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CONCEIVING EQUALITY: INFERTILITY-RELATED ILLNESS UNDER THE PREGNANCY DISCRIMINATION ACT

Nichole DeVries¹

INTRODUCTION

While infertility may have always posed an obstacle to conception,² scientific advancements have made it possible for the afflicted to conceive with the help of assisted reproductive technologies (ARTs).³ For women, ARTs, however, are often expensive and invasive procedures.⁴ In 2006, approximately 6.1 million Americans of reproductive age were affected by infertility-related illness,⁵ forty percent related to female factors.⁶ The rise in ART success rates and access to treatments has motivated increasing legal challenges surrounding the rights and benefits of employees affected by infertility issues.⁷ Claims range in scope from challenging

1. A special thanks to Professor Mary Radford and Dean Kelly Timmons, both of Georgia State University College of Law, for their guidance and insight during the development of this Note.

2. In 1995, fifteen percent of women had used some type of infertility service (medical advice, tests, drugs, surgery, or other treatments) compared to twelve percent in 1988. JOYCE C. ABMA, ANJANI CHANDRA, WILLIAM D. MOSHER, LINDA S. PETERSON & LINDA J. PICCININO, U.S. DEP'T OF HEALTH & HUMAN SERVS., FERTILITY, FAMILY PLANNING, AND WOMEN'S HEALTH: NEW DATA FOR THE 1995 NATIONAL SURVEY OF FAMILY GROWTH 7 (1997), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_019.pdf.

3. The success rate for assisted reproductive technologies has improved over time. In 2002, twenty-eight percent of in-vitro fertilization and embryo transfer procedures resulted in a live birth compared to fourteen percent in 1988. Society for Assisted Reproductive Technologies, Success Rates, http://www.sart.org/Guide_SuccessRates.html (last visited Sept. 29, 2008).

4. Ctrs. for Disease Control, Assisted Reproductive Technology: Home, <http://www.cdc.gov/ART/> (last visited Sept. 29, 2008); see also A.D.A.M., Inc., *Infertility in Women, Assisted Reproductive Technologies*, N.Y. TIMES, <http://health.nytimes.com/health/guides/disease/infertility-in-women/assisted-reproductive-technologies.html> (last visited Oct. 29, 2009).

5. Jessica L. Hawkins, *Separating Fact from Fiction: Mandated Insurance Coverage of Infertility Treatments*, 23 WASH. U. J.L. & POL'Y 203, 205 (2007).

6. Forty percent were related to male factors and twenty percent of infertility cases were related to both male and female factors. Cintra D. Bentley, Note, *A Pregnant Pause: Are Women Who Undergo Fertility Treatment to Achieve Pregnancy Within the Scope of Title VII's Pregnancy Discrimination Act?*, 73 CHI.-KENT L. REV. 391, 394 (1998).

7. Melissa B. Brisman, *Legal Issues of Fertility*, FERTILITY TODAY, http://www.fertilitytoday.org/fertility_law_ethics.html (last visited Nov. 9, 2008).

insurance policies that do not cover infertility treatments⁸ to combating discriminatory policies against employees undergoing treatment⁹ and fetal protection policies.¹⁰ While protecting women from discriminatory policies remains an important objective requiring continuing efforts, the absence of consensus regarding the level of protection the law provides creates a burden for the millions of people seeking medical help for infertility-related illness and disability.¹¹

On July 17, 2008, the United States Court of Appeals for the Seventh Circuit held in *Hall v. Nalco* that women discharged while undergoing infertility treatment may state a claim of sex discrimination under Title VII of the Civil Rights Act of 1964¹² “not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity.”¹³ This ruling reversed the lower court decision finding the Pregnancy Discrimination Act (PDA) under Title VII does not protect infertility alone.¹⁴ The *Hall* decision is only one example of the inconsistency among federal courts’ recognizing the importance of protecting gender equality and antidiscrimination policies while grappling with newer challenges of infertility treatments and illness in the workplace.¹⁵

8. See generally *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003); *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102 (S.D. Iowa 1995), *aff’d*, 95 F.3d 674 (8th Cir. 1996).

9. See generally *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008).

10. See generally *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (holding fetal protection policies treating the childbearing capacity of men and women differently unconstitutional because they are unjustifiable sexually discriminatory policies); Barbara Jo Naretto, *Employment Discrimination Made Easy: Fetal Protection Policies*, 24 VAL. U. L. REV. 441 (1990). Although relevant reasoning within these cases is used to evaluate infertility in the context of this article, extensive discussion of fetal protection policies is outside the scope of this Note.

11. See Bentley, *supra* note 6, at 392.

12. Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1982).

13. *Hall*, 534 F.3d at 649.

14. *Hall v. Nalco Co.*, No. 04 C 7294, 2006 WL 2699337 (N.D. Ill. Sept. 12, 2006), *rev’d*, 534 F.3d 644 (7th Cir. 2008); *Pregnancy: Federal Court Rules Infertility Is No Basis for Protection Under Federal Pregnancy Law*, 27 Emp. Discrimination Rep. (BNA) No. 435 (Oct. 11, 2006).

15. Compare *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102 (S.D. Iowa 1995), *aff’d*, 95 F.3d 674 (8th Cir. 1996) (finding that both men and women have the biological potential to be infertile and therefore infertility does not fall within the protections of the PDA under Title VII), with *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995) (finding that infertility is a pregnancy-related condition under the Pregnancy Discrimination Act).

The PDA is one avenue employees use to challenge employment-related infertility policies.¹⁶ In 1978, Congress amended Title VII to include the PDA,¹⁷ requiring employers to treat pregnancy and pregnancy-related conditions the same as other disabilities.¹⁸ The PDA represented considerable progress toward employment equality, but also left ample room for interpretation.¹⁹ One concern courts have attempted to resolve includes challenges to the meaning and breadth of the language “pregnancy-related condition.”²⁰ While case law and legal scholarship surrounding this landmark legislation developed, so did the availability of advancements in reproductive technology,²¹

16. A plaintiff often brings a claim under the PDA, as well as other statutes and regulations such as Title VII and the Americans with Disabilities Act. *See, e.g.,* Pacourek v. Inland Steel Co., 858 F. Supp. 1393 (N.D. Ill. 1994) (analyzing a claim brought under Title VII, Pregnancy Discrimination Act, Age Discrimination in Employment Act, and Americans with Disabilities Act).

17. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (amending 42 U.S.C. § 2000e(k)). The PDA extended the reach of the Civil Rights Act:

(k) The terms “because of sex” or “on the basis of sex” include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 703(h) of this title [42 U.S.C. § 2000e-2(h)] shall be interpreted to permit otherwise. This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term, or except where medical complications have arisen from an abortion: *Provided*, That nothing herein shall preclude an employer from providing abortion benefits or otherwise affect bargaining agreements in regard to abortion.

18. 29 C.F.R. § 1604.10 (2007) (providing that disabilities caused or contributed to by pregnancy, childbirth, or related medical conditions, for all job-related purposes, shall be treated the same as disabilities caused or contributed to by other medical conditions, under any health or disability insurance or sick leave plan available in connection with employment).

19. DEBRA ROWLAND, *THE BOUNDARIES OF HER BODY: THE TROUBLING HISTORY OF WOMEN’S RIGHTS IN AMERICA* 165–66 (2007).

20. *See Piantanida v. Wyman Ctr., Inc.*, 116 F.3d 340 (8th Cir. 1997) (holding that a parent’s decision to remain at home with a child does not qualify as a pregnancy-related condition for purposes of the PDA); *Fleming v. Ayers & Assocs.*, 948 F.2d 993 (6th Cir. 1991) (determining that a child’s medical condition does not qualify as related to pregnancy under Title VII); *Jirak v. Fed. Express Corp.*, 805 F. Supp. 193 (S.D.N.Y. 1992) (finding policies excluding menstrual cramps as a condition related to pregnancy or childbirth do not violate the PDA).

21. In 1978, successful in-vitro fertilization was realized for the first time in London, England, Bentley, *supra* note 6, at 395, the same year that the PDA was passed into law, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076. Since 1978, success rates for live births attributed to assisted reproductive technologies have been steadily increasing. Society for Assisted Reproductive Technologies, *supra* note 3.

inevitably placing pressure on the judicial system to address whether infertility is a pregnancy-related condition under the statute.²²

This Note examines the various and inconsistent methods federal circuit courts have employed to interpret the applicability of infertility-related illness to the PDA. Part I discusses the history of employment protection policies that benefit women, including Title VII and the PDA.²³ Part II analyzes the difference in reasoning among circuits, particularly highlighting inconsistencies between insurance coverage cases and wrongful discharge cases.²⁴ Part III considers whether classifying discriminatory infertility policies under the PDA provides the best method for protecting equal opportunity for women. This section seeks to reconcile legislative history with the differences between infertility and pregnancy,²⁵ concluding that while Congress should consider independently protecting women who undergo fertilization procedures, the spirit of the PDA affords courts the opportunity to include childbearing capacity in the meaning of “pregnancy-related condition.”²⁶

I. THE ADVENT OF EQUAL RIGHTS FOR WOMEN IN THE WORKPLACE

Feminist legal scholars and advocates have worked tirelessly to promote equal conditions for women in the workplace by changing the prevailing legal framework dictating an employer’s responsibility to its worker.²⁷ Many of their efforts failed along the way, including multiple versions of an Equal Rights Amendment explicitly providing equal status and rights to women and men.²⁸ However, the concept of

22. See, e.g., *supra* note 15.

23. See *infra* Part I.

24. See *infra* Part II.

25. See *infra* Part III.

26. See *infra* Conclusion.

27. See, e.g., Herma Hill Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN’S L.J. 1 (1985) (positing that the Supreme Court has swayed the balance of power between men and women unequally).

28. Multiple versions of the Equal Rights Amendment to the Constitution were proposed between 1923 and 1969, but none was successful. See Andrea Barnes, *Women and the Law: A Brief History*, in THE HANDBOOK OF WOMEN, PSYCHOLOGY, AND THE LAW 26 (Andrea Barnes ed., 2005). The Amendment remained opposed by both those who wished to maintain the status quo and those labeled “progressive reformers” who feared the ramifications. See A WOMAN MAKING HISTORY: MARY RITTER

equality embodied in the Fifth and Fourteenth Amendments to the U.S. Constitution and the addition of sexual equality to Title VII exemplifies significant progress.²⁹

A. *Gender Equality and the Civil Rights Act of 1964*

Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating against employees on the basis of “race, color, religion, sex, or national origin.”³⁰ Conceived in the midst of racial tensions in the United States, Title VII³¹ sought equality for African Americans in the workplace, schools, and centers of social activity.³² The word “sex” was introduced in an amendment to Title VII, broadening the scope of Title VII’s prohibition on workplace discrimination.³³ Ironically, Congressman Howard Smith introduced the amendment to defeat the Civil Rights Act as opposed to expanding the Act to include women’s rights.³⁴

Title VII dramatically affected discrimination against women in the workplace.³⁵ When it was passed in 1964, almost forty percent of all employers lacked provisions in their employment policies for any

BEARD THROUGH HER LETTERS 99–100 (Nancy F. Cott ed., 1992); SARA M. EVANS, *BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA* 274 (1997).

29. Although there is evidence that the Fourteenth Amendment to the United States Constitution and the Civil Rights Act of 1964 were never meant to embody gender specific antidiscrimination policies, it has nevertheless served in that capacity. Kay, *supra* note 27, at 3–8; Barnes, *supra* note 28, at 29.

30. 42 U.S.C. § 2000e-2(a).

31. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241.

32. See generally BERNARD GROFMAN, *LEGACIES OF THE 1964 CIVIL RIGHTS ACT* (2000); *THE CIVIL RIGHTS ACT OF 1964: THE PASSAGE OF THE LAW THAT ENDED RACIAL SEGREGATION* (Robert D. Loevy et. al. eds., 1997); SUSAN WRIGHT, *THE CIVIL RIGHTS ACT OF 1964: LANDMARK ANTIDISCRIMINATION LEGISLATION* (2006).

33. 42 U.S.C. §§ 2000e to 2000e-17 (1982). Limited by the Equal Protection Clause, Congress used the Commerce Clause to reach private employers. IVAN E. BODENSTEINER & ROSALIE BERGER LEVINSON, *STATE & LOCAL GOVERNMENT CIVIL RIGHTS LIABILITY* § 5:1 (2009).

34. Representative Howard Smith of Virginia, an opponent of the Civil Rights Bill, introduced the Amendment with the language “sex” to hinder the chances of the Bill’s passage. See EVANS, *supra* note 28, at 276. The Bill passed twenty-two months after introduction with amendments. JOYCE GLEB & MARIAN LIEF PALLEY, *WOMEN AND PUBLIC POLICIES: REASSESSING GENDER POLITICS* 172 (1996); Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 457 (1981), available at <http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1010&context=cbpubs>; Jo Freeman, *How “Sex” Got into Title VII: Persistent Opportunism As a Maker of Public Policy*, 9 LAW & INEQ. 163 (1991).

35. GLEB & PALLEY, *supra* note 34, at 164–65.

type of maternity leave.³⁶ Women who became pregnant were simply fired.³⁷ A mere six percent of employers allowed women to use sick leave for pregnancy-related illness or disability.³⁸ By 1973, however, seventy-three percent of female workers reported that their employer included maternity leave and reemployment rights as part of their employment benefits and twenty-six percent could use accrued sick leave for pregnancy-related illness or disability.³⁹

Before 1978, several courts ruled that pregnancy and pregnancy-related conditions were not included in the protections of Title VII, threatening to turn back the progress achieved since the passage of the Civil Rights Act.⁴⁰ This trend culminated with the United States Supreme Court decision *General Electric v. Gilbert*, holding that refusal to extend disability benefits to pregnant women did not qualify as gender discrimination under Title VII.⁴¹ The Court reasoned that *pregnant* versus *non-pregnant* defined the class at issue, not *male* versus *female*, primarily because both women and men potentially qualify as non-pregnant people.⁴² Therefore, the Court subverted applying heightened scrutiny to the insurance policy because gender, a suspect class deserving of heightened scrutiny, was not at issue.⁴³

B. *Gilbert Spurs Congressional Action*

Civil rights proponents, community organizations, and Congress—immediately outraged—reacted to the *Gilbert* decision by developing legislation to circumvent the Court's classification and its subsequent effect on gender equality in the workforce.⁴⁴ In March of 1977,

36. *Id.* at 164.

37. *Id.*

38. *Id.*

39. *Id.* at 165.

40. *See, e.g., Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976); *Geduldig v. Aiello*, 417 U.S. 484 (1974); Wesley Kobylak, Annotation, *Disparate Impact Test for Sex Discrimination and Employment Under Title VII of the Civil Rights Act 1964 (U.S.C.A. § 2000e et seq.)*, 68 A.L.R. FED. 19 (1984).

41. *Gilbert*, 429 U.S. 125; *see also* GLEB & PALLEY, *supra* note 34, at 166.

42. *Gilbert*, 429 U.S. at 137–46; Barnes, *supra* note 28, at 28.

43. *Gilbert*, 429 U.S. at 188.

44. Lisa Wilson, *Pregnancy Discrimination in the Workplace*, in *THE HANDBOOK OF WOMEN, PSYCHOLOGY, AND THE LAW*, *supra* note 28, at 129.

Senator Harrison Williams introduced the PDA to amend Title VII.⁴⁵ The PDA expanded the definition of “sex” to include pregnancy and related illnesses,⁴⁶ specifically rejecting the Supreme Court’s interpretation of Title VII in *Gilbert*.⁴⁷

The Congressional Record shows that the bill was designed to ensure that working women would not be discriminated against because of pregnancy.⁴⁸ The bill passed on October 31, 1978, with provisions for fringe and insurance benefits to take effect 180 days after its passage.⁴⁹ The PDA did not create any new rights for women, but clarified that employers are required to treat gender-specific qualities, like pregnancy and pregnancy-related conditions, the same way as other temporary disabilities in the workplace.⁵⁰

Once the PDA became law, the judicial system was left to decide the extent of the PDA’s coverage.⁵¹ Soon thereafter, courts determined that the PDA does not require that employers provide special treatment or accommodations for those covered by the Act, only that they extend the same courtesy they would for other employees with disabling conditions.⁵² Pregnant employees, therefore, are not granted special consideration for excessive

45. GLEB & PALLEY, *supra* note 34, at 168.

46. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

47. Wilson, *supra* note 44, at 129.

48. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 679 (1983) (citing S. REP. NO. 95-331, 95th Cong., 1st Sess. 2-3 (1977), Leg. Hist. at 7-8) (“[T]he bill is merely reestablishing the law as it was understood prior to *Gilbert* by the EEOC and by the lower courts.”); H.R. REP. NO. 95-948; 123 CONG. REC. 10582 (1977) (remarks of Rep. Hawkins) (“H.R. 5055 does not really add anything to title VII . . . [because] it seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy.”); *Id.*, at 29,387 (remarks of Sen. Williams) (“[T]his bill is simply corrective legislation, designed to restore the law with respect to pregnant women employees to the point where it was last year, before the Supreme Court’s decision in *Gilbert*.”).

49. Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

50. 45 AM. JUR. 2D *Job Discrimination* § 138 (2009).

51. Wilson, *supra* note 44, at 129.

52. *Troupe v. May Dep’t Stores*, 20 F.3d 734 (7th Cir. 1994) (determining that excessive tardiness and absenteeism are not protected by Title VII and the Pregnancy Discrimination Act); *Byrd v. Lakeshore Hosp.*, 30 F.3d 1380 (11th Cir. 1994) (holding that the PDA only requires an equality of benefits and does not require special accommodation); Wilson, *supra* note 44, at 131; 45 AM. JUR. 2D *Job Discrimination* § 138 (2009).

absences, tardiness, rehiring, insurance or other benefits not extended to other disabled employees.⁵³

C. Perspectives on Gender Discrimination

As the number of people wishing to pursue treatment for infertility-related illnesses increases,⁵⁴ so does the need to provide employers and employees with consistent legal guidance.⁵⁵ In some instances, courts have defined infertility as an illness when analyzing whether it qualifies as a gender-neutral condition.⁵⁶ In other cases, such as the recently decided *Hall v. Nalco*, courts have focused on the infertility treatment and its disparate impact on men and women when determining whether infertility treatments fall under the PDA.⁵⁷

Appropriate analysis of judicial decision-making regarding gender discrimination cases requires recognition that alternate theories of gender discrimination influence courts in various ways.⁵⁸ Originally, “equal treatment” theories of gender equality, as the name implies, sought to equalize the treatment of women and men.⁵⁹ However, some feminist groups soon realized that policies equalizing the treatment of women and men could have a harmful effect on women and the fight to help women advance in the workplace.⁶⁰ Thus,

53. See *Troupe*, 20 F.3d 734 (determining that excessive tardiness and absenteeism are not protected by Title VII and the PDA); *Byrd*, 30 F.3d 1380. See generally Judith G. Greenberg, *The Pregnancy Discrimination Act: Legitimizing Discrimination Against Pregnant Women in the Workforce*, 50 ME. L. REV. 225 (1996).

54. See sources cited *supra* note 4.

55. Bentley, *supra* note 6, at 392.

56. See *Saks v. Franklin Covey Co.*, 316 F.3d 337, 349 (2d Cir. 2003) (finding both men and women may suffer from infertility and therefore the PDA does not provide a cause of action unless men and women are treated differently under the employer's policy).

57. *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008).

58. See ANNE E. MORRIS & SUSAN M. NOTT, *WORKING WOMEN AND THE LAW: EQUALITY AND DISCRIMINATION IN THEORY AND PRACTICE* 12 (1991); Mary F. Radford, *Sex Stereotyping and the Promotion of Women to Positions of Power*, 41 HASTINGS L.J. 471, 478–86 (1990).

59. See A WOMAN MAKING HISTORY: MARY RITTER BEARD THROUGH HER LETTERS, *supra* note 28; EVANS, *supra* note 28, at 274; BELL HOOKS, *FEMINISM IS FOR EVERYBODY, PASSIONATE POLITICS* 1–3 (2000).

60. One example is the Equal Rights Amendment proposed numerous times in Congress, but never passed. Barnes, *supra* note 28. While the amendment seemed to have broad support, many feminists were fearful that the amendment could harm the progress of women's rights. A WOMAN MAKING HISTORY: MARY RITTER BEARD THROUGH HER LETTERS, *supra* note 28. Only thirty-five of the

advocates for “special treatment” equality focus their argument on the inherent differences between women and men in the context of pregnancy and childbirth issues as an obstacle to advancement in the workplace.⁶¹

The *Gilbert* decision sided with equal treatment proponents by holding that the absence of insurance coverage for pregnancy did not amount to discrimination because there was “no risk from which men [were] protected and women [were] not.”⁶² In dissent, Justice Brennan recognized the unique obstacles to advancement women face as compared to men⁶³ when he emphasized that Title VII was passed “to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [sexually] stratified job environments to the disadvantage of [women].”⁶⁴ Congress, dissatisfied with the *Gilbert* decision, relied on the dissent as motivation behind the enactment of the PDA, rejecting a rigid equal treatment approach to Title VII.⁶⁵ Senator Williams, a supporter of the PDA, stated that “[t]he entire thrust . . . behind this legislation is to guarantee women the basic right to participate fully and equally in the workforce, without denying them the fundamental right to full participation in family life.”⁶⁶

The PDA has two specific clauses that are difficult to reconcile. The first classifies sex discrimination on the basis of pregnancy, childbirth, or a related condition, while the second, the “equality clause,” articulates that women temporarily disabled by these

necessary thirty-eight states ratified the equal rights amendment. JANE J. MANSBRIDGE, *WHY WE LOST THE ERA* 12–14 (1986); Deborah L. Rhode, *Equal Rights in Retrospect*, 1 *LAW & INEQ.* 1 (1983).

61. See FEMINIST LEGAL THEORY: FOUNDATIONS 124 (D. Kelly Weisberg ed., 1993); Radford, *supra* note 58, at 478.

62. *Gilbert v. Gen. Elec. Co.*, 429 U.S. 125, 135 (1976) (quoting *Geduldig v. Aiello*, 417 U.S. 484, 496–97 (1974)).

63. Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act*, 38 *AM. BUS. L.J.* 819, 820–21 (2001).

64. *Gilbert*, 429 U.S. at 160 (Brennan, J., dissenting) (quoting *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 800 (1973)). (quoting Justice Brennan in *Gilbert v. Gen. Elec. Co.*, 429 U.S. 125, 160 (1976) (Brennan, J., dissenting)).

65. Maureen E. Eldredge, *The Quest for a Lactating Male: Biology, Gender, and Discrimination*, 80 *CHI.-KENT L. REV.* 875, 883–84 (2005).

66. Dana Page, *D.C.F.D.: An Equal Opportunity Employer—As Long As You Are Not Pregnant.*, 24 *WOMEN’S RTS. L. REP.* 9, 12 (2002) (quoting 123 *CONG. REC.* 29,658 (daily ed. Sept. 16, 1977) (statement of Sen. Williams)).

conditions are to be treated the same as those similarly situated by a disability.⁶⁷ Despite evidence Congress recognized that differences between men and women should not prohibit equal advancement opportunities, courts have narrowly interpreted the scope of the “equality” clause.⁶⁸

Inconsistency between congressional intent and judicial precedent has made it difficult for courts to analyze the application of the PDA to infertility-related disability.⁶⁹ Some courts continue to apply the principles espoused in *Gilbert* when determining the application of the PDA to infertility-related conditions.⁷⁰ Other courts, however, use the disparate impact approach to provide women relief, closing the gap between strict equality and special treatment theories of gender discrimination.⁷¹

II. VARIATIONS ON A THEME: JUDICIAL INTERPRETATIONS OF INFERTILITY

The Supreme Court’s 1991 decision in *International Union v. Johnson Controls* applied the *Gilbert* neutrality principle to fertility-

67. See Magid, *supra* note 63, at 824, and Page, *supra* note 66, at 13, for a discussion on how these clauses are interpreted.

68. Title VII as amended by the PDA was interpreted by courts to give no special consideration to women, only to treat pregnancy as a temporary disability. See *Troupe v. May Dep’t Stores*, 20 F.3d 734 (7th Cir. 1994); *Byrd v. Lakeshore Hosp.*, 30 F.3d 1380 (11th Cir. 1994).

69. See Bentley, *supra* note 6, at 392; see also Kay, *supra* note 27, at 3–8 (positing that the Supreme Court has swayed the balance of power between men and women unequally).

70. While courts have explicitly rejected the *Gilbert* classifications, the neutrality principle remains strong in jurisprudence. CATHERINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION* 115 (1979). Most courts interpret the PDA as equating pregnancy to temporary disabilities experienced by other non-pregnant employees. See, e.g., *Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983) (holding that an insurance policy that provides maternity benefits for female employees cannot deny equal benefits to the spouses of male employees because males and females must be treated equally); *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102 (S.D. Iowa 1995) (finding that both men and women have the biological potential to be infertile and therefore infertility does not fall within the protections of the PDA under Title VII), *aff’d*, 95 F.3d 674 (8th Cir. 1996); 2 SUSAN M. OMILIAN & JEAN P. KAMP, *SEX-BASED EMPLOYMENT DISCRIMINATION* § 20:3 (2009).

71. Pregnancy or pregnancy-related discrimination can be analyzed under disparate treatment theory or disparate impact theory. Page, *supra* note 66, at 14. Disparate impact theory allows a plaintiff to challenge facially neutral policies that discriminatorily impact women. Jamie Darin Prenekert, *The Role of Second-Order Uniformity in Disparate Treatment Law: McDonnell Douglas’s Longevity and the Mixed-Motives Mess*, 45 AM. BUS. L.J. 511, 521 (2008).

related illness.⁷² At issue in *Johnson Controls* was a fertility protection policy that prohibited fertile women from engaging in jobs which exposed them to lead because of lead's impact on the women's fertility.⁷³ The Court stated that "unless pregnant employees differ from others 'in their ability or inability to work,' they must be 'treated the same' as other employees 'for all employment-related purposes,'" and the Court proceeded to invalidate the company policy.⁷⁴

Despite the espoused gender neutrality principles, the Seventh Circuit has used *Johnson Controls* to provide relief to women discriminatorily dismissed while undergoing infertility treatment.⁷⁵ The following section explores the differences in analysis among courts as they waded through Title VII claims relating to infertility discrimination.

A. Infertility: Gender Neutral or Not?

Central to case law focusing on infertility as a pregnancy-related condition is the question: *If science has determined that infertility affects men and women equally why should the PDA afford consideration specifically to women?*⁷⁶

Despite equal occurrences of infertility in men and women, most ARTs are invasive only to women because of the woman's unique biological position in the reproductive process.⁷⁷ Although treatments for men consist largely of various drug therapies, treatments for women may be physically invasive or present emotional risks, with

72. *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (determining an employer's policy prohibiting women from working in a lead exposed environment violates the PDA because policies that distinguish men and women based on childbearing capacity are discriminatory unless reproductive potential prohibits a woman from doing her job).

73. *Id.* at 198 (finding Johnson Controls's policy facially discriminatory because it "requires only a female employee to produce proof that she is not capable of reproducing").

74. *Id.* at 188.

75. *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008) (using *Johnson Controls*'s use of childbearing capacity as a basis for the court's analysis).

76. Bentley, *supra* note 6, at 392.

77. While men can undergo certain hormone treatments, the more expensive and invasive procedures are undergone by women. Frank van Balen & Marcia C. Inhorn, *Interpreting Infertility: A View from the Social Sciences*, in *INFERTILITY AROUND THE GLOBE: NEW THINKING ON CHILDLESSNESS, GENDER, AND REPRODUCTIVE TECHNOLOGIES* 14 (Marcia C. Inhorn & Frank van Balen eds., 2002).

options ranging from intensive drug therapies and hormonal monitoring to egg transfer, surgery, and surrogate pregnancy.⁷⁸ The particular risks to women become even more apparent when reproductively healthy women undergo treatments because of an infertile partner.⁷⁹ In many instances, the female partner undergoes invasive ART procedures because her partner's illness does not facilitate conception.⁸⁰ In these cases ARTs simulate conception in the lab and doctors surgically implant the embryo, increasing the risk to the male's healthy partner.⁸¹

Noninvasive procedures, such as hormone therapies, allow most of the 6.1 million women and their partners to conceive.⁸² Approximately five percent of infertile women turn to more invasive ARTs such as in-vitro fertilization (IVF) and gamete intra-fallopian transfer (GIFT).⁸³ IVF occurs when doctors fertilize an egg with sperm outside of the mother's womb and then implant the embryo into her uterus.⁸⁴ In addition to hormone therapy that encourages egg production, the "egg harvesting" portion of IVF is often extremely painful and ridden with potential complications.⁸⁵ These complications, collectively referred to as ovarian hyper stimulation syndrome (OHSS), include "severe pelvic pain, ovarian cysts, rupture of the ovaries, impaired future fertility, stroke, brain damage, coma, and even death."⁸⁶ GIFT is a similar process except that the egg and

78. See *id.*; BRETTE MCWHORTER SEMBER, *THE INFERTILITY ANSWER BOOK: THE COMPLETE GUIDE TO YOUR FAMILY-BUILDING CHOICES WITH FERTILITY AND OTHER ASSISTED REPRODUCTION TECHNOLOGIES* 3–5 (2005).

79. See Balen & Inhorn, *supra* note 77.

80. See generally *id.*; SEMBER, *supra* note 78, at 4.

81. Balen & Inhorn, *supra* note 77; SEMBER, *supra* note 78, at 5.

82. Shorge Sato, Note, *A Little Bit Disabled: Infertility and the Americans with Disabilities Act*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 189, 193 (2001–2002).

83. KAREN F. GREIF & JON F. MERZ, *CURRENT CONTROVERSIES IN THE BIOLOGICAL SCIENCES: CASE STUDIES OF POLICY CHALLENGES FROM NEW TECHNOLOGIES* 86 (2007); NANCY LUBLIN, *PANDORA'S BOX: FEMINISM CONFRONTS REPRODUCTIVE TECHNOLOGY* 2 (1998); Sato, *supra* note 82, at 194. Other invasive procedures to achieve pregnancy exist but are beyond the scope of this Note. See SEMBER, *supra* note 78, at 4–5.

84. SEMBER, *supra* note 78, at 5.

85. PAMELA LEVIN, *THE FEMALE HORMONE JOURNEY: LIFETIME CARE OF YOUR HORMONES* 58 (2005).

86. *Id.*

sperm are planted into the fallopian tube independent of one another, allowing fertilization to occur naturally.⁸⁷

In addition to the physical invasion of infertility treatment, it is also an extremely emotional process that often leads to severe depression. Intense feelings of isolation and failure accompanying infertility are compounded by the high cost of treatment⁸⁸ and the knowledge that it may be the last hope of conceiving.⁸⁹ Cost estimates for one cycle of IVF in the United States vary from \$9,550 to \$12,400.⁹⁰ Based on the estimated number of procedures annually in the United States, these costs may exceed \$1 billion.⁹¹ Expenses are indicative of the extensive lengths that couples will go to achieve pregnancy including “multiple medical consultations, prescribed drugs, laboratory charges, ultrasound procedures, payments to ‘donors,’ IVF procedures (egg retrieval and embryo transfer), hospital charges, and other administrative and medical costs,” approximately eighty-five percent of which are not covered by insurance.⁹² The situation is markedly different than in many European countries where the costs of ARTs are capped and insurance covers the cost.⁹³

Women, not men, are therefore faced with exceptionally high medical risk if they wish to have a child.⁹⁴ Infertile women who have not responded to hormone therapy or whose husbands have not responded to hormone therapy cannot remedy the condition of infertility without undergoing invasive treatments and therefore have

87. See SEMBER, *supra* note 78, at 4.

88. See Marcia P. Harrigan & Suzanne M. Baldwin, *Conception, Pregnancy, and Childbirth*, in DIMENSIONS OF HUMAN BEHAVIOR: THE CHANGING LIFE COURSE 64 (Elizabeth D. Hutchinson ed., 3d ed. 2008); Sato, *supra* note 82, at 193–94.

89. In a study of 100 women at two reproductive endocrinology centers, researchers found that women exhibited quantifiable levels of depression and grief at multiple stages of treatment. Michelle Lukse & Nicholas Vacc, *Grief, Depression, and Coping in Women Undergoing Infertility Treatment*, 93 OBSTETRICS & GYNECOLOGY 245, 245–47 (1999).

90. See GREIF & MERZ, *supra* note 83.

91. *Id.*

92. *Id.*

93. *Id.*

94. Balen & Inhorn, *supra* note 77, at 15.

no other option if they want to realize the dream of conceiving and carrying a biological child.⁹⁵

B. *Gilbert Principles Transcend Congressional Intent*

It is clear from the Congressional Record that the PDA was enacted to reverse *Gilbert*'s insensitivity to the unique biological characteristics of pregnancy and pregnancy-related conditions.⁹⁶ However, the neutrality principle embedded in *Gilbert* survived the legislative process, making its way into pregnancy discrimination claims and eventually infertility discrimination claims.⁹⁷

In *Krauel v. Iowa Methodist Medical Center* a female employee brought an action against her employer after she was denied insurance coverage for fertility treatments.⁹⁸ The plaintiff argued that infertility is a pregnancy-related condition because there was a causal connection between her medical condition, endometriosis, and pregnancy.⁹⁹ The Eighth Circuit disagreed, reasoning that fertility treatments transcended the bounds of a "pregnancy-related condition" as defined by the PDA.¹⁰⁰ Much of the reasoning in *Krauel* focused on the Supreme Court's analysis in *Johnson Controls*, identifying

95. Erin Lynn Connolly, Note, *Constitutional Issues Raised by States' Exclusion of Fertility Drugs from Medicaid Coverage in Light of Mandated Coverage of Viagra*, 54 VAND. L. REV. 451, 478–79 (2001).

96. See sources cited *supra* note 48; see also Eldredge, *supra* note 65, at 883; Harriet Beth Robbins-Ost, Note, *Newport News Shipbuilding & Dry Dock Co. v. EEOC: The Family Unit Protected from Pregnancy Discrimination*, 33 DEPAUL L. REV. 545, 556 (1984).

97. Although Congressional intent indicates a desired repudiation of *Gilbert*, the PDA provides only a narrow departure from its principles. Eldredge, *supra* note 65, at 883. Most courts focus on the second clause of the PDA, providing that women with pregnancy-related conditions are treated the same as similarly situated, temporarily disabled, non-pregnant employees, rather than the first defining clause. Jessica Carvey Manners, Note, *The Search for Mr. Troupe: The Need to Eliminate Comparison Groups in Pregnancy Discrimination Act Cases*, 66 OHIO ST. L.J. 209, 211, 214–23 (2005) (highlighting the difficulty in interpreting the two clauses of the PDA).

98. *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102 (S.D. Iowa 1995), *aff'd*, 95 F.3d 674 (8th Cir. 1996).

99. *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996). Endometriosis is condition that affects over ten million women in the United States and occurs when the tissue normally lining the uterus is found elsewhere in the body, likely the pelvis. End to Endo: Genetic Endometriosis Research Study, http://www.endtoendo.com/Endometriosis_Overview_End_to_Endometriosis.html (last visited Apr. 26, 2010).

100. *Krauel*, 95 F.3d at 679 (referring to the lack of legislative history specifying infertility as a related condition).

potential pregnancy as a basis for a Title VII and PDA claim.¹⁰¹ The *Krauel* court rejected the notion that infertility presents sufficient similarity to potential pregnancy because infertility is gender-neutral while pregnancy is female-specific.¹⁰²

In *Saks v. Franklin Covey Co.*, the Second Circuit similarly upheld the practice of excluding fertility treatments from inclusion in insurance benefit plans.¹⁰³ In *Saks*, the plaintiff argued that fertility treatments disproportionately affect women because most fertility treatments are performed exclusively on women, regardless of whether the fertility issue originated with the male or the female.¹⁰⁴ The district court found that infertility was a related condition under the PDA, but used the neutrality principle from *Gilbert* to conclude that the policy was valid.¹⁰⁵

The circuit court rejected the district court's argument, recognizing that Congress specifically rejected *Gilbert* when enacting the PDA.¹⁰⁶ Although the court noted that the PDA protects more than pregnancy itself,¹⁰⁷ they declined to extend those protections to infertility-related conditions, thus limiting the scope of the PDA.¹⁰⁸ Like *Krauel* the court used *Johnson Controls* to conclude that discrimination based on "fertility alone" would not violate Title VII and the PDA because any condition within the meaning of "related medical condition" must be "unique to women," and infertility is not.¹⁰⁹

101. *Id.* at 680.

102. *Id.*

103. *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003).

104. *Id.* at 340. There are very few options for male infertility, although males account for forty to fifty percent of infertility-related illness. GAYLENE BECKER, THE ELUSIVE EMBRYO: HOW WOMEN AND MEN APPROACH NEW REPRODUCTIVE TECHNOLOGIES 56 (2000). As a result, women use ARTs that can simulate natural conception, compensating for the lack of options to treat male infertility. Bentley, *supra* note 6, at 396. For discussion about infertility, infertility treatments, and their effect on women, see Harrigan & Baldwin, *supra* note 88, at 64; SUE LLEWELLYN & KATE OSBORNE, WOMEN'S LIVES 133–37 (1990); TONI WESCHLER, TAKING CHARGE OF YOUR FERTILITY 18–26 (2002).

105. *Saks v. Franklin Covey Co.*, 117 F. Supp. 2d 318, 328 (S.D.N.Y. 2000) (upholding an insurance policy because the policy affected men and women equally).

106. Eldredge, *supra* note 65, at 884.

107. *Saks*, 316 F.3d at 345 (citing *Carney v. Martin Luther Home, Inc.*, 824 F.2d 643, 647–48 (8th Cir. 1987)).

108. *Id.*

109. *Id.* at 346.

Insurance coverage cases have predominantly used the above analysis, making it even more difficult for women dismissed by employers because of infertility discrimination to state a viable claim of Title VII employment discrimination.¹¹⁰ However, *Saks* left the door to the Second Circuit open to claims of adverse employment action on the basis of infertility disability by expressly declining to analyze the PDA's application to the dismissal of women taking sick days for infertility treatments.¹¹¹ Infertility discrimination claims have been successful in other circuits, also applying *Johnson Controls* to support the plaintiff's claims.¹¹²

C. Courts Dismiss Consistency in Infertility-Related PDA Cases

Pacourek v. Inland Steel was the first major case to hold that infertility is a medical condition sufficiently related to pregnancy and childbirth to fall under the protections of the PDA.¹¹³ The plaintiff was diagnosed with esophofical reflux, a condition preventing natural pregnancy.¹¹⁴ Inland Steel fired the plaintiff because her medical condition "was a problem" and that she was a "high risk" after she underwent in-vitro fertilization procedures to induce pregnancy.¹¹⁵

The court in *Pacourek* held that classifications based on potential pregnancy or intentions to become pregnant are covered by the PDA.¹¹⁶ Rejecting the neutrality principles in *Gilbert* and embracing the potential pregnancy language in *Johnson Controls*,¹¹⁷ the court stated that the underlying theory of the PDA is that "stereotypes based on pregnancy and related medical conditions have been a barrier to women's economic advancement; and classifications based

110. Hawkins, *supra* note 5, at 212.

111. *Saks*, 316 F.3d at 346 n.4.

112. See Hall v. Nalco Co., 534 F.3d 644, 649 (7th Cir. 2008); Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ., 911 F. Supp. 316 (N.D. Ill. 1995); Pacourek v. Inland Steel, 858 F. Supp. 1393, 1401 (N.D. Ill. 1994).

113. Pacourek v. Inland Steel, 858 F. Supp. 1393, 1401 (N.D. Ill. 1994).

114. *Id.*

115. *Id.*

116. *Id.* (using congressional intent and *Johnson Controls* as a basis for its decision).

117. In *Int'l Union v. Johnson Controls*, 499 U.S. 187, 198 (1991), the court explicitly ruled that classifications on the basis of potential to become pregnant are a basis for Title VII discrimination.

on pregnancy and related medical conditions are never gender neutral.”¹¹⁸

Interpreting the PDA broadly,¹¹⁹ the *Pacourek* court embraced the argument that medical conditions preventing a woman from naturally becoming pregnant fall within the scope of the PDA, specifically including infertility treatment.¹²⁰ Despite the holding, the court noted that classifications based on potential for pregnancy do not automatically qualify a plaintiff's condition as pregnancy-related, seemingly limiting protections for infertility disability.¹²¹ *Pacourek* did not require that employers treat medical infertility in any particular way, stopping short of embracing a “special treatment” theory.¹²² However, the court came closer to providing women relief than any other court at the time by rejecting the argument that infertility is a gender-neutral condition, and recognizing that seemingly neutral policies that in reality burden women are in fact discriminatory.¹²³

The Seventh Circuit recently agreed with the *Pacourek* result, but used a different method of analysis to protect women undergoing fertility treatment from discriminatory practices violating Title VII, as amended by the PDA.¹²⁴ In *Hall v. Nalco*, a sales secretary was dismissed from her position after undergoing one treatment cycle of in-vitro fertilization and requesting leave to undergo a second treatment cycle.¹²⁵ Although the district court dismissed the claim on the basis that gender-neutral conditions like infertility are not

118. *Pacourek*, 858 F. Supp. at 1401 (citing *Newport News Shipbldg. & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1983) (repudiating the principles in *Gilbert* based on congressional intent of the PDA)).

119. The court noted the expansive language of “pregnancy, childbirth, or related medical conditions” in the PDA, suggesting that the court should err on the side of inclusion rather than exclusion. *Pacourek*, 858 F. Supp. at 1402; see also *Hawkins*, *supra* note 5, at 211.

120. *Pacourek*, 858 F. Supp. at 1402; see also *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316, 320 (N.D. Ill. 1995) (agreeing with the *Pacourek* court that the PDA applies to discrimination based upon potential for pregnancy and that infertility is a pregnancy-related condition within the scope of the PDA).

121. *Pacourek*, 858 F. Supp. at 1402.

122. *Id.* at 1403.

123. See *Eldredge*, *supra* note 65, at 885; see also *Erickson*, 911 F. Supp. at 320 (holding that the argument that infertility is gender neutral fails because male infertility treatments do not “relate to his capacity to become pregnant”).

124. *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008).

125. *Hall*, 534 F.3d at 646.

sufficient to state a Title VII claim, the circuit court found that the plaintiff was not discriminated against because of the condition of “infertility,” rather she was discriminated against for the “gender-specific quality of childbearing capacity.”¹²⁶

The Seventh Circuit relied heavily on the Supreme Court’s holding in *Johnson Controls*.¹²⁷ *Johnson Controls* implied in its holding that classifications based solely on infertility are not violations of the PDA.¹²⁸ This is consistent with the holding in *Saks* which declined to create a class of infertile people protected by the PDA which are both male and female.¹²⁹ The court reasoned that Congress did not intend the PDA to protect both genders, only women.¹³⁰ However, the Seventh Circuit highlighted that *Johnson Controls* does recognize that potential pregnancy and childbearing capacity are within the scope of the PDA.¹³¹ Therefore, the court narrowed the scope of the issue to specific treatments for fertility related illnesses that are unique to women and affect childbearing capacity.¹³²

Focusing on the specific IVF procedure¹³³ allowed the court to analyze the plaintiff’s dismissal as an issue of childbearing capacity, avoiding reproductive capacity and gender distinction arguments which have not had much success.¹³⁴ The analysis complements the test for Title VII violations: “Adverse employment action based on childbearing capacity will always result in treatment of a person in a manner which but for that person’s sex would be different.”¹³⁵ The gender specific demands of infertility treatment suggest that women

126. *Hall*, 534 F.3d at 649.

127. *Id.*

128. *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 198 (1991) (finding the fetal protection policy was invalid because it “classifie[d] on the basis of gender and childbearing capacity, rather than fertility alone”).

129. *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003); Hawkins, *supra* note 5, at 213.

130. *Saks*, 316 F.3d at 346.

131. *Johnson Controls, Inc.*, 499 U.S. at 198; *Hall*, 534 F.3d at 648.

132. *Hall*, 534 F.3d at 648.

133. *Id.* The Seventh Circuit notes in-vitro fertilization is one of a bundle of ARTs that is especially burdensome to women and affects childbearing capacity. See sources cited *supra* note 4.

134. See *Saks*, 316 F.3d at 346; *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102 (S.D. Iowa 1995), *aff’d*, 95 F.3d 674 (8th Cir. 1996).

135. *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (establishing the test for Title VII actions).

undergoing IVF and other infertility treatments need considerations similar to those of pregnant women who must take sick leave during the early stages of pregnancy or need to take time off of work for the childbirth.¹³⁶

D. Subverting Progress

Although inroads have been made to prevent discrimination based on infertility, obstacles remain. Since the inception of the PDA, courts have consistently declined to require employers give any special consideration to pregnant women or those afflicted with pregnancy-related conditions¹³⁷ while at the same time recognizing that women and men do have unique biological characteristics.¹³⁸ Therefore, Title VII requires employers to treat women with these conditions only as they would any other person with a temporary disability, not as compared to other pregnant women.¹³⁹ Title VII requires that the employer not discriminate on the basis of pregnancy, but permits the employer to take action based on absence from work or any other biological manifestation of pregnancy.¹⁴⁰ Indeed, in *Troupe v. May Department Stores Co.*, Judge Posner went as far as saying that “employers can treat pregnant women as badly as they treat similarly affected but not pregnant employees.”¹⁴¹

Some courts have treated pregnancy-related conditions as an immutable characteristic which at no time should interfere with productivity.¹⁴² Other courts, however, have recognized that some medical conditions, such as morning sickness, that accompany pregnancy and pregnancy-related conditions may interfere with daily

136. Bentley, *supra* note 6, at 394–95.

137. *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994); *Pacourek v. Inland Steel*, 858 F. Supp. 1393, 1402 (N.D. Ill. 1994); Eldredge, *supra* note 65, at 884; Magid, *supra* note 63, at 824; Manners, *supra* note 98, at 219–20; Page, *supra* note 66, at 13.

138. Eldredge, *supra* note 65, at 884.

139. 45 AM. JUR. 2D *Job Discrimination* § 138 (2009); Manners, *supra* note 98, at 219.

140. Eldredge, *supra* note 65, at 884.

141. *Troupe*, 20 F.3d at 738. The PDA does not mandate treatment of pregnant employees, but does require that employers do not treat a pregnant employee any worse than other temporarily disabled employees or as they would have if she had not been pregnant. 45 AM. JUR. 2D *Job Discrimination* § 138 (2009).

142. Manners, *supra* note 98, at 219.

duties in the workplace.¹⁴³ Overall, courts have failed to acknowledge that pregnancy-related conditions produce a variety of health complications, unlike other characteristics protected under Title VII such as religion and race.¹⁴⁴

In the context of infertility treatment, protection from infertility discrimination provided under the *Hall* analysis could be negated by the permissible dismissal of the employee for the time the employee would have to take off from work while undergoing infertility treatment or the side effects of undergoing the treatment as described in *Troupe*.¹⁴⁵ This approach directly conflicts with the purpose of the PDA: to combat discrimination that prevents women from advancing in the workplace.¹⁴⁶

While some courts have argued that Congress did not design the PDA to force employers to suffer economic hardship by providing special treatment,¹⁴⁷ the law provides an exception for those companies that can demonstrate bona fide occupational qualification

143. *Troupe*, 20 F.3d at 738 (acknowledging that morning sickness is a related medical condition under the PDA); *Moawad v. Rx Place*, No. 95 CV 5243(NG), 1999 WL 342759 (E.D.N.Y. May 27, 1999) (providing a plaintiff relief under the PDA if she can show that her condition was pregnancy-induced).

144. The Supreme Court has held to the notion that equality is defined as treating everyone the same, as opposed to providing equal opportunity in light of the unique characteristics of females. *Eldredge*, *supra* note 65, at 881–85; *Manners*, *supra* note 98, at 219–20 (arguing that pregnancy is not the same as skin color or religion with respect to the physical manifestations of the illness, making it especially difficult to find a comparison group).

145. In *Troupe*, 20 F.3d at 738, a pregnant employee, consistently afflicted with morning sickness, was permissibly dismissed from employment because she was treated as other similarly situated employees. Fertility procedures often are invasive and require time away from work. *LEVIN*, *supra* note 85. Because pregnancy-related conditions are unique to women, courts often have a difficult time discerning male diseases and injuries that serve as models for the typical temporarily disabled employees. *Manners*, *supra* note 98, at 219.

146. Senator Williams, a sponsor of the PDA, emphasized that the PDA allowed women to participate fully in the workforce without denying them the right to have a family. *Magid*, *supra* note 63, at 830; *see also MORRIS & NOTT*, *supra* note 58, at 69.

147. *Maldonado v. U.S. Bank*, 186 F.3d 759, 767 (7th Cir. 1999). For a discussion of the opportunity cost of antidiscrimination policy, see Alexandra G. White, Note, *Paralyzing Discord: Workplace Safety, Paternalism, and the Accommodation of Biological Variance in the Americans with Disabilities Act*, 63 LA. L. REV. 509, 573 (2003) (referring to Congressional discussion of the economic ramifications of passing the PDA). *But see CAMPBELL R. MCCONNELL & STANLEY L. BRUE*, MICROECONOMICS: PRINCIPLES, PROBLEMS, AND POLICIES 419 (2004) (arguing that discrimination costs employers more than not discriminating).

(BFOQ) for discharging an employee who is undergoing reproductive therapy.¹⁴⁸

III. THE PDA: THE BEST AN INFERTILE WOMAN CAN GET?

The Supreme Court has noted that, “[w]ith the PDA, Congress made it clear that the decision to become pregnant or to work while being pregnant or capable of becoming pregnant was reserved to each individual woman to make for herself.”¹⁴⁹ For infertile women, the decision to become pregnant involves a more complex process of diagnosis and treatment than the average female.¹⁵⁰ The spirit of the PDA suggests that any woman, regardless of the process by which she becomes pregnant, should not face disadvantages in the workplace because of that choice.¹⁵¹

Despite disagreement among circuits as to how infertility treatments should be analyzed under the PDA, the fact remains that millions of infertile women will be seeking legal guidance regarding their insurance coverage and employment protections in the coming years.¹⁵² While Congress should consider independently protecting women who undergo fertilization procedures, the spirit of the PDA affords courts the opportunity to include childbearing capacity in the meaning of “pregnancy-related condition.”

148. In rebutting a showing of discriminatory actions, defendants can show that the action was “reasonably necessary to the normal operation of . . . business,” the bona fide occupational qualification test (BFOQ). Eldredge, *supra* note 65, at 878; Magid, *supra* note 63, at 829; Kobylak, *supra* note 40, § 10[b].

149. *Int’l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 206 (1991).

150. See Marie Johnston, *Reproductive Issues: Decisions and Distress*, in *THE HEALTH PSYCHOLOGY OF WOMEN* 27–32 (Catherine Niven & Douglas Carroll eds., 1993) (explaining that couples making the decision to undergo infertility treatments consider not only the reasons why they want to have a child, but the side effects of treatment and the significant chance that the treatments will fail).

151. “The Pregnancy Discrimination Act sought to reconcile women’s unique capacities as childbearers with their status as members of the workforce” LISE VOGEL, *MOTHERS ON THE JOB: MATERNITY POLICY IN THE U.S. WORKPLACE* 72 (1993).

152. About seven percent of married couples experience infertility. Hawkins, *supra* note 5, at 203 (citing ABMA ET AL., *supra* note 2). In 2006 138,198 ART cycles were performed at 426 reporting clinics resulting in 41,343 live births (deliveries of one or more living infants) and 54,656 infants. CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP’T OF HEALTH & HUMAN SERVS., 2006 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 11 (2008), <http://www.cdc.gov/ART/ART2006/508PDF/2006ART.pdf>.

While women seeking insurance coverage and employment protection are both within the scope of Title VII, currently the judiciary seems unwilling to extend insurance coverage to women seeking infertility treatment absent legislative intervention.¹⁵³ Although courts may not be able to overcome precedent surrounding insurance coverage cases, *Saks* distinguishes insurance cases from employment discrimination cases, opening the door to provide a remedy to women unjustly treated or discharged from employment for undergoing infertility treatment.¹⁵⁴

Hall provides the most consistent line of reasoning to support the inclusion of infertility treatments as a pregnancy-related condition in employment discharge cases. Classifying infertility procedures as related to the gender-specific quality of childbearing capacity rather than reproductive capacity respects the fact that infertility affects both men and women,¹⁵⁵ while at the same time recognizes the unique biological characteristics of women that interconnects pregnancy and fertility.¹⁵⁶

However, to genuinely protect women from discrimination based on infertility, courts cannot stop their analysis at the interconnection of infertility treatment with childbearing capacity. As previously discussed, these women are particularly vulnerable because of the difficulty stating a cause of action when the treatment itself requires unanticipated time away from work or severe side effects.¹⁵⁷ Because employers are not required to give even reasonable accommodations

153. Currently, courts have taken a fairly united stance against extending insurance benefits to infertility treatments. See *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003); *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102 (S.D. Iowa 1995), *aff'd*, 95 F.3d 674 (8th Cir. 1996); *Hawkins*, *supra* note 5.

154. *Saks*, 316 F.3d at 346 n.4 (“We expressly decline to consider whether an infertile female employee would be able to state a claim under . . . Title VII for adverse employment action taken against her because she has taken numerous sick days in order to undergo surgical impregnation procedures.”).

155. The *Hall* court is careful to avoid the argument in *Saks* that infertility affects both men and women equally and instead examines the specific treatment and its impact on female participants. *Hall v. Nalco Co.*, 534 F.3d 644, 648 (7th Cir. 2008).

156. *Pacourek*, unlike *Hall*, directly opposes the reasoning in insurance cases by claiming a causal link between infertility illness and pregnancy, although it does take a disparate impact approach to infertility treatments. *Pacourek v. Inland Steel*, 858 F. Supp. 1393 (N.D. Ill. 1994).

157. See *Saks*, 316 F.3d at 346; *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102 (S.D. Iowa 1995), *aff'd*, 95 F.3d 674 (8th Cir. 1996).

to women who are pregnant or have related conditions that they would not give to other disabled employees, employers can legally dismiss female employees who need additional leave or reasonable accommodations.¹⁵⁸

Biological conditions create a distinctive problem under Title VII because, unlike race or religion, these conditions come with contemporaneous physical manifestations of illness which create barriers to advancement.¹⁵⁹ Unlike the PDA, however, the Americans with Disabilities Act (ADA) may provide courts the opportunity to further protect women who require reasonable accommodations to achieve reproductive capacity.¹⁶⁰ A “disability” under the ADA is “a physical or mental impairment that substantially limits one or more of the major life activities of such individual.”¹⁶¹ In *Bragdon v. Abbott* the Court considered reproductive capacity a major life activity because “reproduction and the sexual dynamics surrounding it are central to the life process itself.”¹⁶²

Like the PDA, the ADA was an expansion of civil rights for those afflicted with disabilities and promised equal opportunity and full participation in the workforce.¹⁶³ In tandem with a favorable interpretation of the ADA, the *Hall* analysis serves to protect women from employment discrimination and wrongful discharge while

158. See VOGEL, *supra* note 152, at 70.

159. Eldredge, *supra* note 65, at 882.

160. Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (1994). A comprehensive analysis of the ADA as it applies to fertility issues is outside the scope of this Note. For extensive discussion, see Kimberly Horvath, *Does Bragdon v. Abbott Provide the Missing Link for Infertile Couples Seeking Protection Under the ADA?*, 2 DEPAUL J. HEALTH CARE L. 819 (1999); Deborah K. Dallmann, Note, *The Lay View of What “Disability” Means Must Give Way to What Congress Says It Means: Infertility As a “Disability” Under the Americans with Disabilities Act*, 38 WM. & MARY L. REV. 371 (1996).

161. 42 U.S.C. § 12102(1)(A) (1994).

162. *Bragdon v. Abbott*, 524 U.S. 624, 625 (1998) (reasoning that an HIV patient’s failure to bear children because of the risk posed to her husband and potential child suffered a limitation of a major life activity, reproduction, and therefore fell under the protection of the ADA). Although *Bragdon* is still the law of the land and offers other courts the opportunity to provide reasonable accommodations to those with infertility-related illnesses, courts are attempting to limit the impact of *Bragdon*. See *Saks v. Franklin Covey Co.*, 316 F.3d 337, 348 (2d Cir. 2003) (finding that the insurance plan did not violate the ADA because it offered the same insurance coverage to all its employees, male and female, once again applying the *Gilbert* neutrality principle). But see *Pacourek v. Inland Steel*, 858 F. Supp. 1393 (N.D. Ill. 1994) (holding that reproduction can constitute a major life activity and is covered under the ADA).

163. Sato, *supra* note 82, at 201–03.

undergoing infertility treatment and provides accommodations reasonably necessary to complete treatment successfully.

Courts, empowered by precedent, should interpret the PDA favorably for women who are discriminated against and denied equal opportunity in the workforce. Judicial trends do not seem likely to interpret both the PDA and the ADA together favorably for infertile women.¹⁶⁴ Legislative history may, however, provide the additional guidance courts need to proceed in this direction.¹⁶⁵ Congressional outrage after *Gilbert* stemmed from the premise that women should be afforded the same opportunity to advance in the workforce as men, respecting the right of women to have both children and a career.¹⁶⁶ At the time, ARTs were in their infancy and therefore it is no surprise that Congress did not mention infertility treatment specifically. Nor could Congress expect to comprehend the magnitude of women who would seek treatment in the next thirty years and beyond, let alone the special burden women would carry in the quest to successfully conceive a child.¹⁶⁷ Further, the ADA Amendments Act of 2008 (ADAAA), effective January 1, 2009, broadens the scope of those covered under the ADA as disabled, specifically including reproductive function as a major life activity. The ADAAA thus provides additional hope for women experiencing discrimination because of infertility-related illness that courts will construe the ADA and PDA in their favor.¹⁶⁸

164. The legal community waited for the holding in *Saks*, the first case to be decided after the *Bragdon* holding, to see how the court would interpret insurance cases under the ADA and PDA, and the court once again did not find favorably for women with infertility issues. *Saks*, 316 F.3d 337.

165. Jamie L. Clayton, Note, *Toward Eradicating Pregnancy Discrimination at Work: Interpreting the PDA to "Mean What It Says,"* 86 IOWA L. REV. 703, 709–10 (2001).

166. *Id.*

167. See Naretto, *supra* note 10, at 469 (arguing that Congress did not intend the PDA to be so narrowly interpreted by courts as to only apply to the specific factual situations presented in Congressional argument or Supreme Court cases).

168. Although the ADA Amendments Act of 2008 (ADAAA) broadens the scope of those considered disabled under the ADA, it is unclear whether the ADAAA will substantially affect the legal position of women undergoing infertility treatment. However, the ADAAA provides that the Act be construed in favor of broad coverage and that it is Congress's intent that the primary issue in ADA cases should be whether employers have discriminated based on disability as opposed to whether the individual's impairment constitutes a disability. ADA Amendments Act of 2008, 42 U.S.C. § 12101 (2008).

Congress has sent the message that it is not in the interest of the United States to support discriminatory policies against women that disadvantage them in the workforce.¹⁶⁹ Moreover, Justice Stevens's dissent in *Gilbert* articulated that "it is the capacity to become pregnant which primarily differentiates the female from the male."¹⁷⁰ In *Hall*, the court harkened back to the congressional intent of the PDA: to protect women with the capacity to become pregnant from discrimination targeting their decision to achieve conception and preventing them from equal opportunity in the workforce.¹⁷¹

CONCLUSION

The female desire to bear children is deep-seated, and womanhood is often intrinsically linked to childbirth.¹⁷² Congress enacted the PDA to maintain the integrity of pregnancy as women entered the workforce.¹⁷³ Interpretations of the PDA across federal circuit courts have failed to provide consistent guidance to women discriminated against because of their choice to undergo infertility treatments, possibly the last hope of conceiving a child.¹⁷⁴

While the PDA's intent was sound, the neutrality principle espoused in *Gilbert* found its way into interpretations of the PDA and the inclusion of infertility as a pregnancy-related condition. Some courts have determined that because infertility can affect men and women it is not a pregnancy-related condition.¹⁷⁵ Other courts, however, have recognized that infertility is fundamentally linked to a woman's ability to bear children and is therefore pregnancy-

169. See Clayton, *supra* note 165, at 709.

170. Gen. Elec. Co. v. Gilbert, 429 U.S. 129, 162 (1976) (Stevens, J., dissenting).

171. Hall v. Nalco Co., 534 F.3d 644 (7th Cir. 2008).

172. See, e.g., JON L. BERQUIST, CONTROLLING CORPOREALITY: THE BODY AND THE HOUSEHOLD IN ANCIENT ISRAEL 75 (2002); DIANA TIETJENS MEYERS, GENDER IN THE MIRROR: CULTURAL IMAGERY AND WOMEN'S AGENCY 46-47 (2002).

173. See discussion *supra* Part I; see also sources cited *supra* note 48.

174. See also Naretto, *supra* note 10, at 448-60 (highlighting that employers are enabled to hide behind the PDA when executing discriminatory policies).

175. See discussion *supra* Part II.

related.¹⁷⁶ *Hall* deviates from the later stance slightly by classifying the specific procedure as a problem of childbearing capacity, distinctly female, as opposed to infertility, a problem affecting males and females.¹⁷⁷

The congressional intent behind the PDA, *Newport News*, and *Johnson Controls* are used to support the analysis of both insurance coverage cases and wrongful discharge cases yet reach significantly different outcomes.¹⁷⁸ Courts have been extremely hesitant to extend insurance benefits to women seeking infertility treatment, a significant barrier to couples without significant financial resources.¹⁷⁹ While this trend is expected to continue, some courts may be open to extending relief to women wrongfully discharged for seeking infertility treatment.¹⁸⁰

The PDA affords women protection equal to that of other disabled persons in the same workplace, but it does not recognize the specific challenges related to invasive infertility treatment.¹⁸¹ This will surely become an obstacle to relief unless courts use the ADA to require reasonable accommodations.¹⁸² It is unlikely that Congress will amend the PDA to specifically include infertility treatments as a pregnancy-related condition in the near future.

The decision in *Hall* created a foundation for stable jurisprudence to guide women when they are seeking answers about their rights and responsibilities under the law. Infertility in and of itself manifests deep uncertainty, stress, and fear in those afflicted.¹⁸³ The law should

176. See *Pacourek v. Inland Steel*, 858 F. Supp. 1393 (N.D. Ill. 1994); *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995).

177. See *supra* text accompanying notes 125–34.

178. Compare *Saks v. Franklin Covey Co.*, 316 F.3d 337 (2d Cir. 2003), and *Krauel v. Iowa Methodist Med. Ctr.*, 915 F. Supp. 102 (S.D. Iowa 1995), *aff'd*, 95 F.3d 674 (8th Cir. 1996) (declining to link infertility treatments to pregnancy-related conditions) with *Hall v. Nalco Co.*, 534 F.3d 644 (7th Cir. 2008); *Pacourek v. Inland Steel*, 858 F. Supp. 1393 (N.D. Ill. 1994); and *Erickson v. Bd. of Governors of State Colls. & Univs. for Ne. Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995) (allowing women undergoing infertility treatments to state a claim under the PDA).

179. Hawkins, *supra* note 5, at 208–14.

180. See *Hall*, 534 F.3d 644; *Pacourek*, 858 F. Supp. 1393; *Erickson*, 911 F. Supp. 316.

181. See discussion *supra* Part III.

182. See D'Andrea Millsap, *Sex, Lies, and Health Insurance: Employer-Provided Health Insurance Coverage of Abortion and Infertility Services and the ADA*, 22 AM. J.L. & MED. 51, 52–56 (1996); Sato, *supra* note 82, at 190.

183. Balen & Inhorn, *supra* note 77, at 15.

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not compound the illness by leaving women vulnerable to employment discrimination. Courts should recognize a woman's childbearing capacity—a function of the success of invasive infertility treatments that disparately affect women—as a pregnancy-related condition under the PDA as they did in *Hall*. In addition, the courts need to reinforce this decision with reasonable accommodations under the ADA to account for unique biological challenges that invasive infertility treatments impose.

