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

Niche DeVries

INTRODUCTION

While infertility may have always posed an obstacle to conception, scientific advancements have made it possible for the afflicted to conceive with the help of assisted reproductive technologies (ARTs). For women, ARTs, however, are often expensive and invasive procedures. In 2006, approximately 6.1 million Americans of reproductive age were affected by infertility-related illness, forty percent related to female factors. 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. 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.


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).


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insurance policies that do not cover infertility treatments to combating discriminatory policies against employees undergoing treatment and fetal protection policies. 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.

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 1964 “not for the gender-neutral condition of infertility, but rather for the gender-specific quality of childbearing capacity.” This ruling reversed the lower court decision finding the Pregnancy Discrimination Act (PDA) under Title VII does not protect infertility alone. 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.

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.
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., 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. While case law and legal scholarship surrounding this landmark legislation developed, so did the availability of advancements in reproductive technology.

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).


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).


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 & Assoc., 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 VII 31 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

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.


type of maternity leave. Women who became pregnant were simply fired. A mere six percent of employers allowed women to use sick leave for pregnancy-related illness or disability. 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.

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. 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. 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. Therefore, the Court subverted applying heightened scrutiny to the insurance policy because gender, a suspect class deserving of heightened scrutiny, was not at issue.

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. In March of 1977,
Senator Harrison Williams introduced the PDA to amend Title VII. The PDA expanded the definition of "sex" to include pregnancy and related illnesses, specifically rejecting the Supreme Court's interpretation of Title VII in *Gilbert*.

The Congressional Record shows that the bill was designed to ensure that working women would not be discriminated against because of pregnancy. The bill passed on October 31, 1978, with provisions for fringe and insurance benefits to take effect 180 days after its passage. 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.

Once the PDA became law, the judicial system was left to decide the extent of the PDA's coverage. 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. Pregnant employees, therefore, are not granted special consideration for excessive

45. GLEB & PALLEY, supra note 34, at 168.
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*.")
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.\textsuperscript{53}

C. Perspectives on Gender Discrimination

As the number of people wishing to pursue treatment for infertility-related illnesses increases,\textsuperscript{54} so does the need to provide employers and employees with consistent legal guidance.\textsuperscript{55} In some instances, courts have defined infertility as an illness when analyzing whether it qualifies as a gender-neutral condition.\textsuperscript{56} In other cases, such as the recently decided \textit{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.\textsuperscript{57}

Appropriate analysis of judicial decision-making regarding gender discrimination cases requires recognition that alternate theories of gender discrimination influence courts in various ways.\textsuperscript{58} Originally, "equal treatment" theories of gender equality, as the name implies, sought to equalize the treatment of women and men.\textsuperscript{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.\textsuperscript{60} Thus,

\begin{itemize}
  \item \textsuperscript{53} See \textit{Troupe}, 20 F.3d 734 (determining that excessive tardiness and absenteeism are not protected by Title VII and the PDA); \textit{Byrd}, 30 F.3d 1380. See generally Judith G. Greenberg, \textit{The Pregnancy Discrimination Act: Legitimating Discrimination Against Pregnant Women in the Workforce}, 50 Me. L. Rev. 225 (1996).
  \item \textsuperscript{54} See sources cited \textit{supra} note 4.
  \item \textsuperscript{55} Bentley, \textit{supra} note 6, at 392.
  \item \textsuperscript{56} See \textit{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).
  \item \textsuperscript{57} \textit{Hall v. Nalco Co.}, 534 F.3d 644, 649 (7th Cir. 2008).
  \item \textsuperscript{59} See A WOMAN MAKING HISTORY: MARY RITTER BEARD THROUGH HER LETTERS, \textit{supra} note 28; Evans, \textit{supra} note 28, at 274; Bell Hooks, \textit{Feminism Is for Everybody, Passionate Politics} 1–3 (2000).
  \item \textsuperscript{60} One example is the Equal Rights Amendment proposed numerous times in Congress, but never passed. Barnes, \textit{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, \textit{supra} note 28. Only thirty-five of the
\end{itemize}
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

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61. See FEMINIST LEGAL THEORY: FOUNDATIONS 124 (D. Kelly Weisberg ed., 1993); Radford, supra note 58, at 478.
conditions are to be treated the same as those similarly situated by a disability.\textsuperscript{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.\textsuperscript{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.\textsuperscript{69} Some courts continue to apply the principles espoused in \textit{Gilbert} when determining the application of the PDA to infertility-related conditions.\textsuperscript{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.\textsuperscript{71}

\section*{II. Variations on a Theme: Judicial Interpretations of Infertility}

The Supreme Court's 1991 decision in \textit{International Union v. Johnson Controls} applied the \textit{Gilbert} neutrality principle to fertility-

\textsuperscript{67} See Magid, \textit{supra} note 63, at 824, and Page, \textit{supra} note 66, at 13, for a discussion on how these clauses are interpreted.

\textsuperscript{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. \textit{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).

\textsuperscript{69} \textit{See} Bentley, \textit{supra} note 6, at 392; \textit{see also} Kay, \textit{supra} note 27, at 3-8 (posing that the Supreme Court has swayed the balance of power between men and women unequally).

\textsuperscript{70} While courts have explicitly rejected the \textit{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. \textit{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), \textit{aff'd}, 95 F.3d 674 (8th Cir. 1996); 2 SUSAN M. OMILIAN & JEAN P. KAMP, SEX-BASED EMPLOYMENT DISCRIMINATION § 20:3 (2009).

related illness. 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. 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.

Despite the espoused gender neutrality principles, the Seventh Circuit has used Johnson Controls to provide relief to women discriminatorily dismissed while undergoing infertility treatment. The following section explores the differences in analysis among courts as they wade 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?

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. 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.
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. The particular risks to women become even more apparent when reproductively healthy women undergo treatments because of an infertile partner. In many instances, the female partner undergoes invasive ART procedures because her partner’s illness does not facilitate conception. In these cases ARTs simulate conception in the lab and doctors surgically implant the embryo, increasing the risk to the male’s healthy partner.

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

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.
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.
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.
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

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).
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. The Krauel court rejected the notion that infertility presents sufficient similarity to potential pregnancy because infertility is gender-neutral while pregnancy is female-specific.

In Saks v. Franklin Covey Co., the Second Circuit similarly upheld the practice of excluding fertility treatments from inclusion in insurance benefit plans. 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. 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.

The circuit court rejected the district court’s argument, recognizing that Congress specifically rejected Gilbert when enacting the PDA. Although the court noted that the PDA protects more than pregnancy itself, they declined to extend those protections to infertility-related conditions, thus limiting the scope of the PDA. 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.

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 Llewelly & Kate Osborne, Women’s Lives 133-37 (1990); Toni Weschler, Taking Charge of Your Fertility 18-26 (2002).
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. 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. Infertility discrimination claims have been successful in other circuits, also applying Johnson Controls to support the plaintiff’s claims.

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. The plaintiff was diagnosed with esophageal reflux, a condition preventing natural pregnancy. 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.

The court in Pacourek held that classifications based on potential pregnancy or intentions to become pregnant are covered by the PDA. Rejecting the neutrality principles in Gilbert and embracing the potential pregnancy language in Johnson Controls, 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.
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.”

The Seventh Circuit relied heavily on the Supreme Court’s holding in Johnson Controls. Johnson Controls implied in its holding that classifications based solely on infertility are not violations of the PDA. 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. The court reasoned that Congress did not intend the PDA to protect both genders, only women. However, the Seventh Circuit highlighted that Johnson Controls does recognize that potential pregnancy and childbearing capacity are within the scope of the PDA. 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.

Focusing on the specific IVF procedure 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. 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.” The gender specific demands of infertility treatment suggest that women

126. Hall, 534 F.3d at 649.
127. Id.
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.
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.\footnote{136}

\section*{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 conditions\footnote{137} while at the same time recognizing that women and men do have unique biological characteristics.\footnote{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.\footnote{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.\footnote{140} Indeed, in \textit{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."\footnote{141}

Some courts have treated pregnancy-related conditions as an immutable characteristic which at no time should interfere with productivity.\footnote{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

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\footnotesize{136. Bentley, supra note 6, at 394–95.}
\footnotesize{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.}
\footnotesize{138. Eldredge, supra note 65, at 884.}
\footnotesize{139. 45 AM. JUR. 2D Job Discrimination § 138 (2009); Manners, supra note 98, at 219.}
\footnotesize{140. Eldredge, supra note 65, at 884.}
\footnotesize{141. Troupe, 20 F.3d at 738. The PDA does not mandate treatment of pregnant employees, but does require that employers 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).}
\footnotesize{142. Manners, supra note 98, at 219.}
\end{flushright}
duties in the workplace. 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.

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. This approach directly conflicts with the purpose of the PDA: to combat discrimination that prevents women from advancing in the workplace.

While some courts have argued that Congress did not design the PDA to force employers to suffer economic hardship by providing special treatment, 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.

(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; Kobyak, supra note 40, § 10[b].
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).
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.  

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.

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, while at the same time recognizes the unique biological characteristics of women that interconnects pregnancy and fertility.

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. 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).

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...
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.
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).
CONCEIVING EQUALITY

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. Moreover, Justice Stevens’s dissent in Gilbert articulated that “it is the capacity to become pregnant which primarily differentiates the female from the male.” 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.

CONCLUSION

The female desire to bear children is deep-seated, and womanhood is often intrinsically linked to childbirth. Congress enacted the PDA to maintain the integrity of pregnancy as women entered the workforce. 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.

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. Other courts, however, have recognized that infertility is fundamentally linked to a woman’s ability to bear children and is therefore pregnancy-related.

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

177. See supra text accompanying notes 125-34.
180. See Hall, 534 F.3d 644; Pacourek, 858 F. Supp. 1393; Erickson, 911 F. Supp. 316.
181. See discussion supra Part III.
183. Balen & Inhorn, supra note 77, at 15.
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.