SCHOOL OF LAW
CASE WESTERN RESERVE UNIVERSITY

Case Western Reserve Law Review

Volume 53 | Issue 2

2002

# Sex Discrimination or a Hard Pill for Employers to Swallow: Examining the Denial of Contraceptive Benefits in the Wake of *Erickson v. Bartell Drug Co.*

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# SEX DISCRIMINATION OR A HARD PILL FOR EMPLOYERS TO SWALLOW:

# EXAMINING THE DENIAL OF CONTRACEPTIVE BENEFITS IN THE WAKE OF *ERICKSON V. BARTELL DRUG CO.*

## INTRODUCTION

When Viagra was first introduced to the marketplace, it had an immediate and far-reaching impact on American culture. Often viewed as a miraculous drug for its ability to cure male erectile dysfunction, Viagra has done much more than fuel the male sexual libido; Viagra has also inspired many women to protest the perceived inequity in their employers' benefits packages.[1] Although reversible contraception has for decades typically not been covered by employee health plans, Viagra was in many cases fully covered as a prescription benefit immediately following its introduction.[2]

Numerous legal scholars, women's rights groups, medical professionals, and family planning specialists have begun demanding that women receive greater access to contraceptive benefits. Citing not only claims of sexual and pregnancy-related discrimination due to longstanding denials by employers and insurers for such coverage, these groups also point to the severe physical, emotional, social, and economic consequences that flow from a lack of access to affordable

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[1] *See* Debra Baker, *Viagra Spawns Birth Control Issue*, A.B.A. J., Aug. 1998, at 36 (suggesting that it took the immediate insurance coverage of Viagra to illustrate that the denial of contraceptive benefits may in fact be discriminatory); Kim H. Finley, Comment, *Life, Liberty, and the Pursuit of Viagra? Demand for "Lifestyle" Drugs Raises Legal and Public Policy Issues*, 28 CAP. U. L. REV. 837, 839, 863 (2000) (discussing the increased calls for broader contraceptive benefits due to the widespread coverage of Viagra by insurers); Amy Goldstein, *Viagra's Success Fuels Gender Bias Debate: Birth Control Advocates Raise Issue*, WASH. POST, May 20, 1998, at A1 (noting that broad insurance coverage for Viagra "is producing howls of frustration from many physicians and women's rights advocates who have been waging a long, arduous campaign" for prescription contraceptive benefits).

[2] *See* Goldstein, *supra* note 1, at A1 (finding that within five weeks of Viagra's introduction to the U.S. market, prescriptions for the drug were subsidized under health plans nearly as often as birth control pills and more frequently than other contraceptive methods).

and effective contraception.[3] To address this problem, a battle has begun on numerous fronts, aimed at guaranteeing women greater access to contraceptive benefits. As is typically the case in American society, one arena in which this battle is being fought is in the courtroom. In June 2001, the first victory for broader contraceptive benefits for women was claimed, when the court in *Erickson v. Bartell Drug Co.*[4] held that the denial of contraceptive benefits constituted sex discrimination.

The *Erickson* court held that an employer, providing a generally comprehensive prescription drug plan that selectively excluded prescription contraceptives, had discriminated on the basis of sex under the Pregnancy Discrimination Act (PDA), part of Title VII of the Civil Rights Act of 1964.[5] Specifically, the court found discrimination based on a disparate treatment claim, stating that "Bartell's prescription drug plan discriminates against . . . female employees by providing less complete coverage than that offered to male employees."[6]

Because of the national media attention that this case has garnered,[7] it will surely not be the last time the issue is litigated. Similar suits have already been filed,[8] and the court's reasoning in *Erickson* will certainly be challenged and scrutinized in future litigation. Still, this decision has far-reaching practical consequences, especially for self-insured businesses that provide prescription benefits to their employees.

This Note will argue that the reasoning employed by the court in *Erickson* was legally sound, although the court's decision would be

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[3] *See, e.g.*, NARAL FOUND., PRIVATE INSURANCE COVERAGE FOR CONTRACEPTION IMPROVES THE HEALTH OF WOMEN AND FAMILIES 1, 4 (2001) ("Access to highly effective contraception is important to improving women's overall health and in reducing unintended pregnancy and should be included as part of basic health care coverage."); Sylvia Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 364-68 (1998) (discussing how a lack of access to contraception contributes to unintended pregnancies, which in turn can result in harmful consequences for women, infants, and society).

[4] 141 F. Supp. 2d 1266 (W.D. Wash. 2001).

[5] *Id.* at 1276-77 (citing 42 U.S.C. §§ 2000e-2 – 2000e-17 (2000) (Title VII); 42 U.S.C. § 2000e(k) (2000) (PDA)).

[6] *Id.*

[7] *See, e.g.*, Lisa Girion, *Judge Orders Coverage of Birth Control*, L.A. TIMES, June 13, 2001, at A1; Sarah Schafer, *Judge Orders Firm to Cover Birth Control*, WASH. POST, June 13, 2001, at E1.

[8] *See, e.g.*, EEOC v. UPS, 141 F. Supp. 2d 1216 (D. Minn. 2001) (denying an employer's motion to dismiss an action asserting sex discrimination under Title VII); Lisa Girion, *Complaint Calls Airline Health Plans Unfair to Women*, L.A. TIMES, Apr. 24, 2001, at C1 (discussing recent charges filed with the EEOC based on an employee's lack of access to prescription contraception under her employer's health plan); Bill Rankin, *Wal-Mart Facing Class-Action Lawsuit: Lack of Worker Coverage for Birth Control Disputed*, ATLANTA J. AND CONST., Aug. 31, 2002, at F1 (reporting that lawsuits have been filed against both Wal-Mart and CVS in an Atlanta federal district court based on the denial of prescription contraceptive benefits for female employees).

less vulnerable to future attack if premised on a disparate impact theory rather than on the disparate treatment of the employees. Furthermore, this Note will attempt to more clearly define the scope of the court's ruling and will critically examine the practical meaning of this decision for employers. Ultimately, given the long-term cost savings employers will realize by providing contraceptive benefits to employees, businesses should embrace the court's decision sooner rather than later.

Part I discusses why affordable and accessible contraceptive benefits are so important for women and for society as a whole. Part II reviews the judicial and legislative history that led up to the *Erickson* decision and on which that decision is grounded. Part III discusses and analyzes the basis for the *Erickson* decision, ultimately concluding that, while the court's decision was legally viable, it is vulnerable to future attack because the court's holding was based on a theory of disparate treatment rather than disparate impact. Finally, Part IV examines the practical meaning and potential future influence of *Erickson* as applied to businesses and employers, while incorporating an economic analysis that justifies providing contraceptive benefits for women.

## I. THE IMPORTANCE OF WIDESPREAD AND AFFORDABLE CONTRACEPTIVE BENEFITS

Nearly half of all pregnancies in the United States are unintended, including 31% of pregnancies among married women.[9] Furthermore, unintended pregnancies typically result in severe consequences for the mother, the baby, and society.[10] Unintended pregnan-

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[9] Stanley Henshaw, *Unintended Pregnancy in the United States*, FAMILY PLANNING PERSPECTIVES, Jan.-Feb. 1998, at 26, 26-27. In 1994, 49% of all pregnancies in the United States, or 2.65 million out of 5.38 million, were unintended. Not including miscarriages, 54% of these unintended pregnancies ended in an abortion, while 46% of women carried the fetus to term. *Id.* at 26. Other studies have placed the number of unintended pregnancies near 60%. *See* INST. OF MEDICINE, THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES 1 (Sarah S. Brown & Leon Eisenberg eds., 1995) (finding that the percentage of unintended pregnancies in the United States exceeds other Western democracies and impacts all demographic groups within American society).

[10] *See, e.g.*, *Erickson*, 141 F. Supp. 2d at 1272-74 (examining the large body of research that suggests that contraceptives serve a vital health care need by reducing the number of unintended pregnancies); ALAN GUTTMACHER INST., ISSUES IN BRIEF: U.S. POLICY CAN REDUCE COST BARRIERS TO CONTRACEPTION 1 (2000), *available at* http://www.guttmacher.org/pubs/ib_0799.html (last visited Oct. 5, 2002) [hereinafter COST BARRIERS TO CONTRACEPTION] ("Unintended pregnancies have ramifications for individual and public health."); NARAL FOUND., *supra* note 3, at 4 (discussing an assortment of studies and reports that detail the costs associated with unplanned pregnancies and that support the need for more widely available contraceptive benefits for women); Law, *supra* note 3, at 364-72 (describing comprehensively the myriad of costs associated with unintended pregnancies and women's lack of access to affordable and effective contraceptive benefits).

cies commonly result in a lack of adequate prenatal care, unhealthy maternal activities (such as smoking and consuming alcohol while pregnant), abortions, and the delivery of low birth weight or ill babies.[11] Furthermore, unintended pregnancies place substantial, unplanned financial obligations on the parents.[12] Given the incidence of low birth weight and ill babies as a result of unplanned pregnancies,[13] the financial burden placed on the mother and society as a whole can be even greater.

Although broad access to affordable contraception would not put an end to unplanned pregnancies, contraceptive use would certainly reduce their incidence.[14] One study found that while less than ten percent of sexually active pre-menopausal American women are not practicing contraception, these women account for nearly half of the unplanned pregnancies each year.[15] Another study found a 16% decrease in the number of unintended pregnancies in the United States from 1987 to 1994, at least partially attributable to the "increase in widespread and effective contraceptive use."[16] Also, it is estimated that access to contraception could reduce the incidence of low birth weight babies by 12% and infant mortality rates by 10%.[17] Such a reduction would necessarily translate into less physical and emotional strain being placed on women and babies, as well as a reduction in the often sizable costs associated with these events. Furthermore, studies indicate that widespread access to reliable contraception would substantially reduce the number of abortions performed annually in the United States.[18]

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[11] INST. OF MEDICINE, *supra* note 9, at 81 (detailing the harm that can flow from an unplanned pregnancy, including a woman being at greater risk of physical abuse and abandonment by her partner and a baby being at greater risk of physical abuse and death before the baby's first birthday).

[12] *See id.* ("Both mother and father may suffer economic hardship and fail to achieve their educational and career goals.").

[13] *See id.* (stating that an unplanned pregnancy can result in a greater risk of the baby "weighing less than 2,500 grams at birth," or approximately 5.5 pounds).

[14] *See* NARAL FOUND., *supra* note 3, at 4 (citing a study that found that the majority of Americans believe that the high cost and lack of access to contraception contributes to the number of unintended pregnancies).

[15] *See* ALAN GUTTMACHER INST., FACTS IN BRIEF: CONTRACEPTIVE USE 1 (1998), *at* http://www.guttmacher.org/pubs/fb_contr_use.html (last visited Nov. 1, 2002) [hereinafter CONTRACEPTIVE USE] (providing general statistics on contraceptive usage, access, and unplanned pregnancies).

[16] Henshaw, *supra* note 9, at 29. For a discussion of the increase in contraceptive use by women, see Linda J. Piccinino & William D. Mosher, *Trends in Contraceptive Use in the United States*, FAMILY PLANNING PERSPECTIVES, Jan.-Feb. 1998, at 5.

[17] NARAL FOUND., *supra* note 3, at 4.

[18] *See* ALAN GUTTMACHER INST., ISSUES IN BRIEF: THE ROLE OF CONTRACEPTION IN REDUCING ABORTION 2 (1997), *available at* http://www.guttmacher.org/pubs/ib19.html (last visited Oct. 5, 2002) [hereinafter ROLE OF CONTRACEPTION IN REDUCING ABORTION] (finding that "contraception reduces the probability of having an abortion by 85% . . . . most of the unintended pregnancies and a disproportionate share of the resulting abortions occur among the 10% of women who use no method of birth control").

Contraceptive use is a reality for most women over a large portion of their lives. The average woman spends over twenty years trying to avoid pregnancy.[19] During this period, absent any birth control, a sexually active woman could have twelve to fifteen pregnancies.[20] As an average American woman hopes to have two children,[21] effective, affordable, and reliable birth control is a necessity. There are currently five prevalent forms of reversible prescription contraception.[22] These include birth control pills, Norplant (implanted contraception), Depo-Provera (injected contraception), intra-uterine devices (IUDs), and diaphragms, all of which are available only to women.[23]

Every year, forty-two million U.S. women are at risk for an unplanned pregnancy.[24] While many of these women have some form of private insurance coverage, they cannot get access to affordable prescription contraception due to a lack of insurance subsidization.[25] It is estimated that three-fourths of U.S. women of childbearing age receive benefits through a private, employer-related health plan.[26] These benefits are typically delivered through a traditional large group indemnity plan, a Health Maintenance Organization (HMO), a Preferred Provider Organization (PPO), or a Point of Service network (POS).[27] Many of these plans do provide prescription benefits but exclude coverage for contraceptives.[28] A recent 2000 study found that 60% to 87% of employers who use one of the four types of employer-related health plans provided some form of contraceptive prescription benefits to their employees.[29] This constituted an increase from three years earlier, when an estimated 35% of small company

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[19] *See* CONTRACEPTIVE USE, *supra* note 15, at 1.

[20] *See* NARAL FOUND., *supra* note 3, at 4.

[21] *See* ROLE OF CONTRACEPTION IN REDUCING ABORTION, *supra* note 18, at 1.

[22] *See* NARAL FOUND., *supra* note 3, at 1. Reversible contraception refers to contraception that does not permanently render a person incapable of conceiving. A vasectomy and tubal ligation are two methods that, for practical purposes, are not reversible forms of contraception. *See* Law, *supra* note 3, at 368-72 (discussing the various contraceptive methods available in the United States).

[23] *See id.*; Lisa A. Hayden, *Gender Discrimination within the Reproductive Health Care System: Viagra v. Birth Control*, 13 J.L. & HEALTH 171, 177-80 (1999) (describing comprehensively the five most common methods of reversible prescription contraception).

[24] *See* CONTRACEPTIVE USE, *supra* note 15, at 1 (stating that seven in ten women of reproductive age are sexually active but wish to avoid pregnancy).

[25] *See* Rachel Benson Gold et al., *Mainstreaming Contraceptive Services in Managed Care – Five States' Experiences*, FAMILY PLANNING PERSPECTIVES, Sept.-Oct. 1998, at 204, 204 (discussing the implications of the shift from traditional insurance plans to managed care insurance plans on the subsidization of prescription contraception).

[26] *See id.* (defining childbearing age as being aged fifteen to forty-four).

[27] For definitions of these various plans, see *infra* notes 31, 36, 39.

[28] *See* Gold et al., *supra* note 25, at 205.

[29] Lisa Girion, *Costs and Benefits; Employers Weighing Birth Control Coverage Consider Other Factors Besides the Upfront Expense*, L.A. TIMES, June 24, 2001, at W1 ("The likelihood that an employee has job-related contraceptive coverage varies, depending on company size and the types of insurance plans, if any, that are offered.").

indemnity plans and 68% of large company HMO plans offered some form of coverage.[30]

Among typical large group insurance plans, 49% do not cover any of the five methods of reversible prescription contraception.[31] This limitation in coverage exists even though 97% of these plans provide for some form of prescription drug coverage.[32] The most popular reversible contraceptive method among American women, the oral contraceptive, is covered by only 33% of these large group plans.[33] Many women cannot use certain methods of birth control for medical reasons, thus necessitating that another method be available to them.[34] In fact, only 15% of large group insurance plans cover all five methods, even though alternative contraceptive choices are essential to a woman's health and well being.[35]

HMO plans fare slightly better in providing women access to contraceptives as 93% cover at least one contraceptive method.[36] Still, only 39% of HMO plans routinely cover the five methods listed above, and even when an HMO does cover a Norplant insertion or the insertion of an IUD, the devices themselves are not regularly covered under existing insurance policies.[37] The devices must then be paid for out-of-pocket, with Norplant costing approximately $450 and an IUD costing $240.[38]

PPO plans and POS networks reveal a similar pattern in coverage gaps for contraception.[39] Forty-nine percent of PPO plans and 19% of POS networks typically provide no coverage for any method of reversible prescription contraception.[40] Only 18% and 33%, respectively, will regularly cover all five forms of contraception.[41] These plans also regularly fail to cover contraceptive devices, result-

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[30] *Id.*

[31] COST BARRIERS TO CONTRACEPTION, *supra* note 10, at 2 (defining large group insurance plans as traditional fee-for-service indemnity plans written for 100 or more employees).

[32] *Id.*

[33] *Id.*

[34] *See* NARAL FOUND., *supra* note 3, at 1 (noting that, for example, many women cannot use hormonally based contraceptives such as birth control pills, necessitating access to other forms of contraception).

[35] COST BARRIERS TO CONTRACEPTION, *supra* note 10, at 2. *See also* EEOC, Decision on Coverage of Contraception (Dec. 14, 2000), *available at* http://www.eeoc.gov/docs/decision-contraception.html (last visited Nov. 1, 2002) [hereinafter EEOC Decision] (discussing the importance of women having access to all five forms of prescription contraception).

[36] COST BARRIERS TO CONTRACEPTION, *supra* note 10, at 3 (stating that a traditional HMO is where "participants may obtain a wide range of care, but through a limited network of providers").

[37] NARAL FOUND., *supra* note 3, at 1.

[38] *See* COST BARRIERS TO CONTRACEPTION, *supra* note 10, at 2.

[39] These are systems where "enrollees have considerable flexibility in their choice of providers but pay more out of pocket if they do not use a designated or network provider." *Id.* at 3.

[40] NARAL FOUND., *supra* note 3, at 2.

[41] *Id.*

ing in insurance subsidization when an IUD is inserted, but no coverage for the actual cost of the IUD.[42] Additionally, it is interesting to note that regardless of contraceptive coverage, large group plans, HMOs, PPOs, and POS networks routinely cover surgical sterilization, abortion, and maternity care.[43]

Primarily due to large gaps in coverage for prescription contraception, women of reproductive age spend, on average, 68% more in out-of-pocket health care costs than men.[44] Without insurance coverage, women will typically pay anywhere from $300 to $700 annually for contraception, depending on the method best suited for them.[45] Furthermore, according to one study, 85% of women aged twenty to forty-four who have ever been sexually active report using oral contraceptives at some point in their lives.[46] The cost of oral contraceptives is estimated at $360 annually.[47] Since one in six women between the ages of fifteen to forty-four have household incomes below 150% of the federal poverty level,[48] this expense can be prohibitive, driving these women to use birth control less frequently or to rely on less effective methods of contraception.[49] Also, while most private

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[42] *See id.* (noting that while 46% of POS networks cover IUDs and diaphragms, only 25% of PPOs cover IUDs and only 23% insure for diaphragms).

[43] *See id.* at 1 (discussing inclination of insurers to cover surgical procedures rather than preventive care, regardless of costs); *see also* COST BARRIERS TO CONTRACEPTION, *supra* note 10, at 3 (noting that nearly nine out of ten health plans cover sterilization, and abortion is covered by two-thirds of all plans).

[44] *See* NARAL FOUND., *supra* note 3, at 3 (finding that "reproductive health care services account[] for much of the difference" in health care expenses between men and women).

[45] *See* COST BARRIERS TO CONTRACEPTION, *supra* note 10, at 2 (explaining that supplies alone can cost $450 for Norplant and $240 for an IUD, not including the expense associated with the outpatient doctor visits needed to attain the contraception).

[46] *See* JACQUELINE E. DARROCH, ALAN GUTTMACHER INST., COST TO EMPLOYER HEALTH PLANS OF COVERING CONTRACEPTIVES 4 (1998), *available at* http://www.guttmacher.org/pubs/kaiser_0698.html [hereinafter COST TO EMPLOYER HEALTH PLANS] (finding that birth control pills are the most prevalent form of reversible contraception in use in the United States, with nearly equal levels of usage regardless of age, race, geographic location, marital status, education, or income).

[47] COST BARRIERS TO CONTRACEPTION, *supra* note 10, at 2.

[48] CONTRACEPTIVE USE, *supra* note 15, at 1.

[49] *See* ALAN GUTTMACHER INST., ISSUES IN BRIEF: CONTRACEPTION COUNTS: STATE-BY-STATE INFORMATION 1 (1999), *available at* http://www.guttmacher.org/pubs/ib22.html [hereinafter CONTRACEPTION COUNTS] (explaining that lower-income women often use birth control incorrectly, do not use contraception regularly due to the cost, or cannot afford a more reliable method of birth control); Jacqueline Darroch Forrest & Jennifer J. Frost, *The Family Planning Attitudes and Experiences of Low-Income Women*, FAMILY PLANNING PERSPECTIVES, Nov.-Dec. 1996, at 246, 246 (finding that in one study 74% of pregnancies to women living 150% below the federal poverty line were unplanned, as opposed to 52% of pregnancies among higher income women). It should be noted that there are numerous free, publicly supported family planning services available to lower-income women through a variety of channels, although such services are not consistently accessed. *See generally* COST BARRIERS TO CONTRACEPTION, *supra* note 10, at 4-6 (describing the success that Medicaid and Title X have had in "improving the health and financial well-being of women and their children," but noting that these programs still need to be expanded); CONTRACEPTION COUNTS, *supra*, at 1 (noting that many women

health insurance policies cover outpatient medical services, they regularly exclude outpatient contraceptive services that are often vital to protecting and maintaining a woman's health.[50]

## II. THE EVOLUTION OF THE LAW PRIOR TO *ERICKSON*

### A. *The* Geduldig *and* Gilbert *Decisions*

To understand the basis of the court's decision in *Erickson*, the development of the law surrounding pregnancy-related sexual discrimination must be examined. One early case that dealt with this issue was *Geduldig v. Aiello*.[51] In *Geduldig*, the denial of coverage for normal pregnancy under the California disability insurance program was challenged under the Equal Protection Clause of the Fourteenth Amendment.[52] The program at issue paid benefits to "persons in private employment who are temporarily unable to work because of disability not covered by workmen's compensation."[53] The program was mandatory for all employees who did not have private coverage, and all employees had to pay one percent of their salary into the fund, up to a certain fixed annual amount. In the event of an extended disability that required absence from work or hospitalization, the employee could collect benefits under the program. The plan covered disabilities that included any physical or mental illness or injury that prevented employees from performing their normal work-related duties.[54] The plan specifically excluded any coverage for normal pregnancies.[55]

Justice Stewart, writing for the majority, held that denying pregnant women disability benefits did not violate the Equal Protection Clause. The majority justified this position primarily on the additional costs that would be incurred if the program covered disabilities arising from normal pregnancy.[56] The Court stated that California "ha[d] an interest in distributing the available resources in such a way

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living in poverty have no Medicaid or private insurance and may live far from publicly subsidized family planning centers); ALAN GUTTMACHER INST., FACTS IN BRIEF: CONTRACEPTIVE SERVICES 1-2 (1998) (detailing the myriad of services provided under federal and state supported Medicaid, as well as under Title X of the Public Health Service Act).

[50] *See* INST. OF MEDICINE, *supra* note 9, at 153 (discussing the need for routine pelvic examinations in order to receive oral contraceptives); NARAL FOUND., *supra* note 3, at 1-2 (noting that even when contraception is covered, the cost to visit the doctor to procure the contraception is often not covered).

[51] 417 U.S. 484 (1974).

[52] *Id.* at 486-87.

[53] *Id.* at 486.

[54] *See id.* at 487-89 (detailing how the benefits plan operated).

[55] *Id.* at 489 ("In no case shall the term 'disability' or 'disabled' include any injury or illness caused by or arising in connection with pregnancy up to the termination of such pregnancy and for a period of 28 days thereafter.").

[56] *Id.* at 495-97.

as to keep benefit payments at an adequate level for disabilities that are covered, rather than to cover all disabilities inadequately."[57] Furthermore, the Court held that excluding pregnancy from coverage did not discriminate against women:

> There is no evidence in the record that the selection of the risks insured by the program worked to discriminate against any definable group or class in terms of the aggregate risk protection derived by that group or class from the program. There is no risk from which men are protected and women are not. Likewise, there is no risk from which women are protected and men are not.[58]

The Court went on to state that "[t]he program divides potential recipients into two groups – pregnant women and nonpregnant persons."[59] As both men and women constitute nonpregnant persons, the Court reasoned that benefits under the program were fairly delivered to both sexes.[60]

Writing in dissent, Justice Brennan noted that men received full compensation for many male-specific disabilities, while pregnancy, which affects only women, was specifically excluded. "In effect, one set of rules is applied to females and another to males. Such dissimilar treatment of men and women, on the basis of physical characteristics inextricably linked to one sex, inevitably constitutes sex discrimination."[61]

Two years after the decision in *Geduldig*, the Supreme Court revisited the issue of pregnancy-related sex discrimination in *General Electric Co. v. Gilbert*.[62] Although factually similar to *Geduldig*, the employees in *Gilbert* brought their claim under Title VII of the Civil Rights Act of 1964.[63] Title VII makes it unlawful for an employer to "discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[64] In *Gilbert*, female employees of General Electric brought a class action against the company. The employees asserted that the company's benefits plan was discriminatory because pregnancy was not a recognized disability that allowed for coverage under the plan. Following judgment

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[57] *Id.* at 496.
[58] *Id.* at 496-97.
[59] *Id.* at 496-97 n.20.
[60] *Id.*
[61] *Id.* at 501 (Brennan, J., dissenting).
[62] 429 U.S. 125 (1976).
[63] 42 U.S.C. §§ 2000e-2 – 2000e-17 (2000).
[64] 42 U.S.C. § 2000e-2(a)(1).

for the employees in the lower courts, a divided Court found in favor of the employer.[65]

Justice Rehnquist delivered the majority opinion, relying heavily on the Court's reasoning in *Geduldig*. "There is no more showing in this case than there was in *Geduldig* that the exclusion of pregnancy benefits is a mere 'pretext designed to effect an invidious discrimination against the members of one sex or the other.'"[66] Furthermore, the Court noted that "gender-based discrimination does not result simply because an employer's disability-benefits plan is less than all inclusive."[67] The Court also found that there was a presumed parity in coverage for both men and women, even though an added risk, namely pregnancy, was not covered by General Electric's disability plan.[68]

In dissent, Justice Brennan argued that General Electric's disability-benefits plan did in fact constitute sex discrimination under Title VII by excluding pregnancy from coverage. After discussing the relevance of Geduldig, Brennan stated that "it offends common sense to suggest that a classification revolving around pregnancy is not, at the minimum, strongly 'sex related.'"69 Joining in dissent, Justice Stevens wrote that "the rule at issue places the risk of absence caused by pregnancy in a class by itself. By definition, such a rule discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."70 Furthermore, Stevens concluded that "[t]he analysis is the same whether the rule relates to hiring, promotion, the acceptability of an excuse for absence, or the exclusion from a disability insurance plan."71

### *B. Congress' Response: Passage of the Pregnancy Discrimination Act (PDA)*

In response to the Court's decision in *Gilbert*, Congress passed the PDA in 1978.[72] The PDA builds on Title VII's prohibition against employer discrimination due to an employee's sex by incorporating pregnancy into the definition of discrimination "on the basis of sex."[73] Congress concluded that the majority in *Gilbert* had incor-

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[65] *Gilbert*, 429 U.S. at 125-26.

[66] *Id.* at 136 (quoting Geduldig v. Aiello, 417 U.S. 484, 496-97 n.20 (1974)).

[67] *Id.* at 138-39 (citation omitted).

[68] *Id.* at 139.

[69] *Id.* at 149 (Brennan, J., dissenting).

[70] *Id.* at 161-62 (Stevens, J., dissenting) (footnote omitted).

[71] *Id.* at 162 (Stevens, J., dissenting).

[72] Pregnancy Discrimination Act, Pub. L. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (2000)).

[73] 42 U.S.C. § 2000e(k) (2000). The PDA provides, in pertinent part:

> 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

rectly interpreted Title VII by not finding it discriminatory to deny disability benefits to pregnant employees.[74] The PDA's legislative history provides further support for the notion that the PDA was enacted to overrule the Court's decision in *Gilbert*.[75] On numerous occasions in the legislative record, members of Congress mentioned how the dissenting justices in *Gilbert* had in fact interpreted Title VII correctly.[76] Given the result in *Gilbert*, Congress felt it necessary to clarify the bounds of Title VII and assure that women would not be subject to further pregnancy-related sex discrimination.[77]

### C. *Coverage for Prescription Contraception Based on the PDA*

Although the PDA provided equal treatment for pregnant women in the sphere of employment, it did not specifically address the coverage of prescription contraception. This was to be expected, given that the PDA was specifically enacted in response to the denial of disability benefits for pregnant women.[78] In a 1998 article, Sylvia Law put forth one of the earliest legal arguments that prescription contraception should be covered under the PDA.[79] Law argued that the PDA did not solely cover pregnant women and could logically be interpreted to necessitate insurance coverage for prescription contraception.[80] Furthermore, she painstakingly noted the physical, social, and

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> 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 . . . .

[74] *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 678 (1983) ("When Congress amended Title VII in 1978, it unambiguously expressed its disapproval of both the holding and the reasoning of the Court in the *Gilbert* decision.").

[75] *See id.* at 678-82 (providing a thorough analysis of the legislative events surrounding the enactment of the PDA); Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1268-71 (W.D. Wash. 2001) (discussing extensively the legislative history of the PDA).

[76] *See Newport News*, 462 U.S. at 679 (concluding that congressional proponents of the PDA felt it "necessary to reestablish the principles of Title VII law as they had been understood prior to the *Gilbert* decision"); *Erickson*, 141 F. Supp. 2d at 1270 (citing congressional statements in support of Justice Brennan's and Justice Stevens' interpretation of Title VII).

[77] *See Newport News*, 462 U.S. at 678-82 (expressing that Congress's intent was to protect *all* workers including, but not limited to, pregnant women); *Erickson*, 141 F. Supp. 2d at 1270 (explaining that Congress passed the PDA in response to *Gilbert* and with it, set forth a broader interpretation of Title VII).

[78] *See Erickson*, 141 F. Supp. 2d at 1274 (explaining that when Congress enacted the PDA, it wanted to immediately remedy obvious pregnancy-related discrimination in the workforce, but had "no specific intent regarding coverage for prescription contraceptives.").

[79] Law, *supra* note 3.

[80] *Id.* at 377-83 (justifying extensively how contraceptive benefits do fall under the PDA's definition of "pregnancy, childbirth, and related medical conditions").

economic ills that were caused by a lack of affordable prescription contraception.[81]

Law concluded that denying coverage for prescription contraception did constitute sex discrimination under the PDA based on a disparate impact theory.[82] To prove disparate impact, an employee must demonstrate that "employer policies . . . are neutral in form but discriminatory in effect . . . . [T]he challenged employment practices 'in fact fall more harshly on one group than another, without justification.'"[83] Specifically, Law stated that the denial of contraceptive benefits for women was based on the "technological limitation" of prescription contraception being available only to women.[84] Therefore, "treating the exclusion of coverage for prescription contraceptives as a facially neutral policy that has a discriminatory impact upon women seems more appropriate."[85] Additionally, women typically bear the cost of obtaining prescription contraception, not to mention the physical and emotional burdens of pregnancy and childbirth, thus further demonstrating the disproportionate impact.[86]

In December 2000, the Equal Employment Opportunity Commission (EEOC) delivered a decision finding that the exclusion of prescription contraception from an otherwise comprehensive prescription drug plan constituted discrimination on the basis of pregnancy in violation of the PDA.[87] Two nurses brought charges against their employers, alleging that their health insurance plan unfairly discriminated against women by failing to cover prescription contraception. Although the plan covered numerous prescription drugs and preventive medical techniques, the plan did not cover any form of prescription contraception.[88] The employer argued that no discrimination was

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[81] *Id.* at 364-68 (finding that in addition to the potential harm caused to women by a lack of access to effective and affordable contraception, unwanted children are at greater risk for psychological disorders through infancy, adolescence, and adulthood).

[82] *Id.* at 374-75 (stating that such exclusion disproportionately affected women because women bear the out-of-pocket expense and bear all the risks and hassles of using contraceptives).

[83] *Id.* at 374 (quoting Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 681 (8th Cir. 1996)).

[84] *Id.* at 374.

[85] *Id.* Law also states that "[e]ven if technology were to make effective prescription contraception available to men, excluding contraception from insurance coverage would still disproportionately impact women. Women, and only women, bear all the *physical* burdens of unwanted pregnancy." *Id.* at 375.

[86] *See id.* at 374-75 (detailing the harsh impact a lack of contraceptive benefits can have on women and noting that more than twice as many women than men have health care costs exceeding ten percent of their income).

[87] EEOC Decision, *supra* note 35.

[88] *Id.* Included for coverage under the plan were vaccinations, weight loss drugs, drugs to control blood pressure and cholesterol levels, Viagra, and preventive dental care. *Id.*

present because, on its face, the benefits plan did not distinguish between the sexes.[89]

Based on the PDA, the EEOC stated that employers could not treat pregnant women differently from others unable to work.[90] The EEOC then extended its interpretation of the PDA to include protection for women based on the capacity to become pregnant.[91] Thus, pregnant women were not the only covered class under the PDA, but all women who had the capacity to become pregnant were entitled to protection from discrimination under the PDA.[92] The commission went on to conclude that, by denying female workers access to prescription contraception, women were being discriminated against based on their capacity to become pregnant.[93] This conclusion followed whether the woman sought birth control for pregnancy avoidance or for an entirely unrelated medical condition.[94]

Ultimately, the EEOC decision was based on two grounds: that a classification based on contraception was a classification based on pregnancy, and that denying contraceptive benefits amounted to disparate treatment.[95] Unlike the disparate impact theory, disparate treatment involves an "employer . . . treat[ing] some people less favorably than others because of their . . . sex."[96] The EEOC never reached a decision on whether a disparate impact claim, as suggested in the Law article, would also have merit.[97] The EEOC ordered the employers in this case to provide coverage for contraception at a level equal to the coverage provided for all drugs, devices, and services used to prevent medical conditions. This included coverage of outpatient services for doctor visits that were needed to obtain prescriptions.[98] Although the Commission's decision was binding on the par-

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[89] *Id.*

[90] Id.

[91] *See id.* ("The PDA's prohibition on discrimination against women based on their ability to become pregnant thus necessarily includes a prohibition on discrimination related to a woman's use of contraceptives.").

[92] *See id.* ("[T]he Commission concludes that the PDA covers contraception based on its plain language, the Supreme Court's interpretation of the statute, and Congress' clearly expressed legislative intent.").

[93] *Id.* (noting that prescription contraceptives are available only for women and any refusal of coverage for them is a sex-based exclusion).

[94] *See id.* (noting that one employee who brought charges sought birth control for medical purposes unrelated to pregnancy prevention, while the other employee sought birth control to avoid an unplanned pregnancy).

[95] *Id.*

[96] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[97] EEOC Decision, *supra* note 35, at n.22.

[98] *Id.*

ties to the dispute, it did not constitute legal precedent.[99] Still, courts will typically show some degree of deference to EEOC rulings.[100]

## III. EXAMINING THE *ERICKSON* DECISION

### A. *The Court's Reasoning and the Employer's Counterarguments*

The *Erickson* decision was based on a foundation similar to the EEOC ruling. The plaintiff was a female pharmacist who worked for Bartell Drug. The plaintiff brought suit, as a class action, challenging her employer's denial of contraceptive benefits as sex discrimination. On cross-motions for summary judgment, the court held that the employer's exclusion of prescription contraceptive benefits from an otherwise comprehensive prescription drug plan constituted disparate treatment, amounting to sex discrimination under the PDA.[101]

Bartell Drug was a self-insured employer that covered a range of medications, including many preventive drugs.[102] Included in coverage were "cholesterol-lowering drugs, hormone replacement therapies, prenatal vitamins, and drugs to prevent allergic reactions, breast cancer, and blood clotting."[103] Excluded from the plan were drugs that aided in weight reduction, infertility drugs, smoking cessation drugs, Viagra, growth hormones, experimental drugs, and all five forms of reversible prescription contraception.[104] Based on the exclusion of contraception from coverage, the plaintiff pursued a claim of discrimination based on both the disparate impact and disparate treatment theories.[105]

The court justified its decision by relying on the judicial and statutory history surrounding Title VII and the PDA. The court first noted that fringe benefit plans that distinguish between the sexes constitute discrimination under Title VII, as fringe benefits such as health insurance are "compensation, terms, conditions, or privileges of employment,"[106] and are thus included within the scope of Title VII.

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[99] *See id.* The decision set forth the Commission's view of the law as applied to the facts of the case. Other employers were not required to heed the decision and implement changes in their own benefit plans, although such changes were recommended. *Id.*

[100] *See, e.g.*, EEOC v. Commercial Office Prod. Co., 486 U.S. 107, 115 (1988) (holding that an EEOC interpretation under Title VII "need only be reasonable to be entitled to deference"). The majority in *Gilbert* did, however, sidestep EEOC guidelines, as have other courts. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 141-45 (1976).

[101] Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1268, 1276-77 (W.D. Wash. 2001).

[102] *Id.* at 1268 n.1.

[103] *Id.*

[104] *Id.*

[105] *Id.* at 1268 n.2.

[106] *Id.* at 1269 n.3 (citing Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983)). In *Newport News*, the Supreme Court held that an insurance policy that gave complete coverage to male spouses of female employees but only partial coverage for female

The court then delved into the legislative history of Title VII and the PDA.[107] In regards to Title VII, "the goal . . . was to end years of discrimination in employment and to place all men and women, regardless of race, color, religion, or national origin, on equal footing in how they were treated in the workforce."[108] The court went on to note that Congress has been ready to step in and clarify Title VII, especially in the face of a restrictive application by the courts. Thus, in the face of the *Gilbert* decision, Congress enacted the PDA to emphasize that pregnancy-related discrimination constitutes unlawful discrimination based on sex.[109] In essence, "Congress intended to correct what it felt was an erroneous interpretation of Title VII by the . . . Supreme Court."[110] When enacting the PDA, supporters in Congress often referred to the dissent in *Gilbert*, suggesting that Justices Brennan and Stevens had in fact correctly interpreted Title VII with their broader and more inclusive views.[111]

Given this backdrop, the court then moved toward its findings. In holding that sex discrimination was evident, the court's analysis can be broken down into two main sections: (1) prescription contraception is a "pregnancy-related" issue, thus falling under the PDA, and (2) the denial of contraceptive benefits, under the facts in *Erickson*, supports a finding of sex discrimination. Turning to the first issue, the court stated that "[t]he PDA is not a begrudging recognition of a limited grant of rights to a strictly defined group of women who happen to be pregnant."[112] Relying on *International Union v. Johnson Controls, Inc.*,[113] the *Erickson* court held that denying coverage for prescription contraception amounted to disparate treatment based on a woman's capacity to become pregnant.[114] Thus, both pregnant women and women who could potentially become pregnant were protected under the PDA.[115]

In *Johnson Controls*, the Supreme Court held that classifying employees based on childbearing capacity, irrespective of whether a woman is in fact pregnant, constitutes sex discrimination under the PDA.[116] *Johnson Controls* involved a group of female employees

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spouses of male employees discriminated against the male employees; thus, the Court looked at relative comprehensiveness of coverage offered to the sexes. *Newport News*, 462 U.S. at 685.

[107] For an extensive discussion of the legislative history surrounding the PDA, see *supra* notes 72-77 and accompanying text.

[108] *Erickson*, 141 F. Supp. 2d at 1269.

[109] *Id.* at 1269-70.

[110] *Id.* at 1269.

[111] *Id.* at 1269-70.

[112] *Id.* at 1271.

[113] 499 U.S. 187 (1991).

[114] *Erickson*, 141 F. Supp. 2d at 1271-72.

[115] *Id.* at 1271.

[116] *Johnson Controls*, 499 U.S. at 198-99.

who challenged their employer's policy of forbidding women with the capacity to bear children to engage in jobs that involve lead exposure.[117] Although these women were not pregnant, the classification was deemed to constitute sex discrimination, because women were being treated differently based on their capacity to become pregnant.[118]

Analogously, the *Erickson* court held that women were being denied benefits because of their capacity to become pregnant.[119] In holding that contraceptives fall within the scope of the PDA, the court also recognized that "[m]ale and female employees have different, sex-based disability and healthcare needs, and the law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception."[120]

Addressing the second issue, the court found disparate treatment of the female employees.[121] To prove disparate treatment, one must demonstrate that an "employer . . . treats some people less favorably than others because of their . . . sex."[122] Specifically, the *Erickson* court found that "mere facial parity of coverage does not excuse or justify an exclusion which carves out benefits that are uniquely designed for women."[123] The court further stated that excluding women-only benefits from a health plan that was generally comprehensive constituted sex discrimination under Title VII, even though it did not appear that Bartell Drug was intentionally discriminating against its female employees.[124]

The court never did reach a conclusion on whether a disparate impact claim would also be meritorious, but noted that Bartell Drug was not under an affirmative duty to provide any prescription drug coverage. Still, by providing a comprehensive prescription drug plan that excluded only a few distinct items, the company must be sure that those exclusions do not result in a sexually discriminatory benefits plan.[125] "In light of the fact that prescription contraceptives are used only by women, Bartell's choice to exclude that particular benefit . . . is discriminatory."[126] Therefore, based on Title VII and the PDA, the

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[117] *Id.* at 187.

[118] *Id.* at 211.

[119] *Erickson*, 141 F. Supp. 2d at 1271.

[120] *Id.* The court went on to state that "[t]he special or increased healthcare needs associated with a woman's unique sex-based characteristics must be met to the same extent, and on the same terms, as other healthcare needs." *Id.*

[121] *Id.* at 1271-72.

[122] Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

[123] *Erickson*, 141 F. Supp. 2d at 1271.

[124] *Id.* at 1272 n.7 (citing Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1080-86 (1983) ("Where a benefit plan is discriminatory on its face, no inquiry into subjective intent is necessary.").

[125] *Id.* at 1272.

[126] *Id.*

court held that all five forms of prescription contraception should be covered on the same terms and to the same extent as other drugs, devices, and preventive care. The decision also granted equal coverage for outpatient services and physician consultations associated with obtaining the needed contraception.[127]

The *Erickson* court addressed six distinct arguments put forth by Bartell Drug. First, the court tackled the issue of whether contraceptive coverage constitutes a health care need necessitating coverage.[128] Given that contraception is preventive in nature and does not treat an illness, Bartell Drug argued that it should be permitted to exclude such benefits from coverage. The court painstakingly noted the often severe physical, emotional, social, and economic consequences that can flow from an unwanted pregnancy to rebut Bartell Drug's arguments.[129] "[T]he adverse economic and social consequences of unintended pregnancies fall most harshly on women and interfere with their choice to participate fully and equally in the 'marketplace and the world of ideas.'"[130] The court also rejected the argument that contraception was preventive in nature by noting that numerous drugs covered under Bartell Drug's prescription drug plan were preventive, including drugs to prevent blood clotting and drugs to lower blood pressure.[131] Additionally, the court found it irrelevant that "pregnancy is a 'natural' state and is not considered a disease or illness."[132] The judge reasoned that "[b]eing pregnant, though natural, is not a state that is desired by all women or at all points in a woman's life."[133]

Second, Bartell Drug argued that prescription contraceptives are not "pregnancy, childbirth, or related medical conditions" covered under the PDA.[134] Returning again to legislative history, the court dismissed this argument.[135] Although the court recognized that Congress likely had no specific intent as to whether the PDA covers prescription contraception, "Congress' decisive overruling of [*Gilbert*] evidences an interpretation of Title VII which necessarily precludes the choices Bartell has made in this case."[136] Furthermore, the court

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127 *Id.* at 1277.

128 *Id.* at 1272-74.

129 *Id.*

130 *Id.* at 1273 (quoting Stanton v. Stanton, 421 U.S. 7, 15 (1975)). The *Erickson* court also quoted language from *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.").

131 *Erickson*, 141 F. Supp. 2d at 1273-74.

132 *Id.* at 1273.

133 *Id.*

134 *Id.* at 1274 (citing 42 U.S.C. § 2000e(k) (2000)).

135 *See supra* notes 107-11 and accompanying text.

136 *Erickson*, 141 F. Supp. 2d at 1274.

pointed out that *Johnson Controls* extended coverage of the PDA beyond women who were currently pregnant to include women with childbearing capability.[137]

Bartell Drug also argued that it should be allowed to limit coverage under its benefits plan to keep costs from spiraling out of control.[138] Although Bartell Drug was free to uniformly raise deductibles or cut benefits, the court found that the company could not systematically exclude coverage that disproportionately affected women.[139] Furthermore, added costs do not excuse denying benefits when such a denial constitutes a violation of Title VII.[140]

Moreover, Bartell Drug argued that all exclusions from prescription drug coverage were gender neutral. Specifically, Bartell Drug contended that it had chosen to exclude all "family planning" drugs.[141] Viagra was not covered under the employee prescription drug plan, thus demonstrating that both men and women were equally subject to certain exclusions.[142] The court countered these arguments by noting that numerous "family planning" aids were in fact covered under the prescription drug plan, including prenatal vitamins[143] and abortion.[144] Also, even though infertility drugs were not covered under the plan, this exclusion appeared to affect both men and women equally.[145] As for the lack of coverage for Viagra, the court noted that male employees might also have a viable cause of action under Title VII, although that issue was not presented to the court.[146]

Aside from these arguments, Bartell Drug also suggested that the denial of contraceptive benefits should not constitute sex discrimination under Title VII because there was no judicial precedent for such a finding.[147] Yet, as the judge correctly noted, this case was a matter

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137 *See supra* notes 113-18 and accompanying text.

138 *Erickson*, 141 F. Supp. 2d at 1274.

139 *See id.* ("[T]he method by which the employer seeks to curb costs must not be discriminatory.").

140 *Id.* (citing City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978) (finding that a cost justification defense under Title VII has never been recognized by Congress or the courts)).

141 *Id.* at 1274-75.

142 *Id.* at 1275.

143 *Id.*

144 *Id.* at 1275 n.13. ("Abortion is, after all, the quintessential 'family planning' measure, and yet it is covered in all circumstances, even though it is specifically excluded under the PDA.").

145 *Id.* at 1275. The court, however, made no determination as to whether the denial of infertility drugs constituted sex discrimination, but noted that several courts had found that such an exclusion is not discriminatory. *Id.* at 1275 n.14.

146 *Id.* at 1275 n.12.

147 *Id.* at 1275-76.

of first impression for the courts, and the EEOC decision issued in December 2000 was entitled to deference.[148]

Finally, the court dismissed the rather weak argument put forth by Bartell Drug that such a mandate for contraceptive prescription coverage is better left to the legislative branch.[149] The court stated that it is the role of the judiciary to interpret existing law. By concluding that Bartell Drug was liable for sex discrimination under Title VII for denying contraceptive benefits to female employees, the court was merely construing existing law.[150]

### *B. Issues not Sufficiently Addressed in the* Erickson *Decision*

Although the *Erickson* court's reasoning appears legally sound, the court should have discussed certain issues more thoroughly. Perhaps the strongest argument an employer could make in denying contraceptive coverage is that the coverage does not fall within the plain language of the PDA, and this argument was made by Bartell Drug.[151] The PDA covers "pregnancy, childbirth, or related medical conditions,"[152] and the argument could certainly be made that prescription contraception does not constitute a medical condition related to pregnancy. It is clear that in enacting the PDA, Congress sought to overrule the Supreme Court's decision in *Gilbert*.[153] In that case, an employee was denied disability for a pulmonary embolism that was suffered while on pregnancy leave.[154] Although not caused by the pregnancy, if the employee had suffered the embolism while not already on pregnancy leave, she would have been covered under General Electric's disability plan.[155] Therefore, the argument could certainly be made that "related medical conditions" refers to disabilities arising during pregnancy but not necessarily because of the pregnancy. Such a definition, however, would not include prescription contraception.

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[148] *Id.* at 1275-76. *See also* Law, *supra* note 3, at 385-91 (providing several explanations for why no cases involving the denial of contraceptive benefits had been brought before the courts).

[149] *Erickson*, 141 F. Supp. 2d at 1276.

[150] *Id.* (citing Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")).

[151] *See supra* notes 134-37 and accompanying text (discussing the court's analysis of whether the PDA covers prescription contraceptive coverage).

[152] 42 U.S.C. § 2000e(k) (2000).

[153] General Elec. Co. v. Gilbert, 429 U.S. 125 (1976). *See also supra* notes 72-77 and accompanying text (discussing that the PDA was enacted in response to an incorrect interpretation of Title VII by the *Gilbert* majority).

[154] *Gilbert*, 429 U.S. at 129 n.4.

[155] *Id.*

Of course, *Johnson Controls* did find that women cannot be discriminated against based on the capacity to become pregnant,[156] but this holding need not necessarily extend to prescription drugs. In *Johnson Controls*, women of childbearing capacity were being discriminated against in terms of their ability to secure work.[157] *Johnson Controls* does not specifically address the exclusion of prescription benefits that burdens women because they have the capacity to become pregnant. To put this fact into perspective, abortion was specifically excluded from the PDA.[158] Therefore, if coverage for prescription contraception was meant to fall outside the PDA, a specific exclusion should have been included in the statute. There is no such exclusion currently in the PDA.

Even if future courts find that prescription contraception does not fall under the PDA, benefits may still be obtainable based on direct claims of sex discrimination under Title VII. [159] It is a woman's ability to bear children that distinguishes the sexes more than any other sex-based difference.[160] To treat women differently under a prescription drug plan (or alternatively for women to be disproportionately affected based on the denial of coverage) could give rise to a sex discrimination claim under Title VII, without tying the claim to the PDA. Furthermore, the sheer number of women in the workforce and the high percentage of women who have at some point used contraceptives further supports a direct finding of sex discrimination under Title VII.[161] The *Erickson* court did not explore this matter.

Aside from these considerations, the court did not address several other issues, some because they were not pertinent to the specific facts in that case and others because Bartell Drug did not proffer the arguments. An employer could claim that no insurance carriers provide prescription contraception, thus exempting the employer from needing to provide such benefits.[162] This argument falters, though, as

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156 Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 211 (1991).

157 *Id.* at 190-92.

158 42 U.S.C. § 2000e(k) ("This subsection shall not require an employer to pay for health insurance benefits for abortion.").

159 *See, e.g.*, EEOC v. UPS, 141 F. Supp. 2d 1216, 1218-20 (D. Minn. 2001) (A Title VII claim, not pursued under the PDA, was allowed to proceed where an employer failed to provide its employees with prescription contraception, although the factual nature of the case varied from *Erickson*.).

160 *Gilbert*, 429 U.S. at 162 (Stevens, J., dissenting).

161 *See* COST TO EMPLOYER HEALTH PLANS, *supra* note 46, at 4 (finding that eighty-five percent of women who have ever had sexual intercourse reported using oral contraceptives at some point in their lives).

162 Law, *supra* note 3, at 383-84 (noting that although employers might assert such an argument, there is no basis for it under the law). Additionally, insurance companies that do not provide adequate contraceptive coverage might be liable for aiding employers in the discriminatory practice of denying equal prescription benefits to women. *Id. See also* Sam Skolnik, *Contraceptive Coverage Suit: Regence Blueshield is Accused by ACLU and NARAL of Bias Against Women Through Exclusion of Plans*, SEATTLE POST-INTELLIGENCER, July 13, 2001, at B1 (dis-

the Supreme Court in *Arizona Governing Committee v. Norris*[163] held that "[i]t would be inconsistent with the broad remedial purposes of Title VII to hold that an employer who adopts a discriminatory fringe-benefit plan can avoid liability on the ground that he could not find a third party willing to treat his employees on a nondiscriminatory basis."[164] Under such circumstances, the Court ruled that an employer "must either supply the fringe benefit himself, without the assistance of any third party, or not provide it at all."[165]

Additionally, an employer could claim that the denial of contraceptive benefits is justified on religious grounds.[166] This might work because Title VII does provide an exemption for religious organizations.[167] Still, this exemption is extremely limited and would not likely provide most employers a credible defense to claims of discrimination under the PDA. Furthermore, an employer could assert that the Employee Retirement Income Security Act (ERISA) preempts discrimination claims brought under Title VII.[168] This argument has previously been addressed by the EEOC.[169] As was noted by the EEOC, "ERISA preempts certain *state* laws that regulate insurance, but explicitly exempts federal law from preemption . . . . [T]he fact that ERISA does not require health plans to 'provide specific benefits' does not mean that other statutes – namely Title VII – do not impose such requirements where necessary to avoid or correct discrimination."[170]

An employer could also claim that it was neutral in excluding prescription contraception, because both female employees and female dependents of male employees were denied benefits, thus causing all employees to be similarly situated. In *EEOC v. UPS*,[171] however, a federal district court rejected such an argument. In *UPS*, a motion to dismiss disparate treatment and disparate impact claims brought under Title VII was denied.[172] The employer in the case ar-

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cussing recent suit filed against insurer by small company plan participants and individual plan participants, based on claims that the insurer "unfairly excludes prescription contraceptives from health plans").

163 463 U.S. 1073 (1983).

164 *Id.* at 1090-91.

165 *Id.* at 1091.

166 Law, *supra* note 3, at 384-86 (concluding that such an exemption is extremely narrow and would likely "carr[y] little weight" for employers seeking to avoid prescription contraceptive coverage).

167 42 U.S.C. § 2000e-1(a) (2000) ("This subchapter shall not apply . . . to a religious corporation, association, educational institution, or society . . . .").

168 29 U.S.C. §§ 1144(a), 1191 (2000).

169 EEOC Decision, *supra* note 35.

170 *Id.*

171 141 F. Supp. 2d 1216 (D. Minn. 2001).

172 *Id.* at 1217-20.

gued that the exclusion was gender neutral, but the court found that the plan in question burdened only female employees.[173]

The court in *Erickson* also did not fully address other decisions that held that the denial of infertility treatments did not constitute discrimination.[174] The reasons these precedents are important are not in how they directly apply to *Erickson*, but in how they would alter the contours of the prescription contraception debate, assuming male contraceptives are introduced to the marketplace. Currently, denials of infertility drugs have been held as not discriminatory under Title VII or the PDA, because both men and women are equally excluded from coverage.[175] Given that men and women are equally denied coverage for infertility drugs, there can be no disparate treatment. Analogously, if a male prescription contraceptive were offered to the public, employers denying coverage to women could also deny coverage to men.[176] As men and women would then both be equally excluded from coverage for prescription contraceptives, there would be no Title VII violation based on disparate treatment. Therefore, female employees could not rely on the *Erickson* decision to receive contraceptive prescription benefits.

In fact, prescription contraception for men could be available within a decade, if not sooner.[177] For decades, scientists have been working on the development of a "male pill," similar to the oral contraceptives that are marketed to women.[178] The "male pill" would be hormonally based and inhibit sperm formation so long as taken regu-

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[173] *Id.* at 1219 (finding that "while [the] exclusion applies to both male and female employees, it only burdens females and, according to the EEOC's allegations, is not gender neutral").

[174] For a discussion of the extent to which the *Erickson* court deals with prior decisions relating to infertility drugs and treatments, see *supra* note 145 and accompanying text; s*ee also* Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674 (8th Cir. 1996) (denying coverage for infertility treatments despite claims of discrimination under the Americans with Disabilities Act (ADA) and the PDA); Saks v. Franklin Covey Co., 117 F. Supp. 2d 318 (S.D.N.Y. 2000) (finding that the denial of coverage for infertility treatments did not constitute discrimination under the ADA, Title VII, or the PDA).

[175] *See* Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1275, 1275 n.14 (W.D. Wash. 2001) (discussing the denial of infertility treatment coverage); *see also infra* notes 224-35 and accompanying text (discussing various decisions dealing with denial of coverage for infertility drugs and treatments).

[176] *See, e.g.*, Law, *supra* note 3, at 374-75 (implying that women are treated differently in terms of contraceptive benefits merely because technology has yet to provide for male contraceptives, although women still suffer from the discriminatory impact of denied coverage).

[177] *See* Timothy Gower, *The Healthy Man: A Way Men Can Take Charge of Birth Control*, L.A. TIMES, Sept. 11, 2000, at S1 (discussing how, given the need for testing and FDA approval, male contraception was at least five years away); Scot Lehigh, *The Male Pill: Men Will Soon Have a New Method of Birth Control – But Will They Use It? And Will Women Trust Them to Do So?*, BOSTON GLOBE, Aug. 27, 2000, at F1 (quoting scientists who believed a "male pill" should be available within five to ten years).

[178] *See* Sharon Begley & Peggy Clausen, *The Search for a Male Pill*, NEWSWEEK, Feb. 25, 1980, at 9 (discussing the various contraceptive methods being tested on men).

larly.[179] The pill would likely have to be supplemented with injections of testosterone or the implantation of "a testosterone pellet" under the skin.[180] Still, the introduction of male prescription contraception does not mean that it would be widely accepted or used by men.[181] Regardless of whether a "male pill" is popular, its mere introduction could destroy the foundation of the *Erickson* decision. Even if the male employees of a company never attempted to purchase prescription contraception under their health plan, the employer could deny all coverage for both female and male contraceptives. Therefore, there could not be disparate treatment because both men and women would be equally excluded from benefits under their employer's health plan, just as no disparate treatment was found by courts deciding the question of coverage for infertility drugs. Thus, the *Erickson* decision is vulnerable to future attacks, especially if a male prescription contraceptive is brought to the market.[182]

### C. *An Alternative Theory: Disparate Impact*

The *Erickson* decision would be more insulated from future rollback if the court had found for the employees based on a disparate impact theory rather than on a disparate treatment theory, as the issue of the introduction of a "male pill" weakening the *Erickson* decision would likely be moot. From a legal standpoint, a disparate impact claim survived a motion to dismiss in *EEOC v. UPS*,[183] a case similar to *Erickson*.[184] The court in *UPS* stated that "because only females can be prescribed the oral contraceptives at issue, the otherwise facially neutral exclusion falls more harshly on . . . female employees . . . than on male employees."[185] To establish a disparate impact claim,

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[179] *See id.* ("When a derivative of the male sex hormone, testosterone, was tested . . . , it prevented sperm formation without turning off sex drive."); Linda Formichelli, *The Male Pill: Male Contraceptive Research*, PSYCHOL. TODAY, Jan. 1, 2001, at 16 (finding success in a recent study where men took female hormones every day for four weeks while simultaneously receiving injections of testosterone).

[180] Lehigh, *supra* note 177.

[181] *Compare id.* (discussing the psychological and physical aspects of contraception and reproductive health that might inhibit men from using a "male pill"), *and* Rita Rubin, *New Study Says Male "Pill" Can Become a Reality*, USA TODAY, Sept. 7, 2000, at 7A (questioning whether a "male pill" requiring men to both take a pill and receive an injection would ever be widely accepted), *with* Kimberly Palmer, *Men Should Share Birth Control Burden*, USA TODAY, Sept. 2, 1999, at 17A (citing World Health Organization study that found men would prefer a pill or injectable form of birth control over condoms or vasectomies).

[182] Sylvia Law first made this argument. *See* Law, *supra* note 3, at 376 (examining employer arguments regarding equal exclusion from coverage). The court in *Erickson* apparently ignored this argument, although the court cited Law's article on several occasions. Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1273, 1275 n.15 (W.D. Wash. 2001).

[183] 141 F. Supp. 2d 1216, 1219-20 (D. Minn. 2001)

[184] For a more thorough discussion of *UPS* and its relationship to *Erickson*, see *infra* notes 210-23 and accompanying text.

[185] *UPS*, 141 F. Supp. 2d at 1220.

an employee must prove that "[an employer] uses 'employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another,' without justification."[186]

Assuming both men and women had prescription contraception available to them, a lack of coverage would still disproportionately harm women, as "[w]omen, and only women, bear all of the *physical* burdens of unwanted pregnancy."[187] Additionally, it is women who must bear the emotional and financial burdens associated with unintended pregnancies and childbirth. It is women whose careers may potentially suffer due to time away from the workforce as a result of an unplanned pregnancy. It is women who ultimately deal with the psychological strains of childbirth, adoption, or abortion. For all of these reasons, it is women who suffer a disparate impact when contraceptive benefits are denied.[188]

Thus, regardless of contraceptive offerings, the fact that women shoulder all of the responsibility for carrying a fetus would still be acknowledged by the courts if the *Erickson* decision was premised on a disparate impact theory. This would allow female prescription contraception to be covered under health benefits plans, despite the eventual introduction of a "male pill," assuming that an employer did provide an otherwise generally comprehensive prescription drug plan.

## IV. HOW *ERICKSON* WILL EFFECT BUSINESSES AND EMPLOYERS

### A. *The Bounds of the* Erickson *Decision*

In finding for the employees, the *Erickson* court held that Bartell Drug offered a "generally comprehensive [prescription] drug plan."[189] The court went on to find that "[a]lthough the plan covers almost all drugs and devices used by men, the exclusion of prescription contraceptives creates a gaping hole in the coverage offered to female employees, leaving a fundamental and immediate healthcare need uncovered."[190] Thus, the question arises as to what constitutes a "generally comprehensive prescription drug plan," as only employers offer-

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[186] Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 681 (8th Cir. 1996) (quoting Houghton v. SIPCO, Inc., 38 F.3d 953, 958 (8th Cir. 1994)). *See also supra* note 83 and accompanying text. For a definition of disparate treatment, see *supra* text accompanying note 96.

[187] Law, *supra* note 3, at 375.

[188] *Id.* at 374-75 (describing physical and financial burdens that fall disparately on women who use contraception or have unwanted pregnancies). *See also supra* Part I (discussing importance of widespread and affordable contraceptive benefits).

[189] *Erickson*, 141 F. Supp. 2d at 1276.

[190] *Id.* at 1277.

ing such plans are affected by the court's ruling. On this issue, the court provided little guidance.[191]

It can safely be assumed that an employer cannot use the denial of coverage for Viagra to justify the exclusion of coverage for prescription contraceptives.[192] Furthermore, an employer cannot deny contraceptive benefits solely because the employer also denies coverage for infertility drugs and treatments. This is because denying coverage for infertility drugs does not result in unequal treatment of men and women, whereas only women are affected by a lack of contraceptive benefits.[193] Aside from these issues, it is unclear precisely what levels of contraceptive coverage would be considered discriminatory based on the court's reasoning.

The safest course for employers who question whether their prescription drug plan is "generally comprehensive" is to examine the totality of their plan. In addition to determining what drugs and devices are covered, they should also look at the extent of coverage for those drugs and devices. It can safely be assumed that any employer providing a broad array of coverage for prescription drugs and devices may fall within the bounds of the *Erickson* decision, although a more concrete definition of what constitutes a "generally comprehensive" plan is difficult. Once an employer determines that its prescription benefits plan is in fact "generally comprehensive," the next issue is to determine whether certain exclusions under the plan constitute sex and pregnancy-related discrimination. On this issue, several examples might help define the bounds of the *Erickson* decision and provide employers with guidance. In all of the following examples, it is assumed that the employer has a comprehensive prescription drug plan.

Initially, consider an employer that provides coverage for routine cholesterol screenings, including both the visit to the doctor and prescription drugs to lower the employee's cholesterol. The employer also provides coverage for prescription contraception, but does not cover the cost of the visit to the doctor's office. This result would likely be deemed as discriminatory under the *Erickson* decision.[194]

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[191] For a discussion of the drugs and devices that were covered and/or excluded by Bartell Drug, see *id.* at 1268 n.1, 1274-75 .

[192] *See supra* notes 141-46 and accompanying text (discussing how court said employees denied coverage for Viagra may have a case under Title VII as well).

[193] *See Erickson*, 141 F. Supp. 2d at 1275 (explaining how the exclusion of infertility drugs affects both men and women in the same manner); *supra* note 145 and accompanying text.

[194] *See Erickson*, 141 F. Supp. 2d at 1277 ("Bartell shall offer coverage for contraception-related services, including the initial visit to the prescribing physician and any follow-up visits or outpatient services, to the same extent, and on the same terms, as it offers coverage for other outpatient services . . . ."); EEOC Decision, *supra* note 35 (requiring coverage for outpatient

Also, an employer that does not cover all five forms of reversible contraception, but covers variations of other drugs and devices, would likely be in violation of Title VII. For example, consider an employer who offers numerous forms of antibiotics under its prescription drug plan. This assortment of prescription choices might be offered so that employees who have allergic reactions or side effects from certain antibiotics can still have alternative drugs to take. Under this scenario, an employer would likely need to provide for all five forms of reversible contraception.[195]

One final example of a prescription plan that is likely discriminatory would involve an employer who required a $10 employee co-pay for prescriptions, except that prescription contraceptives required a $15 co-pay. In this instance, although the employer might already provide coverage for all forms of prescription contraception, it is only the female employees who are burdened by the higher co-pay, and consequently inequality between men and women results.[196]

As these examples demonstrate, there is no clear test as to what prescription drug plans would violate Title VII, based on the framework developed by the *Erickson* court. What is certain is that the *Erickson* decision will have long-lasting ramifications on the U.S. business community. Employers that offer prescription benefits to their employees but limit or deny contraceptive coverage will need to reevaluate the extent of their coverage, or face potential liability for discrimination under Title VII and the PDA. Still, not all employers, regardless of prescription drug coverage, will be affected by the *Erickson* decision.

### *B. To Whom the Decision Applies*

The *Erickson* decision only affects employers that have fifteen or more employees.[197] This is because the court based its findings of

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services and doctor visits "to the same extent, and on the same terms" as coverage "for other preventative or health maintenance services").

[195] *See Erickson*, 141 F. Supp. 2d at 1277 (requiring Bartell Drug "to cover each of the available options for prescription contraception to the same extent, and on the same terms, that it covers other drugs, devices, and preventative care . . . ."); EEOC Decision, *supra* note 35 (ordering the employer to cover all forms of prescription contraception).

[196] Even if an employer attempted to justify the higher co-pay for contraception based on the fact that this benefit accrues only to women, a court would still likely find there to be unequal treatment of the sexes. *See* Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 685 n.26 (1983) (finding that "no [cost] justification is recognized under Title VII once discrimination has been shown"); *see also supra* notes 138-40 and accompanying text (discussing the use of a cost defense in a Title VII action, and how this issue was addressed by the *Erickson* court).

[197] *See Erickson*, 141 F. Supp. 2d at 1276 n.16 (concluding that the court's decision differs from pending legislation that might require insurance companies, HMOs, and employers with less than fifteen employees to provide prescription contraception, in that the court's decision applies only to self-insured employers with fifteen or more employees).

discrimination on Title VII, which exempts firms with fewer than that number of employees.[198] Additionally, an employer must provide prescription benefits under its health plan for *Erickson* to apply. It cannot be discriminatory to exclude a specific prescription when a plan explicitly denies coverage for all prescriptions.[199] "However, when an employer decides to offer a prescription plan covering everything except a few specifically excluded drugs and devices, it has a legal obligation to make sure that the resulting plan does not discriminate based on sex-based characteristics and that it provides equally comprehensive coverage for both sexes."[200] Furthermore, *Erickson* only applies if the employer provides its benefits plan on a self-insured basis.[201] Employers providing self-insured health benefit plans typically pay employee claims from funds set aside by the employer or directly from company accounts.[202] "Alternatively, an employer may fully insure its plan by purchasing health and accident insurance on behalf of plan participants from a third-party insurer."[203]

The *Erickson* decision will apply to a growing number of employers, because an increasing number of businesses are electing to self-insure. In fact, over sixty-five percent of employers self-insure, and some studies indicate that about half of U.S. workers are covered

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198 42 U.S.C. § 2000e(b) (2000) (defining an "employer" covered under the statute as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . .").

199 *See Erickson*, 141 F. Supp. 2d at 1272 (stating that "Title VII does not require employers to offer any particular type or category of benefit").

200 *Id.*. *See also* Girion, *supra* note 7, at A17 (noting that many employers could "cut back on benefits to avoid having to add contraceptive[]" benefits).

201 The *Erickson* decision only applies to businesses that are self-insured, as under such plans it is the employer who decides what coverage to provide to employees, which in the case of *Erickson* produced a discriminatory result. *See Erickson*, 141 F. Supp. 2d at 1268 n.1 (noting that "Bartell's benefit plan is self-insured"); *see also* NATIONAL WOMEN'S LAW CENTER, CONTRACEPTIVE COVERAGE: A MULTI-TRACK APPROACH 1 (2001), *available at* http://www.nwlc.org/pdf/ContraceptiveCoverageAMulti-TrackApproach.pdf (last visited Nov. 2, 2002) (discussing application to employers of Title VII claims of discrimination based on denials of contraceptive benefits, and stating that "[e]mployers that provide health insurance that covers prescription drugs and devices but excludes prescription contraceptives are in violation of Title VII's prohibition against sex discrimination"); Troy Paredes, Note, *Stop-Loss Insurance, State Regulation, and ERISA: Defining the Scope of Federal Preemption*, 34 HARV. J. ON LEGIS. 233, 234 (1997) (explaining the various ways in which employers might structure their employee health benefits plans).

202 *See* Paredes, *supra* note 201, at 234 (noting that "the employer-sponsor retains the risk of providing health care").

203 *Id.* Many employers now self-insure, but purchase stop-loss insurance to additionally insure against the risk of employee claims exceeding a predetermined expected amount. *Id.* A benefits plan structured using stop-loss insurance would still likely fall within the *Erickson* decision, because at its core the employer is still electing to self-insure and define the benefits its employees will receive.

by a self-insured plan.[204] Of course, many of these self-insured employers have less than fifteen employees. Approximately fourteen million workers, or more than four-fifths of the U.S. workforce, are employed by entities with less than fifteen employees, thus falling outside the scope of *Erickson*.[205] Still, looking at larger companies, 78% of employers with more than 1000 employees self-fund their benefits plans, as well as "nearly 90% of Fortune 500 companies."[206] Many businesses are electing to self-insure because ERISA[207] preempts state regulation of self-funded plans, thus allowing employers greater flexibility in structuring their employee benefit plans with less government intervention.[208]

### C. *Other Litigation and Legislation*

The *Erickson* decision will surely be contested in future lawsuits, and there is a possibility that the decision will not be followed by other courts.[209] Looking at recent cases that might have an impact on the future relevance of *Erickson*, the most notable is *EEOC v. UPS*.[210] In *UPS*, the EEOC brought a Title VII claim based on the denial of prescription contraception for the spouse of a male employee, and for other employees similarly situated.[211] The claim of sex discrimination was brought directly under Title VII, without reference to the PDA.[212] The spouse of the male employee at issue sought oral contraceptives to treat a hormonal disorder, but coverage was denied.[213] The EEOC brought claims of disparate treatment and disparate impact because UPS provided male employees with prescription treatments for hormonal disorders. The court denied the employer's motion to dismiss.[214] Examining the disparate treatment claim, the court found that, taking all asserted facts as true, an employer cannot deny coverage to women when the same drugs taken for the same purpose are covered for men. The court also noted that it was not gender neutral

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[204] *See id.* nn. 5-8 (citing recent studies which indicate a decade-long trend toward employers electing to self-insure).

[205] *See* NATIONAL WOMEN'S LAW CENTER, *supra* note 201, at 2 ("Requiring contraceptive coverage through enforcement of Title VII thus will not benefit these people.").

[206] Paredes, *supra* note 201, at 234.

[207] 29 U.S.C. § 1144(b) (2000).

[208] *See* Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 61 n.68 (D. Mass. 1997) (discussing the growing number of self-insured employers and the benefit of ERISA preemption in avoiding state insurance regulation); Paredes, *supra* note 201, at 235-36 (questioning whether self-funded employers who purchase stop-loss insurance are still preempted from state regulation by ERISA).

[209] *Erickson* only serves as binding precedent in the Western District of Washington.

[210] 141 F. Supp. 2d 1216 (D. Minn. 2001).

[211] *Id.* at 1217-18.

[212] *Id.* at 1217, 1218 n.1.

[213] *Id.* at 1217.

[214] *Id.* at 1218-20.

to deny coverage for female employees and spouses of male employees.[215]

In the second part of the court's decision, the EEOC argued that even if the employer's benefits plan was gender neutral, women were still more harshly affected. As only women "can be prescribed the oral contraceptive at issue, the otherwise facially neutral exclusion falls more harshly on . . . female employees . . . ."[216] On this basis, the court also denied the UPS motion to dismiss the disparate impact claim.[217]

Aside from these findings, future courts could embrace portions of the *UPS* decision in an attempt to distinguish or reject *Erickson*. In *UPS*, the court was not deciding whether all contraceptives should be covered under Title VII, but rather whether oral contraceptives needed to treat a hormone condition should be covered to the extent male prescription hormone treatments were covered.[218] Furthermore, the court noted that UPS excluded Viagra and Propecia (used to treat male baldness) from coverage.[219] The court found that "the exclusions for Viagra and Propecia are not relevant because those drugs are non-medically necessary and elective treatments, and are unlike the oral contraceptives prescribed to [the female employee] as a medically necessary treatment for a serious hormonal disorder."[220] It could be argued that based on this statement, contraception prescribed solely to prevent unplanned pregnancy is not medically necessary, but elective. Similarly, employers could deny coverage for Viagra and consequently deny coverage for contraception that is prescribed solely for pregnancy prevention. Based on the dicta of the *UPS* court, such denials might not violate Title VII.[221]

Another issue that runs contrary to the *Erickson* decision involves whether contraception is covered under the PDA. The EEOC sought to amend its complaint and additionally bring a claim under the PDA.[222] The court would not allow the complaint to be amended, noting "serious doubts about the merits of a PDA claim in this context." The United States Court of Appeals for the Eighth Circuit has made clear that "'prevention of conception is outside the scope of the

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[215] *Id.* at 1218-19.

[216] *Id.* at 1220.

[217] *Id.*

[218] *Id.* at 1217-18.

[219] *Id.* at 1219 n.2.

[220] *Id.*

[221] *Compare id.* (allowing the exclusion of Viagra to justify the exclusion of contraception), *with Erickson*, 141 F. Supp. 2d at 1275 (noting that the exclusion of Viagra does not justify the denial of coverage for contraceptive benefits when a discriminatory result is evident under a prescription benefits plan).

[222] *UPS*, 141 F. Supp. 2d at 1218 n.1.

PDA.'"[223] Of course, this ruling was issued several months before the *Erickson* decision, and the *UPS* court's logic seems faulty, in that the Eighth Circuit case referred to drew a distinction between potential pregnancy, which only affects women, and infertility, which affects both men and women.

In *Krauel v. Iowa Methodist Medical Center*,[224] a female employee brought a discrimination claim under the PDA, based on the denial of coverage for infertility treatments.[225] On appeal, the Eighth Circuit affirmed summary judgment for the employer.[226] The court held that infertility is not a medical condition related to pregnancy or childbirth, thus disallowing any claim under the PDA.[227] The court then distinguished *International Union v. Johnson Controls, Inc.*[228] by noting that the Supreme Court's decision involved unequal treatment of women based on their "reproductive capacity."[229] The court concluded that "[p]otential pregnancy, unlike infertility, is a medical condition that is sex-related because only women can become pregnant."[230] This would seem to counter the statement of the *UPS* court and further support the *Erickson* court's finding that the discriminatory denial of contraceptive benefits is protected under the PDA, as contraception is a medical condition related to the potential for pregnancy, affecting only women.

Furthermore, in *Pacourek v. Inland Steel Co.*,[231] an employer's motion to dismiss an employee's claims of discrimination under the PDA was denied.[232] The employee brought her claims based on the circumstances surrounding her attempts to become pregnant and her eventual discharge.[233] Although the employee had been undergoing infertility treatments, the court based a PDA claim on how the employee was treated "because she intends to, is trying to, or simply has the potential to become pregnant . . . ."[234] The court went on to find that "the PDA was intended to cover a woman's intention or potential to become pregnant, because all that conclusion means is that dis-

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223 *Id.* (citing Krauel v. Iowa Methodist Med. Ctr., 95 F.3d 674, 679-80 (8th Cir. 1996)).

224 95 F.3d 674 (8th Cir. 1996).

225 *Id.* at 675-76. The employee also asserted claims under Title VII and the Americans with Disabilities Act. The appellate court affirmed summary judgment for the employer on these various claims. *Id.* at 675.

226 *Id.*

227 *Id.* at 679-80.

228 499 U.S. 187 (1991).

229 *Krauel*, 95 F.3d at 680 (citing *Johnson Controls*, 499 U.S. at 199).

230 *Id. Accord* Saks v. Franklin Covey Co., 117 F. Supp. 2d 318 (S.D.N.Y. 2000) (holding that, although infertility was a pregnancy-related condition and a disability, an insurance plan excluding coverage for surgical impregnation procedures did not discriminate against infertile women in violation of the ADA, Title VII, or PDA).

231 858 F. Supp. 1393 (N.D. Ill. 1994).

232 *Id.* at 1401-04.

233 *Id.* at 1396-97.

234 *Id.* at 1401.

crimination against persons who intend to or can potentially become pregnant is discrimination against women, which is the kind of truism the PDA wrote into law."[235] Given these decisions, it is apparent that contraception available only to women is subject to the PDA, despite the conflicting suggestion of the *UPS* court. Additionally, the bulk of prior case law and the statutory history surrounding the PDA suggest that contraception is a "related medical condition," thus insulating the *Erickson* decision from future rejection.[236]

The question of whether the *Erickson* decision will stand up to challenges in future litigation remains to be seen, but observers may not have to wait long to find out. In late 2001, charges were filed against American Airlines asserting pregnancy-related discrimination, although this lawsuit was ultimately dismissed before the court could rule on the merits of the PDA-based denial of contraceptive benefits claim.[237] Other suits have recently been filed against both Wal-Mart and CVS in an Atlanta federal district court.[238] In the action against Wal-Mart, a judge in August 2002 granted class action status to "all women working for the nation's largest retailer after March 2001 and who were using prescription contraceptives."[239] The judge refused, however, to extend the class to male employees whose spouses use prescription contraception.[240]

Even employers and insurers who are not covered by the *Erickson* ruling may wish to reevaluate their prescription benefit plan offerings, as pending legislation could soon affect those businesses. "Since 1998, 16 states have enacted comprehensive laws to address the imbalance in prescription contraceptive coverage in private insurance . . . . Six other states have laws, policies, or regulations that re-

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[235] *Id. Accord* Cleese v. Hewlett-Packard Co., 911 F. Supp. 1312, 1317-20 (D. Or. 1995) ("This court agrees with *Pacourek* that the purpose of the PDA is best served by extending its coverage to women who are trying to become pregnant . . . . [T]he Supreme Court has equated discrimination on the basis of pregnancy with discrimination based on sex.").

[236] *See supra* notes 107-20 and accompanying text.

[237] Alexander v. American Airlines, Inc., No. 4:02-CV-0252-A, 2002 WL 731815, at *2, *4 (N.D. Tex. Apr. 22, 2002) (finding that the employee lacked standing to bring a claim for denial of contraceptive benefits because she never sought such benefits, while also addressing other infertility related claims). *See also* Girion, *supra* note 8 (discussing charges filed with the EEOC against American Airlines based on a lack of access to prescription contraception, as company policy stated that contraception for pregnancy prevention was not medically necessary, thus receiving no subsidization, although birth control prescribed for medical conditions was covered).

[238] *See* Rankin, *supra* note 8, at F1 (noting that CVS has since "changed its health plan to include prescription birth control," although the employee who brought the lawsuit is still seeking class compensation for female employees who used prescription contraceptives prior to the policy change).

[239] *Id.*

[240] *Id.*

quire some level of insurance coverage for contraception . . . ."[241] More states will likely follow, as from 1998 to 2000 state legislators introduced 121 bills requiring insurance coverage of prescription contraception.[242] This legislation works to provide contraceptive benefits for the sixteen million Americans who receive health insurance through private insurance plans, not to mention the fourteen million workers who are employed by businesses with fewer than fifteen employees and are thus outside the scope of Title VII.[243]

Despite any state legislation that is passed, the majority of U.S. workers have health insurance plans covered by ERISA. State laws that seek to regulate health plans covered by ERISA are preempted, thus again leaving many women without adequate prescription contraceptive coverage.[244] Furthermore, many states have yet to pass legislation requiring equitable prescription drug coverage.[245]

As the plethora of recent state legislation has only limited reach, a bipartisan coalition in Congress has been working toward the enactment of the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC).[246] The bill "would require *all private insurance plans* that provide prescription drug coverage to provide prescription contraceptive coverage."[247] EPICC was first presented to the 105th Congress "and has since been introduced in the 106th Congress and the 107th Congress."[248] Still, the bill has yet to reach the floor of either the House or the Senate.[249] Assuming EPICC is passed and signed into law, it would have a drastic impact on the ability of

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[241] NARAL FOUND., *supra* note 3, at 4. *See also* Julie T. Hatcher, *Employment Law:* Erickson v. Bartell Drug Co.: *Prescription for Equality in Insurance Coverage*, 25 AM. J. TRIAL ADVOC. 213, 215 (2001) (citing specific state statutory provisions dealing with required coverage for prescription contraceptives). Many state statutes have conscience clauses allowing an employer to be exempted from coverage under the law on religious grounds. For a detailed discussion of the various state laws, including each state's respective religious exemption clause, see CENTER FOR REPRODUCTIVE LAW AND POLICY, CONTRACEPTIVE EQUITY BILLS GAIN MOMENTUM IN STATE LEGISLATURES, *at* http://www.crlp.org/pub_fac_epicchart.html (last visited Oct. 5, 2002). On at least one occasion, an employer that did not fall into a narrowly drawn religious employer exemption clause has challenged the constitutionality of a state statute requiring coverage for contraceptive benefits. The statute was upheld. *See* Catholic Charities of Sacramento, Inc. v. Superior Court, 109 Cal. Rptr. 2d 176 (Ct. App. 2001), *superceded by*, 31 P.3d 1271 (Cal. 2001).

[242] NARAL FOUND., *supra* note 3, at 4.

[243] NATIONAL WOMEN'S LAW CENTER, *supra* note 201, at 2.

[244] NARAL FOUND., *supra* note 3, at 5.

[245] *Id.*

[246] EPICC of 2001, S. 104, 107th Cong. (2001); EPICC of 2001, H.R. 1111, 107th Cong. (2001). An additional 1.2 million women already receive contraceptive benefits as employees of the federal government, thanks to legislation passed by Congress. NATIONAL WOMEN'S LAW CENTER, *supra* note 201, at 1 ("requiring all health insurance plans available to federal employees to include coverage of prescription contraceptives if other prescription drugs are covered.").

[247] NATIONAL WOMEN'S LAW CENTER, *supra* note 201, at 2.

[248] NARAL FOUND., *supra* note 3, at 5.

[249] *Id.*

U.S. women to secure prescription contraceptive benefits, aside from the gains that might be realized through the *Erickson* decision.

### *D. The Cost of Providing Contraceptive Benefits*

Employers should not view the *Erickson* decision as yet another court-ordered mandate that will inflate their costs and drive down their profits. In fact, both cost-benefit analysis and economic theory suggest that employers would save money by providing prescription contraceptive benefits. One recent study estimated that the cost of providing all five forms of reversible prescription contraception under a health benefits plan would be $21.40 per employee per year.[250] This cost is even less if an employer already provides some degree of coverage for prescription contraception, not taking into account potential cost savings that might be realized.[251] Assuming that employers pay 80% of this added cost, the true cost to employers, exclusive of potential savings, would be $17.12 per employee per year, or $1.43 per month.[252] These costs "represent[] a mean increase of less than 1% in employers' costs of providing employees with medical coverage."[253]

Employees would face additional insurance payments of $4.28 per year, or about thirty-six cents per month.[254] Despite this added cost, recent polls indicate strong employee support for expanded contraceptive benefits, even in the face of a limited increase in health insurance premiums.[255] Seventy-three percent of Americans support insurance coverage for contraception, even if it means that their premiums could be raised anywhere from $1.00 to $5.00 per month, amounts well above a projected thirty-six-cent monthly increase.[256] Furthermore, it is worth noting that the importance of women having access to affordable and reliable contraception is not a gender-specific issue. In fact, 87% of all Americans agree that family planning services should be covered under health benefits plans.[257]

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[250] *See* COST TO EMPLOYER HEALTH PLANS, *supra* note 46, at 1 (estimating the total average cost of providing contraceptive coverage, inclusive of administrative costs).

[251] *Id.* at 2 ( "This estimate represents the average cost of adding coverage to a plan that now does not cover any of these nonpermanent contraceptive methods. The cost would be less for those plans that cover at least some of these methods . . . .").

[252] *Id.* at 1. *See also* Eileen McNamara, *Obstruction an Injustice*, BOSTON GLOBE, Jan. 23, 2002, at B1 (citing the Massachusetts Group Insurance Commission study, which found that the cost to insurers of providing prescription contraception amounted to $1.39 per employee per month).

[253] COST TO EMPLOYER HEALTH PLANS, *supra* note 46, at 1.

[254] *Id.*

[255] *See* NARAL FOUND., *supra* note 3, at 3.

[256] *See id.* (stating that while 75% of Americans support coverage for contraceptives, only 49% support insurance subsidization of Viagra).

[257] DAVID M. ADAMSON ET. AL., HOW AMERICANS VIEW WORLD POPULATION ISSUES: A SURVEY OF PUBLIC OPINION 49-51 (2000) (citing a recent survey).

Any additional costs associated with providing prescription contraceptive benefits would likely be fully defrayed through the long-term cost savings an employer would realize. For example, most employers do provide coverage for ectopic pregnancies, term pregnancies, miscarriages, maternity care, and newborn hospitalizations.[258] Some employers even cover abortions.[259] Each of these services often costs in excess of $5000.[260] By covering prescription contraception, unintended pregnancies would be reduced,[261] thereby saving an employer thousands of dollars over the long-term.[262] As the authors of one recent study concluded: "[C]ontraception saves money. Preventing unintended pregnancy is highly cost-effective."[263]

Turning to empirical data, if a sexually active pre-menopausal woman used no contraception, over five years she might experience, on average, 4.25 unplanned pregnancies costing her insurer and employer nearly $15,000 under a standard benefits plan.[264] Assuming a female employee would otherwise use no contraceptive method, the insurance savings realized over five years by providing prescription contraceptive benefits amount to over $13,000 for Norplant and Depo-Provera and over $12,000 for oral contraceptives.[265] Although it can be assumed that most women faced with a lack of contraceptive benefits will purchase birth control out-of-pocket rather than not use any method, these women may still elect to use less expensive and less effective methods. This increases the risk of unplanned pregnancy, which in turn raises costs for employers under their benefit plans. "[I]f broader coverage leads to improved access and substantially more effective contraceptive use, our models suggest that payers may save resources by avoiding the costs of unintended pregnancies."[266]

Another recent study reached a similar conclusion. In that analysis, it was determined that for every dollar an employer spent on con-

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[258] James Trussell et. al, *The Economic Value of Contraception: A Comparison of 15 Methods*, 80 AM. J. PUB. HEALTH, 494, 500 (1995) (evaluating the impact of fifteen distinct contraception methods on societal health care costs).

[259] *Id.* ("Most private plans . . . cover induced abortions.").

[260] *Id.* at 497 tbl.4. The costs to insurers are as follows: term pregnancy ($8619), maternity care and delivery ($5512), ectopic pregnancy ($4994), newborn hospitalization ($3107), miscarriage ($1038), and induced abortion ($416). *Id.*

[261] *See supra* notes 14-18 and accompanying text (discussing the correlation between increases in contraceptive use and reductions in unplanned pregnancies).

[262] Trussell et al., *supra* note 258, at 501 fig.4 (providing, for most forms of contraception, both the number of total unplanned pregnancies avoided over five years, as well as the "five-year savings achieved over no method").

[263] *Id.* at 499.

[264] *Id.* at 497.

[265] *Id.* at 501 fig.4.

[266] *Id.* at 500.

traceptive coverage, $4.40 in net savings would be realized.[267] Furthermore, not offering contraceptive benefits can cost a business 17% more than if those benefits were in fact provided to employees.[268]

Aside from these savings, an employer electing to provide contraceptive coverage would also realize several benefits that are more difficult to quantify. Specifically, prescription contraceptive coverage would likely result in less discontent among female workers.[269] By achieving higher levels of worker satisfaction, businesses would see increased productivity and less absenteeism. Also, female employees pleased with their benefits would be more willing to stay with their current employer rather than risk losing coverage.[270] The consequent reduction in employee turnover would save employers the often substantial costs associated with recruiting and training a replacement. Furthermore, when labor markets are tight, employers can differentiate themselves by providing this coverage to female employees.[271] Thus, employers offering conception coverage could potentially have an advantage in attracting and retaining talented applicants.

From an economic perspective, employers are in a better position than employees to efficiently purchase contraceptive benefits.[272] Employers can achieve economies of scale when purchasing contraception, a luxury individual employees do not enjoy.[273] Essentially, this means that an employer that purchases coverage for a large group can negotiate a bulk discount, thus generating collective savings. Furthermore, tax savings can be derived when an employer pays a portion of an employee's total compensation in the form of health bene-

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[267] Girion, *supra* note 29. *See also* CONTRACEPTION COUNTS *supra* note 49, at 6. (noting that "[e]very dollar spent for contraceptive services saved $3 in public funds that would have been needed for prenatal and newborn medical care alone."). Assuming an employer covers prenatal and newborn medical care under its benefits plan, then that employer would also likely realize savings by providing contraceptive benefits.

[268] Girion, *supra* note 29 (stating that "a hypothetical business employing 80,000 people, including 40,000 women of reproductive age" was used in the study).

[269] *See id.* (noting the anger felt every month by many female employees who are forced to purchase oral contraceptives out-of-pocket). Less discontent among female employees would not likely be offset by increased discontent among male employees, despite a nominal increase in insurance premiums, as both men and women seem to support expanded contraceptive benefits. *See supra* notes 255-57 and accompanying text (discussing general support among all employers for contraceptive coverage).

[270] This assumes that all other aspects of the employee's compensation would be equal.

[271] *See* Girion, *supra* note 29 (citing a need among employers "to appeal to a labor market that is increasingly female").

[272] *See* Paul Fronstin, *An Economic Model of Employee Benefits and Labor Supply: An Application of the Almost Ideal Demand System, in* EMPLOYEE BENEFITS AND LABOR MARKETS IN CANADA AND THE UNITED STATES 87, 92 (William T. Alpert & Stephen A. Woodbury eds., 2000).

[273] *Id.* (explaining the efficiency gains through economies of scale that can be achieved when an employer provides health insurance).

fits.[274] These savings also work to counteract the employer's added costs of providing such coverage.

Furthermore, any added cost that an employer does in fact realize by covering contraceptives should theoretically be passed on to the employees, based on the economics surrounding health benefits and labor markets.[275] For example, assume that the government has mandated that all employers offering prescription drug coverage provide contraceptive benefits.[276] In theory, employees will desire a compensation mix involving wages and health benefits.[277] This mix would be standard across all comparable businesses and these businesses will compete in the labor market. The requirement that prescription contraception be covered would thus equally impact all businesses, causing uniform increases in insurance premiums. These increases would then be uniformly deducted from the wages of employees, as the mix of health benefits have now expanded. As such an action would be taken by all businesses, no single employer would be disadvantaged, fear losing employees to a competitor, or face a reduction in sales or profits.[278]

## CONCLUSION

The *Erickson* decision marks a significant victory in the battle for broader contraceptive benefits. Such benefits are necessary to reduce the number of unplanned pregnancies and to improve the physical, emotional, and financial well-being of women and infants. Although the decision will certainly be challenged in future litigation, the court's reasoning appears legally sound. Still, the decision would be more insulated from future challenge if the court had decided for the employees based on a disparate impact basis. Regardless of such future challenges, employers should embrace the decision, as their benefits plans may already be affected by the court's ruling. Furthermore, the long-term cost savings employers would realize by providing prescription contraceptive benefits well outweigh any potential costs.

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[274] *Id.* ("[P]referential tax treatment of employee benefits reduces the price of the benefits to both employers and employees and is thus expected to increase the demand for employee benefits.").

[275] *See* MARK V. PAULY, HEALTH BENEFITS AT WORK 33-35 (1997).

[276] *Id.* This is a modified example of an illustration used by Pauly to demonstrate who bears the economic burden of added coverage under a health benefits plan.

[277] This example ignores other elements that might be included in a total compensation package.

[278] PAULY, *supra* note 275, at 34.

[†] I would like to thank Professor Jonathan L. Entin for his guidance and insights, the staff of the Case Western Reserve Law Review for their assistance, my father for all his support, my

mother for her tireless dedication by reading countless drafts, and Melissa for giving me the love, encouragement, and vision I needed to complete this Note.