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## **WELCOME TO THE FAMILY: A NEW CLASS OF COGNIZABLE CLAIMS UNDER THE PREGNANCY DISCRIMINATION ACT**

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### I. INTRODUCTION

Imagine that you are one of 25 million working women, or suppose that you are a husband and father who depends on your wife's weekly paycheck to help provide basic support for your family.<sup>1</sup> You, or your wife, are pregnant, and in addition to the menace of medical bills, your livelihood is further threatened because the new mother will have to take time off work in order to recover from her pregnancy. The compensation package at your, or your wife's, place of work includes comprehensive non-occupational disability benefits, extending to disabilities such as venereal disease, athletic injuries, and even hair transplants, but the plan specifically excludes coverage for pregnancy and pregnancy-related medical conditions.<sup>2</sup>

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<sup>1</sup> Committee on Labor and Human Resources, 96th Cong., LEGISLATIVE HISTORY OF THE PREGNANCY DISCRIMINATION ACT, 1978, at 3 (Comm. Print 1980) (noting that 25 million women working in 1978 to provide basic support for their families).

<sup>2</sup> Legislative History of the PDA, at 2. G.E.'s program provided an employee who became disabled as a result of an eligible non-occupational injury or illness to receive 60% of his or her salary for a maximum of 26 weeks. *Id.* at 1.

In 1976, the female employees of General Electric (“G.E.”) faced precisely this situation.<sup>3</sup> Forty-three of the then-current and former female G.E. employees banded together to challenge G.E.’s benefits program.<sup>4</sup> Alleging that G. E.’s exclusion of pregnancy from an otherwise comprehensive list of covered non-occupational disabilities violated Title VII of the U.S. Code, these women argued their case all the way to the Supreme Court—and lost.<sup>5</sup>

Utilizing the definition of discrimination developed in its Fourteenth Amendment jurisprudence,<sup>6</sup> the Supreme Court of the United States determined that G.E.’s failure to provide disability benefits for pregnancy related work absences did not discriminate on the basis of sex.<sup>7</sup> Congress reacted to the Supreme Court’s decision in *General Electric Co. v. Gilbert* by amending Title VII, explicitly providing, “the terms “because of sex” or “on the basis of sex”

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<sup>3</sup> *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 129-130 (1976), *overruled by* Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2005).

<sup>4</sup> Legislative History of the PDA at 4.

<sup>5</sup> *Gen. Elec.*, 429 U.S. at 138. The judge of the District Court of the Eastern District of Virginia and of the Fourth Circuit Court of Appeals ruled in favor of the female employees, holding that G.E.’s exclusion of pregnancy from its disability benefits plan constituted sex discrimination in violation of Title VII. *Gilbert v. Gen. Elec. Co.*, 375 F. Supp. 367, 386 (E.D. Va. 1974), *overruled by Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), *overruled by* Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2005); *Gilbert v. Gen. Elec. Co.*, 519 F.2d 661, 668 (4th Cir. 1975), *overruled by Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), *overruled by* Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2005). The Supreme Court’s interpretation of Title VII’s sex discrimination provisions overruled the holdings of 24 lower Federal courts. Legislative History of the PDA at 7. In addition, the Supreme Court refused to accord the force of law to EEOC Guidelines stating, “Disabilities caused or contributed to by pregnancy, miscarriage, abortion, childbirth, and recovery therefrom are, for all job-related purposes, temporary disabilities and should be treated as such under any health or temporary disability insurance or sick leave plan available in connection with employment. (Benefits) shall be applied to disability due to pregnancy or childbirth on the same terms and conditions as they are applied to other temporary disabilities.” *Gen. Elec.* 429 U.S. at 140-41 (quoting 29 C.F.R. § 1604.10(b) (1975)).

<sup>6</sup> *Gen. Elec.*, 429 U.S. at 133.

<sup>7</sup> *Id.* at 145-46.

include . . . because of or on the basis of pregnancy, childbirth, or related medical conditions.”<sup>8</sup> Predictably, medical advances and technological innovation have forced courts to apply Title VII in a host of circumstances unconsidered by the express language of the Pregnancy Discrimination Act and its legislative history. Causes of Action examined as potentially cognizable include claims related to maternal leave to accommodate breastfeeding,<sup>9</sup> insurance coverage of contraceptives,<sup>10</sup> and adverse employment action due to an employee’s decision to have an abortion.<sup>11</sup>

Recently, the Seventh Circuit became the first Federal Circuit Court of Appeals to recognize a cognizable Title VII claim where a woman alleged an adverse employment action taken in response to her pursuit of in vitro fertilization, a type of infertility treatment.<sup>12</sup> In so doing, the Seventh Circuit created a possible conflict with the Eighth and Second Circuits, which have both refused to recognize a cognizable Title VII claim where an employer excludes infertility treatments from insurance benefits plans.<sup>13</sup> Furthermore, the Seventh Circuit’s reasoning creates a murky distinction between child bearing capacity and fertility—although discrimination based on child bearing capacity violates Title VII as amended by the Pregnancy Discrimination Act, discrimination based on fertility does not.<sup>14</sup>

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<sup>8</sup> Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2005).

<sup>9</sup> See e.g. *Barrash v. Bowen*, 846 F.2d 927 (4th Cir. 1988); *McNeill v. N.Y.C. Dept. of Corrections*, 950 F. Supp. 564 (S.D.N.Y. 1996); *Martinez v. N.B.C., Inc.*, 49 F.Supp.2d 305 (S.D.N.Y. 1999); *Wallace v. Pyro Min. Co.*, 789 F.Supp. 867 (W.D. Ky. 1990).

<sup>10</sup> See e.g. *In re Union Pac. R.R. Emp. Prac. Lit.*, 479 F. 3d 936 (8th Cir. 2007); *Erickson v. Bartell Drug Co.*, 141 F.Supp.2d 1266 (W.D. Wash., 2001); *Stocking v. AT&T Corp.*, 436 F.Supp.2d 1014 (W.D. Mo., 2006), *reconsidered and vacated*, 2007 WL 3071825 (W.D.Mo. 2007).

<sup>11</sup> See e.g. *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008); *Turic v. Holland Hospitality, Inc.*, 85 F.3d 1211 (6th Cir. 1996).

<sup>12</sup> *Hall v. Nalco*, 534 F.3d 644, 649 (7th Cir. 2008).

<sup>13</sup> *Saks v. Franklin Covey*, 316 F.3d 337 (2d Cir. 2003); *Krauel v. Iowa*, 95 F.3d 674 (8th Cir. 1996)

<sup>14</sup> *Hall*, 534 F.3d at 647-648.

Despite the possible conflict and the obscure distinction, the Seventh Circuit correctly determined that adverse employment action based on an employee's pursuit of infertility treatments is gender discrimination under the Pregnancy Discrimination Act. Furthermore, the Seventh Circuit correctly recognized its decision as distinguishable from those of the Second and Eighth Circuits.

## II. THE PREGNANCY DISCRIMINATION ACT: GESTATION OF CIVIL RIGHTS PROTECTION

### A. *Title VII and the PDA*

The history of the Pregnancy Discrimination Act<sup>15</sup> begins fourteen years before its birth, with the enactment of Title VII of the Civil Rights Act of 1964. The relevant portion of Title VII states:

It shall be an unlawful employment practice for an employer—

- (1) to fail or refuse to hire or to discharge any individual, or otherwise 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.<sup>16</sup>

A sex discrimination claim may arise under Title VII when an employer perpetrates an adverse employment action due to an employee's gender. In other words, an employer violates Title VII if it makes hiring, firing, or promotional decisions based on an employee's gender.<sup>17</sup> However, Title VII also prohibits gender discrimination in

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<sup>15</sup> Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2005).

<sup>16</sup> 42 U.S.C. § 2000e-2(a)(1) (2005).

<sup>17</sup> *Id. See e.g. Anderson v. City of Bessemer City, N.C.*, 470 U.S. 564, 580 (1985)(affirming District Court's finding of gender discrimination where petitioner was denied position in favor of male applicant with qualifications inferior to petitioner's and where selection committee demonstrated gender bias); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1154, 1562-1566 (11<sup>th</sup> Cir. 1987)(denying

the terms and conditions of employment, including compensation, benefits, job assignments, and transfers.<sup>18</sup> In addition, a Title VII claim may proceed under either a disparate treatment or disparate impact theory.<sup>19</sup> Overt or intentional conduct that treats an employee in a manner which would be different but for the employee's gender represents disparate treatment discrimination.<sup>20</sup> In contrast, a facially neutral employment practice which is applied even-handedly to all employees but which, nonetheless, disproportionately impacts one gender violates Title VII under the disparate impact theory.<sup>21</sup>

The legislative history of Title VII, so expansive with regard to the matter of race and color, is nearly mute with respect to the meaning of the term sex and the extent of protection thereby provided.<sup>22</sup> Virginia Congressman Howard Smith, a staunch opponent of civil rights legislation, proposed amending Title VII to include the term "sex" late in the Congressional deliberations, just two days

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summary judgment on gender discrimination claim where employee was fired after refusing manager's sexual advances and where male employee retained position).

<sup>18</sup> 42 U.S.C. § 2000e-2(a)(1). *See e.g.* *Ariz. Governing Committee for Tax Deferred Annuity and Deferred Compensation Plans v. Norris*, 462 U.S. 1073, 1074 (1983)(holding that a retirement benefits plan which paid lower monthly benefits to woman than to men who made the same contributions constituted sex discrimination in violation of Title VII); *City of Los Angeles, Dept. of Water and Power*, 435 U.S. 702, 711 (1978)(holding that sex discrimination occurs where women are required to pay greater pension contributions than men due to females' greater life expectancy)

<sup>19</sup> *Texas Dept. of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981)(defining the elements of the prima facie Title VII disparate treatment claim); *Connecticut v. Teal*, 457 U.S. 440, 448 (1982)(finding a violation of Title VII where employer administered examination had a disparate impact on black employees)

<sup>20</sup> *See Burdine*, 450 U.S. at 253 (indicating that burden of proving intentional discrimination remains with plaintiff).

<sup>21</sup> *See Teal*, 457 U.S. at 446 (noting that to establish a prima facie case of Title VII disparate impact, plaintiff must demonstrate "the facially neutral employment practice had a significantly discriminatory impact.")

<sup>22</sup> *Erickson v. Bartell Drug Co.*, 141 F. Supp.2d 1266, 1269 (W.D. Wash. 2001).

before the final vote.<sup>23</sup> Congress adopted the amendment after a mere two hours of floor debate.<sup>24</sup>

The Supreme Court attempted to interpret Congress' prohibition of discrimination "because of...sex," in *General Electric v. Gilbert*.<sup>25</sup> According to the Supreme Court, the female G.E. employees failed to demonstrate a gender-based effect resulting from the exclusion of pregnancy related disabilities from coverage.<sup>26</sup> Rather than representing an example of facial or pre-textual gender discrimination, the G.E. plan, in the Supreme Court's view, was "nothing more than an insurance package, which covers some risks, but excludes others."<sup>27</sup> Since the male and female employees of G.E. received the exact same package covering the exact same categories of risk, the Supreme Court classified the benefits plan as facially

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<sup>23</sup> Commentators speculate that the term was added in an attempt to derail passage of the Civil Right Act by adding a controversial category to the list of protected classes. *Id. But see* Jo Freeman, *How "Sex" Got into Title VII: Persistent Opportunism as a Maker of Public Policy*, 9 LAW & INEQ. 163 (1990-1991) (arguing that the sudden addition of "sex" to the protections of Title VII is better understood as an instance of persistent opportunism forcing major public policy innovation). In support of her theory, Ms. Freeman notes several important factors which argue against the addition of "sex" as a ploy to strike down the Civil Rights Act:

1)The potential beneficiaries of the amendment—women—had experienced lobbyists on the Hill and were not uninterested in the bill; 2) most Southerners had conceded defeat and gone home by Wednesday; the vote occurred on a Saturday, which is not Members' favorite day to be in Washington; 3) the number of Members voting on the amendment—301—was larger than any other counted vote that day (the others ranged from 178 to 240); 4) other amendments which might "clutter up" the bill, including "sex" amendments to other titles, were voted down.

*Id.* at 164-65.

<sup>24</sup> Freeman, *supra* note 23, at 163.

<sup>25</sup> Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 133 (1976), *overruled by* Pregnancy Discrimination Act of 1978, 42 U.S.C. § 2000e(k) (2005).

<sup>26</sup> *Id.* at 137.

<sup>27</sup> *Id.* at 138.

neutral.<sup>28</sup> The Supreme Court also failed to detect any discriminatory effect. In the court's reasoning, G.E.'s failure to provide pregnancy-related benefits did not change the parity of the benefits offered to men and women.<sup>29</sup> Pregnancy-related illness and disabilities simply exemplified an "additional risk, unique to women," that exceeded the benefits offered by the plan.<sup>30</sup>

However brief its original consideration of the term, following the Supreme Court's decision in *General Electric*, Congress amended Title VII to include the following definition of sex discrimination:

The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected by similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.<sup>31</sup>

Now known as the Pregnancy Discrimination Act ("PDA"), this amendment to Title VII did not create any new rights or remedies.<sup>32</sup> Rather, the PDA is a rejection of the Supreme Court's holding and reasoning in *General Electric*.<sup>33</sup> Through the PDA, Congress expressly provided that discrimination on the basis of pregnancy is per se sex discrimination and a violation of Title VII.<sup>34</sup>

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<sup>28</sup> *Id.*

<sup>29</sup> *Id.*, at 139.

<sup>30</sup> *Id.*

<sup>31</sup> Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2005).

<sup>32</sup> *Hall v. Nalco*, 534 F.3d 644, 647 (7th Cir. 2008)(citing *Newport News Shipping & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678-679 (1983)).

<sup>33</sup> *Newport News*, 462 U.S. at 670.

<sup>34</sup> See Committee on Labor and Human Resources, 96th Cong., Legislative History of the Pregnancy Discrimination Act of 1978, at 126 (Comm. Print 1980) (stating that "since only the female sex can bear children, any attempt to single out



*B. Supreme Court Interpretation of the PDA*

Since the amendment of Title VII by the PDA, the Supreme Court has had several occasions to consider the breadth and application of the PDA. Through *Newport News v. EEOC* and *International Union v. Johnson Controls*, the Supreme Court began to create an analytical and precedential framework to guide the interpretation and application of the Pregnancy Discrimination Act.

In *Newport News v. EEOC*, the Supreme Court recognized the PDA as a rejection of the Court's reasoning and holding in *General Electric*.<sup>35</sup> *Newport News*, like *General Electric*, considered employees' allegations of gender discrimination in the provision of employment benefits.<sup>36</sup> In *Newport News*, the Supreme Court determined that the health insurance plan at issue violated Title VII by providing more comprehensive health care benefits to female employees than to male employees.<sup>37</sup> Following the enactment of the Pregnancy Discrimination Act, *Newport News Shipping* had revised its health care plan to cover pregnancy, childbirth, and related medical conditions of its female employees.<sup>38</sup> The company did not, however, extend pregnancy benefits to the female spouses of its male employees.<sup>39</sup>

The Supreme Court first noted that Title VII protects male as well as female employees from gender discrimination.<sup>40</sup> Next, the

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and discriminate against the condition of pregnancy is an inherent attempt to single out and discriminate against women.”).

<sup>35</sup> *Newport News*, 462 U.S. at 670.

<sup>36</sup> *Id.* at 671.

<sup>37</sup> *Id.* at 676.

<sup>38</sup> *Id.* at 671-72.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.* at 682. The Supreme Court found no merit in the Petitioner, *Newport News*'s, argument that Congress intended to limit the Pregnancy Discrimination Act's application to pregnant *employees* and that *Newport News* had no statutory obligation to provide pregnancy benefits to the *wives* of its employees. The Supreme Court reasoned that Congress's focus on female workers did not “create a ‘negative

Supreme Court reasoned that Newport News had gifted its female employees with more favorable terms of employment than its male employees.<sup>41</sup> Like the male employees in *General Electric*, the dependents of Newport's female employees enjoyed protection from all categories of risk; in contrast, the female dependents of male employees lacked protection for pregnancy related illness.<sup>42</sup> Because Newport News had provided pregnancy disability insurance coverage for its female employees, but not for the spouses of its male employees, the company discriminated on the basis of pregnancy and violated Title VII.<sup>43</sup>

Unlike the benefits-received reasoning employed by the Supreme Court in *General Electric*, the reasoning embraced in *Newport News* is risk oriented.<sup>44</sup> In *Newport News*, the Supreme Court recognized the *General Electric* dissenters' interpretation of Title VII as the approved Congressional interpretation.<sup>45</sup> Justice Brennan's *General Electric* dissent argued that a policy which specifically excludes pregnancy related illness from a benefits package is facially

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inference' limiting the scope of the act to the specific problem that motivated its enactment" and determined that the question of differential treatment of dependents "should be resolved 'on the basis of existing title VII principles.'" *Id.* at 680 (*quoting* Committee on Labor and Human Resources, 96<sup>th</sup> Cong., Legislative History of the Pregnancy Discrimination Act of 1978, at 42-43 (Comm. Print 1980).

<sup>41</sup> *Id.* at 683.

<sup>42</sup> *Id.* at 684.

<sup>43</sup> *Id.* The Supreme Court assumed only heterosexual couples exist, and noted, "since the sex of the spouse is always the opposite of the sex of the employee, it follows inexorably that discrimination against female spouses in the provision of fringe benefits is also discrimination against male employees." *Id.* For a discussion of access to reproductive technology and same-sex couples, see Judith F. Daar, *Accessing Reproductive Technologies: Invisible Barriers, Indelible Harms*, 23 BERKELEY J. OF GENDER, L. & JUST. 18 (2008).

<sup>44</sup> *Compare* Gen. Elec. Co. v. Gilbert, 429 U.S. at 138-139, with *Newport News* 462 U.S. at 678.

<sup>45</sup> *Newport News*, 462 U.S. at 678. The *Newport* court pointed to sections of the Legislative History of the PDA which expressed Congress's favor for the reasoning and perception of the dissent. For example, the House Report stated, "It is the Committee's view that the dissenting Justices correctly interpreted the Act." *Id.* The Senate Report also quoted from the dissenting justices' opinions. *Id.*

discriminatory.<sup>46</sup> Contrary to the majority's perception of gender neutral classifications based on pregnant and non-pregnant, Justice Brennan asserted that any classification based on pregnancy must be "at minimum, strongly 'sex related.'"<sup>47</sup> But for pregnancy, argued Justice Brennan, the plan "offers protection for all risks, even those that are 'unique to' men or heavily male dominated."<sup>48</sup> By excluding pregnancy, a uniquely feminine condition, from coverage, the General Electric disability program left a greater burden of risk upon the female employees than it did upon the male.<sup>49</sup> Whereas men were protected from all categories of risk to which they could be subjected, women received only partial protection.<sup>50</sup>

Adopting Justice Brennan's analytical approach, the *Newport* court analyzed the comprehensiveness of coverage offered to males and females by evaluating the risks to which each gender remained exposed.<sup>51</sup> Because the Newport plan refused coverage of pregnancy related illness to female dependents of male employees, the Court concluded that the plan "provide[d] more complete hospitalization coverage for the spouses of female employees than it did for the spouses of male employees,"<sup>52</sup> and therefore "unlawfully [gave] married male employees a benefit package for their dependents that is less inclusive than the dependency coverage provided to married female employees."<sup>53</sup>

The Supreme Court's decision in *International Union* is equally important to the Seventh Circuit's analysis in *Hall v. Nalco*. Unlike *Newport* and *General Electric*, *International Union* concerned adverse employment actions perpetrated due to gender discrimination

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<sup>46</sup> *Gen. Elec.*, 429 U.S. at 148 (Brennan, J., dissenting).

<sup>47</sup> *Id.* at 149.

<sup>48</sup> *Id.* at 160.

<sup>49</sup> *Newport News*, 462 U.S. at 677-678.

<sup>50</sup> *Id.* at 678 (quoting *Gen. Elec.*, 429 U.S. at 161-62 n.5 (Brennan, J., dissenting)).

<sup>51</sup> *Id.* at 683-684.

<sup>52</sup> *Id.*

<sup>53</sup> *Id.* at 684.

rather than unequal terms of employment.<sup>54</sup> In *International Union*, male and female employees of the battery manufacturer, Johnson Controls, challenged the company's fetal protection policy as a violation of Title VII.<sup>55</sup> The fetal protection policy prohibited fertile women from performing jobs involving lead exposure with the stated goal of protecting the females' unborn children.<sup>56</sup> Despite credible scientific evidence demonstrating negative fetal effects due to the father's exposure to lead, Johnson Controls allowed fertile men to risk their reproductive health.<sup>57</sup>

The Supreme Court concluded, "Johnson Controls' policy is not neutral because it does not apply to the reproductive capacity of the company's male employees in the same way as it applies to that of the females."<sup>58</sup> Because it treated the reproductive capacities of each gender differently, the fetal protection policy could not be a classification based on "fertility alone."<sup>59</sup> Rather, the policy discriminated based on fertility and on gender and childbearing capacity.<sup>60</sup> By targeting female reproductive capacity in particular, the policy discriminated on the basis of "potential for pregnancy," and could not be considered facially neutral.<sup>61</sup>

In *Newport* and *International Union*, the Supreme Court began the creation of an analytical and precedential framework to guide lower courts in their interpretation of the Pregnancy Discrimination Act. By repudiating the *General Electric* majority's reasoning and by embracing Justice Brennan's analytical approach, the Supreme Court has directed lower courts to focus on the risks to which gender classification remain vulnerable when analyzing the neutrality of employment benefits. In contrast, *International Union* creates

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<sup>54</sup> *Int'l Union v. Johnson Controls*, 499 U.S. 187, 192 (1991).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 191-192.

<sup>57</sup> *Id.* at 197-198.

<sup>58</sup> *Id.* at 199.

<sup>59</sup> *Id.* at 198.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 199.

Supreme Court precedent suggesting that employers may differentiate among employees according to fertility, so long as those differentiations occur in a gender neutral manner.

### III. THE BOUNCING BUNDLE OF JOY: A NEW CLASS OF CLAIMS IN THE PDA FAMILY

In its recent decision, *Hall v. Nalco*, the Seventh Circuit became the first Circuit Court of Appeals to recognize a cognizable claim of Title VII sex discrimination where an employer allegedly perpetrated an adverse employment action in response to an employee's pursuit of infertility treatments. More specifically, Ms. Hall, the plaintiff in *Hall*, sought leave from her job in order to undergo in vitro fertilization, a surgical impregnation procedure. According to Ms. Hall's allegations, her employer terminated her as a result of her request for leave.

#### A. *The Problem of Infertility*

Infertility is a common problem that affects approximately 10% of all couples in the United States.<sup>62</sup> Within that 10% of infertile couples, 40% of all cases are attributable to male infertility factors, and a corresponding 40% of cases are attributable to female infertility factors.<sup>63</sup> Doctors attribute the remaining 20% of cases to a combination of male and female infertility issues.<sup>64</sup> According to the medical community, infertility is "a disease or condition of the reproductive system often diagnosed after a couple has had one year of unprotected, well-timed intercourse, or if the woman has suffered from multiple miscarriages."<sup>65</sup> For couples who wish to conceive despite

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<sup>62</sup> Bradley J. Voorhis, *In Vitro Fertilization*, 356 NEW ENG. J. MED. 379, 379 (2007).

<sup>63</sup> Bentley, *supra* note 10, at 394-395.

<sup>64</sup> *Id.*

<sup>65</sup> Elizabeth A. Pendo, *The Politics of Infertility: Recognizing Coverage Exclusions as Discrimination*, 11 CONN. INS. L.J. 293, 297 (2004-2005).

reduced fertility of either the male or female form, medical assistance exists in the form of hormone treatments, prescription drugs, and corrective surgeries such as the repair or removal of blockages from fallopian tubes.<sup>66</sup>

Eighty-five to ninety percent of infertility cases are able to conceive using the treatments already described.<sup>67</sup> The remaining 10–15 % of cases, however, may turn to more drastic measures such as surgical impregnation procedures.<sup>68</sup> Surgical impregnation procedures come in a variety of forms, including in vitro fertilization, Gamete Intrafallopian Transfer (GIFT), and Zygote Intrafallopian Transfer (ZIFT).<sup>69</sup> The procedures are defined by the manner in which fertilization is attempted and the location in which implantation of the fertilized egg occurs.<sup>70</sup> With in vitro fertilization, for instance, the female's eggs are surgically extracted and then fertilized by the male's sperm in a laboratory.<sup>71</sup> The embryos resulting from fertilization are then placed in the female's womb.<sup>72</sup> Many gender specific infertility problems have prescribed treatments that must be performed on the particular individual suffering from the problem.<sup>73</sup> Surgical impregnation procedures, although performed only on women, can be used to treat both male and female fertility.<sup>74</sup>

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<sup>66</sup> *Id.* at 299-300.

<sup>67</sup> *Id.* at 300.

<sup>68</sup> *Id.*

<sup>69</sup> Bentley, *supra* note 10, at 396.

<sup>70</sup> *Id.*

<sup>71</sup> MARK H. BEERS, MERCK MANUAL OF MEDICAL INFORMATION 1418-1419 (2d Home ed., Pocket Books 2003).

<sup>72</sup> *Id.*

<sup>73</sup> See, e.g., Stuart S. Howards, *Treatment of Male Infertility*, 332 NEW ENG. J. MED. 312, 313-316 (1998); Howard S. Jones & James P. Toner, *The Infertile Couple*, 329 NEW ENG. J. MED. 1710, 1711-1712 (1993).

<sup>74</sup> See Howards, *supra* note 73, at 313-316.

*B. Hall v. Nalco*

Ms. Hall began working for Nalco in 1997, becoming a sales secretary in 2000.<sup>75</sup> In March 2003, Ms. Hall requested a leave of absence to undergo in vitro fertilization.<sup>76</sup> This leave was approved by her direct supervisor and lasted from March 24 through April 21.<sup>77</sup> Unfortunately, Ms. Hall's first attempt to become pregnant through reproductive technology failed.<sup>78</sup> Upon returning to work, Ms. Hall informed her supervisor that she would be requesting additional leave in order to undergo the in vitro fertilization procedure again.<sup>79</sup>

Beginning in January of 2003, several months prior to Ms. Hall's initial request for leave, Nalco began preparations for a consolidation of its sales offices.<sup>80</sup> Sometime between that January and July of 2003, Nalco determined that the consolidated sales offices would require only one secretary.<sup>81</sup> Since each office had its own secretary, one of them would have to be let go following completion of the consolidation.<sup>82</sup> After Ms. Hall returned from her first leave and requested additional leave to again attempt in vitro fertilization, Ms. Hall was terminated.<sup>83</sup>

In response to her termination, Ms. Hall brought a gender discrimination claim under Title VII as amended by the Pregnancy Discrimination Act, alleging that Nalco terminated her because of her request for leave to undergo in vitro fertilization treatments.<sup>84</sup> To demonstrate a causal link between her attempts to become pregnant and her termination, Ms. Hall offered several statements from her

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<sup>75</sup> Hall v. Nalco, 534 F.3d 644, 646. (7<sup>th</sup> Cir. 2008)

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.* at 645.

supervisor, which asserted that the termination was in Ms. Hall's "best interest due to [her] health condition."<sup>85</sup> In addition, Ms. Hall pointed to notes regarding the content of a meeting between the supervisor and the employee relations manager which specifically mentioned her infertility treatments.<sup>86</sup> Specifically, the notes read, "missed a lot of work due to health," and, "absenteeism-infertility treatments."<sup>87</sup>

Without reaching the merits of Ms. Hall's claim, the District Court for the Northern District of Illinois granted summary judgment for the defendant, Nalco.<sup>88</sup> Concluding that infertile women are not a protected class under the Pregnancy Discrimination Act,<sup>89</sup> the District Court held that Ms. Hall could not demonstrate sex discrimination because infertility is a gender neutral condition.<sup>90</sup> Ms. Hall appealed the District Court judgment, and the Seventh Circuit reversed, stating, "Because adverse employment actions taken on account of childbearing capacity affect only women, Hall has stated a cognizable sex-discrimination claim under the language of the PDA."<sup>91</sup>

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<sup>85</sup> *Id.* at 646.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 645.

<sup>90</sup> *Id.* In so holding, the District Court called two previous Northern District of Illinois cases into question. *See Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393 (N.D. Ill. 1994); *Erickson v. Bd. of Governors of State Coll. and Univ. for Northeastern Ill. Univ.*, 911 F. Supp. 316 (N.D. Ill. 1995). Both of these cases involved female employees who utilized sick days or other leave in order to undergo infertility treatments. In each case, the female was terminated and brought suit under the PDA alleging that an adverse employment action had occurred. And in both cases, the District Court found their claims cognizable, arguing that the PDA extends protection to potential pregnancy. *See Pacourek*, 858 F.Supp. at 1401; *Erickson*, 911 F.Supp. at 319. The Court also argued that a female undergoing fertility treatments should be included in the class of women who are potentially pregnant. *Pacourek*, 858 F.Supp. at 1403; *Erickson*, 911 F.Supp. at 320.

<sup>91</sup> *Hall*, 534 F.3d at 645. Although Ms. Hall based her case on the argument that infertile women are a protected class under the PDA, the Seventh Circuit analyzed the case under the childbearing capacity/potential pregnancy legal theory. *Id.* at 649 n. 3.



By so stating, the Seventh Circuit classified the pursuit of infertility treatments as a medical condition related to pregnancy within the meaning of the PDA and recognized an adverse employment action based on an employee's pursuit of infertility treatments as a cognizable claim Title VII claim.<sup>92</sup>

#### IV. MAKING ROOM FOR THE NEW ARRIVAL: *HALL V. NALCO* AND CONTEMPORARY PDA JURISPRUDENCE

Although likely to face a warm reception from champions of a liberal interpretation of the Pregnancy Discrimination Act ("PDA"),<sup>93</sup> the Seventh Circuit's decision to recognize pursuit of infertility treatments as a medical condition related to pregnancy causes some strain in the context of contemporary PDA jurisprudence. First, the Seventh Circuit's holding creates a possible conflict with the Second and Eighth Circuits, both of which have previously refused to recognize a cognizable claim arising from the exclusion of infertility treatments from insurance coverage.<sup>94</sup> Second, in articulating and justifying its decision, the Seventh Circuit created a murky distinction between fertility related medical conditions, which do not give rise to a cognizable claim under the PDA, and childbearing related medical conditions, which can give rise to a cognizable claim under the PDA.<sup>95</sup> Despite the seeming obscurity of this distinction, Supreme Court precedent, the legislative history of the PDA, and logic indicate that

<sup>92</sup> *Id.* at 646.

<sup>93</sup> See Pendo, *supra* note 65, at 343 (arguing that comprehensive insurance coverage of infertility treatments would lead to better, more humane, and more cost-effective treatments); Julie Manning Magid, *Contraception and Contractions: A Divergent Decade Following Johnson Controls*, 41 AM. BUS. L.J. 115, 142-144 (2003) (advocating a broad interpretation of the PDA). *But see* Katherine E. Abel, *The Pregnancy Discrimination Act and Insurance Coverage for Infertility Treatment: An Inconceivable Union*, 37 CONN. L. REV. 819, 849-850 (2005) (urging a more complete understanding of the moral and legal implications of infertility treatments before expanding PDA protection).

<sup>94</sup> *Saks v. Franklin Covey*, 316 F.3d 337 (2d Cir. 2003); *Krauel v. Iowa*, 95 F.3d 674 (8th Cir. 1996).

<sup>95</sup> *Hall*, 534 F.3d at 647-648.

the Seventh Circuit correctly determined that adverse employment action based on an employee's pursuit of infertility treatments is cognizable gender discrimination under the PDA. To the extent that the Seventh Circuit's opinion is inconsistent with those of the Eighth and Second Circuits, the Seventh Circuit has chosen the more logical approach.

A. *Establishing the New-Born Identity: The Distinction Between Fertility and Childbearing Capacity*

Given the express language of the PDA<sup>96</sup> and Supreme Court precedent suggesting that infertility is a gender neutral characteristic lacking protection under the PDA<sup>97</sup>, Ms. Hall's claim does not immediately appear as the ideal candidate for coverage under the PDA. In the District Court, Hall alleged that she was "a member of a protected class, female with a pregnancy related condition, infertility."<sup>98</sup> The District Court promptly dismissed her claim on summary judgment, stating that infertile women are not a protected class under the PDA because infertility is a gender neutral condition.<sup>99</sup> Although accepting the Supreme Court's implication that infertility discrimination is not prohibited by the PDA, the Seventh Circuit nevertheless found the District Court's emphasis on "infertility alone" was misplaced within the factual context of Ms. Hall's claim.<sup>100</sup> According to the Seventh Circuit's reasoning, Ms. Hall's claim did not allege infertility discrimination, but rather discrimination on the basis of childbearing capacity, a gender-specific trait qualifying as a medical

<sup>96</sup> Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2005).

<sup>97</sup> *Int'l Union v. Johnson Controls*, 499 U.S. 187, 198 (1991).

<sup>98</sup> *Hall*, 534 F.3d at 646.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 648. Despite the Supreme Court precedent provided by *International Union*, commentators continue to argue that infertility should receive protection under Title VII as amended by the PDA. *See Pendo, supra* note 65, at 336-338 (arguing that infertility is a gender-specific trait because it is still seen as a "woman's problem" and because infertility has a disproportionate psychological impact on females).

condition related to pregnancy under the PDA.<sup>101</sup> The Seventh Circuit thereby reached two separate conclusions: 1) childbearing capacity is separate and distinct from fertility, and 2) childbearing capacity is a medical condition related to pregnancy and, therefore, a protected classification under Title VII as amended by the PDA.

The distinction between childbearing capacity and fertility at first appears murky. Fertile, in medical terminology, means “fruitful; having the capacity to reproduce.”<sup>102</sup> Logically, a female who is capable of reproducing, and who is therefore fertile, must be capable of bearing a child. Nevertheless, the Seventh Circuit properly recognized childbearing capacity as gender specific while continuing to maintain the gender neutrality of infertility.

Although the Seventh Circuit referred to *Newport News* in support of its recognition of the PDA as a Congressional overruling of *General Electric*,<sup>103</sup> the Seventh Circuit’s reasoning in support of the distinction between childbearing capacity and fertility relied almost exclusively on *International Union*.<sup>104</sup> The Seventh Circuit reiterated the Supreme Court’s finding that a fetal protection policy which classifies on the basis of gender and childbearing capacity rather than fertility alone violates Title VII.<sup>105</sup> According to the Seventh Circuit, “As *Johnson Controls* illustrates, even where (in)fertility is at issue, the employer conduct complained of must actually *be gender neutral* to pass muster.”<sup>106</sup> An action undertaken by an employer based on an employee’s childbearing capacity, however, can never be gender neutral: the Seventh Circuit argued, “Employees terminated for taking time off to undergo IVF—just like those terminated for taking time off to give birth or receive other pregnancy-related case—will always be

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<sup>101</sup> *Hall*, 534 F.3d at 648-649.

<sup>102</sup> DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 684 (Elsevier, 30<sup>th</sup> ed. 2003).

<sup>103</sup> *Hall*, 534 F.3d at 647 (citing *Newport News v. EEOC*, 462 U.S. 669, 676-678 (1983)).

<sup>104</sup> *Id.* at 648-649.

<sup>105</sup> *Id.* at 648.

<sup>106</sup> *Id.*

women.”<sup>107</sup> Therefore, the Seventh Circuit’s distinction between childbearing capacity and fertility is best understood as a reiteration of the Supreme Court’s suggestion that an employer may differentiate between employees on the basis of fertility, so long as the employer does so in a gender neutral manner. Differentiation based on employees’ childbearing capacity is differentiation based on fertility; however differentiation based on childbearing capacity is not a gender neutral differentiation based on fertility and it therefore violated Title VII as amended by the PDA.

Having reached the logic behind the Seventh Circuit’s differentiation between childbearing capacity and fertility, one must still consider whether childbearing capacity is appropriately considered a medical condition related to pregnancy. The PDA states, “The terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions . . .”<sup>108</sup> The PDA does not define related medical condition. Furthermore, the Supreme Court’s only guidance appears by implication in *International Union*, where the Supreme Court appeared to suggest that employment discrimination on the basis of fertility is permissible under Title VII and the PDA so long as the discrimination is truly gender neutral.<sup>109</sup> Clearly, there is a causal chain between fertility treatments and pregnancy, but the Circuit Courts of Appeal rather unanimously require more than a simple causal chain to establish a medical condition related to pregnancy.<sup>110</sup>

<sup>107</sup> *Id.* at 648-649.

<sup>108</sup> Pregnancy Discrimination Act 42 U.S.C. § 2000e(k)

<sup>109</sup> *Int’l Union v. Johnson Controls*, 499 U.S. 187, 198 (1991). The Second, Seventh, and Eighth Circuits all appear to accept this implication as sound and binding precedent. *E.g.*, *Saks v. Franklin Covey*, 316 F.3d 337, 346 (2d Cir. 2003); *Hall*, 534 F.3d at 638; *Krauel v. Iowa*, 95 F.3d 674, 679 (8<sup>th</sup> Cir. 1996).

<sup>110</sup> *E.g.* *Fleming v. Ayers & Assoc.’s*, 948 F.2d 993, 997 (6<sup>th</sup> Cir. 1991) (medical related conditions under the PDA do not encompass adverse employment actions based on the medical condition of the child simply because the condition is present at birth); *Troupe v. May Dept. Stores Co.*, 20 F.3d 734 (7<sup>th</sup> Cir. 1994) (affirming grant of summary judgment to employer who terminated female employee who arrived late due to morning sickness); *In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 941 (8<sup>th</sup> Cir. 2007) (rejecting argument

The Eighth Circuit in particular has taken a conservative view of what constitutes a medical condition related to pregnancy and childbirth.<sup>111</sup> In *International Union*, the Supreme Court found sex discrimination because the fetal protection policy was classified based on childbearing capacity and potential for pregnancy.<sup>112</sup> Heedless of the inclusion of “potential for pregnancy” within the PDA, the Eighth Circuit refuses to extend PDA coverage to issues and conditions which predate pregnancy.<sup>113</sup> If the Eighth Circuit clings to this line of reasoning, it will likely refuse PDA protection for claims such as Ms. Hall’s. But if the Eighth Circuit realizes the error of its approach, or at least decides to temper that approach upon recalling the decision in *International Union*, it should reach the same conclusion which the Seventh Circuit reached in *Hall*.

Even if the Eighth Circuit wished to perpetuate its refusal to class use of contraceptives as a medical condition related to pregnancy, the Eighth Circuit could still reach the Seventh Circuit’s holding that pursuit of surgical impregnation procedures is a medical condition related to pregnancy in the context of adverse employment actions. First, although the in vitro fertilization treatments received by Ms. Hall necessarily occur prior to conception, just like the contraceptives for which the plaintiffs sought insurance coverage in *In*

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that causal chain between contraceptives and pregnancy entitled petitioner to Title VII relief); *McNeill v. N. Y.C. Dept. of Correction*, 950 F. Supp.564, 570-571 (S.D.N.Y. 1996) (limiting “related medical conditions” to incapacitating conditions in the mother for which medical care is usual and normal).

<sup>111</sup> *In re Union*, 479 F.3d at 941. For a brief additional discussion of the Eighth Circuit’s decision in *In re Union*, see Harvard Law Review Association, *Employment Law—Title VII—Eighth Circuit Holds That Benefits Plans Excluding All Contraceptives Do Not Discriminate Based on Sex—In Re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936 (9<sup>th</sup> Cir. 2007), *Reh’g and Reg’g En Banc Denied*, No. 06-1706 (8<sup>th</sup> Cir. May 23, 2007), 121 HARV. L. REV. 1447 (2008). For a discussion regarding insurance coverage of contraceptives generally, see Pendo, *supra* note 65, at 293-343; Ernest F. Lidge III, *An Employer’s Exclusion of Coverage for Contraceptive Drugs is Not Per Se Sex Discrimination*, 76 TEMP. L. REV. 533 (2003).

<sup>112</sup> *Int’l Union*, 499 U.S. at 198-199.

<sup>113</sup> *In re Union*, 479 F.3d at 939.

*re Union*, the treatments are conceptually different from contraceptives. Second, in vitro fertilization and similar surgical impregnation procedures are less open to characterization as gender-neutral than is contraceptive use.

In addition to the temporal disconnection between contraceptive use and pregnancy, the Eighth Circuit also identified a conceptual dissonance between the issues, arguing, “Contraception is not a medical treatment that occurs when or if a woman becomes pregnant; instead contraception prevents pregnancy from even occurring.”<sup>114</sup> In contrast, surgical impregnation procedures are undertaken with the specific intent of instigating pregnancy rather than preventing it. A woman who undergoes in vitro fertilization has a clear intention of becoming pregnant. As a result, fertility treatments such as in vitro fertilization are much more closely related to the concept of potential pregnancy than are contraceptives.

In *In re Union*, the Eighth Circuit also asserted that contraception, like infertility, is a gender-neutral term.<sup>115</sup> Men and women do suffer equally from infertility,<sup>116</sup> and both men and women may seek to avoid an unplanned pregnancy by utilizing contraceptives. However, only women can undergo surgical impregnation procedures. Therefore, as the Seventh Circuit noted, only women will ever request leave of absence from their employer for the purpose of undergoing infertility treatments of this type, and only women will be the subject of adverse employment actions taken in response to those requests.<sup>117</sup>

In any event, the Eighth Circuit’s stark refusal to consider pre-pregnancy conditions as potential medical conditions related to

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<sup>114</sup> *Id.* at 942.

<sup>115</sup> *Id.* at 943. The dissent argues that contraception is far less gender-neutral than the Eighth Circuit would claim and asserts that the burden of excluding any contraceptive, including surgical forms performed only on men, falls on women because women remain the sole gender capable of becoming pregnant. *Id.* at 945 (Bye, J. dissenting).

<sup>116</sup> James F. Donovan & Jay I. Sandlow, *The Infertile Couple*, 330 NEW ENG. J. MED. 1154, 1154 (1994) (stating that male infertility is a primary or secondary factor in fifty percent of infertile couples)

<sup>117</sup> *Hall v. Nalco*, 534 F.3d 644, 648-649 (7<sup>th</sup> Cir. 2008).

pregnancy is inappropriate in light of both the Supreme Court precedent already cited and the legislative history of the PDA. The PDA was drafted and passed in response to the Supreme Court's decision in *General Electric*, and for the stated purpose of countering the societal perspective of women as temporary members of the workforce who would cease working as soon as pregnancy and a family occurred.<sup>118</sup> This perception affected not only pregnant women but every woman perceived by her employer as potentially pregnant.<sup>119</sup> Employers hesitated to advance women to positions and salaries of importance due to the belief that the women would not be in the workplace for more than a few years.<sup>120</sup> Recognizing this prevalent societal view, the enacting Congress understood that forbidding an employer to discriminate against pregnant women is a useless stopgap if the employer remains free to discriminate against women who the employer knows or suspects to be attempting to become pregnant.<sup>121</sup>

If, based on logic, legislative history, and Supreme Court precedent, it is essential to include potentially pregnant women within the protection of the PDA, it makes no sense to distinguish between potentially pregnant women based on whether they intend to become pregnant through natural means or with the assistance of reproductive technology. Given the legislative history and purpose surrounding the PDA and the Supreme Court's recognition of PDA coverage of potential pregnancy, the Seventh Circuit created a valid distinction between childbearing capacity and fertility and correctly classified childbearing capacity as a medical condition related to pregnancy.

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<sup>118</sup> Committee on Labor and Human Resources, 96<sup>th</sup> Cong., Legislative History of the Pregnancy Discrimination Act of 1978, at 3 (Comm. Print 1980).

<sup>119</sup> *Id.* at 62.

<sup>120</sup> *Id.* at 3.

<sup>121</sup> *Id.* at 62-63.

*B. Keeping Peace Between the Siblings: Distinguishing Hall from Saks and Krauel*

Although the Seventh Circuit is the first Circuit Court of Appeals to recognize a cognizable claim where an adverse employment action arises from a woman's pursuit of surgical impregnation procedures, two other Circuit Courts have considered a closely related issue: whether gender discrimination occurs where an employer excludes insurance coverage for surgical impregnation procedures.<sup>122</sup> Neither the Eighth Circuit, which considered the question in *Krauel v. Iowa*, nor the Second Circuit, which faced the issue in *Saks v. Franklin Covey*, extended the protection of the PDA to women undergoing the procedures.<sup>123</sup> As the Seventh Circuit points out, neither the Eighth nor the Second Circuits considered the precise question at issue in *Hall*.<sup>124</sup> Furthermore, to the extent that the Seventh Circuit's opinion is inconsistent with those of the Eighth and Second Circuits, the Seventh Circuit has chosen the more logical approach.

In *Krauel*, the Eighth Circuit considered the PDA claim of a female respiratory therapist who had been denied coverage under her company plan for a surgical impregnation procedure.<sup>125</sup> The insurance policy in question excluded not just treatment of female infertility problems but treatment of male infertility as well.<sup>126</sup> The Eighth Circuit construed the terms of the PDA narrowly, determining that the general term "related medical condition" should be understood as referring to the specific terms of pregnancy and childbirth and should not be extended outside of those contexts.<sup>127</sup> Based on this restrictive

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<sup>122</sup> *Saks v. Franklin Covey*, 316 F.3d 337, 345 (2d Cir. 2003); *Krauel v. Iowa*, 95 F.3d 674, 679 (8<sup>th</sup> Cir. 1996).

<sup>123</sup> *Saks*, 316 F.3d at 345; *Krauel*, 95 F.3d at 679.

<sup>124</sup> *Hall v. Nalco*, 534 F.3d 644, 646 (7<sup>th</sup> Cir. 2008).

<sup>125</sup> *Krauel*, 95 F.3d at 675. Specifically, Ms. Krauel underwent GIFT, a surgical infertility treatment procedure in which the ova and sperm are mixed in a Petri dish. The mixture is then inserted in the fallopian tube to allow natural fertilization to occur. *Id.* at 676, 676 n.3.

<sup>126</sup> *Krauel v. Iowa*, 95 F.3d 674, 676 (8<sup>th</sup> Cir. 1996).

<sup>127</sup> *Id.* at 679.



interpretation of “related medical conditions,” the Eighth Circuit found fertility treatments to be too temporally and conceptually disconnected from pregnancy and childbirth to be a cognizable claim under the PDA; the Court argued, “[p]regnancy and childbirth, which occur after conception, are strikingly different from infertility, which prevents conception.”<sup>128</sup>

Similarly, in *Saks*, the Second Circuit addressed the gender discrimination claim of a female employee who had been denied insurance coverage for a surgical impregnation procedure.<sup>129</sup> Unlike the policy at issue in *Krauel*, however, the policy which denied the Ms. Saks coverage did cover some fertility treatments. Ovulation kits, oral fertility drugs, medically-necessary penile prosthetic implants, and nearly all surgical infertility treatments other than surgical impregnation procedures received insurance coverage.<sup>130</sup> The policy expressly excluded coverage for surgical impregnation procedures, including artificial insemination, in vitro fertilization (“IVF”), and embryo and fetal implantation.<sup>131</sup> Ms. Saks was denied coverage for an IVF attempt and related prescription drug therapy.<sup>132</sup> At the Second Circuit, Ms. Saks argued that the insurance plan violated the Pregnancy Discrimination Act by providing less comprehensive coverage for surgical treatments addressing female infertility than it provided for non-pregnancy related illness.<sup>133</sup> Although recognizing

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<sup>128</sup> *Id.*

<sup>129</sup> *Saks v. Franklin Covey*, 316 F.3d 337, 341 (2d Cir. 2003).

<sup>130</sup> *Id.* Specifically, the plan covered surgical procedures including those to remedy varicoceles (varicose veins in the testicles leading to low sperm count), blockages of the vas deferens (also a procedure performed on males), endometriosis, and tubal occlusions. *Id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 342. Saks also raised a Title VII argument, alleging that the plan violated Title VII by providing “incomplete coverage for surgical treatments for female infertility but. . .complete coverage for surgical procedures remedying male infertility.” *Id.*

that the PDA “clearly embraces more than pregnancy itself,”<sup>134</sup> the Second Circuit rejected Saks’ argument, stating:

Including infertility within the PDA’s protection as a “related medical condition[.]” would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination...[W]e hold that infertility standing alone does not fall within the meaning of the phrase “related medical conditions” under the PDA.<sup>135</sup>

Like the Eighth Circuit, the Second Circuit differentiated its case from *International Union*. According to the Second Circuit’s reasoning, unlike the fetal protection policy in *International Union*, the Franklin Covey insurance plan achieved a gender neutral discrimination based on fertility alone.<sup>136</sup> Even though the Franklin Covey insurance plan covered all surgical infertility treatments performed on males but only some of those performed on females, the Second Circuit found the plan to be gender neutral because the excluded surgical impregnation procedures may treat either male or female infertility.<sup>137</sup> The Second Circuit concluded, “[B]ecause the exclusion of surgical impregnation procedures disadvantages infertile male and female employees equally, Saks’s claim does not fall within the purview of the PDA.”<sup>138</sup>

Despite the seeming inconsistency between the Eighth and Second Circuits and the Seventh Circuit, *Hall* confronts the decisions of the Eighth and Second Circuits peripherally and brushes them aside casually.<sup>139</sup> The Seventh Circuit found little fault with *Saks* and *Krauel*. Indeed, the courts reached several common conclusions. The

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<sup>134</sup> *Id.* at 343.

<sup>135</sup> *Id.* at 346.

<sup>136</sup> *Id.*; See also *Int’l Union v. Johnson Controls*, 499 U.S. 187, 198 (1991).

<sup>137</sup> *Saks*, 316 F.3d at 347.

<sup>138</sup> *Id.* at 346.

<sup>139</sup> *Hall v. Nalco*, 534 F.3d 644, 648 (7<sup>th</sup> Cir. 2008)..

Seventh Circuit accepts the Eighth and Second Circuit's assertions that classifications based on fertility alone are gender neutral and therefore beyond the reach of the PDA.<sup>140</sup> In fact, the Seventh Circuit even cites favorably to some of the core reasoning of *Saks*, noting the logic behind the Second Circuit's contention that the PDA cannot extend protection to a classification simultaneously including equal numbers of both genders and remaining vulnerable to gender discrimination.<sup>141</sup> The questions considered by the three courts are similar in a general sense—all three questions considered whether a woman alleging discrimination based on her pursuit of infertility treatments states a cognizable claim under the PDA.<sup>142</sup> Furthermore the Seventh Circuit appears to reach a result that is diametrically opposed to those of the Eighth and Second Circuits: the Seventh Circuit finds the claim cognizable, while the Second and Eighth Circuits refuse to do so.<sup>143</sup> Yet, the Seventh Circuit directly conflicts with the Eighth and Second Circuits on only two points: the application of the PDA to potential pregnancy and the application of *International Union v. Johnson Controls* to the facts of the case.

On the question of the application of the PDA to potential pregnancy, the Seventh Circuit explicitly disagrees with the Eighth Circuit.<sup>144</sup> With respect to this issue, the Eighth Circuit asserted that the PDA applies only after conception.<sup>145</sup> The Second Circuit reserved

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<sup>140</sup> *Id.*

<sup>141</sup> *Id.*

<sup>142</sup> *Saks*, 316 F.3d at 340-41; *Hall*, 534 F.3d at 645; *Krauel v. Iowa*, 95 F.3d 674, 675-676 (8<sup>th</sup> Cir. 1996).

<sup>143</sup> *Saks*, 316 F.3d at 346; *Hall*, 534 F.3d at 649; *Krauel*, 95 F.3d at 679-680.

<sup>144</sup> *Hall*, 534 F.3d at 648, n. 1.

<sup>145</sup> *Krauel*, 95 F.3d at 679. This aspect of the Eighth Circuit's reasoning became an integral part of that court's ruling in *In re Union*, where the Eighth Circuit refused to require insurance coverage of contraceptives. *In re Union Pac. R.R. Prac. Lit.* 479 F.3d 936, 942 (8<sup>th</sup> Cir. 2007). Interestingly, the Eighth Circuit's assertion is at odds with its own case law. In *Walsh v. National Computer Systems, Inc.*, 332 F.3d 1150, 1160 (8<sup>th</sup> Cir. 2003), the Eighth Circuit upheld a jury verdict awarded in response to a PDA claim brought by a woman who was "discriminated against. . .because she is a woman who had been pregnant, had taken a maternity

judgment on the issue.<sup>146</sup> The Seventh Circuit however, stated, “[T]his argument . . . is specifically foreclosed by *Johnson Controls*, which explicitly recognized the applicability of the PDA to classifications based on “potential for pregnancy,” not just actual pregnancy.”<sup>147</sup> In this respect, the Seventh Circuit’s reasoning is irreconcilable with the Eighth Circuit’s.<sup>148</sup> However, the holdings of the two cases may still be distinguishable. Because the insurance plan at issue in *Krauel* excluded coverage for all infertility treatments,<sup>149</sup> the Eighth Circuit could have decided the question by simply terming the exclusion a gender-neutral differentiation based on fertility.<sup>150</sup>

The Seventh Circuit also diverges from the Eighth and Second at the point that those two Circuits begin to differentiate their facts from those of *International Union*. After noting that the *International Union* decision implicitly allows discrimination based on fertility under the PDA,<sup>151</sup> the Eighth and Second Circuits take distinctive approaches to distinguishing *International Union*.<sup>152</sup> The Eighth Circuit points out that the exclusion of surgical impregnation procedures in its case, unlike the fetal protection policy in *International Union* truly achieved gender neutrality—the policy refused to cover any infertility treatments, whether designed to treat

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leave, and might become pregnant again.” At the time of the litigation, however, the women had not yet become pregnant. *Id.*

<sup>146</sup> *Saks*, 316 F.3d at 346. By expressly declining to consider whether an infertile female employee could state a claim under the PDA for an adverse employment action, the Second Circuit also declined to assert that potential pregnancy could never give rise to a cognizable PDA claim. *Id.*

<sup>147</sup> *Hall*, 534 F.3d. at 648, n.1.

<sup>148</sup> *Id.* The Seventh Circuit specifically refers to this aspect of the Eighth Circuit’s reasoning as “foreclosed by *Johnson Controls*.” *Id.* For additional discussion of the Eighth Circuit’s holding in *Krauel*, 95 F.3d at 674.

<sup>149</sup> *Krauel*, 95 F.3d at 678.

<sup>150</sup> See *Int’l Union v. Johnson Controls*, 499 U.S. 187, 198 (1991).

<sup>151</sup> *Krauel*, 95 F.3d at 679-680.

<sup>152</sup> *Saks v. Franklin Covey*, 316 F.3d 337, 345-346 (2d Cir. 2003); *Krauel*, 95 F.3d at 680.

males or females and no matter what caused the infertility.<sup>153</sup> The Second Circuit had a slightly more difficult time. The policy at issue in *Saks*, after all, did provide coverage for some infertility treatments. The Second Circuit concluded, however, that the employer's insurance policy achieved gender neutrality by refusing to cover surgical impregnation procedures whether the procedure was used to treat male or female infertility.<sup>154</sup>

In contrast, the Seventh Circuit determined that *Hall* mirrored the circumstances of *International Union*,<sup>155</sup> employing the case in support of its argument that the PDA applies to potential pregnancy in general and to adverse employment actions arising from the pursuit of surgical impregnation procedures specifically.<sup>156</sup> This inconsistency between the three cases creates two possibilities: either (1) either the Seventh Circuit or the Eighth and Second Circuits are incorrect, or (2) all three Circuits are correct and it is appropriate to view the pursuit of surgical impregnation procedures as a medical condition related to pregnancy in the context of adverse employment action while not conferring the same status in the context of insurance coverage.

The Seventh Circuit observed no inconsistency in viewing an adverse employment action perpetrated due to an employee's decision to undergo in vitro fertilization as a violation of Title VII as amended by the PDA, while simultaneously maintaining that there is no cognizable claim under the PDA against an employer who refuses to provide insurance coverage for surgical impregnation procedures.<sup>157</sup> The Seventh Circuit viewed the question addressed to it as fundamentally different from the question considered by the Eighth and Second Circuit.<sup>158</sup>

The PDA, however, applies equally to discrimination in the form of adverse employment action and discrimination in the form of

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<sup>153</sup> *Krauel*, 95 F.3d at 680.

<sup>154</sup> *Saks*, 316 F.3d at 347.

<sup>155</sup> *Hall v. Nalco*, 534 F.3d 644, 647-648 (7<sup>th</sup> Cir. 2008).

<sup>156</sup> *Id.* at 648.

<sup>157</sup> *Id.* at 647-648.

<sup>158</sup> *Id.* at 646.

unequal benefits or dissimilar access to fringe benefit programs.<sup>159</sup> In relevant part, the Pregnancy Discrimination Act states,

[W]omen 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 by similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise.<sup>160</sup>

The Act makes no distinction between discrimination through adverse employment action and discrimination through unequal provision of employment benefits. With respect to both adverse employment actions and benefits, discrimination on the basis of “pregnancy, childbirth, or related medical conditions,” is prohibited.<sup>161</sup> Neither does the PDA provide any distinction between “related medical conditions” in the adverse employment action and “related medical conditions” in the benefits contexts.<sup>162</sup>

Although the plain language of the PDA makes no distinction between the benefits and the adverse employment action contexts, infertility treatments would not be the first characteristic to be treated differently with respect to insurance coverage and adverse employment actions. Abortion is specifically exempted from the medical conditions for which an employer must provide medical insurance benefits.<sup>163</sup> The PDA includes a provision reading,

This subsection shall not require an employer to pay for health insurance benefits for abortion, except where the life of the mother would be endangered if the fetus were carried to term,

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<sup>159</sup> Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2005).

<sup>160</sup> *Id.*

<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.*

or except where medical complications have arisen from an abortion.<sup>164</sup>

The Act makes no statement regarding the scope of protection offered to adverse employment actions perpetrated on the basis of an employee's decision to receive an abortion.<sup>165</sup> However, the Third Circuit and the Sixth Circuit have both concluded that adverse employment actions taken in response to an employee's intent or decision to receive an abortion does give rise to a cognizable claim under the PDA.<sup>166</sup>

Both Circuits supported their decisions with legislative history, and EEOC Guidelines. The Legislative History of the PDA provides:

Because [the PDA] applies to all situations in which women are "affected by pregnancy, childbirth, and related medical conditions," its basic language covers women who chose to terminate their pregnancies. This no employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion.<sup>167</sup>

In addition, the House Conference Report on the Pregnancy Discrimination Act suggests that women who chose to terminate a pregnancy are protected by the PDA. The Report states, "[N]o employer may, for example, fire or refuse to hire a woman simply because she has exercised her right to have an abortion."<sup>168</sup> Finally, the Third and Sixth Circuits relied on EEOC Guidelines promulgated in 1986. Those Guidelines indicate that abortion is a medical condition

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<sup>164</sup> *Id.*

<sup>165</sup> *Id.*

<sup>166</sup> *Doe v. C.A.R.S. Prot. Plus, Inc.*, 527 F.3d 358 (3d Cir. 2008); *Turic v. Holland Hosp.*, 85 F. 3d 1211 (6<sup>th</sup> Cir. 1996).

<sup>167</sup> *Turic*, 85 F.3d at 1214 (quoting H.R. Conf. Rep. No. 95-1786, 95<sup>th</sup> Cong., 2d Sess. 4, reprinted in 1978 U.S.C.C.A.N. pp. 4749, 4765-66.)

<sup>168</sup> H.R. Conf. Rep. 95-1786 (Oct. 13, 1978).

related to pregnancy in the limited context of adverse employment actions:

The basic principle of the [PDA] is that women affected by pregnancy and related conditions must be treated the same as other applicants and employees on the basis of their ability or inability to work. A woman is therefore protected against such practices as being fired...merely because she is pregnant or has had an abortion.<sup>169</sup>

The very specific discussion of abortion in the legislative history of the PDA and in the EEOC Guidelines provides an indication of Congressional intent on the issue.

Given the unique treatment of abortion, it is not inconceivable that an employee's pursuit of surgical impregnation would or would not give rise to a cognizable claim depending on the type of unequal treatment giving rise to claim. But abortion is accorded unique treatment precisely because it is a unique issue in the PDA context. Proponents of the PDA abortion exclusion provision strongly felt that "employers who are opposed to abortion should not be forced to, in effect, violate their personal moral conscience by financing payments for abortion."<sup>170</sup> Contemporary moral attitudes toward the use of infertility treatments would not seem to justify a specific exclusion for insurance coverage for surgical impregnation procedures.<sup>171</sup> Although the specific language of the Act does not support the anomalous treatment of abortion, there is strong support in the legislative history of the PDA for doing so.<sup>172</sup> There is no similar expression of Congressional intent with respect to surgical impregnation procedures,

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<sup>169</sup> *Turic*, 85 F.3d at 1213 (quoting 29 C.F.R. § 1604 (1986)).

<sup>170</sup> Committee on Labor and Human Resources, 96<sup>th</sup> Cong., Legislative History of the Pregnancy Discrimination Act of 1978, at 113 (Comm. Print 1980)

<sup>171</sup> *But see Abel*, *supra* note 93, at 849-850 (urging a more complete understanding of the moral and legal implications of infertility treatments before expanding PDA protection).

<sup>172</sup> *See supra* text accompanying notes 167-168.



which were not widely available in 1978 when Congress enacted the PDA.<sup>173</sup>

Nevertheless, there is a logical distinction between infertility treatments in the context of insurance coverage and in the context of adverse employment action. The distinction relies upon the Seventh Circuit's differentiation between childbearing capacity and fertility and is supported by the Supreme Court's *International Union*. As the Supreme Court noted in *City of L.A., Dept. of Water and Power v. Manhart*, in the context of insurance benefits, "[t]reating different classes of risks as though they were the same for purposes of group insurance is a common practice that has never been considered inherently unfair."<sup>174</sup> So long as the insurance classification does not treat any person "in a manner which but for that person's sex would be different," there is no Title VII sex discrimination claim.<sup>175</sup> An illustration of this reasoning occurs where an employer creates gender neutral distinctions between fertile and infertile individuals.<sup>176</sup> So long as the distinction is truly gender neutral, the employer's refusal to provide insurance coverage for infertility treatments can apply to men and women equally.<sup>177</sup> In this circumstance, a woman may be potentially pregnant, but there is no differentiation on that basis. The class who suffers from the denial of fertility treatment insurance coverage includes men who are unable to father children as a result of their own infertility.<sup>178</sup> Furthermore, consistent with the Supreme Court's reasoning in *Newport News*, both the male and female employees bear the risk of their own infertility, and neither gender is

<sup>173</sup> Van Voorhis, *supra* note 62, at 379 (noting the inception of IVF procedures in 1978 and its remarkable increase in use since).

<sup>174</sup> *City of L.A., Dept. of Water and Power v. Manhart*, 435 U.S. 702, 710 (1978).

<sup>175</sup> *Id.* at 711.

<sup>176</sup> *See International Union v. Johnson Controls*, 499 U.S. 187, 198 (1991).

<sup>177</sup> Bentley, *supra* note 10, at 394 (stating that statistically, 40% of all infertility cases are attributable to a female factor with a corresponding 40% of cases attributable to a male factor. The remaining 20% of infertility cases are attributable to a combination of male and female factors.)

<sup>178</sup> *Saks v. Franklin Covey*, 316 F.3d 337, 346 (2d Cir. 2003).

treated more favorably than another.<sup>179</sup> Therefore, the exclusion of surgical impregnation procedures from insurance coverage can be gender neutral, depending on the accompanying provisions of the policy.<sup>180</sup>

In addition, there may be good policy reason for excluding insurance coverage for infertility procedures. The cost of a single in vitro fertilization cycle runs from \$7,000 to \$10,000.<sup>181</sup> Some estimates suggest that including coverage of fertility treatments in group health plans could increase the cost of these plans by as much as 3-5%.<sup>182</sup> Other sources argue that the estimated cost of comprehensive infertility treatment coverage is overstated and may amount to as little as \$3.14 per employee, per year.<sup>183</sup> In the past, the Supreme Court has been wary of allowing cost justifications to justify gender discrimination. For instance, in *International Union*, the Supreme Court refused to allow the increased cost associated with hiring members of a particular sex to justify gender discrimination.<sup>184</sup> However, the Supreme Court has not entirely foreclosed the possibility that financial concerns may be a weighty policy issue. In *International Union*, the Supreme Court carefully emphasized,

We, of course, are not presented with, nor do we decide, a case in which costs would be so prohibitive as to threaten the survival of

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<sup>179</sup> *Newport News v. EEOC*, 462 U.S. 669, 684 (1983). This approach raises the challenge, however, of ensuring that employer benefits plans are gender neutral both facially and in effect. For an argument that the Second Circuit wrongly determined that the Franklin Covey insurance plan avoided gender discrimination and that coverage exclusion of infertility treatments disparately impacts women, see Pendo, *supra* note 65, at 336-340.

<sup>180</sup> *Saks*, 316 F.3d at 346.

<sup>181</sup> Tarun Jain, Bernard L. Harlow, & Mark D. Hornstein., *Insurance Coverage and Outcomes of In Vitro Fertilization*, 347 NEW ENG. J. MED. 661, 661 (2002).

<sup>182</sup> Insure.com, *Paying the Price for Infertility*, <http://www.insure.com/articles/healthinsurance/infertility-price.html> (last visited Dec. 11, 2008).

<sup>183</sup> Pendo, *supra* note 65, at 341.

<sup>184</sup> *Int'l Union v. Johnson Controls*, 499 U.S. 187, 210-11 (1991).

the employer's business. We merely reiterate our prior holding that the incremental cost of hiring women cannot justify discriminating against them.<sup>185</sup>

If the costs of providing infertility treatments such as surgical impregnation procedures prove to be so costly as to force businesses to close their doors, the Supreme Court could determine that policy concerns excuse unequal treatment in this regard.

In contrast, adverse employment action due to an employee's intent to undergo surgical impregnations procedures cannot claim the same gender neutrality.<sup>186</sup> Males may participate in the procedure by providing sperm, and male infertility may cause the need for the procedure,<sup>187</sup> but only the female can undergo the procedure and only the female will bear the risk of adverse employment action arising from absences from work.<sup>188</sup> As a result, "Employees terminated for taking time off to undergo IVF—just like those terminated for taking time off to give birth or receive other pregnancy-related care—will always be women."<sup>189</sup> As a result, the class is no longer gender neutral, and the woman who experiences an adverse employment action as the result of taking time off to undergo fertility treatments can state a cognizable claim under the Pregnancy Discrimination Act, although a woman who is denied insurance coverage for the same treatment may not have a claim.<sup>190</sup>

## V. CONCLUSION

The Seventh Circuit's novel decision in *Hall v. Nalco*, though employing a murky distinction between childbearing capacity and infertility and seeming to contradict the decisions of the Eighth and

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<sup>185</sup> *Id.*

<sup>186</sup> *Hall v. Nalco*, 534 F.3d 644, 649 (7<sup>th</sup> Cir. 2008).

<sup>187</sup> Bentley, *supra* note 10, at 397.

<sup>188</sup> *Hall*, 534 F.3d at 648-649.

<sup>189</sup> *Id.*

<sup>190</sup> *Id.* at 649.

Second Circuits, is nonetheless correct in its determination that an employee who is terminated for taking time off to undergo in vitro fertilization treatments states a cognizable claim under the Pregnancy Discrimination Act. The holding neither requires employers to begin providing insurance coverage for infertility treatments nor to provide special accommodations to women attempting to become pregnant through reproductive technology.<sup>191</sup> The decision simply requires an employer to treat absence resulting from infertility treatments like any other non-occupational disability for sake of hirings, firings, and other employment actions.

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<sup>191</sup> The Pregnancy Discrimination Act does not require employers to make it easier for women to work. *California Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 286-287 (1987). Rather, the PDA simply requires employers to treat pregnant and potentially pregnant workers in the same manner that they treat “similarly affected but non-pregnant workers.” *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 738 (7<sup>th</sup> Cir. 1994). *See also* Committee on Labor and Human Resources, 96<sup>th</sup> Cong., Legislative History of the Pregnancy Discrimination Act of 1978, at 83 (Comm. Print 1980) (“The touchstone of compliance is equality of treatment, and any policy which affects pregnancy, childbirth, or related conditions must apply equally to other types of disabling conditions as well.”) *But see* Daniela M. de la Piedra, *Flirting with the PDA: Congress must Give Birth to Accommodation Rights that Protect Pregnant Working Women*, 17 COLUM. J. GENDER & L. 275 (2008) (arguing that employees experiencing pregnancy-related limitations should not be denied accommodations due to pregnancy-blind policies).