

LABORING AFTER LABOR: APPLYING USERRA’S JUST
CAUSE PROTECTION TO PREGNANT AND POSTPARTUM
WORKERS

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Most American workers labor at will, meaning that employers may fire employees for any nondiscriminatory reason or no reason at all. Employers can even dismiss workers for seemingly unfair or arbitrary reasons. This fraught employment relationship has long resulted in a power imbalance for workers. That imbalance is particularly pronounced for pregnant and postpartum workers, who face disproportionate rates of discrimination at work. Even though pregnant and postpartum workers face greater discrimination than other subsets of workers, proving that discrimination using the burden-shifting framework articulated in McDonnell Douglas Corp. v. Green is unduly difficult under the at-will system. Despite some reform at the state and local levels and calls for just cause reform—which would require employers to provide a reason before terminating an employee—the at-will system prevails as the default rule in the American employment relationship. Significantly, however, one federal statute provides just cause protection: the Uniformed Services Employment and Reemployment Rights Act (USERRA).

This Note provides a path to just cause protection for pregnant and postpartum workers by amending the Pregnancy Discrimination Act (PDA). Modeled after USERRA’s just cause protection for veteran workers, this new system would help pregnant and postpartum workers prove their discrimination cases under the McDonnell Douglas burden-shifting framework. Both servicemembers and pregnant workers must leave their jobs for a set period of time, and both are particularly vulnerable upon reemployment. Therefore, this Note argues that both deserve similar reemployment protections.

INTRODUCTION 1054
I. MOST AMERICAN WORKERS SUFFER UNDER AT-WILL
EMPLOYMENT WHILE VETERANS ENJOY UNIQUE JUST CAUSE
PROTECTIONS..... 1058

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A.	The Faulty Foundation of the At-Will Default	1058
B.	Just Cause Protection as an Alternative Path	1062
C.	How USERRA’s Robust Protections Benefit Veterans.....	1066
II.	THE CURRENT STATUS OF PREGNANT AND POSTPARTUM WORKERS LAGS BEHIND THAT OF VETERAN WORKERS PROTECTED BY USERRA.....	1070
A.	Pregnant Worker Protections Against Termination	1070
1.	Pregnancy Discrimination Act Protections.....	1071
2.	Family and Medical Leave Act Protections.....	1072
3.	Territorial Protections	1072
B.	The Insufficiency of the PDA and FMLA in Eradicating Pregnancy Discrimination	1074
C.	Surveying PDA Cases: The Difficulties Plaintiffs Face	1076
D.	Surveying USERRA Cases: Veteran Workers’ Edge and the Resulting Benefits	1080
III.	AMENDING THE PDA TO IMPLEMENT JUST CAUSE REFORM BASED ON USERRA	1083
A.	Pregnant and Postpartum Workers Returning to Work Are Similar to Servicemembers Returning to Work	1084
B.	Aligning the PDA With the Supreme Court’s Interpretation of the Statute	1086
C.	Reducing the Number of Discrimination Cases Filed and Ameliorating the Difficulty that Pregnant Plaintiffs Face	1087
	CONCLUSION.....	1089

INTRODUCTION

Nearly 70% of women today work during their pregnancies,¹ and 85% of working women will become mothers at some point in their careers.² Pregnant workers continue to work further along in their pregnancies than their mothers and grandmothers did.³ Pregnant and postpartum

1. Carly McCann & Donald Tomaskovic-Devey, Ctr. for Emp. Equity, *Pregnancy Discrimination at Work: An Analysis of Pregnancy Discrimination Charges Filed With the U.S. Equal Employment Opportunity Commission 8* (2021), <https://www.umass.edu/employmentequity/sites/default/files/Pregnancy%20Discrimination%20at%20Work.pdf> [<https://perma.cc/4BRB-9WGJ>].

2. Bryan Robinson, *Pregnancy Discrimination in the Workplace Affects Mother and Baby Health*, *Forbes* (July 11, 2020), <https://www.forbes.com/sites/bryanrobinson/2020/07/11/pregnancy-discrimination-in-the-workplace-affects-mother-and-baby-health/?sh=10f4db26cac6> (on file with the *Columbia Law Review*).

3. See George Gao & Gretchen Livingston, *Working While Pregnant Is Much More Common Than It Used to Be*, *Pew Rsch. Ctr.* (Mar. 31, 2015), <https://www.pewresearch.org/fact-tank/2015/03/31/working-while-pregnant-is-much-more-common-than-it-used-to-be/> [<https://perma.cc/S9XL-92B3>] (“In the early 1960s, most working women

workers are an essential part of the labor force, but when employers find out about a worker's pregnancy status, they often react adversely.⁴ Pregnant and postpartum workers are often seen as unreliable, unavailable, and bad for business.⁵ Even a simple request for maternity leave can cause an employer to dismiss an otherwise good employee.⁶ Pregnant people of color and low-income pregnant people, in particular, face unparalleled discrimination in the workplace and report disproportionate rates of discrimination for their share of the labor force.⁷ Black

pregnant with their first child (65%) stopped working more than a month before the birth By the late 2000s, that trend had reversed. About eight-in-ten pregnant workers (82%) continued in the workplace until within one month of their first birth”).

4. See Dina Bakst, Opinion, Pregnant, and Pushed Out of a Job, *N.Y. Times* (Jan. 30, 2012), <https://www.nytimes.com/2012/01/31/opinion/pregnant-and-pushed-out-of-a-job.html> (on file with the *Columbia Law Review*) (“[T]housands of pregnant women are pushed out of jobs that they are perfectly capable of performing . . . when they request an accommodation to help maintain a healthy pregnancy.”); Natalie Kitroeff & Jessica Silver-Greenberg, Pregnancy Discrimination Is Rampant Inside America’s Biggest Companies, *N.Y. Times* (Feb. 8, 2019), <https://www.nytimes.com/interactive/2018/06/15/business/pregnancy-discrimination.html> (on file with the *Columbia Law Review*) (“Whether women work at Walmart or on Wall Street, getting pregnant is often the moment they are knocked off the professional ladder.”).

5. See Judy Clair, Kristen Jones, Eden King & Beth K. Humberd, The Right and Wrong Ways to Help Pregnant Workers, *Harv. Bus. Rev.* (Sept. 27, 2016), <https://hbr.org/2016/09/the-right-and-wrong-ways-to-help-pregnant-workers> [<https://perma.cc/58W9-AL48>] (“Pregnant women . . . are viewed as less competent and capable . . .”). Though pregnant workers are often stigmatized in this way, evidence suggests that creating supportive environments for pregnant workers leaves everyone better off, including the employer. See Accommodating Pregnant Workers Is Good for Business, Nat’l Women’s L. Ctr. 2 (2020), <https://nwlc.org/wp-content/uploads/2020/01/New-PWFA-Factsheet.pdf> [<https://perma.cc/469X-GJ6F>] (concluding that providing accommodations for employees benefits businesses overall because almost 90% of surveyed employers reported that accommodations allowed them to retain employees, and 59% reported that accommodations eliminated the cost of training new employees).

6. See Kitroeff & Silver-Greenberg, *supra* note 4 (describing Walmart’s denial of accommodations and subsequent firing of Otisha Woolbright, who asked to stop lifting heavy things at Walmart, provided a physician’s note saying she was at risk of miscarriage, and asked about maternity leave when the accommodation was denied). Ms. Woolbright filed suit against Walmart, alleging pregnancy discrimination under the PDA. Complaint at 16, *Borders v. Wal-Mart Stores, Inc.*, No. 3:17-cv-00506 (S.D. Ill. filed May 12, 2017), 2017 WL 2062862. The court approved a \$14 million settlement for the class of almost 4,000 workers. Erin Mulvaney, Walmart’s \$14 Million Deal With Pregnant Workers Gets Approval, *Bloomberg L.* (Apr. 29, 2020), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XMHECCO000000?bna_news_filter=daily-labor-report#jcite (on file with the *Columbia Law Review*).

7. See McCann & Tomaskovic-Devey, *supra* note 1, at 18 (“[W]omen in low wage jobs are particularly vulnerable to pregnancy discrimination.”); Nora Ellmann & Jocelyn Frye, Efforts to Combat Pregnancy Discrimination: Confronting Racial, Ethnic, and Economic Bias, *Ctr. for Am. Progress* (Nov. 2, 2018), <https://www.americanprogress.org/article/efforts-combat-pregnancy-discrimination/> [<https://perma.cc/NJ6C-TS2Z>] (“[B]lack or African American women filed 28.6 percent of pregnancy discrimination charges filed with the EEOC, despite making up 14.3 percent of the female labor force.”); Maryam Jameel & Joe Yerardi, Despite Legal Protections, Most Workers Who Face Discrimination Are on Their

women, specifically, report a disproportionately high percentage of all workplace pregnancy-discrimination cases.⁸

The COVID-19 pandemic has exacerbated these disparities. The economic burden on pregnant workers—especially pregnant workers of color—has been particularly heavy.⁹ In 2021, at the height of the pandemic, the ten most common occupations for pregnant workers aligned almost exactly with the CDC’s categories of “essential worker” occupations.¹⁰ As a result, pregnant workers are simultaneously exposed to some of the most difficult working conditions in the pandemic and pushed out of the workforce in a time of particular need. Losing a job during a pandemic—especially for no reason or an unjust reason—is uniquely damaging. Job termination has been called the “‘capital punishment’ of employment relations” because of the profound impact it has on both an individual’s economic health and their sense of self and belonging.¹¹ Stronger protections are therefore necessary, especially for pregnant people, to prevent the devastating consequences that come with losing a job.

Most workers in the United States are terminable “at will,” meaning an employer does not need a reason to fire someone and can even offer an arbitrary or unjust reason, unless that reason is discriminatory.¹² But

Own, Ctr. for Pub. Integrity (Feb. 28, 2019), <https://publicintegrity.org/inequality-poverty-opportunity/workers-rights/workplace-inequities/injustice-at-work/workplace-discrimination-cases/> [<https://perma.cc/MEH5-B5YP>] (“Race claims are among the most commonly filed [with the EEOC] and have the lowest rate of success, with just fifteen percent receiving some form of relief.”).

8. See McCann & Tomaskovic-Devey, *supra* note 1, at 11–12 (“[Black women] account for 14% of the female labor force but file 37% of pregnancy discrimination charges.”).

9. See Dina Bakst, Elizabeth Gedmark, Sarah Brafman & Meghan Racklin, *A Better Balance, Long Overdue: The Pregnant Workers Fairness Act Is a Critical Measure to Remove Barriers to Women’s Workplace Participation and Promote Healthy Pregnancies* 4, 8–9 (2021), <https://www.abetterbalance.org/wp-content/uploads/2021/06/Long-Overdue-June-2021-Update-Final-1.pdf> [<https://perma.cc/KT6Q-L8N6>] (noting that the COVID-19 pandemic has disproportionately harmed pregnant workers of color, who have “exited the workforce in droves”); see also Sarah A. Donovan & Marc Labonte, Cong. Rsch. Serv., R46632, *The COVID-19 Pandemic: Labor Market Implications for Women* 3 (2020) (“[W]orking mothers living in states that were the first to close schools were considerably more likely to be absent from work than those in late closure states, but no such effect was observed for working fathers or for women without school age children.”).

10. Compare Morgan Harwood & Sarah David Heydemann, *Nat’l Women’s L. Ctr., By the Numbers: Where Do Pregnant Women Work?* 2 (2019), <https://nwlc.org/wp-content/uploads/2019/08/Pregnant-Workers-by-the-Numbers-v3-1.pdf> [<https://perma.cc/UY78-9S5M>] (listing the ten most common occupations for pregnant workers, which include school teachers, nurses, service workers, and retail workers), with Interim List of Categories of Essential Workers Mapped to Standardized Industry Codes and Titles, CDC, <https://www.cdc.gov/vaccines/covid-19/categories-essential-workers.html> [<https://perma.cc/JHM4-UUA2>] (last updated Mar. 29, 2021) (listing many of these same occupations as “essential workers”).

11. Donna E. Young, *Racial Releases, Involuntary Separations, and Employment At-Will*, 34 *Loy. L.A. L. Rev.* 351, 352 (2001) (quoting Mark A. Rothstein & Lance Liebman, *Employment Law: Cases and Materials* 910 (4th ed. 1998)).

12. See *infra* section I.A.

Congress has seen fit to protect military servicemembers and veterans from this standard at-will regime.¹³ Current and former military servicemembers who return to their civilian jobs are terminable from those positions only for “just cause.” This Note argues that pregnant and postpartum people require the same protection. Although “just cause” has differing definitions, it generally means that an employer cannot fire an employee without providing a good reason for dismissal.¹⁴ This Note advocates for an amendment to the Pregnancy Discrimination Act (PDA)¹⁵ to give pregnant and postpartum workers just cause protection, modeled after the Uniformed Services Employment and Reemployment Rights Act (USERRA).¹⁶

This Note starts by examining the at-will default and explaining why just cause, like the type used in USERRA, is preferable. It explains the current protections for pregnant and postpartum workers, concluding that they are lacking. The Note then compares cases under the PDA and USERRA, showing how the PDA’s legal framework fails to properly protect pregnant and postpartum people and how much better USERRA plaintiffs fare. Finally, it argues that pregnant and postpartum workers are substantially similar to veteran workers such that policymakers can extend just cause protection to pregnant and postpartum workers using USERRA as a model.

Many scholars have written about the need for just cause protection for either a subset of workers or for all American workers. However, they have not explored extending just cause protection for pregnant and postpartum workers specifically. Nor have they considered modeling such protection after USERRA. While broader protections for a larger group would no doubt be preferable, pregnant and postpartum workers are particularly vulnerable and need protection more urgently.¹⁷ There is also a uniquely strong political appetite for legislation specific to pregnant

13. See *infra* section I.C.

14. See, e.g., Roger I. Abrams & Dennis R. Nolan, *Toward a Theory of “Just Cause” in Employee Discipline Cases*, 1985 *Duke L.J.* 594, 601 (“Just cause . . . embodies the idea that the employee is entitled to continued employment, provided he attends work regularly, obeys work rules, performs at some reasonable level of quality and quantity, and refrains from interfering with his employer’s business by his activities on or off the job.”); Wendi J. Delmendo, *Determining Just Cause: An Equitable Solution for the Workplace*, 66 *Wash. L. Rev.* 831, 837–39 (1991) (describing the “fair and honest cause or reason” definition of just cause and noting its limitations); Morris D. Forkosch, *The Doctrine of Just Cause*, 1 *Lab. L. J.* 789, 790 (1950) (explaining the history of the just cause doctrine in depth and noting that the doctrine suggests that an “intentional interference” with an employee’s rights results in injury, giving rise to a *prima facie* case); Richard D. Himberger, *Unjust Discharge: Why Nonunion Employees Need a Just Cause Statute*, 25 *Willamette L. Rev.* 135, 150 (1989) (“[J]ust cause statutes in countries outside of the United States prohibit termination unless a valid, relevant reason exists concerning either a worker’s capacity or conduct, or the employer’s operational requirements.”).

15. 42 U.S.C. § 2000e(k) (2018).

16. 38 U.S.C. § 4316 (2018).

17. See *infra* section II.B.

workers in the current moment, reflected by the recent passage of the Pregnant Workers Fairness Act, which goes into effect in June 2023 and requires employers to provide reasonable accommodations for pregnant workers.¹⁸ The solution that this Note advocates for is also narrower and thus more palatable than wholesale just cause reform, making it easier to enact. Since the USERRA model already exists in federal law, this Note's solution would be easier to implement than a completely new policy proposal. This reform would therefore aid policymakers in their long-term advocacy for greater protections for vulnerable workers. USERRA's just cause provision has received little attention in academic literature, making it a ripe area for exploration in reimagining employment discrimination legal frameworks. The solution this Note presents would help prevent arbitrary dismissals of pregnant and postpartum workers and close the power gap between them and their employers, making a fairer legal landscape through which pregnant and postpartum workers can litigate their discrimination claims.

I. MOST AMERICAN WORKERS SUFFER UNDER AT-WILL EMPLOYMENT WHILE VETERANS ENJOY UNIQUE JUST CAUSE PROTECTIONS

This Part explains the difference between just cause protection and at-will employment and summarizes the arguments for why just cause is superior. It then describes the scope of USERRA's just cause protection, explaining why it is an apt model for PDA reform.

A. *The Faulty Foundation of the At-Will Default*

The federal default rule for employment arrangements in nearly every U.S. jurisdiction is at-will employment,¹⁹ meaning either party may terminate the employment relationship any time for any reason or no reason.²⁰ This at-will rule maps a historically racist and patriarchal tradition of master domination over the servant onto modern employment law.²¹ In the 1884 case *Payne v. Western & Atlantic Railroad Co.*, thought to

18. Pregnant Workers Fairness Act, H.R. 1065, 117th Cong. (2022) (enacted); see also What You Should Know About the Pregnant Workers Fairness Act, EEOC, <https://www.eeoc.gov/wysk/what-you-should-know-about-pregnant-workers-fairness-act> [<https://perma.cc/886Y-6XRM>] (last visited Mar. 5, 2023) (“The PWFA goes into effect on June 27, 2023.”).

19. See Restatement (Third) of Emp. L. § 2.01(a) (Am. L. Inst. 2015). The one exception is Montana, which has a wrongful discharge statute. See *infra* notes 63–64 and accompanying text.

20. Restatement (Third) of Emp. L. § 2.01(a).

21. See *Payne v. W. & Atl. R.R. Co.*, 81 Tenn. 507, 518–20 (1884) (“[Employers] must be left, without interference . . . to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se.”), overruled by *Hutton v. Watters*, 179 S.W. 134, 137 (1915); Lea VanderVelde, *The Anti-Republican Origins of the At-Will Doctrine*, 60 Am. J. Legal Hist. 397, 401–02 (2020) (calling it “surprising” that the “subordinating doctrine [of] termination at-will” emerged in the

be the foundation for the American at-will default,²² the Tennessee Supreme Court applied a common law at-will rule and likened employees of a business to servants of a master, asking, “May I not dismiss my domestic servant for dealing, or even visiting, where I forbid?”²³ The court also asked, “May I not forbid my family to trade with anyone?”²⁴ This one, relatively obscure Tennessee case was subsequently cited by courts nationwide, entrenching the at-will rule.²⁵ The whole country therefore adopted a rule based on an antiquated system of family law and master-servant labor law. The major exception to the at-will rule is that an employer may not discharge an employee for a discriminatory reason, as defined by Title VII of the Civil Rights Act of 1964.²⁶ Although there are other exceptions to the at-will rule,²⁷ it is still the predominant framework for employment relationships, and its effect cannot be understated.

At-will employment has been criticized by many scholars, activists, legislators, and workers.²⁸ Defenders of the at-will system assert that it is

years following Reconstruction with its egalitarian rejection of the domination of master-servant rules).

22. See VanderVelde, *supra* note 21, at 422 (naming *Payne* as the “first legal opinion to introduce the at-will rule”); Katrin Varner & Klaus Schmidt, *Employment-At-Will in the United States and the Challenges of Remote Work in the Time of COVID-19*, 11 *Laws*, no. 2, art. 29, 2022 at 1, 4 (citing *Payne* as the case that established the “employment-at-will monolith”).

23. *Payne*, 81 Tenn. at 518.

24. *Id.*

25. See, e.g., *Chipley v. Atkinson*, 1 So. 934, 938 (Fla. 1887) (citing *Payne*, 81 Tenn. 507); *Pa. Co. v. Whitcomb*, 12 N.E. 380, 383 (Ind. 1887) (same); *Brewster v. Miller*, 41 S.W. 301, 304 (Ky. 1897) (same).

26. See 42 U.S.C. § 2000e (2018) (stating that employers may not fire someone because of their “race, color, religion, sex, or national origin”). Congress has expanded these categories, and the courts have brought other groups under the ambit of Title VII. See *Americans With Disabilities Act of 1990*, 42 U.S.C. § 12112 (adding disability as a protected category); *Bostock v. Clayton County*, 140 S. Ct. 1731, 1735 (2020) (interpreting Title VII to include LGBTQ+ workers).

27. These exceptions can broadly be categorized as implied-contract, public policy, and good-faith exceptions. David H. Autor, John J. Donohue III & Stewart J. Schwab, *The Costs of Wrongful-Discharge Laws*, 88 *Rev. Econ. & Stat.* 211, 211 (2006). Some states have recognized common law torts or passed statutes codifying some of these at-will exceptions. See *id.* at 211 & n.3 (noting that ten states recognize these exceptions). The National Labor Relations Act provides additional federal limitations. See 29 U.S.C. § 158(a)(3)–(4) (2018) (prohibiting discharge based on membership in a labor organization or cooperation with relevant authorities).

28. See, e.g., Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 *Colum. L. Rev.* 1404, 1405–06 (1967) (arguing that at-will employment is the primary source of employer power over employees, forces employees to “rely on the whim of [their] employer[s] for preservation of [their] livelihood,” and “renders the great majority of employees vulnerable to employer coercion”); Cynthia L. Estlund, *How Wrong Are Employees About Their Rights, and Why Does It Matter?*, 77 *N.Y.U. L. Rev.* 6, 9–10 (2002) (“[Because of] employees’ widespread and systematic misunderstanding of the law . . . we cannot assume that the prevalence of employment at will reflects what employees want or what they are willing to pay for.”). But see Richard A. Epstein, *In Defense of the Contract at Will*, 51 *U. Chi. L. Rev.* 947, 951 (1984)

“neutral” since both sides of the employment relationship purportedly have the power to control their status, but the Supreme Court has long recognized that employers have significantly more power in this system.²⁹ Seeing as courts have recognized that employees consistently have inferior bargaining power,³⁰ any mutuality is illusory. This laissez-faire assumption that both sides have equal bargaining power has entrenched hierarchies and emboldened employers to mistreat workers.³¹

The current at-will framework leaves employees subject to unpredictable conditions with almost no job security. But workers are mostly unaware of their at-will status and mistakenly believe they have protections that they don't.³² This at-will system has unfairly disadvantaged workers for decades. In a recent survey by the National Employment Law Project, more than two out of three discharged workers received either no reason for their termination or an unfair reason.³³ In another national survey of workers by Data for Progress, 47% of respondents believed they

(“[T]he contract at will represents in most contexts the efficient solution to the employment relation.”).

29. Compare *Blades*, supra note 28, at 1417–18 (citing *Adair v. United States*, 208 U.S. 161, 174–75 (1908), in which the Supreme Court equated an employee's right to quit to an employer's right to fire), with *Coppage v. Kansas*, 236 U.S. 1, 17 (1915) (“[I]t is self-evident that . . . it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.”).

30. See, e.g., Deborah A. Ballam, *Employment-At-Will: The Impending Death of a Doctrine*, 37 *Am. Bus. L.J.* 653, 657 (2000) (“By mid-twentieth century . . . courts and legislators began recognizing the inequality of bargaining power between employer and employee and that the inability of employees to protect themselves from unjust actions by their employers had not just economic ramifications, but also emotional and social ramifications . . .”); see also *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1637 (2018) (Ginsburg, J., dissenting) (noting that Congress enacted the National Labor Relations Act with the purpose of “remedying ‘[t]he inequality of bargaining power’ workers faced” (alteration in original) (quoting 29 U.S.C. § 151)).

31. See Lawrence Mishel, *Not So Free to Contract: The Law, Philosophy, and Economics of Unequal Workplace Power*, *Econ. Pol’y Inst.: Working Econ. Blog* (Oct. 13, 2022), <https://www.epi.org/blog/not-so-free-to-contract-the-law-philosophy-and-economics-of-unequal-workplace-power/> [<https://perma.cc/U7U6-86P8>] (decrying the equal power assumption that undergirds much of employment law and policy as a faulty misconception).

32. See Pauline T. Kim, *Bargaining With Imperfect Information: A Study of Worker Perceptions of Legal Protection in an At-Will World*, 83 *Cornell L. Rev.* 105, 110–11 (1997) (“[A]lthough the common law rule clearly permits an employer to terminate an at-will employee out of personal dislike, so long as no discriminatory motive is involved, an overwhelming majority of the respondents—89%—erroneously believe that the law forbids such a discharge.”).

33. Irene Tung & Paul Sonn, *Nat'l Emp. L. Project, Fired With No Reason, No Warning, No Severance: The Case for Replacing At-Will Employment With a Just Cause Standard 1* (2022), <https://www.nelp.org/publication/fired-with-no-reason-no-warning-no-severance-the-case-for-replacing-at-will-employment-with-a-just-cause-standard/> [<https://perma.cc/QP3J-4VG4>].

had been fired for no reason or a bad reason.³⁴ The results were even more startling when taking race into account: Black and Hispanic workers reported even higher levels of arbitrary dismissal, and these disparities persisted regardless of the worker's level of education.³⁵ Employees have been discharged for reasons many would deem ludicrous, like not smiling enough, pointing out that a manager arrived at work two hours late, or refusing to cut their dreadlocks.³⁶

Previous scholarship has addressed why at-will employment is an outdated, imbalanced scheme and explained why a just cause framework would be preferable.³⁷ Especially since the United States is one of the few countries that continues to use at-will as a baseline rather than just cause or another system,³⁸ it seems high time for a change. Some configurations of just cause laws list examples of what would count as a just cause, like misconduct or poor performance.³⁹ Just cause mechanisms vary from country to country. In Japan, for example, if an employee's dismissal is "without any rational reason" and contravenes "social justice," then the dismissal is considered void because it is an "abuse of the employer's right

34. Kate Andrias & Alexander Hertel-Fernandez, Roosevelt Inst., *Ending At-Will Employment: A Guide for Just Cause Reform* 9 (2021), <https://rooseveltinstitute.org/publications/ending-at-will-employment-a-guide-for-just-cause-reform/> [<https://perma.cc/QB7Z-FP2F>].

35. *Id.*

36. See Josh Eidelson, *Most Americans Can Be Fired for No Reason at Any Time, But a New Law in New York Could Change That*, Bloomberg Businessweek (June 21, 2021), <https://www.bloomberg.com/news/features/2021-06-21/new-york-just-cause-law-is-about-to-make-workers-much-tougher-to-fire> [<https://perma.cc/A85A-NYPZ>] [hereinafter *Eidelson*, *New Law in New York*].

37. See, e.g., Andrias & Hertel-Fernandez, *supra* note 34, at 4–5; Ellen Dannin, *Why At-Will Employment Is Bad for Employers and Just Cause Is Good for Them*, 58 *Lab. L.J.* 5, 7–8 (2007), <https://ssrn.com/abstract=1010437> [<https://perma.cc/YG8N-FHSW>]. But see Rachel S. Arnow-Richman, *Just Notice: Re-Reforming Employment At-Will*, 48 *UCLA L. Rev.* 1, 8 (2010) (arguing that just notice, not just cause, should replace at-will since just cause provides too little protection); Zev J. Eigen, Nicholas F. Menillo & David Sherwyn, *Shifting the Paradigm of the Debate: A Proposal to Eliminate At-Will Employment and Implement a "Mandatory Arbitration Act"*, 87 *Ind. L.J.* 271, 286 (2012) (proposing a system of mandatory severance for terminations without cause, with an option to adjudicate before an administrative law judge); Daniel J. Libenson, *Leasing Human Capital: Toward a New Foundation for Employment Termination Law*, 27 *Berkeley J. Emp. & Lab. L.* 111, 115 (2006) (arguing for imposing on employers a duty of care that would "require employers to give pretermination notice to employees, which would allow employees to attempt to secure a comparable new position"); Young, *supra* note 11, at 355 (proposing a system requiring notice of dismissal or pay in lieu of notice).

38. See Andrias & Hertel-Fernandez, *supra* note 34, at 4 (citing examples like Australia, Canada, Germany, the Netherlands, Sweden, and the United Kingdom, all of which have varying types of just cause protection); see also Samuel Estreicher & Jeffrey M. Hirsch, *Comparative Wrongful Dismissal Law: Reassessing American Exceptionalism*, 92 *N.C. L. Rev.* 343, 347 (2014) ("[The] 'at-will' default puts the United States in a singular position among most other developed countries, which usually require 'cause' for non-economic dismissals." (footnote omitted)).

39. See, e.g., P.R. Laws Ann. tit. 29, § 185b(a)–(c) (2017).

to dismissal.”⁴⁰ In the United Kingdom, dismissal must be grounded in one of six potentially fair reasons: the worker’s capability or qualifications for performing job functions, their conduct, their retirement, their redundancy, their inability to continue working without contravening a statutory duty or restriction, or some other substantial reason.⁴¹

B. *Just Cause Protection as an Alternative Path*

This Note contends that just cause is the strongest, best protection for pregnant and postpartum workers. Most union-negotiated contracts include just cause protections,⁴² giving unionized workers the ability to challenge dismissals more easily than nonunionized workers. Labor unions have therefore understood and grasped the critical power of just cause. However, most American workers are not unionized, and union membership has been dwindling in the last few decades.⁴³ A system that affords just cause protection to unionized workers but denies such protection to nonunionized workers enforces a senseless distinction between classes of workers. What’s more, unionized workers are not the only ones with just cause protection. High-level executives and business leaders routinely negotiate contracts with dismissal protections—that is, just cause protection—highlighting the hypocrisy in their hollow claims that at-will is better for workers.⁴⁴ Lower-paid employees rarely have such contract bargaining power. The fact that workers with greater bargaining power—both high-level executives and unionized workers—typically negotiate just cause protections speaks to the power of such protection and illustrates workers’ perception that just cause is the best framework for an employment relationship. Indeed, most American workers support just cause protection. In the Data for Progress survey, 67% of workers polled supported just cause termination rights.⁴⁵ The International Labour Organization (ILO), a United Nations agency aimed at addressing global

40. Fumito Komiya, *Dismissal Procedures and Termination Benefits in Japan*, 12 *Comp. Lab. L.J.* 151, 154 (1991).

41. See Andrias & Hertel-Fernandez, *supra* note 34, at 8.

42. *Id.* at 5.

43. Celine McNicholas, Heidi Shierholz & Margaret Poydock, *Union Workers Had More Job Security During the Pandemic, but Unionization Remains Historically Low*, *Econ. Pol’y Inst.* 1 (2021), <https://files.epi.org/pdf/218638.pdf> [<https://perma.cc/JEC5-K5VF>] (“While there was an increase in the unionization rate in 2020 because union workers fared better than nonunion workers during the pandemic . . . the rate is still less than half what it was roughly 40 years ago.” (emphasis omitted)). There has recently been a sudden, noticeable increase in attempts to unionize, but the numbers are still historically low. *Id.*

44. Andrias & Hertel-Fernandez, *supra* note 34, at 47.

45. Alexander Hertel-Fernandez, *Data for Progress, What Americans Think About Worker Power and Organization: Lessons From a New Survey 4* (2020), <https://www.filesforprogress.org/memos/worker-power.pdf> [<https://perma.cc/7KLT-PGSN>].

labor issues, also advocates for just cause as the recommended standard for employment relationships.⁴⁶

Opponents of just cause reform for broad categories of workers argue that workers who want just cause protection can bargain for it while others can remain under the at-will presumption.⁴⁷ This argument assumes that workers have substantially more bargaining power than they do. Indeed, considering the large supply of lower-paid workers, employers are unlikely to voluntarily provide these protections when other workers would accept the same job on the employer's conditions.⁴⁸ Opponents of just cause also argue that the reason higher-paid corporate executives have just cause protection, while most lower-paid workers do not, is not rooted in a bargaining power imbalance. Instead, they would claim that higher-level workers' skilled work entitles them to greater protections since their work has greater value to an employer and is less easily replaceable. But the labor of lower-paid workers is no less valuable than that of higher-paid workers and no less deserving of protection. Supposedly "lower-level" work like sanitation or retail supports the backbones of businesses, providing essential services that society requires. The inflated emphasis on higher-paid workers' labor is artificially manufactured and does not reflect the relative importance of either type of labor.⁴⁹

Just cause protection is also an important safeguard necessary to limit employer retaliation against employees. Title VII prohibits employer retaliation against employees engaging in various protected activities, including suing employers for discrimination claims.⁵⁰ Nevertheless, retaliation cases are unfortunately common,⁵¹ and many workers hesitate

46. ILO, Termination of Employment Convention, art. 4, ILO Convention No. 158 (June 22, 1982), https://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C158 [<https://perma.cc/K4TW-NSZR>] ("The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker or based on the operational requirements of the undertaking, establishment or service.").

47. See, e.g., Epstein, *supra* note 28, at 962–69 & n.38 ("The at-will contract . . . allows both sides to take a wait-and-see attitude to their relationship so that new and more accurate choices can be made on the strength of improved information. . . . [T]hat is no warrant for replacing the contract at will with a for-cause contract provision.").

48. See, e.g., Christopher Ingraham, Why Many 'Essential' Workers Get Paid So Little, According to Experts, Wash. Post (Apr. 6, 2020), <https://www.washingtonpost.com/business/2020/04/06/why-do-so-many-essential-workers-get-paid-so-little-heres-what-economists-have-say/> (on file with the *Columbia Law Review*).

49. *Id.* ("Salaries of millions of dollars (common in the financial industry and among corporate executives today) often have little measurable social utility' and are instead the result of individuals and companies manipulating political, social and economic circumstances to pad their profits" (quoting economist Gabriel Zucman)).

50. See 42 U.S.C. § 2000e-3 (2018).

51. In the fiscal year 2020, 41.5% of charges filed with the EEOC were retaliation charges under Title VII. See Charge Statistics (Charges Filed With EEOC) FY 1997 Through FY 2020, EEOC, <https://www.eeoc.gov/statistics/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2020> [<https://perma.cc/39TW-MXZ8>] (last visited Feb. 15, 2023).

to sue or to report hazards out of fear of retaliation.⁵² Unsurprisingly, workers of color are not only more likely to indicate they have experienced retaliatory discrimination but also more likely to be forced to work in unsafe conditions,⁵³ creating a catch-22 where these workers are the most at risk yet the least protected if they choose to ameliorate their situation by reporting. With stronger protections from unjust adverse actions and a legal framework that makes unjust firing easier to prove, workers may be more likely to report injustice at work. The burden of having to show cause may also make employers less likely to engage in retaliatory termination.⁵⁴ Under a just cause regime, employers may be less likely to retaliate against employees since they would have to conjure a legitimate, non-discriminatory, and non-retaliatory reason to excuse the dismissal.⁵⁵ Under at-will employment, employers need not even worry themselves about coming up with a valid reason—they can assume that a dismissed employee will simply move on. Employers are mostly correct in making this assumption, since employment discrimination suits are cost prohibitive for many employees,⁵⁶ especially the poorer employees who most often fall victim to dismissals from at-will employment.

But just cause protection is not just preferable for workers. Employers should also embrace this change. While employers favor an at-will regime because of the relative power this framework gives them, they also suffer under at-will employment. The increasing volume of wrongful discharge litigation burdens employers with significant expenses, some of which could be avoided by transitioning to a system that encourages information-sharing and, in turn, makes case outcomes more predictable.⁵⁷ Compared

52. See, e.g., Andrias & Hertel-Fernandez, *supra* note 34, at 10–12 (noting that workers in the meat and poultry industry—an industry rife with workplace danger—were reluctant to report safety law violations, like being denied access to the restroom or being forced to work with unsafe equipment, because they feared dismissal).

53. See Irene Tung, Paul Sonn & Jared Odessky, Nat'l Emp. L. Project, 'Just Cause' Job Protections: Building Racial Equity and Shifting the Power Balance Between Workers and Employers 16 (2021), <https://www.nelp.org/publication/just-cause-job-protections-building-racial-equity-and-shifting-the-power-balance-between-workers-and-employers> [<https://perma.cc/KDT7-8NGN>].

54. See *id.* at 18 (“With fewer arbitrary firings and a more stable workforce, retaliatory actions would be harder for employers to disguise.”).

55. See Tung & Sonn, *supra* note 33, at 1 (“Because just cause protections ‘flip the script’ by requiring employers to provide good reasons for discharges, they give workers more effective protection from being fired when speaking up about workplace concerns.”).

56. See, e.g., Patrick Mitchell, Hiscox, The 2017 Hiscox Guide to Employee Lawsuits 7 (2017), <https://www.hiscox.com/documents/2017-Hiscox-Guide-to-Employee-Lawsuits.pdf> [<https://perma.cc/2G5S-EVVX>] (explaining that, in a 2017 study of 1,214 closed claims from employers with fewer than 500 employees, a meager 24% of claims resulted in any type of win for plaintiffs, and those matters took 318 days on average to resolve).

57. See Dannin, *supra* note 37, at 7–8 (“Even more expensive, however, is law that is so unstable and complex that it is impossible to predict outcomes. Instability and complexity make it impossible to plan.”). For a discussion on the role of information sharing, see *infra* notes 111, 144–146 and accompanying text.

to the protracted process of litigating classic discrimination claims, all a potential plaintiff must show under just cause protection is that the proffered reason for dismissal was pretextual, saving time and court costs for all parties. Shortening the process of suing for discrimination lowers litigation costs for both sides.

Just cause protections additionally inspire more job confidence and security in employees, creating a more efficient workforce.⁵⁸ Employers also benefit from having less turnover in their workforce, decreasing the administrative and training costs of constantly hiring new workers.⁵⁹ Under a just cause framework, employers are still fully within their rights to fire workers who are not meeting performance standards or who are failing to meet their duties. Unproductive, inefficient workers would not be protected.⁶⁰ Though employers intimate that transitioning to a just cause framework would increase labor-related costs, an economic study that analyzed state wrongful discharge laws found only a slight net increase in expenses for the first year after adoption of such laws and no long-term economic effects.⁶¹ Just cause protections therefore benefit employers' bottom lines, saving them litigation costs while improving employee productivity. While it is premature to attempt to predict the exact economic effects that a transition to just cause would have, many indicators suggest that employers would benefit from such a transition.⁶²

All states except Montana use at-will as their default for employment arrangements.⁶³ Even the strength of Montana's just cause protection has been hotly contested.⁶⁴ The at-will states, like the federal government, have created certain carveouts for just cause protection. Of the U.S. territories,

58. Andrias & Hertel-Fernandez, *supra* note 34, at 47–48.

59. See Crosby Burns, Ctr. for Am. Progress, *The Costly Business of Discrimination 1* (2012), https://cdn.americanprogress.org/wp-content/uploads/issues/2012/03/pdf/lgbt_biz_discrimination.pdf?_ga=2.44989988.1014111463.1636383411-2008668126.1636383411 [<https://perma.cc/2LFG-GA9G>] (“[\$64 billion is] the annual estimated cost of losing and replacing more than 2 million American workers who leave their jobs each year due to unfairness and discrimination.”). For further discussion on the costs of employment discrimination litigation to employers, see generally James N. Dertouzos, *The End of Employment At-Will: Legal and Economic Costs* (RAND Corp., Working Paper No. P-7441, 1998), <https://www.rand.org/pubs/papers/P7441.html> [<https://perma.cc/L7CP-ZSNF>].

60. Dannin, *supra* note 37, at 13 (“If an employer has abided by reasonable just-cause standards, any case that gets to the point of being filed will be quickly dismissed.”).

61. Robert C. Bird & John D. Knopf, *Do Wrongful-Discharge Laws Impair Firm Performance?*, 52 *J.L. & Econ.* 197, 219 (2009) (“Effects on labor expenses and profitability appear only for the first year [T]he adoption of wrongful-discharge laws does not appear to impose long-term firm effects.”).

62. See *supra* note 59 and accompanying text.

63. See Montana Wrongful Discharge from Employment Act, Mont. Code Ann. § 39-2-904(1)(b) (West 2021) (outlawing employee discharge without “good cause”).

64. See, e.g., Andrias & Hertel-Fernandez, *supra* note 34, at 14 (noting that Montana's law was not supported by worker groups, and many lawyers have found it impossible to use the statute to pursue claims, in part because it limits penalties and imposes a high burden of proof on employees, not employers).

Puerto Rico and the Virgin Islands have plainly rejected at-will in favor of just cause.⁶⁵

There have been notable efforts to introduce just cause protection into the American workforce. Some cities, like New York and Philadelphia, have slowly chipped away at the at-will default by passing legislation to expand just cause protection to certain groups of workers, like fast food workers and parking lot attendants.⁶⁶ In a bold move, New York City is currently considering legislation to prohibit employers from terminating employees without just cause, expanding the protections recently afforded to fast food workers to almost all workers in the city.⁶⁷ Federally, the Model Employment Termination Act (META) was a failed attempt to extend just cause protections to almost all American workers. The Act would have made it illegal to “terminate the employment of an employee without good cause,”⁶⁸ describing good cause as “a reasonable basis . . . in view of relevant factors and circumstances, which may include the employee’s duties, responsibilities, conduct on the job or otherwise, job performance, and employment record” among other factors.⁶⁹ But in an effort to create a passable compromise in exchange for just cause protection, META limited the amount of damages that a liable employer would have to pay after losing a lawsuit under the Act.⁷⁰ Not a single state has adopted META’s solution to the problem of at-will employment.⁷¹

C. *How USERRA’s Robust Protections Benefit Veterans*

Although just cause has received substantial attention from scholars and reformers, few have focused on the fact that federal law already provides just cause protections to one particular group of workers. The Uniformed Services Employment and Reemployment Rights Act of 1994 provides broad protections for servicemembers returning to work from service.⁷² USERRA has been lauded as the most comprehensive federal law

65. *Id.* at 26.

66. New York fast food workers won a monumental victory two years ago by securing passage of a law that bans at-will employment at fast food businesses and implements a just cause standard. Eidelson, *New Law in New York*, *supra* note 36. This law will affect around 70,000 workers. *Id.* It was modeled after a Philadelphia law that provides just cause protection to parking lot attendants, affecting around 1,000 workers. *Id.*

67. See Josh Eidelson, *NYC Bill Would Ban Firing Most Workers Without a Good Reason*, *Bloomberg* (Dec. 7, 2022), <https://www.bloomberg.com/news/articles/2022-12-07/nyc-bill-would-ban-firing-most-workers-without-a-good-reason-just-cause> [<https://perma.cc/FRU9-MGYC>].

68. Model Emp. Termination Act § 3(a) (Unif. L. Comm’n 1991).

69. *Id.* § 1(4).

70. See Theodore J. St. Antoine, *The Model Employment Termination Act: A Fair Compromise*, 536 *Annals Am. Acad. Pol. & Soc. Sci.* 93, 98 (1994) (“In a major concession to employers, compensatory and punitive damages are expressly excluded.”).

71. William R. Corbett, Mike Zimmer, *McDonnell Douglas* and a “Gift That Keeps Giving”, 20 *Emp. Rts. & Emp. Pol’y J.* 303, 321 (2016).

72. 38 U.S.C. § 4316 (2018).

covering the civil rights of workers.⁷³ It provides antidiscrimination, antiretaliation, and reemployment rights for veteran workers. It is well known for being one of the only federal laws that provides just cause protection for some sector of workers. Section 4316(c) lays out:

- (c) A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—
 - (1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or
 - (2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days.⁷⁴

The statute thus requires that employers rehire employees who embark on mandatory or voluntary military service when those employees return from that service.⁷⁵ It goes on to explain that, so long as a servicemember gave adequate notice to their employer, the cumulative service did not exceed five years, the servicemember was not released dishonorably, and the servicemember returned to the civilian job in a timely manner with a timely request for reemployment, an employer may not discharge them without cause.⁷⁶ This just cause protection exists for one year if the servicemember worked more than 180 days before their deployment. The protection exists for 180 days if the servicemember worked more than 30 days but less than 181 days before their deployment.⁷⁷

USERRA represents one of the few instances in which the federal government has recognized and given credence to a just cause framework for employment relationships. The statute also specifies that it is meant to be liberally construed, and courts have adhered to this directive.⁷⁸ The Department of Labor (DOL) promulgates regulations that aid in this liberal construction of USERRA. In particular, its regulations help explain exactly what is meant by “for cause” in subsection (a) of the statute. Under the DOL regulations, an employee may be fired “for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons.”⁷⁹ As with many definitions of what counts as “for cause,” this definition leaves considerable room for

73. Marcy Lynn Karin, “Other Than Honorable” Discrimination, 66 Case W. Rsrv. L. Rev. 135, 135 (2016).

74. 38 U.S.C. § 4316(c).

75. *Id.* § 4312.

76. See *id.* § 4316(c).

77. *Id.*

78. See, e.g., *Vega-Colón v. Wyeth Pharms.*, 625 F.3d 22, 26 (1st Cir. 2010) (“USERRA should be broadly construed in favor of military service members as its purpose is to protect such members.”).

79. 20 C.F.R. § 1002.248 (2022).

interpretation since it uses the catchall phrase “other legitimate nondiscriminatory reasons,” which doesn’t provide much guidance. Still, it helps to elaborate on the protections afforded to servicemembers under USERRA by providing what conduct is an example of a just cause for termination.

The regulations also explicitly maintain that the burden of showing that the reason for dismissal is a just cause rests squarely on the employer. Subsection (a) provides:

In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.⁸⁰

The employee does, however, still have a burden of showing that their military status was a “motivating factor in the employer’s action, unless the employer can prove that the action would have been taken in the absence” of such military status.⁸¹ In practice, this translates to a two-prong burden-shifting analysis (one burden-shift from employee to employer), as opposed to the three-prong burden-shifting analysis (two burden-shifts from employee to employer, back to employee) of Title VII cases.⁸² The employee must first show that military status was a motivating factor.⁸³ Courts may reasonably infer that military status was a motivating factor based on a variety of factors including “proximity in time” between the military service and the adverse action, inconsistencies between an employer’s reason and the employer’s other actions, an employer’s “expressed hostility” toward people protected by USERRA together with knowledge of the particular plaintiff’s military activity, and disparate treatment of some employees compared to others.⁸⁴ After showing that military service was a motivating factor, the burden shifts to the employer to show that its stated reason was not pretextual—that the employer would have taken the same action in the absence of the plaintiff’s military service.⁸⁵ In Title VII cases, the employee has the burden of showing that a stated reason for termination is pretextual, but in USERRA cases, the employer has the burden of showing that its reason is *not* pretextual—a subtle but important distinction.

USERRA provides substantially more protection than the PDA or the Family Medical Leave Act (FMLA).⁸⁶ USERRA applies to virtually all

80. Id. § 1002.248(a).

81. 38 U.S.C. § 4311(c)(1).

82. See *Velázquez-García v. Horizon Lines of P.R., Inc.*, 473 F.3d 11, 17 (1st Cir. 2007).

83. See *Blais v. Bridgewell, Inc.*, No. 11-10100-DJC, 2012 WL 2577566, at *6 (D. Mass. July 3, 2012).

84. *Sheehan v. Dep’t of Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001).

85. See *Blais*, 2012 WL 2577566, at *6; see also *Velázquez-García*, 473 F.3d at 17.

86. See 29 U.S.C. § 2612 (2018); see also *infra* section II.A.2.

employers, regardless of size, including the federal government.⁸⁷ The same cannot be said of the PDA or the FMLA.⁸⁸ By requiring that an employer wishing to discharge a returning servicemember show cause, USERRA helps plaintiffs circumvent many of the difficulties that other plaintiffs suing under Title VII face. Plaintiffs suing under USERRA benefit from a presumption of discrimination, so they have a less daunting task in proving their discrimination than plaintiffs suing under the PDA or FMLA, which use the Supreme Court's *McDonnell Douglas Corp. v. Green* burden-shifting framework.⁸⁹

Under *McDonnell Douglas*, a plaintiff must first establish a prima facie case of discrimination.⁹⁰ The burden then shifts to the defendant to produce a legitimate, nondiscriminatory reason for the adverse employment action.⁹¹ Finally, the burden shifts back to the plaintiff to show that this offered reason was pretextual and the employer was actually intentionally discriminating.⁹² USERRA plaintiffs can completely bypass the last step of this tedious process since USERRA essentially combines the second and third steps of *McDonnell Douglas* into one step where the employer, not the employee, shows that a proffered reason is not pretextual.

USERRA also contains what has been referred to as the “escalator principle.” Through the escalator principle, a veteran reemployed under USERRA must be reinstated to the position they would have enjoyed if they had been continuously employed.⁹³ The worker is entitled to promotions, rate of pay, and other benefits that they would've had on the date that their service began, plus additional seniority and rights that they would've achieved had they not left employment for service.⁹⁴ If a worker is not qualified for this higher position, the employer must make reasonable efforts to help the worker become qualified or, if that does not work, place the worker in the most similar position for which they are qualified.⁹⁵ No such “escalator principle” exists in the PDA.⁹⁶

87. See Torrans, *supra* note 75, at 13.

88. See *infra* sections II.A.1–2.

89. 411 U.S. 792 (1973).

90. *Id.* at 802.

91. *Id.*

92. *Id.* at 804.

93. 20 C.F.R. § 1002.192 (2023); see also *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (describing the escalator principle as picking out the “precise point” a servicemember would've occupied within a workplace had they kept their position continuously during the war).

94. 20 C.F.R. § 1002.193.

95. *Id.* § 1002.196.

96. A similar protection does exist in the FMLA, though, through the DOL's regulations and interpretations of the FMLA. See 29 C.F.R. § 825.220(d) (2023) (stating that employees have the “right to be restored to the same position the employee held at the time the employee's FMLA leave commenced or to an equivalent position”). Note that, unlike

There are, however, some exceptions to USERRA's broad protections. Reemployment is excused if an employer's circumstances have changed such that reemployment would be impossible or unreasonable.⁹⁷ The example given by the DOL is a reduction in force.⁹⁸ Additionally, employers need not reemploy people with service-connected disabilities when doing so would be of such difficulty or expense as to cause "undue hardship."⁹⁹ In this way, the statute and its accompanying regulations give some examples of what might count as just cause for discharge. Still, an employer seeking to avoid reemployment under one of these theories must prove "undue hardship" or a reduction in force as an affirmative defense, carrying a burden of preponderance of the evidence.¹⁰⁰ Therefore, USERRA makes it clear that the responsibility of proving a just cause reason for termination rests on an employer's shoulders.

II. THE CURRENT STATUS OF PREGNANT AND POSTPARTUM WORKERS LAGS BEHIND THAT OF VETERAN WORKERS PROTECTED BY USERRA

This Part explores how just cause protection modeled after USERRA could strengthen pregnant and postpartum workers' claims, which currently suffer under the overly burdensome structure created by the PDA. It advances this position by analyzing how workers have fared under both the PDA and USERRA. Section A lays out the legal landscape pregnant and postpartum workers face. Sections B and C explain the difficulties faced by PDA plaintiffs suing for wrongful discharge and show how futile such suits can be. Conversely, section D describes the relative successes of USERRA wrongful discharge claims, exhibiting what a difference a just cause framework and the different burden-shifting framework makes for the adjudication of these kinds of cases. This Part therefore concludes that while PDA cases often suffer under the *McDonnell Douglas* burden-shifting framework's exceedingly burdensome requirements, USERRA plaintiffs enjoy a simpler, shorter, and fairer process. The at-will presumption in PDA cases therefore puts plaintiffs at a substantial disadvantage compared to USERRA plaintiffs, who enjoy a just cause presumption.

A. *Pregnant Worker Protections Against Termination*

This section assesses the current federal protections for pregnant and postpartum workers under the PDA, the FMLA, and territorial laws.

under USERRA, the DOL's regulation does not require employers to *advance* employees' careers during the leave time.

97. 38 U.S.C. § 4312(d)(1)(A) (2018).

98. 20 C.F.R. § 1002.139(a).

99. 38 U.S.C. § 4312(d)(1)(B).

100. 20 C.F.R. § 1002.139(d).

1. *Pregnancy Discrimination Act Protections.* — The Pregnancy Discrimination Act of 1978 amended Title VII of the Civil Rights Act to prohibit sex discrimination on the basis of pregnancy and provide stronger protection for pregnant people. Specifically, it mandates that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so similarly affected but similar in their ability or inability to work.”¹⁰¹ These protections apply to employers with fifteen or more employees.¹⁰² Congress passed the PDA with the intent to eliminate “the pervasive presumption that women are mothers first, and workers second,” demonstrating a clear intent to specifically protect pregnant workers as a class who face unique struggles and disadvantages in the workplace.¹⁰³ The statute overruled the Supreme Court’s holding in *General Electric Co. v. Gilbert*¹⁰⁴ and codified that pregnancy discrimination is, by nature, a form of sex discrimination.¹⁰⁵ As with all Title VII cases, PDA claims follow the *McDonnell Douglas Corp. v. Green* burden-shifting framework.¹⁰⁶

The back-and-forth of *McDonnell Douglas* has been heavily criticized by many, like Professor William R. Corbett, who calls the framework an “unruly beast.”¹⁰⁷ In practice, this burden-shifting mechanism is thought to favor employers.¹⁰⁸ The burden on employers is hardly a burden at all, as employers can meet their burden by providing “implausible,” “silly,” “fantastic,” or “superstitious” reasons for termination.¹⁰⁹ Conversely, the burden on employees has long been recognized as much heavier.¹¹⁰ This legal structure also means that a worker claiming discrimination bears the initial burden of proving a prima facie case, so the plaintiff battles an unfavorable presumption from the outset. This burden is challenging for plaintiffs to meet since there is often informational asymmetry that makes it difficult for employees to access sufficient information to survive

101. 42 U.S.C. § 2000e(k) (2018).

102. Id. § 2000e(b).

103. Nev. Dep’t of Hum. Res. v. Hibbs, 538 U.S. 721, 736 (2003).

104. 429 U.S. 125 (1976).

105. See *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 227 (2015) (“Congress’ ‘unambiguou[s]’ intent in passing the Act was to overturn ‘both the holding and the reasoning of the Court in the *Gilbert* decision.’” (quoting *Newport News Shipbuilding & Dry Dock Co. v. Equal Emp. Opportunity Comm’n*, 462 U.S. 669, 678 (1983))).

106. The Court extended the *McDonnell Douglas* framework to pregnancy discrimination claims in *Young*, 575 U.S. at 228.

107. Corbett, *supra* note 71, at 304.

108. Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 Mich. L. Rev. 2229, 2243 n.49, 2302 (1995).

109. Id.

110. See, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 Harv. L. & Pol’y Rev. 103, 131–32 (2009) (using an empirical study showing low success rates for employment discrimination plaintiffs to argue that judges may be more demanding of plaintiffs in these cases than juries are).

summary judgment.¹¹¹ As a result, few claims under the PDA are successful.¹¹²

2. *Family and Medical Leave Act Protections.* — The Family and Medical Leave Act of 1993 guarantees family leave under certain circumstances.¹¹³ Parents who have been employed for at least twelve months by the employer from whom they are seeking leave and who worked at least 1,250 hours with that employer in the previous twelve-month period are covered.¹¹⁴ The FMLA therefore makes it illegal to discriminate against—that is, terminate or demote—a covered worker because they took their twelve weeks of leave.¹¹⁵ Adhering closely to the process under the PDA, some courts have held that suing under the FMLA requires that a plaintiff show a prima facie case of discrimination; the burden then shifts to the employer to give a legitimate, nondiscriminatory reason; finally, the burden shifts back to the plaintiff to prove that the reason was pretextual.¹¹⁶

The FMLA intersects with the PDA in that both statutes apply to pregnant workers, but the two statutes still have different coverage. To fall under the purview of the PDA, a worker need not have been employed for the minimum twelve months that the FMLA requires.¹¹⁷ The FMLA is also more limited in scope. Whereas the PDA applies to all aspects of a worker's pregnancy, the FMLA only comes into play specifically if a pregnant worker requests some pregnancy-related leave, often coming up either when a pregnant worker needs bed rest or for labor and maternity leave.¹¹⁸

3. *Territorial Protections.* — The only other pregnancy-specific employment legislation that some workers can turn to for just cause

111. Kim, *supra* note 32, at 118 (“Informational asymmetries inherent in the employment contracting process may create signaling problems which further interfere with efficient bargaining over the issue of job security.”); Jameel & Yerardi, *supra* note 7 (“[W]hen hard evidence of unequal treatment exists, it is often buried in personnel records only the employer can access.”).

112. See *infra* section II.B.

113. See 29 U.S.C. § 2612 (2018).

114. *Id.* § 2611(2)(A).

115. See 29 C.F.R. § 825.300(c)(vi) (2023) (explaining that employers must provide employees notice of the employee's right to “restoration to the same or an equivalent job” when an employee returns from FMLA leave).

116. See, e.g., *Donald v. Sybra, Inc.*, 667 F.3d 757, 762 (6th Cir. 2012) (“There is no doubt that this Court applies the *McDonnell Douglas* burden-shifting framework to FMLA retaliation suits”); *Colburn v. Parker Hannifin/Nichols Portland Div.*, 429 F.3d 325, 335 (1st Cir. 2005) (applying the *McDonnell Douglas* framework to an FMLA retaliation claim). But see *Diaz v. Fort Wayne Foundry Corp.*, 131 F.3d 711, 712 (7th Cir. 1997) (declining to extend *McDonnell Douglas* to an FMLA case and calling the district court's decision to do so “not a sound extension of *McDonnell Douglas*”).

117. Wage & Hour Div., DOL, WH 1421, *The Employer's Guide to the Family and Medical Leave Act* 68, <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf> [<https://perma.cc/NT4T-M9LZ>] (last visited Apr. 9, 2023).

118. See *id.* at 14–15 (detailing employees' obligation to provide notice of their need for FMLA leave).

protection is Puerto Rico's recently amended Working Mothers Protection Act (WMPA).¹¹⁹ The statute states, "The employer shall not, without just cause, discharge a pregnant woman or a woman who adopts a child pursuant to the legislation and legal procedures in effect in Puerto Rico or in any jurisdiction of the United States of America."¹²⁰ It provides that an employer who discharges a pregnant worker because the amount or quality of their work decreased because of their pregnancy has not engaged in a just cause discharge.¹²¹ The WMPA follows and enhances a long tradition of just cause protection in Puerto Rico. The territory has long rejected at-will employment, notably through the Puerto Rico Unjust Dismissal Act, also known as Act No. 80.¹²² Under Act No. 80, an employer can fire an employee for cause if it can show that the employee is "incompetent, inefficient, or negligent in such a manner that it would be adverse to the proper and normal operations of the establishment" to keep them.¹²³ Once the fact of dismissal has been established, there is an evidentiary presumption that the dismissal was unlawful.¹²⁴ The burden then shifts to the employer to show by a preponderance of the evidence that the termination was for cause.¹²⁵ The WMPA therefore adds to Act No. 80 and creates a special carveout for pregnant women where even certain performance-based reasons—like a decrease in quality or amount of work—will not constitute a just cause. Under Act No. 80., without the WMPA, such a reason for dismissal would be valid.¹²⁶ Pregnant workers in Puerto Rico have therefore been afforded more protection than other American employees.

With the exception of the WMPA, no efforts for just cause reform have been specifically geared toward pregnant and postpartum workers. Under the current statutory framework, therefore, pregnant and postpartum workers can really only look to Title VII's baseline protections or other state- or local-level legislation to protect their rights in the workplace. These protections are insufficient to serve the needs of pregnant and postpartum workers.¹²⁷

119. P.R. Laws Ann. tit. 29, § 469 (2023).

120. *Id.*

121. *Id.*

122. *Id.* §§ 185a–185m.

123. Luis Antonetti, A Modern Approach to Pregnancy Discrimination: Puerto Rico's Working Mothers Protection Act, 29 U. Mem. L. Rev. 531, 547 (1999) (citing § 185b).

124. Jorge M. Farinacci-Férnós, The Search for a Wrongful Dismissal Statute: A Look at Puerto Rico's Act No. 80 as a Potential Starting Point, 17 Emp. Rts. & Emp. Pol'y J. 125, 128 n.11 (2013).

125. *Id.*

126. See Antonetti, *supra* note 123, at 548.

127. See *infra* section II.B.

B. *The Insufficiency of the PDA and FMLA in Eradicating Pregnancy Discrimination*

Pregnancy discrimination plaintiffs face almost unbeatable odds. Less than 5% of all discrimination plaintiffs will ever achieve any legal relief.¹²⁸ This grim reality is acutely apparent for pregnancy discrimination plaintiffs. Although pregnancy discrimination lawsuits have been on the rise, most pregnant people who are discriminated against do not file cases,¹²⁹ and few cases result in victories for plaintiffs.¹³⁰ Even though the National Center for Health Statistics reports that the birth rate has been declining by an average of 2% per year, the number of pregnancy discrimination lawsuits has increased steadily.¹³¹ In 2016, 235 federal workers, representing only a small slice of the total workforce, filed pregnancy discrimination cases.¹³² In 2017, they filed just over 300.¹³³ By 2020, the number of cases was just under 400.¹³⁴ This year, the number is projected to exceed 400 cases, setting a new record.¹³⁵ Yet it is estimated that only 2% of pregnancy discrimination incidents are filed with the Equal Employment Opportunity Commission (EEOC) or Fair Employment Practices Agencies, the state counterparts to the EEOC.¹³⁶ For cases filed with the EEOC between 2012 and 2016, 74% of pregnancy claims resulted in “no monetary benefit or required workplace change,” and of the 23% that did result in monetary benefits, the average benefit was only \$17,976.¹³⁷ These numbers include cases of benefits disputes, accommodations, and other non-termination-related issues outside the scope of this Note. But the point remains that proving pregnancy discrimination in cases of discharge or demotion is extremely arduous and often futile.

This difficulty for PDA plaintiffs is compounded by the fact that the EEOC, the agency through which all discrimination claims must first pass before a plaintiff may sue in federal court, is woefully understaffed and

128. Katie R. Eyer, *That’s Not Discrimination: American Beliefs and the Limits of Anti-Discrimination Law*, 96 *Minn. L. Rev.* 1275, 1276–78 (2012) (providing a theoretical framework for “understanding the difficulties that discrimination litigants face”).

129. See Tom Spiggle, *Are More Women Filing Pregnancy Discrimination Lawsuits?*, *Forbes* (July 20, 2021), <https://www.forbes.com/sites/tomspiggle/2021/07/20/are-more-women-filing-pregnancy-discrimination-lawsuits/> (on file with the *Columbia Law Review*).

130. See McCann & Tomaskovic-Devey, *supra* note 1, at 4.

131. Spiggle, *supra* note 129.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. McCann & Tomaskovic-Devey, *supra* note 1, at 9.

137. *Id.* at 4.

underfunded.¹³⁸ Today, the agency has a smaller budget and 42% less staff than it did in 1980.¹³⁹ The problem has existed for decades and stems from Congress's desire to restrict the EEOC's power and scope from the outset.¹⁴⁰ Even in 1967, then-chairman of the EEOC Stephen N. Shulman remarked of the agency, "We're out to kill an elephant with a fly gun."¹⁴¹ Operating under "the twin handicaps of restricted power and a limited budget,"¹⁴² the EEOC is, by design, ill-equipped to handle the sheer breadth of discrimination cases that arise in today's labor market.

Another reason that so many discrimination cases fail is the informational asymmetry between employers and employees—an asymmetry that is no less in PDA cases.¹⁴³ In intentional discrimination cases, the key fact that a plaintiff will have to prove is the defendant's state of mind. Proving state of mind is inherently difficult, and a plaintiff cannot access circumstantial evidence shedding light on state of mind without some information-sharing by the defendant.¹⁴⁴ Scholars have therefore suggested that the law should create incentives to force information-sharing in order to ensure greater fairness between parties and resolve cases more efficiently.¹⁴⁵ Information-forcing rules decrease transaction costs by creating a framework through which the cheapest discloser has the stronger incentive to disclose, no matter who that cheapest discloser is or what the information is.¹⁴⁶ In the employment discrimination context, requiring a reason for dismissal serves this information-forcing function. It gives plaintiffs charging discrimination something to latch on to as they try to convince a court to reject defendants' summary judgment motions.

138. See Jameel & Yerardi, *supra* note 7 ("Each year the EEOC and its state and local partner agencies close more than 100,000 cases. But workers receive some form of assistance, such as money or a change in work conditions, only 18 percent of the time.").

139. *Id.*

140. See Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the U.S.* 116–18 (2010) (describing the many compromises made to create the EEOC and explaining how conservative Republicans imposed private litigation as an alternative to government regulation with the purpose of limiting civil rights enforcement); Eric E. Petry, *Master of Its Own Case: EEOC Investigations After Issuing a Right-to-Sue Notice*, 85 *U. Chi. L. Rev.* 1227, 1261 (2018) ("The legislative record does show that Congress intentionally restrained the EEOC's independent enforcement power by limiting its ability to bring civil actions and making an individual charge of discrimination a jurisdictional prerequisite to EEOC action.").

141. Jameel & Yerardi, *supra* note 7.

142. U.S. Comm'n on C.R., *Federal Civil Rights Enforcement Effort* 341–42 & n.772 (1970) (quoting former EEOC Chairman, William Brown).

143. See *supra* note 111 and accompanying text.

144. See Alex Reinert, *Pleading as Information-Forcing*, 75 *Law & Contemp. Probs.*, no. 1, 2012, at 1, 3 ("[A]llegations regarding a defendant's state of mind are difficult to plead with specificity, because of the profound informational asymmetry that exists with regard to state of mind evidence.").

145. See *id.* ("[W]here one party has better (or cheaper) access to relevant information, sometimes it makes sense to create incentives for that party to produce that information.").

146. See *id.* at 30.

Under the status quo, plaintiffs may never reach the phase of their lawsuit where they learn a defendant's legitimate, nondiscriminatory reason for dismissal. It is difficult to fight against an unknown enemy. For plaintiffs facing an uphill evidentiary battle, learning an employer's proffered reason for discharge unveils the name and nature of the enemy, allowing the employee to tailor their case to debunking that reason.

C. *Surveying PDA Cases: The Difficulties Plaintiffs Face*

Wrongful termination suits brought under the PDA show just how difficult it is for plaintiffs to survive summary judgment because of the *McDonnell Douglas* burden-shifting framework. Most PDA cases are dismissed or resolved in favor of defendants.¹⁴⁷ Of course, it is impossible to know just how many of these cases were "rightly" decided or how many meritorious claims were dismissed. However, analyzing the way federal courts tend to handle PDA cases reveals that the PDA is clearly being construed in a light more favorable to employers than employees, contravening Congress's intent in passing this statute.

In many PDA wrongful termination cases, courts' interpretations of the *McDonnell Douglas* formulation have created unwarranted obstacles in a way that narrows the PDA and unjustifiably burdens plaintiffs. Many courts seem to require some proof, at the prima facie stage, of causation between the discriminatory motive and the termination, even though the Supreme Court detailed no such requirement in *McDonnell Douglas*.¹⁴⁸

For example, in *Sorah v. New Horizons Home Healthcare L.L.C.*, the court dismissed the plaintiff-employee's PDA claim at summary judgment, claiming she did not make out a prima facie case even though she showed she was terminated because she took FMLA leave after her pregnancy.¹⁴⁹ The court stated that she provided "[no] evidence that she was terminated for being pregnant" and "no link" between her pregnancy and her termination—just that she was terminated for taking leave.¹⁵⁰ But her leave was *because* of her pregnancy, so the link is clear. The court plainly refused to consider this argument, demanding some kind of explicit discriminatory statement to the effect of "I am firing you because you are pregnant," which, in reality, is very unlikely to occur.¹⁵¹ Regardless, such proof of a causal link should not have been required at such an early stage.

In another case, the court granted the defendant's motion for summary judgment and dismissed the plaintiff's PDA claim even though the plaintiff provided evidence that she was terminated because of her pregnancy

147. See *supra* note 137 and accompanying text.

148. See *infra* notes 196–197 and accompanying text.

149. No. 1:16-CV-291-TLS, 2018 WL 5830753, at *6 (N.D. Ind. Nov. 7, 2018).

150. *Id.*

151. *Id.* at *1 (accepting the validity of the employer's letter stating that the Plaintiff was terminated "because of [her] failure to return to work following [her] authorized 12-week maternity leave" (internal quotation marks omitted)).

leave.¹⁵² She told her employer she was pregnant but expressed a desire to return to work shortly after delivery; she worked until the day of her delivery, and when she returned six weeks later, she was told her leave was considered a voluntary resignation, and there were no positions available for her.¹⁵³ Her employer was able to exclude her from her previous position because, after the plaintiff told her supervisors she was pregnant, the employer issued a new leave policy that explicitly excluded her from protection by providing leave only for employees who had been employed for at least one year.¹⁵⁴ The court stated that such evidence could be circumstantial proof of discrimination but was insufficient on its own to meet the plaintiff's burden since she couldn't show that her pregnancy was the cause of the termination.¹⁵⁵ Again, direct evidence of causation should not be required at so early a stage. Still, the plaintiff did present evidence that pregnancy might have been the cause, since no other nonpregnant employees were treated as she was, and her leave was specifically for pregnancy-related conditions. Under a just cause framework, this type of argument would be void. The defendant would have had to justify its actions before the plaintiff had any burden. It would have to show that there was a legitimate, nondiscriminatory reason for this leave policy and for terminating the plaintiff. Placing the onus on the employer to justify its actions rather than requiring the plaintiff to speculate as to the internal mindset of the employer makes for a clearer, fairer adjudication of the issues.

Cases also demonstrate that courts' construction of the PDA and *McDonnell Douglas* creates impossible-to-reach standards for pleading and summary judgment. In *LaCount v. South Lewis SH OPCO, L.L.C.*, the plaintiff's PDA claim was dismissed for failure to allege sufficient facts, even though she showed that she presented her employer with a doctor's note that she should not lift more than twenty-five pounds because of her pregnancy and was immediately placed on medical leave.¹⁵⁶ When her FMLA leave expired, she was terminated.¹⁵⁷ Since the court in this case was considering a motion to dismiss for failure to state a claim rather than a motion for summary judgment, the court did not even need to find that the plaintiff made a prima facie case. It just needed to find an inference that her employer discriminated against her because of her pregnancy, an even lower standard than a prima facie case.¹⁵⁸ She showed that her employer had permitted other workers with Americans with Disabilities Act (ADA) accommodations to maintain their employment and had not subjected them to similar treatment.¹⁵⁹ This evidence should

152. *Piraino v. Int'l Orientation Res., Inc.*, 137 F.3d 987, 991 (7th Cir. 1998).

153. *Id.* at 989–90.

154. *Id.* at 989.

155. *Id.* at 991.

156. No. 16-CV-0545-CVE-TLW, 2017 WL 1826696, at *1 (N.D. Okla. May 5, 2017).

157. *Id.*

158. *Id.* at *5.

159. *Id.*

be considered sufficient to support at least a circumstantial inference of discrimination because the plaintiff showed she was pregnant and treated differently than other nonpregnant workers and suggested a causal inference based on the timing of the employer's actions. In this motion to dismiss, the plaintiff had an even lower burden than plaintiffs facing summary judgment, but the court still dismissed her complaint, despite evidence of discrimination.

In another example, the Fifth Circuit Court of Appeals affirmed a grant of summary judgment for a defendant-employer, determining that the plaintiff-employee didn't make out a prima facie case, even though she presented evidence that the employer treated similarly situated workers more favorably.¹⁶⁰ The district court had based its decision on her failure to present the "names, titles, or other information" of similarly situated individuals.¹⁶¹ The Fifth Circuit's affirmance of this judgment underscores just how impossible courts have made it for plaintiffs to meet their *McDonnell Douglas* burden.

The details required by these courts should not be necessary to make out a prima facie case, since circumstantial evidence that some other employees were treated better should be sufficient without knowing every detail about those employees. The type of evidence this district court demanded is exactly the kind that a plaintiff would not have access to until further along in the discovery process due to the employer-employee information asymmetry.¹⁶² Under a just cause formulation, if the employer had borne the initial burden to present a legitimate, nondiscriminatory reason for termination, the plaintiff would have had more time to figure out names and titles, as well as greater information-forcing power in general to support her case. If the employer were called upon to justify its actions and provided some reason that changed the course of the plaintiff's argument regarding her termination, these details may not have even become relevant.

Plaintiffs will only prevail on summary judgment when the facts are overwhelmingly in their favor to the point that granting summary judgment for a defendant-employer would be a clear miscarriage of justice. For example, in one case, a plaintiff sufficiently made out a prima facie case by providing evidence that her supervisor terminated her after she requested accommodations for her pregnancy, and her supervisor said the plaintiff couldn't both do her job and be pregnant.¹⁶³ In another example, *Hicks v. City of Tuscaloosa*, a jury found in favor of the plaintiff on her PDA claim that she was reassigned to an inferior position after returning to work from pregnancy leave. The plaintiff

160. Santos v. Wincor Nixdorf, Inc., 778 Fed. App'x 300, 303 (5th Cir. 2019).

161. Santos v. Wincor Nixdorf, Inc., No. 1:16-CV-440-RP, 2018 WL 1463710, at *8 (W.D. Tex. Mar. 23, 2018).

162. See supra notes 143-144 and accompanying text.

163. Townsend v. Town of Brusly, 421 F. Supp. 3d 352, 362 (M.D. La. 2019).

presented evidence that she was demoted only eight days after returning from her FMLA leave; her captain said he did not want it to look like she was transferred “because of her pregnancy”; and her superiors made multiple disparaging comments relating to her parenthood status, all amounting to a constructive discharge.¹⁶⁴ In reviewing the jury’s decision, the appellate court noted that the *McDonnell Douglas* burden shifting had a role—but a diminished role—at this stage in the process since a jury had already reached a verdict.¹⁶⁵ Cases are rarely this explicit, however, and most employers know not to make such obviously discriminatory comments.¹⁶⁶

If plaintiffs can get their case through all the early stages of litigation and get to a jury, they can find success. However, cases with overwhelming direct evidence are rare since so much modern-day discrimination is couched in innuendo and vague language.¹⁶⁷ Workers know what they are experiencing, but the onerous legal standards make it difficult to prove.

Making out a *prima facie* case should, by definition, be simple for plaintiffs. In fact, the Supreme Court has explained that a *prima facie* case of discrimination “operates as a flexible evidentiary standard” and not a “rigid pleading standard.”¹⁶⁸ But these cases demonstrate that courts have interpreted the *McDonnell Douglas* burden-shifting framework in a way that is unduly burdensome and that is not in line with the Supreme Court’s guidance on Title VII discrimination claims.

In one rare case, *Everts v. Sushi Brokers LLC*, the plaintiff employee won summary judgment against her employer on a PDA claim where she was fired without reason just two days after her boss made plainly discriminatory comments to her manager.¹⁶⁹ He said in a voicemail,

I can’t leave these messages because obviously we’d get in trouble We can’t have a big fat pregnant woman working in my restaurant. I’m sorry it doesn’t fly. I will not hire them when they walk in. I will not eat them with eggs. I will not eat them with ham. No green eggs; no ham.¹⁷⁰

Despite such strong evidence of discrimination, the court did not grant summary judgment in this case based on this statement.¹⁷¹ The court

164. 870 F.3d 1253, 1257 (11th Cir. 2017).

165. *Id.* at 1257–58.

166. See, e.g., *Rosen v. Thornburgh*, 928 F.2d 528, 533 (2d Cir. 1991) (“An employer who discriminates is unlikely to leave a ‘smoking gun,’ such as notation in an employee’s personnel file, attesting to a discriminatory intent.”).

167. See, e.g., Kristin M. Van De Griend & DeAnne K. Hilfinger Messias, *Expanding the Conceptualization of Workplace Violence: Implications for Research, Policy, and Practice*, *Sex Roles*, July 2014, at 33, 38 (“[W]orkplace violence is not limited to overt acts of aggression but also includes ongoing incidents of microaggression.”).

168. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002).

169. *Everts v. Sushi Brokers LLC*, 247 F. Supp. 3d 1075, 1077–78 (D. Ariz. 2017).

170. *Id.*

171. *Id.* at 1080.

based its grant of summary judgment on “overwhelming evidence that Defendant has a standard, unwritten policy at the restaurant of reassigning pregnant servers to the hostess position”—a facially discriminatory policy.¹⁷² If the plaintiff didn’t have evidence of that policy, the court would not have granted summary judgment because the supervisor did not explicitly say in that phone call that he would fire the plaintiff because she was pregnant. The court’s reasoning in this case exemplifies that the way courts apply the *McDonnell Douglas* burden-shifting framework significantly disfavors plaintiffs because it does not accurately reflect reality. Courts’ stringent interpretations of the legal standard essentially require plaintiffs to present direct, unequivocal evidence of causation to survive summary judgment, which is antithetical to the meaning of a prima facie case under *McDonnell Douglas*.¹⁷³ This case exemplifies why a just cause framework is more workable in pregnancy discrimination cases, unlike the excessive encumbrance placed on plaintiffs under the current system. Under a just cause rule, the employer in this case would have had to answer for those statements, and the court’s adjudication would have depended on the defendant’s explanation for the boss’s comments. Although the ultimate result would have been the same, the process of getting to that result would have been more straightforward and just.

These PDA cases exhibit the severe deficiencies in how courts have been handling pregnancy discrimination wrongful termination claims. As courts stray farther and farther from the intended purpose of the *McDonnell Douglas* burden-shifting framework, employee plaintiffs continue to suffer, attempting to meet unreachable standards that exceed what the Supreme Court intended in creating this process. Pregnant and postpartum workers are therefore being denied the protections promised to them in Title VII under the status quo.

D. *Surveying USERRA Cases: Veteran Workers’ Edge and the Resulting Benefits*

In contrast, veteran workers have enjoyed substantial successes in challenging their terminations after returning from service. Through USERRA’s just cause protection, veteran workers begin in a much more favorable position than pregnant and postpartum workers: After termination, a veteran’s employer must provide a reason, giving a veteran-plaintiff something to latch on to in crafting their case. In proving a USERRA claim, courts have held that discriminatory motivation may be inferred from a number of considerations. These considerations include proximity in time between the employee’s military activity and the adverse employment action, inconsistencies between the employer’s conduct and the proffered reason for its actions, the employer’s expressed hostility toward military members together with knowledge of the employee’s

172. *Id.*

173. See *infra* notes 199–204 and accompanying text.

military activity, and disparate treatment of certain employees compared to other employees with similar work records or offenses.¹⁷⁴

These considerations are often present in PDA cases as well, but they are not given the same weight as they are in USERRA cases. For example, in *Everts*, discussed above, the adverse employment action occurred only two days after an agent of the employer made clearly discriminatory comments.¹⁷⁵ Were *Everts* a USERRA case, this consideration would have conceivably created an inference of discriminatory motivation, but instead, the court declined to make such an inference.¹⁷⁶ Courts therefore seem more willing in USERRA cases to construe evidence in a light more favorable to the plaintiff at early stages—a willingness that the law on its face requires in PDA cases as well, but that courts don't seem to extend to pregnant and postpartum workers.

Fewer USERRA cases are filed than other types of discharge or discrimination cases, but the rates of dismissal for these cases are also lower, suggesting that plaintiffs are more successful in USERRA cases than they are in PDA cases.¹⁷⁷ Additionally, whereas PDA cases frequently feature a pregnant woman who was terminated, most USERRA cases seem to surround the escalator provision and disputes regarding whether an employer's reemployment adheres to the statute's requirements. This trend makes sense because USERRA's just cause provision essentially demands that employers rehire veterans, even if in different positions, using firing as a last resort only if a business necessity requires it. Adding a just cause provision to the PDA therefore might result in fewer terminations and employers instead reassigning pregnant and postpartum workers. While an unfair or discriminatory reassignment is still nothing to celebrate, it is often preferable to termination. The economic devastation of entirely losing employment is far worse than being demoted or transferred to a less desirable but still income-producing position.

Under USERRA's just cause structure, plaintiffs survive summary judgment under circumstances in which PDA plaintiffs would not, largely because of the different burden-shifting structure. In *Sericchio v. Wachovia Securities, LLC*, for instance, the court denied the defendant-employer's motion for summary judgment on the plaintiff's USERRA claim that he had

174. See *Jones v. Dep't of Health and Hum. Servs.*, 834 F.3d 1361, 1367 (Fed. Cir. 2016); *Bobo v. United Parcel Serv., Inc.*, 665 F.3d 741, 754 (6th Cir. 2012).

175. See *supra* notes 169–172 and accompanying text.

176. See *supra* notes 169–172 and accompanying text.

177. Compare Off. of the Assistant Sec'y for Veterans' Emp. & Training, DOL, Uniformed Services Employment and Reemployment Rights Act of 1994: FY 2019 Annual Report to Congress 8 (July 2020), https://www.dol.gov/sites/dolgov/files/VETS/legacy/files/USERRA_Annual_FY2019.pdf [<https://perma.cc/ACZ7-P7SE>] (reporting that, between 2004 and 2019, the DOJ filed 107 USERRA lawsuits and favorably resolved 195 USERRA complaints), with *supra* notes 130–135 (tracing the increase in pregnancy discrimination cases filed between 2016 to the present, but emphasizing that 74% of cases resulted in no monetary benefit or required workplace change).

been constructively discharged without cause when he was given a lesser position after returning from his military service.¹⁷⁸ The plaintiff did not provide any evidence of disparaging or discriminatory comments made by his employer. In fact, the employer's stated cause for changing the plaintiff's position was that its entire business had been restructured in the plaintiff's absence and the employer no longer serviced most of the plaintiff's clients.¹⁷⁹ However, the court still denied the employer's motion for summary judgment. In the PDA cases discussed above, even when plaintiffs provided evidence of plainly discriminatory comments, courts granted summary judgment for employers. This case shows just how powerful transferring the initial burden from employees to employers can be in ensuring that a case progresses to the point of a fair adjudication before a jury. The onus was on the employer to explain why its stated cause was not pretextual, rather than the onus being on the employee, as it would be in a Title VII case. This seemingly minor shift in standards profoundly impacts how courts adjudicate these cases. With the favorable presumption on their side, plaintiffs can expect more positive outcomes.

In another example, a USERRA plaintiff survived summary judgment even though he did not provide any facially discriminatory comments and in fact had numerous documented performance issues before even enlisting in the armed services,¹⁸⁰ further demonstrating the power of USERRA's just cause provision. The court found that the plaintiff met his initial burden of showing that his military status was a motivating factor in termination based on the fact that a manager reacted "angrily" when she heard of the plaintiff's plans to enlist and said she hoped the military leave wouldn't pose an inconvenience to her.¹⁸¹ A vague assertion of "anger" would almost certainly fail in PDA cases where courts demand specific details from plaintiffs, like names and titles of similarly situated employees.¹⁸² The court in this case did note that the anger itself was insufficient, but additionally relied on the plaintiff's assertion that when he returned from his military leave, his once-close relationship with his supervisor had ended, and the supervisor indicated that the plaintiff might be fired soon.¹⁸³ The court admitted that nothing about that statement suggested he might be fired because of his military status, yet the court used this comment in conjunction with the supervisor's anger to find that the plaintiff had proved that military status was a motivating factor and deny summary judgment. In the *Sorah* and *Piraino* PDA cases discussed above, the plaintiffs' inability to explicitly show that the adverse employment actions were because of pregnancy—even though both plaintiffs disclosed

178. 556 F. Supp. 2d 99, 102 (D. Conn. 2008).

179. *Id.* at 103.

180. *Blais v. Bridgewell, Inc.*, No. 11-10100-DJC, 2012 WL 2577566, at *7 (D. Mass. July 3, 2012).

179. See *id.* at *12.

182. See *supra* notes 160–161 and accompanying text.

183. *Blais*, 2012 WL 2577566, at *12.

their pregnancy status and almost immediately suffered consequences—rendered their claims too weak to survive summary judgment.¹⁸⁴ The disconnect between PDA and USERRA cases could not be clearer. USERRA cases don't require nearly as much from plaintiffs because the just cause requirement creates a burden paradigm that asks employers to explain their actions instead of demanding that employees speculate and state with specificity why employers took the actions they did.

Rather than engaging in a confusing three-part back-and-forth of burden-swapping as with PDA cases, USERRA just cause termination cases focus on whether the reason for dismissal was reasonable—a simpler, fairer standard. In *Johnson v. Michigan Claim Service, Inc.*, for example, the court denied summary judgment where the veteran-plaintiff was terminated for refusing to sign a noncompete agreement since the reasonableness of this justification presented a salient issue of material fact upon which reasonable jurors could disagree.¹⁸⁵ Though the court did note that it believed an employer “almost surely does not have ‘cause’ to fire an employee for refusing to sign an unenforceable agreement,” it could not determine whether the agreement was in fact unenforceable, so it allowed the case to proceed so that a jury could have the choice of drawing that conclusion for themselves.¹⁸⁶ By inquiring into whether there was a just cause for firing in this case, the court recognized that the firing was potentially unreasonable, allowing the case to proceed to a phase in which the jury could determine both whether the stated reason for dismissal was reasonable and whether discrimination played a role. By requiring a reason for termination, USERRA creates a structure in which the legal inquiry primarily focuses on whether the reason was just or not. Conversely, with PDA claims, courts must first untangle whether there was a reason for termination or whether the termination was arbitrary, yet legal. Then, if there was a reason, the court must determine whether the reason was discriminatory. By skipping that first step, USERRA's configuration gives courts a more straightforward and transparent path to determine what really happened and what justice requires.

III. AMENDING THE PDA TO IMPLEMENT JUST CAUSE REFORM BASED ON USERRA

Considering the deficiencies in the PDA, this Part concludes that implementing a just cause framework under the PDA using USERRA as a model would result in a clearer, fairer mechanism for courts to use in resolving wrongful dismissal claims. This Part shows that pregnant and postpartum workers are eminently comparable as a class to veteran workers. Further, the legislative history of USERRA and Congress's intent in enacting the PDA demonstrate that the rationale for having just cause

184. See *supra* notes 149–155 and accompanying text.

185. 471 F. Supp. 2d 967, 968–69 (D. Minn. 2007).

186. *Id.* at 969.

protection for veterans is equally applicable to pregnant and postpartum workers, and the PDA should incorporate such protection.

A. *Pregnant and Postpartum Workers Returning to Work Are Similar to Servicemembers Returning to Work*

USERRA's just cause provision is uniquely tailored to the situation of a person who was once employed, had to leave employment for a distinct period of time, and then returned to work. Pregnant people are often in this same position. Pregnant and postpartum workers, like servicemembers, face job insecurity when they reveal their protected status to employers, and employers concerned with their bottom line can see both servicemembers and pregnant and postpartum workers as burdens rather than assets.

Unlike other protected classes, pregnant and postpartum workers and veteran workers are both protected only temporarily. A person does not cease being of a particular race or national origin, and changes in gender and sexuality do not usually result in a loss of protection, but a person is only pregnant for a set period of time. While a person does not cease being a veteran, their military service is also for a set period of time. Both identities have permanent aspects—pregnant workers become parents, and workers who embark on military service become veterans—but the two groups are most vulnerable when they are forced to take time away from work to do the task that gives them their particular class identity. In that sense, pregnant workers are more analogous to veteran workers than most other classes of protected workers are. Both groups are time-limited classes. The protections afforded to veterans, therefore, should also be afforded to pregnant and postpartum workers. This argument is not unprecedented—USERRA has also been used to argue for broader protections for low-income breastfeeding workers.¹⁸⁷ Therefore, extending this logic to pregnant and postpartum workers in general is not much of a stretch.

The goal of this Note is not to suggest that pregnancy and military service are identical experiences. To argue as such would be unfairly reductive. Antidiscrimination law, however, is formulated to require these types of analogies, constantly asking whether groups are “similarly situated” in inquiring as to whether protections for one group should extend to another.¹⁸⁸ This Note therefore operates within the current confines of the law and argues that pregnant and postpartum workers and veteran workers are similarly situated such that the groups should receive similar protections.

187. Marcy Karin & Robin Runge, *Breastfeeding and a New Type of Employment Law*, 63 *Cath. U. L. Rev.* 329, 355–56, 362–63 (2014).

188. See *Young v. United Parcel Serv., Inc.*, 575 U.S. 206, 210 (2015).

The history and intent of USERRA as well as the ways it has been used show that its just cause protection is intended to be robust.¹⁸⁹ USERRA's just cause provision is no accident. The explicit legislative intent was to put the burden of showing that a reason for termination was not pretextual on the employer rather than putting the burden of showing pretext on the employee.¹⁹⁰ The House report clarifies that Congress's reason for this decision was to ensure that servicemembers have adequate time to reacclimate to civilian life and guard against bad faith by employers.¹⁹¹

The purpose behind USERRA and the reasoning used to enact it support extending just cause protection to pregnant and postpartum workers. Section 4301(a) of USERRA explicitly states the statute's purposes: Congress enacted USERRA to encourage servicemembers to reintegrate into the workforce by "eliminating or minimizing the disadvantages to civilian careers and employment" and to minimize the "disruption to the lives" of servicemembers, "their employers, their fellow employees, and their communities."¹⁹² There is a clear logical step between the benefits that the country receives from uniformed service and pregnancy. USERRA refers to service as a "disruption to the lives" of servicemembers.¹⁹³ This is an apt analogy to the disruption that pregnancy and childbirth bring to a pregnant or postpartum worker. USERRA's legislative history shows that it was meant to provide broad labor protections to a particularly vulnerable group that faces unfair stereotypes upon their return to work. It was in fact enacted in response to a Supreme Court decision holding that USERRA's predecessor, the Vietnam Era Veterans' Readjustment Assistance Act, was a limited, narrow statute.¹⁹⁴ Congress passed USERRA to remedy that incorrect holding.

Pregnant and postpartum workers are a similarly vulnerable group that face unfair stereotypes upon their return to work. The PDA was passed precisely to eliminate such stereotypes, like the assumption that women are "mothers first, and workers second."¹⁹⁵ Congress had clear intent to ensure that pregnant workers have effective redress through Title VII if they are discriminated against, but courts' construction of plaintiffs' burdens of proof under Title VII has eroded the protections Congress intended. Just as USERRA brought the law closer to what Congress originally intended after the courts misconstrued congressional intent, implementing this Note's proposed change would bring the PDA closer to Congress's original intent.

189. H.R. Rep. 103-65, pt. 1, at 23 (1993) ("The Committee intends that these anti-discrimination provisions be broadly construed and strictly enforced.").

190. *Id.* at 24, 35.

191. *Id.* at 26.

192. 38 U.S.C. § 4301(a) (2018).

193. *Id.*

194. See *Monroe v. Standard Oil Co.*, 452 U.S. 549, 551, 556 (1981).

195. See *supra* note 103 and accompanying text.

B. *Aligning the PDA With the Supreme Court's Interpretation of the Statute*

Modeled after USERRA, Congress should add a subsection to 42 U.S.C. § 2000e(k) that states, "It shall be an unlawful employment practice for an employer to discharge a pregnant or postpartum worker without just cause."

Currently, under the *McDonnell Douglas* framework, when the employer has a burden of providing a nondiscriminatory reason for the employment action, courts have been very willing to accept employers' reasons.¹⁹⁶ The burden is hardly a burden at all.¹⁹⁷ In fact, "even a facially 'implausible,' 'silly,' 'fantastic,' or 'superstitious' reason" suffices to meet the employer's burden.¹⁹⁸ This change would ensure that employers have an actual burden in pregnancy discrimination cases, equalizing the playing field for employers and employees. Requiring just cause would give employees a favorable presumption that they currently lack. All discharges would be presumed unfavorable until the employer offered a just cause for dismissal. This model essentially simplifies and flips the current burden framework, a corrective step that is necessary to address the power imbalance between employers and employees.

Even though this solution technically changes the burden-shifting framework from the *McDonnell Douglas* framework, it is completely in line with the Supreme Court's original intent in *McDonnell Douglas* and thus does not represent a substantial departure. Currently, courts are improperly applying the burden-shifting framework in PDA cases and are demanding too much of plaintiffs too early on.¹⁹⁹ The *McDonnell Douglas* Court did not require any evidence of causation in the first step of the proof process. Justice Lewis Powell explained that the plaintiff in the case could meet his burden under a prima facie case by proving that he belonged to a protected class, he was qualified for the position and applied for it, he was rejected, and the employer continued to seek candidates.²⁰⁰ Nowhere in that formulation does Powell say some evidence of causation is required, yet federal courts at the district and appellate levels routinely dismiss cases for insufficient proof that a discriminatory intent caused the employee's termination.²⁰¹ Furthermore, in *Young v. United Parcel Service, Inc.*, which extended the *McDonnell Douglas* framework to PDA cases, the court reaffirmed that the framework is "not intended to be an inflexible

196. See supra Part II.

197. As one author has argued, the "burden is so light as to be trivial. . . . It is exceedingly rare for an employer to fail to satisfy its intermediate burden on summary judgment." Malamud, supra note 108, at 2302 & n.236.

198. Id.

199. See supra section II.C.

200. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 792-93 (1973).

201. See supra section II.C.

rule.”²⁰² Justice Stephen Breyer clarified that the burden on plaintiffs is not meant to be “onerous.”²⁰³ The Supreme Court has time and time again indicated that the prima facie case should not be a difficult standard for plaintiffs to meet,²⁰⁴ but lower courts have not adhered to this directive. Simplifying the burden-shifting framework and imposing a heavier burden on employers to explain their actions would better fulfill the PDA’s original goal of eradicating pregnancy-based discrimination and bring the statute in line with how the Supreme Court’s precedent has interpreted that Congressional intent.

The PDA is the best place to introduce this reform. The nature of the federal system means that laws will vary from state to state, but the absence of a federal dismissal standard is especially concerning in employment law. A worker may be hired in one state, work part of the time in another state, work the other part of the time in another state, and be fired in another state. Uniformity at the federal level on this critical issue would provide more clarity for both employers and employees. Enacting this reform through the PDA therefore results in better predictability for courts and lawyers, too. It is also no stretch to imagine that if the federal government took this type of action, many states would follow suit. Most employment discrimination lawsuits arise under Title VII,²⁰⁵ further underscoring why it is the proper place for this reform. The PDA is the most comprehensive statute on pregnancy-related protections for workers, so it is the best place to extend just cause protection to pregnant and postpartum workers. Modeling this change in the PDA after USERRA is also in line with the Supreme Court’s understanding of USERRA. After all, in *Staub v. Proctor Hospital*, the Court noted that USERRA is “very similar to Title VII.”²⁰⁶

C. *Reducing the Number of Discrimination Cases Filed and Ameliorating the Difficulty that Pregnant Plaintiffs Face*

Parts I and II have established that, as it stands, the PDA is insufficient to meet the needs of pregnant and postpartum workers and that USERRA’s configuration more closely mirrors how an antidiscrimination statute should be modeled to ensure adherence to Congress’s intent of reducing workplace discrimination. Adding a just cause provision to the PDA brings it in line with USERRA’s clearer, fairer framework. With a just cause standard, it would be more difficult for employers to fire arbitrarily,

202. 575 U.S. 206, 228 (2015) (internal quotation marks omitted) (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 575 (1978)).

203. *Id.* (internal quotation marks omitted) (quoting *Tex. Dep’t of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981)).

204. See *supra* notes 168, 199–204 and accompanying text.

205. This is true at least as of 2004. Kevin Clermont & Stewart J. Schwab, *How Employment Discrimination Plaintiffs Fare in Federal Court*, 1 J. Empirical Legal Stud., 429, 433 (2004) (“Title VII cases constitute the bulk of [employment discrimination] cases, nearly 70 percent.”).

206. 562 U.S. 411, 417 (2011).

so employees would benefit from fewer dismissals. Since substantial discrimination may be hidden underneath supposedly arbitrary dismissals, such illegal firings would become less common. If an employer who harbored animus toward pregnant or postpartum workers knew she had to give a reason for firing, she could not simply say it was for no reason when the real reason was discrimination. She would have to conjure a legitimate business reason for dismissal.

Currently, PDA cases resolve in favor of defendants even when reasons for dismissal are unreasonable, so long as they aren't discriminatory. For example, in *Brown v. OMO Group, Inc.*, the court granted summary judgment in favor of the employer where the plaintiff, a federal contractor working for a Navy dental clinic, was terminated by the contracting organization after suffering emergency medical circumstances related to her pregnancy.²⁰⁷ The court stated that, "reasonable or not," OMO Group terminated her because it felt pressured by the Navy, so the plaintiff hadn't shown that the legitimate, nondiscriminatory reason was pretextual.²⁰⁸ Under a just cause framework, an unreasonable motivation for the decision would not be considered a just reason for termination and would not stand. The defendant employer would have to prove that its proffered reason was nonpretextual.

Furthermore, workers rarely win pregnancy discrimination cases.²⁰⁹ Drawing on psychological research aimed at explaining why discrimination lawsuits fare so poorly, one researcher concluded, "Most people do not 'see' discrimination, except where there is effectively no plausible alternative."²¹⁰ By starting out a lawsuit with a favorable presumption—that there was likely some sort of discrimination—the law can counter this psychological barrier that many judges and jurors face in evaluating discrimination claims.

Courts may also expect to see fewer wrongful termination cases under the PDA if this change were implemented. Under a just cause framework, dismissed workers would know the reason for dismissal, so they may be less likely to file a discrimination suit if given a specific reason. This configuration would therefore also encourage better recordkeeping on the part of employers, which may marginally increase costs for employers but would ultimately result in better, fairer legal cases since courts would have specific documented reasons to consider in determining whether a termination was discriminatory or not.

207. No. 9:14-cv-02841-DCN, 2017 WL 1148743, at *1–2 (D.S.C. Mar. 28, 2017).

208. *Id.* at *3.

209. See *supra* section II.B.

210. Eyer, *supra* note 128, at 1278.

CONCLUSION

This Note provides a framework for chipping away at the deeply entrenched at-will system by focusing on a particularly vulnerable class of workers: pregnant and postpartum workers. The proposed solution would prevent arbitrary firings and demotions from happening in the first place, reduce the prevalence of retaliatory employer actions, and dismantle the colossal barriers that pregnant and postpartum workers face in pursuing discrimination claims when they have been fired or demoted. This solution is efficient, fair, and serves both employers and employees. Since this USERRA-based model already exists in federal law and functions effectively, it would be easy to implement. Lawmakers have demonstrated their willingness to adopt employee-protective legislation specific to pregnant workers, as evidenced by the recent passage of the Pregnant Workers Fairness Act. That groundbreaking new law illustrates just what a critical juncture this country is at. Capitalizing on that momentum, lawmakers would do well to adopt this proposal to protect pregnant and postpartum workers' interests and correct the grossly imbalanced power dynamics that plague the employer–employee relationship.

