: SIDELINED OR MAINSTREAMED?* 38 (2013).

16. U.S. SENATE COMM. ON HEALTH, EDUC., LABOR & PENSIONS, *FULFILLING THE PROMISE: OVERCOMING PERSISTENT BARRIERS TO ECONOMIC SELF-SUFFICIENCY FOR PEOPLE WITH DISABILITIES* 6 (2014) [hereinafter *FULFILLING THE PROMISE*], <https://perma.cc/8N2F-P6QA>.

17. *Id.* at 2.

18. Porter, *Mothers*, *supra* note 6, at 78.

19. Sharona Hoffman, *Settling the Matter: Does Title I of the ADA Work?*, 59 ALA. L. REV. 305, 329–31 (2008) (stating that one explanation for the lower employment rate for people with disabilities is the fact that employers perceive the costs of accommodating people with disabilities to be high).

20. 42 U.S.C. § 12112(b)(5)(A).

21. *Id.* § 12111(9).

22. PORTER, *REIMAGINED*, *supra* note 2, at 48.

23. SCHUR ET AL., *supra* note 15, at 76; COLKER, *supra* note 13, at 19.

know that costs are relatively low, and it is understandable that some employers might have been (and might still be) concerned that the costs would be high.²⁴ Accordingly, employers' perceived costs of providing accommodations contribute to the lower employment rate for people with disabilities as compared to non-disabled individuals.

Even when employers hire people with disabilities, or when an already-hired employee becomes disabled,²⁵ the employee's need for accommodations can cause special treatment stigma.²⁶ As I have previously explained:

Special treatment stigma manifests itself in two distinct but related ways. First, the requirement to provide accommodations to individuals [with disabilities] in the workplace makes an employer believe (sometimes correctly) that employing such individuals is more expensive and burdensome than employing other individuals. This belief, in turn, causes an employer to be reluctant to hire and promote these individuals. Second, the provision of special accommodations to certain individuals in the workplace fosters the resentment of coworkers who believe (again, sometimes correctly) that they have to carry a larger burden to help accommodate the employee or that the employee who receives the accommodation or "special treatment" is getting an unfair (and perhaps undeserved) advantage.²⁷

Accordingly, even when people with disabilities are hired (or in the more likely case, when they develop disabilities after they were hired), their need for accommodations contributes to their marginalization.²⁸

24. PORTER, REIMAGINED, *supra* note 2, at 168–69; *see also* Jasmine E. Harris, *Taking Disability Public*, 169 U. PA. L. REV. 1681, 1732 (2021) (discussing the perception that accommodating workers with disabilities is very expensive).

25. This can happen for a variety of reasons. An employee might develop cancer, have a car or other accident that leads to mobility impairments, or develop heart disease or diabetes. All of these can and should be considered disabilities under the ADA after it was amended in 2008. And, of course, the likelihood of developing a disability increases as one ages. As one scholar has stated, "[A]nyone could become disabled at any time and will likely become so, if fortunate enough to live that long." Elizabeth F. Emens, *Getting It: The ADA After Thirty Years*, 71 SYRACUSE L. REV. 637, 679 (2021).

26. Porter, *Stigma*, *supra* note 3, at 233–39; Porter, *Everyone*, *supra* note 3, at 97.

27. Porter, *Marginalization*, *supra* note 1, at 1108–09 (citations omitted).

28. *See also* Harris, *supra* note 24, at 1696 (discussing the stigma and shamefulness of disability in part based on the actual or perceived dependency of people with disabilities).

B. Working Mothers and the Caregiver Conundrum

Working mothers²⁹ experience the “caregiver conundrum”³⁰ in three primary ways. First, many mothers need more time and flexibility to successfully balance their work and their caregiving obligations and are unable to achieve that balance or do so only by marginalizing their careers.³¹ Second, some mothers are not working enough to adequately provide for their families, especially if they are single moms, or are working in precarious jobs that do not provide a steady income. These mothers might also need flexibility to attend to their parenting obligations but are less likely to want to work reduced hours or part-time.³² Finally, some mothers experience the caregiver conundrum because, even though they are meeting their employers’ expectations, their employers assume they are not based on the stereotypes surrounding working mothers.³³ Because my focus here is on mothers who will sometimes request schedule changes or time off to attend to caregiving obligations, this section will focus on the lack of flexibility of most jobs.

Mothers who work for wages often have difficulty balancing their jobs and their parenting responsibilities. This is because so many jobs are built around the “ideal worker”³⁴ norm, which spurs employees to work full time,

29. Most of my scholarship discussing caregiver discrimination refers not only to mothers but also to anyone who has caregiving responsibilities, including fathers, or those who have caregiving responsibilities for other adults. Nicole Buonocore Porter, *Why Care About Caregivers? Using Communitarian Theory to Justify Protection of “Real” Workers*, 58 KAN. L. REV. 355, 355 n.4 (2010) [hereinafter Porter, *Why Care*] (citing Joan C. Williams & Stephanie Bornstein, *Caregivers in the Courtroom: The Growing Trend of Family Responsibilities Discrimination*, 41 U.S.F. L. REV. 171, 171 (2006) (recognizing that the problem of work/family balance also affects men, and some caregivers are not caring for their children but for other family members)). However, because my focus is specifically “mothers” with disabilities, I will mostly refer to “mothers” in this Article although some of what I am discussing would also apply to fathers or to anyone caring for adult loved ones rather than children.

30. I coined the phrase “caregiver conundrum” because the topic of work/family conflict has puzzled me for many years. Porter, *Why Care*, *supra* note 29, at 356.

31. *See id.* at 361–66 (discussing this part of the caregiver conundrum).

32. *See id.* at 366–67.

33. *Id.* at 367–69 (discussing cases where employers based adverse employment decisions on mistaken assumptions about the plaintiff/mother’s competency or commitment).

34. Joan Williams coined the phrase “ideal worker.” JOAN C. WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 1 (2001). Michelle Travis calls it the “full-time, face-time” norm. Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 6 (2005).

overtime, year-round, without any time off for caregiving.³⁵ Moreover, many employers have rigid schedules, shifts, and attendance policies. As I have described elsewhere, most mothers cannot meet these norms.³⁶ Most mothers are, instead, what I call “real workers.”³⁷ In my previous work, I described real workers as follows:

Real workers are the caregivers who get the job done, probably very efficiently, but either do not put in as many hours as their non-caregiver counterparts, or violate their employers’ attendance policies because they have children These are the parents to whom “life happens” and they are left juggling without a lesson, which inevitably leads to one or more balls falling to the ground.³⁸

Few mothers perform as ideal workers because mothers still do the majority of family caregiving.³⁹ Accordingly, unless a mother has a stay-at-home spouse, which is fairly rare, or has the financial means (and willingness) to delegate all of the childcare to one or more daycares, nannies, or babysitters, she will occasionally need time off to attend to unavoidable caregiving obligations.⁴⁰

Yet very few laws protect mothers who need time off to attend to their children.⁴¹ Accordingly, when children are sick and cannot attend school or daycare, when schools are closed or babysitters do not show up, and when children need routine medical care, mothers are usually not entitled to this time off or schedule change.⁴² They might still seek it, and some employers might grant them variances in their hours, shifts, or schedule. But doing so leads to the same special treatment stigma with respect to disabled workers.⁴³

35. Porter, *Mothers*, *supra* note 6, at 80.

36. Porter, *Why Care*, *supra* note 29, at 363.

37. *Id.* at 357 (describing “real workers”).

38. *Id.*

39. *See* WILLIAMS, *supra* note 34.

40. Porter, *Why Care*, *supra* note 29, at 357.

41. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women’s Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 399 (2001) (noting the lack of protection for caregiving); Porter, *Mothers*, *supra* note 6, at 80.

42. *See* Porter, *Why Care*, *supra* note 29, at 370–80 (describing the inadequacy of our laws to protect caregivers who need time off or a changed schedule for routine caregiving obligations).

43. Porter, *Marginalization*, *supra* note 1, at 1108–15; *see also* Lease, *supra* note 8, at 722 (noting that women are often afraid to ask for a change in schedule).

C. The Intersection: Mothers with Disabilities

For decades, discussions of intersectionality have focused on the intersection of sex with race, sexual orientation, and religion, but only recently have scholars begun focusing on the intersection of gender and disability.⁴⁴ This section briefly examines this scholarship before turning to the more focused intersection of *mothers* with disabilities rather than all *women* with disabilities.

As Michelle Travis explains, disability is a “master status,” the identity that trumps all of an individual’s other identities.⁴⁵ Therefore, people with disabilities are perceived neither as men nor women but solely as disabled,⁴⁶ rendering all other aspects of their identity (sex, race, ethnicity, sexual orientation, and class) irrelevant.⁴⁷ Because the image of a disabled person is usually a white, heterosexual man with a mobility impairment, women with disabilities are rendered atypical members of the disability community, which leads women to experience a sense of exclusion from the disability rights movement.⁴⁸ Women with disabilities have also been invisible within the feminist movement. As Travis explains: “Without a strong voice in either the disability rights or feminist movements, women with disabilities have been unable to draw attention to their unique forms of multiple oppression: being both female in a male-dominated society and disabled in a society designed for the able bodied.”⁴⁹

In the employment context, sex- and disability-based subordination means that “[w]omen with disabilities are less likely to be employed than either men with disabilities or nondisabled women,” and even when they are employed, they are less likely to have secure positions and will often earn significantly less than disabled men.⁵⁰ Jennifer Shinall has empirically demonstrated that

44. Porter, *Mothers*, *supra* note 6, at 82; *see also* Jennifer Bennett Shinall, *The Substantially Impaired Sex: Uncovering the Gendered Nature of Disability Discrimination*, 101 MINN. L. REV. 1099, 1102 (2017) (stating that the intersection of sex and disability has been “completely ignored by prior intersectional scholarship”).

45. Michelle A. Travis, *Gendering Disability to Enable Disability Rights Law*, 105 CAL. L. REV. 837, 840 (2017).

46. *Id.*

47. Adrienne Asch & Michelle Fine, *Introduction: Beyond Pedestals*, in *WOMEN WITH DISABILITIES: ESSAYS IN PSYCHOLOGY, CULTURE, AND POLITICS* 1, 3 (Michelle Fine & Adrienne Asch eds., 1st ed. 1988).

48. Travis, *supra* note 45, at 842–43.

49. *Id.* at 844.

50. *Id.* at 846–47; Shinall, *supra* note 44, at 1130; Silvers, *supra* note 12, at 89.

“sex discrimination and disability discrimination have a compounding, not an additive effect.”⁵¹

Moving from *women* with disabilities to the more specific identity of *mothers* with disabilities, this discussion now explores how mothers with disabilities fare in life and in the workplace. Generally speaking, mothers with disabilities are likely to experience the stigma of being dependent. They might be dependent on employers for accommodations for their disabilities, and they might be dependent on family (or sometimes the government) to help with their parenting roles or their disabilities.⁵² Mothering is physically arduous and often unpleasant.⁵³ Most mothers know the experience of pacing back and forth with a baby in their arms in the middle of the night, trying to get the baby back to sleep. This phase of motherhood can last through the toddler ages, as the child grows larger and heavier. Wrestling with mobile infants and toddlers to get a diaper changed is also physically difficult work.⁵⁴ Most mothers are often sleep-deprived.⁵⁵ Now imagine doing that work with an impairment that hinders mobility or causes pain and fatigue.

Of course, the experiences of mothers with disabilities vary depending on the severity of their disability, the age of their children, the type of job they have, and many other variables.⁵⁶ If a woman’s disability substantially limits major life activities, she may be unable to find employment at all, a possibility evidenced by the lower employment rates of people with disabilities compared to their non-disabled peers.⁵⁷ But because I focus on the employment experience, I mainly address the work experiences of mothers with disabilities.

51. Shinall, *supra* note 44, at 1132; *see also id.* at 1136 (stating that her findings “strongly suggest that sex and disability discrimination intersect much in the same, well-documented way that race and sex discrimination intersect”).

52. *See* Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U.J. GENDER SOC. POL’Y & L. 13, 17 (2000).

53. Kessler, *supra* note 41, at 380.

54. *See generally* Kitchen, *supra* note 8, at 200 (stating that despite parenting being a “labor of love,” it is still really hard work).

55. *Id.* at 201.

56. *See* Porter, *Mothers*, *supra* note 6, at 105; *see also* Lease, *supra* note 8, at 731 (stating that factors such as single parent or coupled, how many children, financial status, etc. all influence how well a woman with children can balance work and family).

57. *See supra* note 16 and accompanying text.

Given the expansive definition of disability under the ADA as amended in 2008,⁵⁸ there are likely many women who have both a disability and children. Many of these women might have acquired a disability after being hired. A woman might develop cancer, diabetes, multiple sclerosis, a mental impairment, or mobility impairments related to some kind of accident or injury.⁵⁹ In addition to how the experience of developing a disability will affect her relationship with her spouse or partner (if applicable) and her relationship with her children, she might also experience workplace consequences.

For instance, there is a significant pay gap between mothers and others.⁶⁰ There is also a pay gap for people with disabilities compared to their non-disabled peers.⁶¹ So one workplace effect of the intersection of mothers with disabilities is that they will likely be making significantly less than their non-disabled peers and less than their disabled peers who are not mothers.

Moreover, a mother with a disability will experience stigma because she might occasionally need accommodations for her disability *and* because of her caregiving responsibilities.⁶² Some accommodations would only be needed because of a disability, such as help with heavy lifting. It is unlikely a mother would need such an accommodation because of her caregiving responsibilities.⁶³

But there are some accommodations that a disabled mother might need because of her disability *or* her caregiving responsibilities, or both.⁶⁴ For instance, schedule changes are the most frequently requested accommodation for people with disabilities.⁶⁵ Disabled employees might need to work a different schedule or shift because, for example, their diabetes is harder to

58. See Katie Eyer, *Claiming Disability*, 101 B.U. L. REV. 547, 553 (2021) (stating that, under the broadened definition of disability after the ADA, a majority of Americans have one or more disabilities).

59. Porter, *Mothers*, *supra* note 6, at 107.

60. Debbie N. Kaminer, *The Work-Family Conflict: Developing a Model of Parental Accommodation in the Workplace*, 54 AM. U.L. REV. 305, 313–14 (2004); Kitchen, *supra* note 8, at 174; Lease, *supra* note 8, at 721 (nothing the pay gap between mothers and fathers).

61. FULFILLING THE PROMISE, *supra* note 16, at 2.

62. Porter, *Mothers*, *supra* note 6, at 133.

63. *But see* PORTER, REIMAGINED, *supra* note 2, at 3–4 (noting that if we include a pregnant woman in our definition of caregiver (because she is literally caring for the baby inside of her), accommodations to the physical functions of the job (such as heavy lifting) might be necessary).

64. Porter, *Mothers*, *supra* note 6, at 135.

65. Lisa Schur et al., *Accommodating Employees with and Without Disabilities*, 53 HUM. RES. MGMT. 593, 601 (2014).

manage when working the night shift, their kidney dialysis schedule makes it impossible to work rotating shifts, or their depression is worse at night.⁶⁶ Employees with disabilities such as multiple sclerosis, hepatitis C, diabetes, and cancer might need to avoid overtime hours or sometimes even full-time hours.⁶⁷ And workers with all kinds of disabilities might need occasional days off or sometimes longer leaves of absence to accommodate doctor's appointments, occasional flare-ups of disabilities, recovery from surgery, and so on.⁶⁸

Similarly, many mothers need various types of schedule changes. For instance, a single mom might not be able to work the night shift or much overtime because she cannot find childcare at odd hours. Or a mother of school-aged children might want to start and end work earlier each day to allow her to be home with her children after school. Or a mother might need occasional time off or longer leave of absence to either accommodate a child's routine medical appointments or to care for a child recuperating from an illness or accident.⁶⁹

Yet all these accommodations cause special treatment stigma. One way this stigma might occur is when employers refuse to hire people who they believe might need accommodations. This could happen if a person's disability is visible or if the person voluntarily discloses it.⁷⁰ Or consider a woman who is visibly pregnant and interviewing for a new job. Even if the employer was willing to provide maternity leave, that employer might not want to hire her knowing she will soon have a new baby to care for.⁷¹ Sometimes, an employer hires a worker not knowing that they will need an accommodation and then refuses to provide it when requested.⁷² This should be unlawful under the ADA because employers are required to provide reasonable accommodations to employees with disabilities as long as they do not cause an undue hardship.⁷³ Although schedule changes are usually very

66. *See, e.g.*, *Colwell v. Rite Aid Corp.*, 602 F.3d 495 (3d Cir. 2010) (plaintiff with night vision impairment requested an accommodation to avoid having to work the night shift); *Humphrey v. Mem'l Hosps. Ass'n*, 239 F.3d 1128, 1136–37 (9th Cir. 2001) (discussing an employee who needed a shift change because of a mental illness).

67. SCHUR ET AL., *supra* note 15, at 51.

68. PORTER, REIMAGINED, *supra* note 2, at 127.

69. *Id.* at 128.

70. *See id.* at 94.

71. *See id.*

72. *Id.* at 95.

73. 42 U.S.C. § 12112(b)(5)(A).

cheap or free,⁷⁴ winning these cases is often difficult.⁷⁵ Of course, other than the limited right to leave under the Family Medical Leave Act (“FMLA”), employers are not required to accommodate an employee’s caregiving responsibilities, and therefore, they often refuse.⁷⁶

Even when an employer does provide the accommodation, the employee still might experience special treatment stigma. First, the employer might treat them worse either by not considering them for promotions or other workplace benefits or by perceiving them as less competent.⁷⁷ Moreover, employees who are provided accommodations might experience resentment by their coworkers, perhaps because the coworkers believe that the accommodation will require them to pick up the slack of the accommodated employee.⁷⁸ Or the resentment might be because the non-accommodated employees might want the same accommodations. Accommodations such as light duty, permission to sit rather than stand, schedule modifications, and reassignment to a vacant position might be coveted by non-disabled employees for a variety of reasons.⁷⁹ This resentment might be worse in the caregiving context because coworkers know that the employer is not legally required to provide the accommodation (other than the limited right to FMLA leave).⁸⁰

Obviously, millions of disabled workers and women with caregiving responsibilities successfully balance their work, health, and families. But it does not take a mathematician to figure out that if a worker occasionally needs accommodations because of *both* their disability *and* their caregiving responsibilities, the stigma that person experiences will multiply.⁸¹

With a basic understanding of the workplace experiences of mothers with disabilities, I turn next to the two major events that have affected and will continue to affect mothers with disabilities. First, the COVID-19 pandemic

74. Nicole Buonocore Porter, *The New ADA Backlash*, 82 TENN. L. REV. 1, 78 (2014) [hereinafter Porter, *Backlash*].

75. See Stephen F. Befort, *An Empirical Examination of Case Outcomes Under the ADA Amendments Act*, 70 WASH. & LEE L. REV. 2027, 2067–68 (2013).

76. Porter, *Why Care*, *supra* note 29, at 375.

77. PORTER, REIMAGINED, *supra* note 2, at 96–97.

78. Porter, *Marginalization*, *supra* note 1, at 1112; PORTER, REIMAGINED, *supra* note 2, at 97–99; Michelle A. Travis, *A Post-Pandemic Antidiscrimination Approach to Workplace Flexibility*, 64 WASH. U. J.L. & POL’Y 203, 218–19 (2021).

79. PORTER, REIMAGINED, *supra* note 2, at 99.

80. Kessler, *supra* note 41, at 399 (noting that there is no protection for caregiving responsibilities); PORTER, REIMAGINED, *supra* note 2, at 99.

81. See Silvers, *supra* note 12, at 89 (discussing the idea that the “two stigmas have more than [an] additive negative effect”).

had profound effects on both mothers and people with disabilities. Second, the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which overturned the constitutional right to an abortion,⁸² is having and will continue to have profound effects on women with disabilities who get pregnant. I address each of these developments in turn.

III. Mothers with Disabilities During and Post-Pandemic

The pandemic had profound effects on every aspect of our lives. None of what I am about to say should diminish the fact that, as of this writing, over one million Americans have died from COVID-19.⁸³ And although the employment numbers have bounced back,⁸⁴ hundreds of thousands of employees lost their jobs at the beginning of the pandemic, causing severe financial strain.⁸⁵ This was especially true for workers whose jobs could not be performed at home and for those who worked in nonessential industries.⁸⁶

My focus here is two-fold. I first discuss how mothers who worked for wages fared during the early days of the pandemic and the continued effects of that experience. I then turn to how employees with disabilities experienced the pandemic. Finally, I discuss the intersectional effects of these two experiences—the workplace consequences for mothers with disabilities during and after the pandemic.

82. 597 U.S. 215 (2022).

83. As of April 26, 2023, the total number of U.S. COVID-19 deaths was 1,130,662. John Elflein, *Total Number of Cases and Deaths from COVID-19 in the United States as of April 26, 2023*, STATISTA (Aug. 29, 2023), <https://www.statista.com/statistics/1101932/coronavirus-covid19-cases-and-deaths-number-us-americans/>.

84. Beth Almeida & Isabela Salas-Betsch, *Fact Sheet: The State of Women in the Labor Market in 2023*, AM. PROGRESS (Feb. 6, 2023), <https://www.americanprogress.org/article/fact-sheet-the-state-of-women-in-the-labor-market-in-2023/> (noting that the U.S. economy recovered in record time from the COVID-19 recession, with overall employment fully recovering to pre-pandemic levels by August 2022).

85. *Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LAB. STAT. (Jan. 17, 2024), <https://www.bls.gov/cps/covid-may2020-sept2022-highlights.htm>.

86. JAMIE K. MCCALLUM, ESSENTIAL: HOW THE PANDEMIC TRANSFORMED THE LONG FIGHT FOR WORKER JUSTICE 30 (2022) (noting that over fifty-five million workers in the global domestic labor pool lost hours or jobs in May 2020 alone, with the unemployment concentrated in the service sector).

A. Mothering and Working During and After the Pandemic

The pandemic had profound effects on women's workforce participation. The overall participation rate was 60.3% right before the pandemic, but by January 2021, it had fallen below 56%—the lowest since 1987.⁸⁷ As one article stated, “We’ve lost a generation of progress.”⁸⁸ One estimate states that the number of women who left the workforce during the pandemic was two million (although more recent research suggests it might be less than that).⁸⁹ A significant cause of this decline was the fact that millions of low-income women were laid off during the pandemic solely because their jobs were eliminated.⁹⁰ This was especially true for nonessential service occupations, such as hair stylists, restaurant workers, department store employees, and others.⁹¹

Not all lower-income women were laid off. Many of them worked in “essential jobs” that could not be performed at home, so their jobs were safe

87. Simeon Djankov et al., *COVID-19 Widens the Gender Gap in Labor Force Participation*, PETERSON INST. FOR INT’L ECON. (Mar. 8, 2021, 4:15 AM), <https://www.piie.com/blogs/realtime-economics/covid-19-widens-gender-gap-labor-force-participation> [https://perma.cc/FBX4-GTDD].

88. Jessica Dickler, *Equal Pay Day Highlights \$1 Million Salary Shortfall for Some Women Amid Covid*, CNBC (Mar. 24, 2021, 12:36 PM), <https://www.cnbc.com/2021/03/24/equal-pay-day-highlights-a-1-million-salary-gender-shortfall-amid-covid.html> [https://perma.cc/RMD5-QS6R].

89. Rothbard et al., *supra* note 8. And it is worth noting that women of color have disproportionately borne the brunt of this loss of jobs. *Id.*

90. See Lindsay F. Wiley & Samuel R. Bagenstos, *The Personal Responsibility Pandemic: Centering Solidarity in Public Health and Employment Law*, 52 ARIZ. ST. L.J. 1235, 1261–62 (2020); see also Scott Horsley, *Women Are Returning to the Job Market in Droves, Just When the U.S. Needs Them Most*, NPR (July 5, 2023, 5:01 AM), <https://www.npr.org/2023/07/05/1185723117/working-women-jobs-workforce-pandemic-economy-employers-labor> (noting that millions of women lost their jobs in the early days of the pandemic as restaurants and other service businesses were closed); McCALLUM, *supra* note 86, at 33 (stating that women were hit the hardest where four times as many women lost their jobs in large part due to their concentration in the service sector).

91. Paul Davidson, *Post-Pandemic, There’s a Record Number of Women in the Workplace. Can the Trend Continue?*, USA TODAY (July 12, 2023, 11:33 AM), <https://www.usatoday.com/story/money/2023/07/11/women-at-work-record-level/70402718007/>; see also Almeida & Salas-Betsch, *supra* note 84 (noting that, before the pandemic, almost six in ten women were employed in just three sectors that also were the hardest hit by the pandemic—education and health, leisure and hospitality, and retail and wholesale trade).

(their health, albeit, less so).⁹² But many of these women were terminated⁹³ or forced to quit because they had no one to care for their children when the daycares and schools closed.⁹⁴ Counter-intuitively, the problem was likely worse for women whose children were school age but too young to stay home alone because daycares opened back up long before many schools did (or when schools opened up, they did so in a hybrid format).⁹⁵

The “lucky” mothers who could perform their jobs at home had the unenviable task of balancing their work obligations with their caregiving

92. Rothbard et al., *supra* note 8 (noting that those who held essential jobs faced “inherent risks simply by going to work”); MCCALLUM, *supra* note 86, at 251 (noting that essential workers died from COVID-19 at a rate greater than everyone else other than the elderly).

93. Jennifer Bennett Shinall, Essay, *Paid Sick Leave’s Payoff*, 75 VAND. L. REV. 1879, 1931 (2022) (discussing low-wage workers who did not have the right to leave and were more likely to have been terminated during the pandemic because they had COVID-19 or they had to care for family members who had COVID-19 or were in quarantine).

94. MCCALLUM, *supra* note 86, at 153–54; Misty L. Heggeness & Jason M. Fields, *Parents Juggle Work and Child Care During Pandemic: Working Moms Bear Brunt of Home Schooling While Working During COVID-19*, U.S. CENSUS BUREAU (Aug. 18, 2020), <https://www.census.gov/library/stories/2020/08/parents-juggle-work-and-child-care-during-pandemic.html> [<https://perma.cc/WBJ2-GRT2>] (“[A]round one in five (19.6%) of working-age adults said the reason they were not working was because COVID-19 disrupted their childcare arrangements Of those not working, women ages 25–44 are almost three times as likely as men to not be working due to childcare demands.”); Davidson, *supra* note 91 (stating that many women who left the workforce during the pandemic did so because of health concerns, to care for children, or to cope with burnout); Horsley, *supra* note 90.

95. See Alyssa Abkowitz, *With Caution and Creativity, Day Care Prepare to Reopen*, N.Y. TIMES (July 2, 2020), <https://www.nytimes.com/2020/06/02/parenting/coronavirus-day-cares-reopening.html> (discussing daycares outside of the public school system reopening in May 2020); Emily Bamforth, *Why Are Daycares Opening Up to School-Age Children, if Some Schools Are Online?*, CLEVELAND.COM (Aug. 27, 2020, 1:03 PM), <https://www.cleveland.com/news/2020/08/why-are-daycares-opening-up-to-school-age-children-if-some-schools-are-online.html> (discussing daycares that were open even though many schools were not); Jessica Guynn, *Coronavirus Child Care Crisis Tops Concerns as Nation Pushes to Reopen. Parents Ask: Who Will Watch Our Children?*, USA TODAY (May 19, 2020, 10:13 AM), <https://www.usatoday.com/story/money/2020/05/17/coronavirus-childcare-america-reopening-trump-fauci/5194811002/> (noting that daycares were not required to close in many places and many remained open for essential workers); see also Rothbard et al., *supra* note 8 (noting that for women with kids under ten, the challenges of balancing work and family were especially difficult); Horsley, *supra* note 90 (discussing one mother who quit her job and spent the first year of the pandemic shepherding her two young kids through remote school, which she described as “suffocating”). But see Rothbard et al., *supra* note 8 (noting that there was greater employment loss during the pandemic for mothers with young children compared to mothers with older children).

responsibilities.⁹⁶ Many women had difficulties finding distraction-free spaces. In fact, there were memes circulating of a woman sitting on a chair inside her shower with her laptop. Even when space was not an issue, time was. Parents of young children whose daycares were closed had to care for them, and those with school-aged children in remote school often needed to help their children in navigating the virtual environment. Many parents were trying to put in a full day of work in the early-morning and late-night hours (and if they were lucky, during the child's naptime).⁹⁷ It is no wonder that many women decided that the difficulty of this balancing act was too much and quit.⁹⁸ (Of course, lower-income women did not have this choice.)

Even for the mothers who did not quit their jobs, many still suffered negative workplace consequences because they were forced to reduce the number of hours they normally worked.⁹⁹ Even in dual-earner families where both parents were working from home, women reduced their hours up to 4.5 times more than men.¹⁰⁰ This could have far-ranging consequences, such as being disciplined, not receiving a bonus or raise (which might increase the long-term earnings gap between men and women), and having their advancement stymied.¹⁰¹ As many scholars have acknowledged, once a woman is on the "mommy track," it is difficult to get off.¹⁰²

Much of the research discussed so far is from the early days of the pandemic and is undoubtedly negative from the perspectives of women's equality in the workplace and economic security, although perhaps positive

96. Porter, *Working*, *supra* note 8, at 6; Rothbard et al., *supra* note 8 (stating that those with the "luxury of jobs they could do remotely had to balance a suddenly nonexistent work-life divide").

97. Porter, *Working*, *supra* note 8, at 7.

98. Rothbard et al., *supra* note 8 (stating that for many women, the additional stressors of balancing work and family during the early days of the pandemic when schools and daycares were closed made them realize that the cost-benefit analysis no longer favored remaining in the workforce); *see also* Heggeness & Fields, *supra* note 94 ("As the weeks wore on, the percent of mothers age 25 to 44 not working due to COVID-19 related childcare issues grew by 4.8 percentage points, compared to no increase for similar men.").

99. Tammy Katsabian, *The Telework Virus: How the COVID-19 Pandemic Has Affected Telework and Exposed Its Implications for Privacy and Equality* 34–35 (Sept. 1, 2020) (unpublished manuscript), <https://perma.cc/LWR7-5ZFL>.

100. Caitlyn Collins et al., *COVID-19 and the Gender Gap in Work Hours*, 28 *GENDER WORK & ORG.* 101, 103 (2020).

101. Porter, *Working*, *supra* note 8, at 8–9.

102. *See, e.g.*, Marion G. Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 *MICH. L. REV.* 1155, 1179–80 (1991); Rothbard et al., *supra* note 8 ("[T]ime away from the workforce has real . . . implications for career progression, wages, and more.").

from the perspective of women's families. So what is the status of women in the workplace in 2023 (when this article was first drafted)?

Fortunately, things have significantly improved for women in the workplace. In June 2023, 77.8% of women ages twenty-five to fifty-four were either working or seeking work, which is the highest in U.S. history.¹⁰³ And among African-American women in that same age range, more than 80% are in the workforce.¹⁰⁴ Women are benefiting from the robust recovery of the economy as well as the wider availability of childcare, schools, and summer camps.¹⁰⁵ Mothers are also benefiting from the fact that more companies are offering remote work and other flexible work options than before the pandemic.¹⁰⁶ And because the market is strong, more women are leaving their jobs, confident that they will find a better one.¹⁰⁷

Having said that, the overall participation rate of women in the workforce is still less than the pre-pandemic level mostly due to early retirements of baby boomers.¹⁰⁸ And certain industries have not bounced back as much as others. Specifically, according to researchers, the "care economy has not yet recovered."¹⁰⁹ The care economy includes healthcare jobs like home health aides, childcare workers, teachers, and others.¹¹⁰ This group's average pay was less than \$30,000 annually, which is equivalent to the 2023 poverty threshold for a family of four in the United States.¹¹¹ Other sectors that have not bounced back include retail, where women's employment remains down, and leisure and hospitality, which as of February 2023, was still down 3.3% from the pre-pandemic levels.¹¹²

Moreover, mothers of children younger than five years old have experienced employment levels that are rising more slowly than mothers of

103. Almeida & Salas-Betsch, *supra* note 84; Davidson, *supra* note 91.

104. Horsley, *supra* note 90.

105. Davidson, *supra* note 91; *see also* Almeida & Salas-Betsch, *supra* note 84 (noting that women with minor children saw improvement in employment over the course of 2022, thanks to widespread reopening of schools and daycares).

106. Davidson, *supra* note 91; *see also* Horsley, *supra* note 90 (discussing one mother who was grateful to be able to return to work remotely so that she could be home in the afternoon when school let out).

107. Rothbard et al., *supra* note 8.

108. Davidson, *supra* note 91.

109. Rothbard et al., *supra* note 8.

110. *Id.*; *see also* Horsley, *supra* note 90 (noting that there are fewer childcare workers today than before the pandemic).

111. Rothbard et al., *supra* note 8.

112. Almeida & Salas-Betsch, *supra* note 84.

school-aged children.¹¹³ There are also “huge gender gaps in employment rates between mothers and fathers.”¹¹⁴ As of 2022, women were five to eight times more likely to experience a caregiving impact on their employment.¹¹⁵ This time out of the labor force can have lifelong effects on women’s economic security.¹¹⁶

In sum, although “women have made impressive employment gains, . . . long-standing structural inequalities and uneven burdens [of motherhood] interfere with women’s full and equal participation in the economy.”¹¹⁷

B. Workers with Disabilities During and After the Pandemic

Compared to the research about women and mothers during the pandemic, there is much less research about people with disabilities during and after the pandemic. Most of what has been written has focused on remote work.¹¹⁸ This makes sense because remote work was the most prominent workplace change that occurred because of the pandemic.¹¹⁹ Accordingly, this section focuses primarily on remote work for people with disabilities and how the rise in remote work will affect disabled workers post-pandemic.

Many people with disabilities sometimes need to work remotely, either intermittently or permanently. Examples of disabilities that might require a remote work accommodation include mobility impairments that make commuting difficult,¹²⁰ bowel or bladder issues that demand constant and close access to a bathroom, mental health conditions that make functioning outside of the home difficult,¹²¹ complications from pregnancy that require

113. *Id.* (noting, however, that even for this group, their employment level is 99.2% of the pre-pandemic level).

114. *Id.* Interestingly (albeit troubling), the pay gap between women and men increases with age and the gaps are even larger for many women of color. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. See, e.g., Stacy A. Hickox & Chenwei Liao, *Remote Work as an Accommodation for Employees with Disabilities*, 38 HOFSTRA LAB. & EMP. L.J. 25 (2020); Arlene S. Kanter, *Remote Work and the Future of Disability Accommodations*, 107 CORNELL L. REV. 1927 (2022); D’Andra Millsap Shu, *Remote Work Disability Accommodations in the Post-Pandemic Workplace: The Need for Evidence-Driven Analysis*, 95 TEMP. L. REV. 201 (2023); Travis, *supra* note 78.

119. Travis, *supra* note 78, at 218 (discussing remote work as the most “influential legacy” of the pandemic).

120. Shu, *supra* note 118, at 211; see also Kanter, *supra* note 118, at 1988.

121. Porter, *Working*, *supra* note 8, at 17; Shu, *supra* note 118, at 211.

bed rest,¹²² pressure ulcers as the result of paraplegia and sitting in a wheelchair,¹²³ impairments where preparing for and traveling to work causes fatigue or pain,¹²⁴ and “flare-ups of diseases like rheumatoid arthritis or multiple sclerosis.”¹²⁵

Although many employers allowed some employees to work from home pre-pandemic, most employers did not.¹²⁶ Obviously, working from home is not possible for millions of jobs, such as in the manufacturing, hospitality, service, and healthcare sectors.¹²⁷ But even when it was possible, most employers refused to allow it, and if the employees with disabilities sued when their remote-work accommodations were denied, they usually lost.¹²⁸ Before the pandemic, most courts held that in-person presence is an essential function of the job, and because an employer never has to eliminate an essential function of the job as an accommodation, remote work accommodations were denied.¹²⁹

As already noted with respect to working mothers, when the pandemic began, virtually everyone who *could* perform their job at home was forced to perform their job at home.¹³⁰ When it came to the essential functions of our jobs—having meetings, teaching classes, etc.—we used existing technology

122. *Mosby-Meachem v. Memphis Light, Gas & Water Div.*, 883 F.3d 595, 599, 604–05 (6th Cir. 2018).

123. *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995).

124. Shu, *supra* note 118, at 211.

125. Porter, *Working*, *supra* note 8, at 18; Kanter, *supra* note 118, at 1988; Shu, *supra* note 118, at 211.

126. Porter, *Working*, *supra* note 8, at 18–19; Hickox & Liao, *supra* note 118, at 31; Shu, *supra* note 118, at 203.

127. Hickox & Liao, *supra* note 118, at 46 (mentioning nurses as an example of a job that cannot generally be performed remotely); Kanter, *supra* note 118, at 1946 (discussing types of jobs that cannot be performed from home—food servers, cashiers, and truck drivers); Shu, *supra* note 118, at 208 (noting that some jobs are incompatible with remote work, such as those jobs involving production, construction, and service, which require in-person interaction with other people or with specialized equipment or machinery); Travis, *supra* note 78, at 211.

128. *See* Kanter, *supra* note 118, at 1946 n.62; Shu, *supra* note 118, at 204, 214; Travis, *supra* note 78, at 209.

129. *Vande Zande v. Wis. Dep’t of Admin.*, 44 F.3d 538, 544 (7th Cir. 1995); *EEOC v. Ford Motor Co.*, 782 F.3d 753, 762–63 (6th Cir. 2015); *see also* Hickox & Liao, *supra* note 118, at 48; Kanter, *supra* note 118, at 1946 n.62, 1954 n.96 (discussing cases where courts found in favor of employers who had denied a remote work accommodation); Shu, *supra* note 118, at 226–29 (discussing cases where employers successfully argued that in-person presence is an essential function of the job); Travis, *supra* note 78, at 207 (same).

130. Porter, *Working*, *supra* note 8, at 20–21; Travis, *supra* note 78, at 217.

to figure out how to perform these functions remotely.¹³¹ And because remote-work arrangements have been successful, most employees want to continue at least some remote work, and many employers are willing to continue accommodating remote work arrangements.¹³²

Moreover, remote work has been even more successful and valuable for people with disabilities. For example, some have argued that remote work has placed people with disabilities on equal footing with non-disabled coworkers because some people with disabilities, such as those with mobility impairments, were already accustomed to not being able to go wherever they wanted at a moment's notice, and they already had experience with staying in touch and supporting one another remotely.¹³³ Remote work also helps people with disabilities avoid some of the disability bias that they might experience from coworkers or supervisors.¹³⁴ And employers will generally spend less on accommodations for employees with disabilities if they are working remotely.¹³⁵

But it is important to not paint too rosy of a picture. There are some disadvantages of remote work for *all* workers, such as effects on workplace culture;¹³⁶ difficulty assimilating into a new job when working remotely;¹³⁷ possible problems with lack of space, privacy, or the correct technology;¹³⁸ problems with the lack of boundaries between work and home (which can also lead to less privacy);¹³⁹ and negative physical and mental health

131. Kanter, *supra* note 118, at 1934 (discussing the improvement in technology that makes remote work possible).

132. *Id.* at 1982–87 (discussing the benefits of remote work for both employees and employers); *id.* at 1934 (stating that 81% of employees in one survey indicated that they do not want to go back to the office after the pandemic or they would prefer a hybrid schedule); Travis, *supra* note 78, at 219–20.

133. Kanter, *supra* note 118, at 1982; *Parenting with a Disability During COVID-19: Insights from the #COVIDDisParenting Twitter Chat*, NAT'L RSCH. CTR. FOR PARENTS WITH DISABILITIES, <https://heller.brandeis.edu/parents-with-disabilities/support/parenting-tips-strategies/parenting-covid.html> (last visited July 3, 2024).

134. Kanter, *supra* note 118, at 1980.

135. *Id.*

136. Shu, *supra* note 118, at 235.

137. Kanter, *supra* note 118, at 1990 (discussing the problem with remote work of not being seen at work in a way that can help with career advancement); Shu, *supra* note 118, at 235 (noting the concern employers have with the lack of mentorship when their employees are working full time from home).

138. Kanter, *supra* note 118, at 1989 (indicating that one problem with remote work is the lack of space); Shu, *supra* note 118, at 212 (same).

139. Kanter, *supra* note 118, at 1989 (discussing the problem of not having boundaries between work and home when employees are working remotely); Fred Turner, *You Call This*

effects.¹⁴⁰ Moreover, there are disadvantages of remote work that are specific to people with disabilities. For some people with disabilities, working from home is harder, not easier. For example, employees with visual disabilities or with disabilities exacerbated by prolonged computer use might have difficulty working from home.¹⁴¹ Additionally, some employees with hearing impairments become more fatigued and stressed from having to concentrate to compensate for poor audio quality.¹⁴²

Luckily, for those employees with disabilities who *prefer* to work at the employer's worksite, virtually all of them should be able to do so. Even though many employers are *allowing* employees to continue to work remotely, at least some of the time, very few employers are *forcing* all workers to work remotely.¹⁴³

With respect to those workers with disabilities who *need* remote work as an accommodation for their disability, there is some evidence that employers will be more willing to grant these accommodations, and there is *some* evidence that courts will force employers to grant remote work accommodations to disabled employees if the employers initially refuse.¹⁴⁴

'Flexible Work?', N.Y. TIMES (Apr. 12, 2013), <https://www.nytimes.com/2023/04/12/magazine/flexible-work-home.html?smid=url-share>.

140. Jordan Metz, *Working from Home Is Less Healthy Than You Think*, N.Y. TIMES (Mar. 14, 2023), <https://www.nytimes.com/2023/03/14/opinion/wfh-return-to-office-health.html?smid=url-share> (discussing the negative physical and mental health consequences of remote work). The primary negative physical effect of remote work is the lack of movement. Even though people working remotely report having more time for formal exercise, they still moved less overall because their bathrooms and kitchens were so close to their workspaces. *Id.* The primary negative effects on mental health include increased rates of depression likely caused by the isolation of remote work. *Id.*

141. Barbara Hoffman, *Accommodating Disabilities in the Post-COVID-19 Workplace*, 11 IND. J.L. & SOC. EQUAL. 51, 60 (2023).

142. *Id.*

143. See Jessica Howington, *20 Companies Embracing Permanent Remote Work-from-Home Jobs*, FLEXJOBS, <https://www.flexjobs.com/blog/post/companies-switching-remote-work-long-term/> (last visited July 7, 2024) (discussing employers who are *allowing* many or most employees to work remotely but not *requiring* remote work).

144. Kanter, *supra* note 118, at 1943; *id.* at 2000 ("Employers who sent their workforce home to work during the pandemic will have difficulty claiming that jobs that were done remotely during the pandemic can be performed now only at the workplace."); PORTER, REIMAGINED, *supra* note 2, at 91–92; Shu, *supra* note 118, at 243–54 (discussing all of the post-COVID-19 cases involving a remote work accommodation request, ultimately concluding that there is *some* evidence that more employees will be able to obtain a remote-work accommodation).

In sum, the workplace¹⁴⁵ effects of the pandemic on employees with disabilities is a mixed bag, but it is certainly more positive than the effects that the pandemic had on working mothers. But what happens when we view the intersection of these two identities? How did the pandemic affect mothers with disabilities in the workplace? I turn to that question next.

C. Mothers with Disabilities in the Workplace During the Pandemic

There is very little research that specifically addresses the effects of the pandemic on mothers with disabilities¹⁴⁶ and virtually no research that addresses the workplace effects and consequences for this group. However, it is possible to imagine some of the ways that being both a caregiver and a person with a disability might affect the working lives of mothers with disabilities during and after the pandemic.

During the pandemic, how a mother with a disability fared depended on her disability, her job, her income level, the number of children she had, the age of her children, and what help (if any) she had from a spouse, partner, or other family member.¹⁴⁷ A full exploration of each combination of these variables is beyond the scope of this Article, but consider the following when thinking about these varied effects.

145. I realize this is far from a complete picture because I am ignoring the personal and health effects of the pandemic on people with disabilities, especially those who are immunocompromised.

146. *But see, e.g.,* Ramya Emandi et al., *Six Ways Women with Disabilities Have Been Affected by the Pandemic*, UN WOMEN (July 5, 2022), <https://data.unwomen.org/features/six-ways-women-disabilities-have-been-affected-pandemic>; Izz Scott Lamagdeleine, *For Disabled Parents, Covid's Trials Are Amplified*, UNDARK (Apr. 26, 2021), <https://undark.org/2021/04/26/physically-disabled-parents-navigating-covid-19/>; *Parenting with a Disability During COVID-19: Insights from the #COVIDDisParenting Twitter Chat*, *supra* note 133; Heather Osterman-Davis, *I'm a Disabled Parent. It Took a Pandemic to Let Me Join the P.T.A.*, N.Y. TIMES (Feb. 2, 2021), <https://www.nytimes.com/2021/02/02/well/family/im-a-disabled-parent-it-took-a-pandemic-to-let-me-join-the-pta.html>; UNITED NATIONS POPULATION FUND (UNFPA) & WOMEN ENABLED INT'L, *THE IMPACT OF COVID-19 ON WOMEN AND GIRLS WITH DISABILITIES* (2021), <https://www.unfpa.org/featured-publication/impact-covid-19-women-and-girls-disabilities>. One interesting study revealed that women with disabilities increased their caregiving and childcare duties during the pandemic *even more* than women without disabilities (and more than men with and without disabilities). Emandi et al., *supra*.

147. *See generally* Lease, *supra* note 8, at 731 (noting that how well a woman with children will balance work and family is based on factors such as whether she is a single parent, how many children she has, how much outside help she has, and her financial status).

*A mother who was an essential worker with young children, who did not have family to watch her children, and who could not afford a nanny*¹⁴⁸: she would have likely had to quit her job unless she had a partner who would care for the children. Given that there are already pay gaps for people with disabilities and for mothers, losing her job could have been devastating. And although not related to employment, as I discussed in *Mothers with Disabilities*, if she was single, losing her job could have led to other negative consequences regarding the custody of her children.¹⁴⁹

A mother with young children whose job could not have been performed remotely but was not essential: she likely would have lost her job at least initially when nonessential businesses were shut down. Assuming she had the opportunity to go back to work after nonessential businesses reopened, she likely would have been in the same situation as the above example: her ability to go back to work would have depended on her income level and whether she had a partner or other family members to care for her children during working hours. Moreover, if her disability made her immuno-compromised, she might not have been able to return to work at all, which could have had devastating financial and career consequences.

A mother with young children whose job could have been performed remotely: as mentioned earlier, in some ways, these mothers were considered “lucky” because they were able to continue working without risking their health through possible exposure to COVID-19 (an advantage especially important for those individuals who were immuno-compromised). However, working from home with young children was difficult in the best of circumstances, and many mothers of young children experienced negative career consequences because of their inability to work as many hours as they usually did before the pandemic.¹⁵⁰ A mother with a disability might have found it especially difficult if her disability affected her motor skills, caused fatigue, or, if her disability was episodic, induced flare-ups. Moreover, people with mental illnesses often experienced worse symptoms during the pandemic. Before the pandemic, if these mothers had received assistance during the day—either to manage their own disability, to help care for the children, or both—they likely would not have been able to continue receiving assistance during the pandemic because of the risk of exposure to COVID-19.

148. Many people with disabilities who are immuno-compromised would likely not want to bring a nanny or other caregiver into the home unless that person was willing to isolate with them.

149. Porter, *Mothers*, *supra* note 6, at 114–15.

150. Porter, *Working*, *supra* note 8, at 8–9.

In the cases in which the mother with a disability was able to keep her job, she still would have had to navigate the possibility of needing her employer's flexibility with respect to her caregiving responsibilities *and* needing her employer's willingness to accommodate her disability. The stigma flowing from this intersectional disadvantage is very significant.

Having highlighted the effects and consequences of the workplace on mothers with disabilities during the pandemic, it is not all bad news. One possible advantage that came out of the pandemic for those with disabilities is that more employers are allowing their employees to work from home.¹⁵¹ Because many people with disabilities need to occasionally or permanently work from home and because many caregivers also might need or prefer to work from home, the increased ability to do so should be advantageous to working mothers with disabilities.

IV. Mothers with Disabilities Post-Dobbs

As mentioned in the introduction, the second major development for mothers with disabilities in the workplace is the Supreme Court's decision in *Dobbs v. Jackson Women's Health Organization*, which overturned the constitutional right to have an abortion.¹⁵² This part explores the consequences of the *Dobbs* decision for women with disabilities who are or may become mothers. Before addressing the *workplace* consequences of *Dobbs* on women with disabilities, this part briefly addresses the *life* consequences of *Dobbs* on women with disabilities.

A. Life Consequences for Women with Disabilities Who Become Pregnant Post-Dobbs

To state the obvious, the less access that women with disabilities have to legal abortions, the more these women will remain pregnant and deliver their babies. This section explores the consequences of this fact.

As a preliminary matter, women with disabilities are more likely to accidentally get pregnant in the first place.¹⁵³ This occurs for several reasons. First, some medications that treat some disabilities can interfere with birth control. For example, anti-seizure medications can interfere with birth

151. *Id.* at 23.

152. 597 U.S. 215 (2022).

153. See Robyn M. Powell, *Disability Reproductive Justice*, 170 U. PA. L. REV. 1851, 1873 (2022) (noting this phenomenon).

control, causing half of all pregnancies for women with epilepsy to be unplanned.¹⁵⁴

Second, as Robyn Powell and others have discussed, people with disabilities are far less likely to receive accurate information about sex and birth control.¹⁵⁵ Unsurprisingly, that lack of education means that people with disabilities are less likely to use contraception.¹⁵⁶ But even if educated about contraception, disabled women are often denied the ability to make their own decisions about contraception.¹⁵⁷ This can happen when their families, doctors, or guardians do not think contraception is necessary because they do not see the woman with a disability as having a sexuality.¹⁵⁸

Finally, people with disabilities are 3.5 times more likely to experience sexual assault that can lead to unplanned pregnancies.¹⁵⁹ And as Powell notes, the lack of sex education can contribute to the higher rates of sexual violence.¹⁶⁰ To make matters worse, people with disabilities who have not received sex education might have a limited ability to report the sexual violence.¹⁶¹

Not only are disabled women more likely to get accidentally pregnant, but the effect of *Dobbs* is likely to be even more severe for them than for non-disabled women. After *Dobbs*, millions of women live in an abortion desert, where they have to travel several hundreds of miles to access a legal and safe abortion.¹⁶² This is true for all women and is undoubtedly worse for lower-

154. Meena Venkataramanan, *Their Medications Cause Pregnancy Issues Post-Roe That Could Be Dangerous*, WASH. POST (July 5, 2022, 11:39 AM), <https://www.washingtonpost.com/health/2022/07/25/disabled-people-abortion-restrictions/>.

155. Powell, *supra* note 153, at 1866.

156. *Id.* at 1872–73.

157. *Id.* at 1871.

158. *Id.* at 1861–62. However, Powell notes that reproductive justice is not just about having the right to an abortion. For many people with disabilities, they are denied the ability to get pregnant in the first place, either because of involuntary sterilizations in the late nineteenth and early twentieth centuries, *id.* at 1857–59, or because, as exemplified in the well-known case of Britney Spears (where her guardian refused to let her get her IUD removed so she could become pregnant), others might interfere with a disabled woman's ability to get pregnant, *id.* at 1853–55.

159. Venkataramanan, *supra* note 154. That number rises to seven times more likely if the person has an intellectual disability. *Id.*

160. Powell, *supra* note 153, at 1866.

161. *Id.*

162. Selena Simmons-Duffin, *Abortion Access Could Continue to Change in Year 2 After the Overturn of Roe v. Wade*, NPR (July 3, 2023, 3:43 PM), <https://www.npr.org/sections/health-shots/2023/07/03/1185849391/abortion-access-could-continue-to-change-in-year-2-after-the-overturn-of-roe-v-w> (showing a map of the increase in abortion deserts, where

income women and other marginalized communities.¹⁶³ But it is even more problematic for some women with disabilities who might have a very difficult time finding accessible and affordable transportation.¹⁶⁴ Or even if they can find transportation, they might have difficulty finding an abortion provider that is accessible.¹⁶⁵

If disabled women are more likely to become accidentally pregnant and are less likely able to receive an abortion, what effects flow from the combination of those two facts? In many cases, the pregnancy will be more dangerous for the disabled woman, her fetus, or both.¹⁶⁶

Addressing dangers to the mother first, pregnancy is known to exacerbate many conditions, including multiple sclerosis, bipolar disorder, and other mental illnesses.¹⁶⁷ Moreover, some medications that treat certain disabilities are dangerous to the fetus.¹⁶⁸ So once a disabled woman discovers she is pregnant, she may stop taking the medication, and doing so can have harmful and even dangerous consequences.¹⁶⁹ Additionally, disabled women who become pregnant are more likely to have complications that can have very dangerous consequences.¹⁷⁰ For example, women with epilepsy experience ten times the risk of death during pregnancy than women without epilepsy.¹⁷¹ Finally, inaccessible healthcare can contribute to or even cause pregnancy complications. As Powell notes, 44% of gynecology practices are inaccessible to women with mobility impairments.¹⁷² And doctors receive no formal education in treating disabled pregnant women.¹⁷³

pregnant persons would have to travel more than 200 miles to get to the nearest legal abortion clinic).

163. Powell, *supra* note 153, at 1873 (noting that other marginalized communities have a difficult time getting access to a safe and legal abortion, often related to poverty and the consequent inability to travel to an abortion provider).

164. *Id.* at 1873–74 (noting the problems disabled women will have accessing abortion because of accessible transportation problems).

165. *Id.* at 1874.

166. *Id.*

167. Venkataramanan, *supra* note 154.

168. *Id.*

169. *Id.*

170. Shurti Rajkumar, *With Roe v. Wade Overturned, Disabled People Reflect on How It Will Impact Them*, NPR (June 25, 2022, 7:00 AM), <https://www.npr.org/2022/06/25/1107151162/abortion-roe-v-wade-overturned-disabled-people-reflect-how-it-will-impact-them>; Powell, *supra* note 153, at 1862 (noting that disabled women have higher risk for pregnancy complications such as gestational diabetes and preeclampsia).

171. Venkataramanan, *supra* note 154.

172. Powell, *supra* note 153, at 1863.

173. *Id.*

In addition to possible harm to the mother, disabled women who become pregnant and choose (or are forced to) remain pregnant have a higher risk of pregnancy complications that are harmful to the fetus. For instance, women with disabilities have a higher risk than non-disabled women for complications such as preterm birth, low birth weight infants, and stillbirth.¹⁷⁴ Moreover, as discussed above, certain medications taken by some disabled women are harmful to the fetus. While some women stop taking these medications after discovering they are pregnant, some of the medications are harmful right from the very beginning of the pregnancy, before a woman even knows she is pregnant.¹⁷⁵ Additionally, the lack of accessible gynecology practices can have negative effects on the fetus as well as on the mother.¹⁷⁶

Finally, there are significant economic costs to remaining pregnant, giving birth, and raising a child. These costs are magnified for people with disabilities, who are disproportionately low income.¹⁷⁷ In one study, the pay gap between people with disabilities and people without disabilities is \$12,000 per year.¹⁷⁸ Many of the economic issues are related to employment, so I turn to that next.

B. Employment Consequences for Women with Disabilities Who Become Pregnant Post-Dobbs

Women with disabilities who accidentally become pregnant and who, because of *Dobbs*, cannot access an abortion will experience a variety of negative workplace consequences. It is important to note that this discussion assumes that the disabled woman is in the workforce. Because of the severity of a disability, discrimination, or outdated Social Security Disability Insurance (“SSDI”) rules, many disabled women are not in the workforce at all.¹⁷⁹ In fact, as of 2010, among the eleven million unemployed working-age

174. Powell, *supra* note 153, at 1862.

175. Venkataramanan, *supra* note 154.

176. NAT’L P’SHP FOR WOMEN & FAMILIES & AUTISTIC SELF ADVOCACY NETWORK, ACCESS, AUTONOMY, AND DIGNITY: ABORTION CARE FOR PEOPLE WITH DISABILITIES 10 (2021), <https://nationalpartnership.org/wp-content/uploads/2023/02/repro-disability-abortion.pdf> [hereinafter ACCESS, AUTONOMY, AND DIGNITY].

177. Powell, *supra* note 153, at 1895, 1898 (discussing the poverty experienced by people with disabilities).

178. ACCESS, AUTONOMY, AND DIGNITY, *supra* note 176; Rajkumar, *supra* note 170.

179. ACCESS, AUTONOMY, AND DIGNITY, *supra* note 176, at 7; Powell, *supra* note 153, at 1899 (discussing how SSDI rules disincentivize disabled women from working because it might lead to them losing their benefits); Schur et al., *supra* note 65, at 594 (discussing both

people with disabilities, 80% want to work now or in the future.¹⁸⁰ Arguably, people with disabilities “comprise one of the largest underutilized labor pools.”¹⁸¹

However, even if a disabled woman is employed, she is more likely to be in a lower-income position that does not provide her with the right to a leave of absence for pregnancy complications or for the birth of her baby.¹⁸² Or if a disabled pregnant woman is entitled to FMLA leave, because of her generally lower income, she might not be able to afford to take the leave.¹⁸³

Moreover, because disabled women are more likely to experience pregnancy complications than non-disabled women,¹⁸⁴ they are more likely to need accommodations for their pregnancies than non-disabled women. These women may even need accommodations for *both* their disability and for the pregnancy complications. In fact, depending on the disability and the pregnancy complications, it might be difficult for the woman or her doctor to know whether the current medical issue or restriction is being caused by the disability or the pregnancy.¹⁸⁵ Given that the passage of the Pregnant Workers Fairness Act (“PWFA”) means that employers are required to accommodate pregnant women in much the same way they accommodate disabilities,¹⁸⁶ it should not matter if the accommodation is needed because of disability or pregnancy. But it is certainly possible that an employer might have more bias against disability than pregnancy, in part because pregnancy

supply-side and demand-side factors that lead to the low employment rate of people with disabilities).

180. Schur et al., *supra* note 65, at 594.

181. *Id.*

182. SCHUR ET AL., *supra* note 15, at 28–29 (discussing the lower income rates for people with disabilities and how this contributes to higher poverty rates).

183. Catherine Albiston & Lindsey Trimble O’Connor, *Just Leave*, 39 HARV. J.L. & GENDER 1, 5 (2016).

184. *See supra* notes 170–74 and accompanying text. Some women with disabilities are also more likely to experience miscarriage, which very well might lead to employment consequences because of needed time off or subsequent depression caused by the miscarriage. Laura T. Kessler, *Miscarriage of Justice: Early Pregnancy Loss and the Limits of U.S. Employment Law*, 108 CORNELL L. REV. 543, 553 (2023); Mekhala V. Dissanayake et al., *Miscarriage Occurrence and Prevention Efforts by Disability Status and Type in the United States*, 29 J. WOMEN’S HEALTH 345, 350 (2020).

185. Anne Branigin, *People with Disabilities Face Much Higher Risk During Pregnancy. Researchers Are Only Beginning to Understand How*, WASH. POST (Dec. 28, 2021, 2:24 PM), <https://www.washingtonpost.com/gender-identity/people-with-disabilities-face-much-higher-risks-during-pregnancy-researchers-are-only-beginning-to-understand-how/>.

186. 42 U.S.C. § 2000gg(4).

is less stigmatized than disability,¹⁸⁷ and pregnancy is necessarily time-limited.¹⁸⁸ In contrast, many disabilities require accommodations forever or at least for an extended period of time, and employers often withdraw accommodations when they find out that the employee's disability is permanent and that the accommodation will be needed indefinitely.¹⁸⁹

Of course, once the baby is born, the disabled woman becomes a *mother* with a disability, if she was not already. This begins or worsens the problem of multiple subordination from being both a disabled person and the (likely) primary caregiver of her children. As discussed above,¹⁹⁰ because mothers with disabilities are likely to need occasional or frequent accommodations for both their disabilities and their caregiving responsibilities, they are less likely to perform as "ideal worker[s]" and more likely to experience "special treatment stigma."¹⁹¹ This stigma can result in decreased job opportunities, fewer promotions and other advancements, and resentment from a disabled mother's coworkers.¹⁹²

In sum, proceeding from the assumption that *Dobbs* will mean that more disabled women carry their pregnancies to term and keep their babies, the employment consequences caused by being both a person with a disability and a mother are likely to be significant. I recognize this is a very negative prediction. I also acknowledge that, depending on the severity of the disability as well as the woman's income level and family status (single parent, number of children, etc.), the difficulties that these combined statuses cause might be insignificant. For instance, imagine a woman whose disability is relatively minor, causing only occasional absences from work and requiring no accommodations while at work (perhaps because her job is not physically arduous). Further imagine that she has a supportive spouse, partner, or nearby family members to help with caregiving and/or sufficient money to pay for excellent childcare. This mother with a disability will likely

187. *But see generally* Jennifer Bennett Shinall, *The Pregnancy Penalty*, 103 MINN. L. REV. 749 (2018) (discussing the workplace penalty associated with pregnancy).

188. *Id.* at 762–63 (discussing whether the penalty experienced by people with disabilities in the workplace should translate to pregnant persons given that any pregnancy restrictions are non-permanent).

189. Nicole Buonocore Porter, *Withdrawn Accommodations*, 63 DRAKE L. REV. 885, 890 (2015).

190. *See supra* Section II.C.

191. Porter, *Mothers*, *supra* note 6, at 108–09.

192. *See supra* notes 25–28 and accompanying text.

not suffer from much stigma.¹⁹³ However, most mothers with disabilities will occasionally need accommodations for either their disabilities or their caregiving responsibilities—and sometimes both—and depending on their job, employer, and their coworkers, this reality will cause at least *some* special treatment stigma. The next Part explores possible solutions and reforms.

V. Possible Solutions and Reforms

A. Current Developments

The most positive development for mothers with disabilities is the passage of the PWFA.¹⁹⁴ With the assumption that *Dobbs* will lead to more women remaining pregnant, the ability to obtain accommodations while pregnant is critical. Prior to the passage of the PWFA, pregnant women with complications that caused job-related restrictions might have been entitled to accommodations under the Pregnancy Discrimination Act (“PDA”)¹⁹⁵ after the Supreme Court’s 2015 decision in *Young v. UPS*.¹⁹⁶ And some pregnant workers would have been protected under the ADA if courts had been willing to classify pregnancy complications as disabilities.¹⁹⁷ But many pregnant women did not receive the accommodations they needed and were either forced to quit their jobs or potentially risk their pregnancies.¹⁹⁸

The PWFA was enacted on December 29, 2022, and it went into effect on June 30, 2023.¹⁹⁹ Modeled after the ADA, the PWFA requires employers to provide “reasonable accommodations” to employees with limitations related to pregnancy, childbirth, and related medical conditions unless doing so

193. Having acknowledged that alternative scenario, I have not found any research addressing this topic, so I would hazard a guess that most mothers with disabilities will not be as fortunate as the hypothetical person just described.

194. 42 U.S.C. § 2000gg; Kessler, *supra* note 184, at 606 (discussing the promise of the PWFA).

195. 42 U.S.C. § 2000e(k).

196. Deborah A. Widiss, *The Federal Pregnant Workers Fairness Act: Statutory Requirements, Regulations, and Need (Especially in Post-Dobbs America)*, 27 EMP. RTS. & EMP. POL’Y J. 84, 93–94 (2024); *Young v. United Parcel Serv., Inc.*, 575 U.S. 206 (2015).

197. Nicole Buonocore Porter, *Accommodating Pregnancy Five Years After Young v. UPS: Where We Are & Where We Should Go*, 14 ST. LOUIS U. J. HEALTH L. & POL’Y 73, 85–90 (2020) (discussing cases where pregnancy was found to be a disability); Widiss, *supra* note 196, at 91–92.

198. Widiss, *supra* note 196, at 91–92.

199. Jason C. Schwartz et al., *Complying with the Pregnant Workers Fairness Act: Considerations for Employers*, GIBSON DUNN (Jan. 20, 2023), <https://www.gibsondunn.com/complying-with-the-pregnant-workers-fairness-act-considerations-for-employers/>.

would cause an undue hardship.²⁰⁰ This should be a very positive development for women with disabilities who are pregnant. Instead of trying to convince an employer (or a court) that their pregnancy is a disability, they are entitled to accommodations for limitations caused by their pregnancy.

The one possible downside of the PWFA is that it is modeled after the ADA, which has not been terribly successful in accommodating disabled employees.²⁰¹ However, there is one difference between the PWFA and the ADA that might make the PWFA more successful than the ADA. Recall that the ADA defines “qualified employees” as those who can perform the essential functions of their job with or without an accommodation.²⁰² Imagine an employee has a job that constantly requires heavy lifting. If that employee becomes disabled through an accident or injury that precludes the employee’s ability to lift heavy weight, they would not be able to perform the essential functions of their job. Therefore, the employer would not be required to accommodate them. But the PWFA states that an employee can still be considered “qualified” even if they cannot perform the essential functions of the job as long as that inability is for a temporary period and the employer can reasonably accommodate the pregnant worker’s inability to perform that function.²⁰³ So if a pregnant woman cannot engage in heavy lifting because of her pregnancy, she might still be qualified and hence entitled to an accommodation because that inability would be temporary. Moreover, if a woman’s pregnancy causes limitations similar to her disability, she might have better luck requesting the accommodation under the PWFA than the ADA.

Another positive development is that some states are enacting paid leave laws.²⁰⁴ Paid leave is often needed both for people with disabilities and for new mothers.²⁰⁵ As of 2023, eleven states plus Washington D.C. have enacted paid leave laws that provide employees with partially paid and (mostly) job-protected leaves of absence.²⁰⁶ Not only does paid leave help keep both people with disabilities and caregivers employed, but it also helps

200. 42 U.S.C. § 2000gg-1(1).

201. *See supra* Section II.A.

202. 42 U.S.C. § 12111(8).

203. 42 U.S.C. § 2000gg(6).

204. Kessler, *supra* note 184, at 609–10; Shinall, *supra* note 187, at 809–12 (discussing the state laws).

205. PORTER, REIMAGINED, *supra* note 2, at 129.

206. Molly Weston Williamson, *The State of Paid Family and Medical Leave in the U.S. in 2023*, AM. PROGRESS (Jan. 5, 2023), <https://www.americanprogress.org/article/the-state-of-paid-family-and-medical-leave-in-the-u-s-in-2023>.

to avoid the spread of contagious diseases in the workplace.²⁰⁷ Obviously, it would be better if this right were universal pursuant to federal legislation, but it is important to recognize wins when we have them.

B. Possible Future Reforms

As is usually the case, there is always room for improvement. This section provides ways to strengthen the protections for mothers with disabilities or otherwise get employers to see the benefits of accommodating their workers.

First, the United States desperately needs *federal* paid leave for an employee's own medical condition and for caring for loved ones.²⁰⁸ As noted, leave under the FMLA is not required to be paid, and the FMLA covers only about 40% of the working population.²⁰⁹ Even if a worker is entitled to leave and can take it, doing so is still stigmatized.²¹⁰ To rid of the stigma, employers must realize that interruptions in our work lives for babies, caregiving, disabilities, or serious illnesses are necessary and inevitable parts of life.²¹¹ The overwhelming majority of all workers will need at least one long-term leave during their working lives.²¹² We need laws at the federal level to better support that reality.

We also need better enforcement of the ADA to strengthen the protections for mothers with disabilities. Plaintiffs are still losing too many failure-to-accommodate claims,²¹³ and that success rate is even lower when the accommodation sought is a modified schedule, which many people with disabilities need.²¹⁴

But if we want to address the heart of the problem, we need to change the way we think about accommodations. We must stop assuming that all, or even most, employees have lives unencumbered by family responsibilities, illness, injuries, and disabilities. We all have needs that will require accommodations at one point or another.²¹⁵ And as Jamie McCallum notes,

207. Shinall, *supra* note 93, at 1885, 1891.

208. *Id.* at 1881 (discussing the problem with the lack of a federal right to paid leave).

209. Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1993*, 15 WASH. U. J.L. & POL'Y 17, 37 (2004); PORTER, REIMAGINED, *supra* note 2, at 129–30.

210. *See* Albiston & O'Connor, *supra* note 183, at 35.

211. *See* Kessler, *supra* note 184, at 608 (discussing the need for paid personal and sick leave).

212. *See* Shinall, *supra* note 187, at 827 (stating that everyone occasionally needs leave).

213. Befort, *supra* note 75, at 2067–68.

214. Porter, *Backlash*, *supra* note 74, at 73–78.

215. *See also* Fineman, *supra* note 52, at 17–18 (discussing the inevitability of dependency).

after the pandemic, we “now know that a saner and safer future is only possible on a broad scale if we recognize the interdependent nature of our work and lives.”²¹⁶

More importantly, we all benefit from women’s reproduction and from their mothering.²¹⁷ Pregnancy is a “social good,” and pregnancy costs should be borne by everyone.²¹⁸ We must stop seeing accommodations for caregiving as a special benefit, even if we are willing to provide that benefit as a matter of goodwill.²¹⁹

Finally, there are many other ways to transform the narrative about accommodations.²²⁰ For example, a proposal I have made elsewhere is a universal accommodation mandate.²²¹ If employers are required to accommodate all workers for all reasons,²²² they may realize that accommodations are not as burdensome as once imagined.²²³ As I and others have discussed, there are significant business benefits to providing accommodating, flexible workplaces.²²⁴ If these benefits are offered to everyone, we can eliminate the special treatment stigma that often accompanies accommodations.²²⁵

216. McCALLUM, *supra* note 86, at 22.

217. Kaminer, *supra* note 60, at 322 (arguing that the decision to raise children well is a public good).

218. See, e.g., Deborah Dinner, *Strange Bedfellows at Work: Neomaterialism in the Making of Sex Discrimination Law*, 91 WASH. U. L. REV. 453, 504 (2014).

219. McCALLUM, *supra* note 86, at 213 (“A society built on a foundation of real mutual aid—all for one and one for all—cannot rely on goodwill.”).

220. For instance, Jamie McCallum focuses on the power of unions in improving all of our lives—we all benefit when labor does well and we all suffer when they don’t. McCALLUM, *supra* note 86, at 14.

221. PORTER, REIMAGINED, *supra* note 2, at 144–58; Porter, *Everyone*, *supra* note 3, at 109–18.

222. To be clear, I am not suggesting employers would always have to provide such accommodations. Just as is the case under the ADA, there might be legitimate reasons why an accommodation request is unreasonable or causes the employer an undue hardship. But if the accommodation is something that can be easily accomplished, such as a slight shift in the schedule (working 8:00–4:00 rather than 9:00–5:00), employers should have to provide such an accommodation even if the reason for requesting it is not one that currently provides the employee a legal entitlement to this schedule change.

223. PORTER, REIMAGINED, *supra* note 2, at 118; Porter, *Everyone*, *supra* note 3, at 124–25.

224. PORTER, REIMAGINED, *supra* note 2, at 113–14; WILLIAMS, *supra* note 34, at 60.

225. PORTER, REIMAGINED, *supra* note 2, at 114–15.

VI. Conclusion

Some concluding thoughts. This Article has demonstrated that we have significant work to do if we hope to end the intersectional subordination facing mothers with disabilities in the workplace. I want to make clear, however, that I recognize that in some ways, mothers with disabilities who can and do work are better off than many of their counterparts. Many people with disabilities cannot work at all. Many lower-income single mothers cannot find reliable childcare that would allow them to work. And of course, many women with disabilities cannot become mothers, or if they do, they find social, medical, and legal systems that assume they are not capable of caring for their children, and sometimes, they have those children taken away. My focus here on mothers with disabilities who *can* work is not meant to minimize the struggles of those who cannot and is simply a product of the fact that I am primarily an employment law scholar.