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THE QUEST FOR A LACTATING MALE: BIOLOGY, GENDER, AND DISCRIMINATION

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INTRODUCTION

In *General Electric Co. v. Gilbert*, the Supreme Court held that Title VII protections did not encompass pregnant women because the act only protected against discrimination based on gender.[1] According to the Court, failure to provide disability benefits for pregnancy was a distinction between two groups of women—pregnant and nonpregnant women—and not a distinction between women and men; thus, it was not discrimination. Congress reacted to *Gilbert* with surprising speed, passing the Pregnancy Discrimination Act ("PDA") in 1978.[2] The PDA did provide pregnant women with protection from discrimination.[3] However, because the PDA is often interpreted narrowly and many courts still rely on the reasoning behind *Gilbert*,[4] women continue to face discrimination based on their unique biological characteristics.

Courts persist in viewing gender discrimination claims through a viewpoint of facial neutrality, refusing to recognize that discrimination can exist in cases when women's biology makes them different from men. For example, so-called "sex-plus" discrimination occurs when a person is discriminated against based on gender plus an additional factor (e.g., marital status, race, age, or family status), and a valid gender discrimination claim can be made only when there is a similarly situated subclass of men who

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1. 429 U.S. 125, 145 (1976).

2. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e-(k) (Supp. V 1976)).

3. *Id.*

4. Derungs v. Wal-Mart Stores, Inc., 141 F. Supp. 2d 884, 889–90 (S.D. Ohio 2000) (relying on *Gilbert* to find that breastfeeding is not protected); Martinez v. N.B.C. Inc., 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999) (relying on *Gilbert* to deny plaintiff's claim for discrimination based on breastfeeding); Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990) (same); Budde v. Travelers Ins. Co., 719 P.2d 376, 377 (Colo. Ct. App. 1986) (relying on *Gilbert* to hold that lack of pregnancy insurance coverage was not discrimination), *rev'd en banc, sub nom*, Colo. Civil Rights Comm'n v. Travelers Ins. Co., 759 P.2d 1358 (Colo. 1988).

are treated differently than women.[5] The PDA and Title VII fail to protect women in situations when, by reason of biological imperative, a "similarly situated" subclass of men is physically impossible. These situations include breastfeeding, prescription contraception coverage, and most types of infertility treatments. It is theoretically possible to compare the requirements of breastfeeding (i.e., the need to take regular breaks to pump milk) to similar medical requirements (i.e., the need to take breaks to stretch for those with back injuries). However, courts have either been unwilling to make those types of comparisons[6] or such a comparison class, even generously defined, does not exist in the particular workplace.

Section I of this paper discusses Title VII gender discrimination claims, including disparate treatment and disparate impact claims. Section II discusses *Gilbert* and its continuing influence on discrimination law. Section III explains the Pregnancy Discrimination Act. Section IV discusses three types of situations—contraception, breastfeeding, and infertility treatments—when the unique biology of women creates situations in which comparison to a similar group of men is impossible. Finally, in Section V, the paper addresses possible solutions to overcoming the limitations of Title VII, including bringing disparate impact claims under Title VII, broadening the conception of what Title VII and the PDA protect, bringing claims under the ADA, passing new state or federal legislation, and increasing public pressure on employers.

I. TITLE VII

Title VII of the Civil Rights Act of 1964 was passed to provide federal protection against workplace discrimination, thus opening the doors of the job market to all individuals.[7] Title VII provides that:

> 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; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which

5. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (setting out a four-factor test for indirectly proving a discrimination claim, requiring a similarly situated subclass); Coleman v. B-G Maint. Mgmt. of Colo., Inc., 108 F.3d 1199, 1204 (10th Cir. 1997) ("[G]ender-plus plaintiffs can never be successful if there is no corresponding subclass of members of the opposite gender.").

6. *See Derungs*, 141 F. Supp. 2d at 893–94 (no comparison group "because men do not produce breast milk"); *Martinez*, 49 F. Supp. 2d at 310 (no comparison class because "men are physiologically incapable of pumping breast milk").

7. *See* Diana Kasdan, Note, *Reclaiming Title VII and the PDA: Prohibiting Workplace Discrimination Against Breastfeeding Women*, 76 N.Y.U. L. REV. 309, 317 (2001).

would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.[8]

A. *Types of Gender Discrimination Claims*

There are two types of gender discrimination claims: disparate treatment and disparate impact, each of which has its own set of requirements for a *prima facie* case. Discrimination is obvious when an employment policy is explicitly based on gender, such as requiring different pension contributions from women than from men.[9] However, disparate treatment claims allege different treatment "because of" or "based on" gender, without an overt gender-based policy.[10] Employers must have intentionally disfavored women (or pregnant women).[11] Such claims can be proved either through direct evidence or indirectly using the *McDonnell Douglas Corp. v. Green* burden-shifting analysis.[12]

Because direct evidence of discrimination is rare, the *McDonnell Douglas* framework has become "ubiquitous."[13] This framework requires a plaintiff to show four elements to make a *prima facie* case.[14] The plaintiff must show (1) that she belongs to the protected class (e.g., female or pregnant); (2) that she performed her duties satisfactorily; (3) that she suffered an adverse employment action; and finally, (4) (in most circuits) that similarly situated employees not in the protected class (e.g., nonpregnant women) received better treatment.[15] If successful, the burden of production

8. 42 U.S.C. § 2000e-2(a) (2000).

9. City of L.A. Dep't of Water & Power v. Manhart, 435 U.S. 702, 714–18 (1978).

10. Johnson v. Transp. Agency, 480 U.S. 616, 626 (1987) (applying the *McDonnell Douglas* test to gender discrimination for bringing a disparate treatment claim absent a facially discriminatory policy).

11. Christine Jolls, Commentary, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 647 (2001).

12. 411 U.S. 792, 802 (1973). Although a racial discrimination case, this test is widely used for gender discrimination as well.

13. Julie Manning Magid, *Pregnant with Possibility: Reexamining the Pregnancy Discrimination Act*, 38 AM. BUS. L.J. 819, 836–40 (2001) (arguing that it is inappropriate to use *McDonnell Douglas* framework in pregnancy discrimination cases because there is rarely a class similarly situated to the plaintiff).

14. The *McDonnell Douglas* requirements for a *prima facie* case of racial discrimination are: (1) that the plaintiff belongs to a racial minority, (2) that the plaintiff applied and was qualified for the job for which the employer was seeking applicants, (3) that the plaintiff was rejected despite being qualified, and (4) after such rejection the job remained open and the employer continued to seek applicants. 411 U.S. at 802. The test has been modified to fit many types of discrimination, including decisions made after hiring. *See, e.g.*, *Johnson*, 480 U.S. at 619.

15. Ilhardt v. Sara Lee Corp., 118 F.3d 1151, 1154–55 (7th Cir. 1997); Magid, *supra* note 13, at 837. The Tenth Circuit does not require a comparison to similarly situated co-workers, but states the plaintiff can satisfy the fourth element in a number of different ways. EEOC v. Horizon/CMS Health-

shifts to the defendant to offer a legitimate nondiscriminatory reason for the action.[16] The ultimate burden of persuasion remains with the plaintiff.[17]

A defendant can escape liability for gender discrimination if it can show a "bona fide occupational qualification ["BFOQ"] reasonably necessary to the normal operation of th[e] particular business or enterprise."[18] The Supreme Court has interpreted this defense narrowly.[19] The "objective, verifiable requirements" must be directly related to the job skills and aptitudes necessary.[20] Furthermore, there must be a high correlation between gender and ability to perform the job.[21]

Title VII not only prohibits disparate treatment, but also prohibits "practices that are fair in form, but discriminatory in operation."[22] In disparate impact claims, there is no requirement to show intent to discriminate, but the plaintiff must show that facially neutral policies caused disproportionate harm to a particular class of employee.[23] The plaintiff must also show that the application of the policy cannot be justified by business necessity.[24] Generally, plaintiffs must rely on statistical evidence to establish the *prima facie* case.[25]

B. Sex-Plus Claims

In some circumstances an employer may not treat men and women differently, but may treat women (or men) who have a particular, additional characteristic differently than the opposite gender with the same additional characteristic. For example, an employer might refuse to hire women with small children, while agreeing to hire men with small children. In these situations, characterized as "sex-plus" claims, people of a certain gender, considered in conjunction with other characteristics, can result in a protected group under Title VII.[26] Sex-plus cases have been brought in a vari-

care Corp., 220 F.3d 1184, 1195 n.6 (10th Cir. 2000) (citing plaintiffs meeting the fourth prong by a showing that the position was not eliminated or was filled).

16. *McDonnell Douglas*, 411 U.S. at 802 (outlining the burden-shifting structure in discrimination cases).

17. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507 (1993) (holding that the ultimate burden of persuasion remains with the plaintiff even if pretext is shown).

18. 42 USC § 2000e-2(e)(1) (2000); *see also* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 200–01 (1991).

19. *Johnson Controls*, 499 U.S. at 201.

20. *Id.*

21. *Id.* at 202.

22. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

23. Jolls, *supra* note 11, at 647.

24. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335–36 n.15 (1977).

25. *See* Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 650–51 (1989).

26. Phillips v. Martin Marietta Corp., 400 U.S. 542, 544 (1971) (per curiam).

ety of contexts, including those involving marital status, family status, age, and fertility.[27] In *Fisher v. Vassar College*, a professor was denied tenure and alleged that the denial was due to her status as a married woman.[28] The court indicated that it would be extremely difficult for a plaintiff to succeed on a sex plus marital status claim because there are so many categories of marital status (divorced, cohabitating, etc.) that such a factor might become unmanageable.[29] In addition, the plaintiff in *Fisher* faced the same stumbling block as many other sex-plus claimants—the requirement of a similarly situated subclass. Despite a rather damning collection of statistics showing the infrequency of promotions to tenured positions for married women, the court found that the plaintiff did not produce sufficient evidence comparing married women to married men.[30]

To succeed on a sex-plus claim, the plaintiff must compare her treatment to a corresponding subclass of men with the same characteristic. For example,

> when one proceeds to cancel out the common characteristics of the two classes being compared ([e.g.,] married men and married women), as one would do in solving an algebraic equation, the cancelled-out element proves to be that of married status, and sex remains the only operative factor in the equation.[31]

Similar to the fourth prong of the *McDonnell Douglas* test, as it is used by most courts,[32] plaintiffs may fail to state a claim when such a subclass does not exist.[33] Even the Tenth Circuit Court of Appeals, which has a more liberal approach to the fourth prong of the *McDonnell Douglas* test,[34] stated that in sex-plus cases, plaintiffs without a similar subclass could *never* be successful.[35] In *Ilhardt v. Sara Lee Corp.*, the court determined that the plaintiff failed to prove her *prima facie* case under the *McDonnell*

27. *See, e.g.*, Int'l Union v. Johnson Controls, Inc., 499 U.S. 187 (1991) (sex plus fertility); Fisher v. Vassar College, 70 F.3d 1420 (2d Cir. 1995) (sex plus marital status); King v. Trans World Airlines, Inc., 738 F.2d 255 (8th Cir. 1984) (sex plus family status).

28. 70 F.3d at 1433–34.

29. *Id.* at 1434.

30. *Id.* at 1446.

31. LEX K. LARSON, EMPLOYMENT DISCRIMINATION § 40.04, at 40-10 (2d. ed. 2002).

32. *See supra* Section I.A.

33. *See* Magid, *supra* note 13, at 838–40. Magid points out that finding a group of similarly situated nonpregnant employees is often impossible, as the pregnancy itself may require accommodations not needed by other employees. *Id.*

34. *See supra* note 13 and accompanying text.

35. Coleman v. B-G Maint. Mgmt. of Colo., 108 F.3d 1199, 1204 (10th Cir. 1997) (reversing judgment for employee on sex-plus claim because she failed to show similar subclass of male employees married to subordinates); *see also Fisher*, 70 F.3d at 1446 (plaintiff incorrectly compared married women to single women, not to married men); Bryant v. Int'l Sch. Servs., Inc., 675 F.2d 562, 574 (3d Cir. 1982) (must show married men received better treatment than similar married women).

Douglas test because there was no similarly situated comparison subclass.[36] The plaintiff was a pregnant attorney working part-time. As there were no nonpregnant part-time attorneys for comparison, she lost her case because the court refused to compare her to full-time attorneys, stating, "[t]here are too many differences between them."[37]

This rigid requirement of a similar subclass falters in some pregnancy-related situations. The EEOC guidelines provide that an employer with an all-female workforce must still provide benefits for pregnancy-related conditions if benefits are provided for other conditions.[38] Some courts have interpreted this to mean that if a classification violates the PDA, it should not be tested further for gender neutrality by comparison to a similar subclass.[39] Unfortunately, such a view has not been applied when a subclass is nonexistent for other biological reasons (i.e., lactating men). If the PDA is viewed as only providing a special exemption for pregnancy and related conditions,[40] this narrow exception from the requirements of a subclass is logical. However, this paper argues that in enacting the PDA, Congress intended to clarify that discrimination can occur whenever there are physical realities that only women face. Thus the rigid adherence to the requirement of a matching subclass is inappropriate.

II. *GILBERT* AND ITS AFTERMATH

In *General Electric Co. v. Gilbert*, the employer provided disability benefits for all employees but excluded disabilities arising from pregnancy.[41] The employees had successfully challenged this benefit plan as discriminatory under Title VII of the Civil Rights Act of 1964 but the Supreme Court reversed, holding:

> For all that appears, pregnancy-related disabilities constitute an *additional* risk, unique to women, and the failure to compensate them for this risk does not destroy the presumed parity of the benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks. To hold otherwise would endanger the commonsense notion that an employer who has no disability benefits program at all does not violate Title VII even though the "underinclusion" of risks impacts, as a result of pregnancy-related disabilities, more heavily upon one gen-

36. 118 F.3d 1151, 1155 (7th Cir. 1997).
37. *Id.*
38. EEOC Questions and Answers, 29 C.F.R. § 1604 app. at 189 (2003).
39. *See, e.g.*, Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1404 (N.D. Ill. 1994).
40. *See infra* Section III.
41. 429 U.S. 125, 127 (1976).

> der than upon the other. Just as there is no facial gender-based discrimination in that case, so, too, there is none here.[42]

The Court based its conclusion primarily on the fact that both men and women had equal access to disability benefits covering the same categories of risks, even though it recognized that pregnancy is confined to women alone.[43] Using an analogy to the equal protection clause of the Fourteenth Amendment, the Court concluded that Title VII protected pregnancy benefits only when exclusion of such benefits was for the purpose of invidious discrimination.[44] Borrowing language from *Geduldig v. Aiello*, also decided on equal protection grounds, the Court noted, "there is no risk from which men are protected and women are not."[45] The basic principle of *Gilbert* is that gender discrimination consists only of favoring men over women. Distinctions based on uniquely female characteristics (i.e., pregnancy) are not covered by Title VII.[46] In taking this restrictive approach to the definition of sex discrimination in Title VII, the Court ignored fundamental biological differences that had real impacts in the lives of working women. Asserting that the benefit plan was facially neutral also flew in the face of the facts of the case, in which vasectomies, circumcisions, and prostatectomies were covered by the plan.[47]

The three dissenting judges argued vigorously against the notion that classifications based on female-only characteristics were not necessarily discrimination.[48] Justices Brennan, Marshall, and Stevens argued that because women were the only sex at risk for pregnancy, they were being discriminated against.[49] Furthermore, they argued that the comprehensiveness of an employment policy for each sex must be examined to determine whether it treated the sexes equally.[50] Justice Stevens stated, "[b]y definition, [a rule excluding pregnancy coverage] discriminates on account of sex; for it is the capacity to become pregnant which primarily differentiates the female from the male."[51]

42. *Id.* at 139–40.

43. *Id.* at 136, 138.

44. *Id.* at 136.

45. *Id.* at 138 (quoting 417 U.S. 484, 496–97 (1974)).

46. *See* Martinez v. N.B.C. Inc., 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999) (describing the principles of *Gilbert*); *see also* Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990) (explaining that the PDA only changed the law with regards to pregnancy and did not alter the principle of *Gilbert* that failure to provide benefits for uniquely female attributes is not gender discrimination).

47. *Gilbert*, 429 U.S. at 152 (Brennan, J., dissenting). The plan also covered female-specific illness and disabilities with the exception of pregnancy. *Id.* at 155.

48. *Id.* at 161–62 (Stevens, J., dissenting).

49. *Id.*

50. *Id.* at 155–60 (Brennan, J., dissenting).

51. *Id.* at 161–62 (Stevens, J., dissenting).

From a biological standpoint, pregnancy or the ability to become pregnant is one of the primary differences between men and women. By denying that discrimination based on pregnancy equaled discrimination based on gender, the Supreme Court foreshadowed its preference for treating the question of equality as one of treating all exactly the same, rather than providing equal opportunity for all.[52] Even though the holding, and arguably the logic, of *Gilbert* was overturned by Congressional action just a few years later, many courts have used the reasoning in *Gilbert* to dismiss discrimination claims that were based on other biologically unique situations facing women.[53] Failing to recognize and provide remedies for women facing discrimination perpetuates an unequal work situation, which is a result of courts attempting to ignore biological truths in favor of a supposed gender-blind justice and serves only to perpetuate the status quo.

III. THE PREGNANCY DISCRIMINATION ACT

The Pregnancy Discrimination Act was passed in 1978 as an amendment to Title VII to ensure that women are protected from discrimination based on pregnancy.[54] Section 2000e(k) 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; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.[55]

In *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, the Supreme Court specifically acknowledged that in enacting the PDA, Congress not only overturned the holding of *Gilbert*, but also rejected the reasoning behind *Gilbert*.[56] The Court went on to say that Congress "unequivocally" rejected the reasoning that a plan, which singled out pregnancy-related

52. Grutter v. Bollinger, 539 U.S. 306, 342–43 (2003) (requiring race-conscious admission programs to terminate in order to reach "equal treatment of all racial . . . groups").

53. Derungs v. Wal-Mart Stores, Inc., 141 F. Supp. 2d 884, 889–90 (S.D. Ohio 2000) (relying on *Gilbert* to find that breastfeeding is not protected); Martinez v. N.B.C. Inc., 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999) (relying on *Gilbert* to deny plaintiff's claim for discrimination based on breastfeeding); Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990) (same); Budde v. Travelers Ins. Co., 719 P.2d 376, 377 (Colo. Ct. App. 1986) (relying on *Gilbert* to hold that lack of pregnancy coverage was not discrimination), *rev'd en banc, sub nom*, Colo. Civil Rights Comm'n v. Travelers Ins. Co., 759 P.2d 1358 (Colo. 1988).

54. Pub. L. No. 95-555, 92 Stat. 2076 (1978) (codified as amended at 42 U.S.C. § 2000e(k) (Supp. V 1976)).

55. 42 U.S.C. § 2000e(k) (2000).

56. 462 U.S. 669, 678 (1983).

benefits, was facially neutral and nondiscriminatory because only women are capable of becoming pregnant.[57]

The legislative history of the PDA also indicates that Congress recognized the unique biological situation facing women and intended to explicitly affirm that Title VII protection extended to those circumstances. For example, one Congressman stated that "it seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women."[58] In enacting the PDA, Congress stated that "[i]t is the committee's view that the dissenting Justices [in *Gilbert*] correctly interpreted [Title VII]."[59] In Justice Brennan's dissent in *Gilbert*, he emphasized that the ultimate objective of Title VII is "'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [sexually] stratified job environments to the disadvantage of [women].'"[60] Justice Stevens' dissent stated that GE's policy discriminates based on sex because "it is the capacity to become pregnant which primarily differentiates the female from the male."[61]

The Supreme Court recognized that Congress rejected the holding and reasoning of *Gilbert* when it passed the PDA;[62] however, the PDA is treated as creating only a narrow exception to the *Gilbert* approach towards gender discrimination. Despite Congress' attempt to disavow this approach, it remains valid law in some jurisdictions. Additionally, the PDA itself is construed narrowly to limit the circumstances to which it applies. One author noted that courts generally focus on the second clause of the PDA ("women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes") in finding that pregnant women must be treated identically to other employees, rather than the first definitional clause ("[t]he 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"), which specifically prohibits discrimination based on pregnancy.[63]

57. *Id.* at 684.

58. 123 CONG. REC. 10581 (1977) (remarks of Rep. Hawkins).

59. H.R. REP. NO. 95-948, at 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4750.

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

61. *Id.* at 162 (Stevens, J., dissenting).

62. *Newport News Shipbuilding & Dry Dock Co.*, 462 U.S. at 678.

63. Magid, *supra* note 13, at 835–36.

This approach strips women of rights when acts and policies, albeit facially neutral, disproportionately impact women.[64] The result is absurd cases like *Maldonado v. U.S. Bank*, in which the court implied that an employer could not fire an employee simply because she was pregnant, but could do so if her pregnancy resulted in the need for *any* time off.[65] Providing protection for pregnancy in the abstract, but limiting protection for any of the biological manifestations of pregnancy, is akin to no protection at all, and is certainly against the spirit, and perhaps the letter, of the PDA.[66]

The approach to gender discrimination used in *Gilbert* appears to remain valid law in some circuits. For example, in *Budde v. Travelers Insurance Co.*, the Colorado Court of Appeals, by analogy to *Gilbert* and its equal protection clause analysis, determined that an insurance plan that did not include coverage for pregnancy was nondiscriminatory.[67] Similarly, in *Saks v. Franklin Covey Co.*, the court for the southern district of New York applied the *Gilbert* equal access standard to grant an employer summary judgment against a plaintiff seeking infertility treatment coverage under an insurance plan.[68] In *Martinez v. N.B.C., Inc.*, the court specifically relied on *Gilbert*, quoting language stating that Title VII "did not apply because the failure to ensure 'an *additional* risk, unique to women, . . . does not destroy the presumed parity of benefits, accruing to men and women alike, which results from the facially evenhanded *inclusion* of risks.'"[69] These courts apparently have concluded that the PDA made only a narrow exception to the *Gilbert* approach to gender discrimination and did not alter the landscape for other types of claims. Given that Congress, in attempting to correct these problems, has approached these issues on a piecemeal basis (i.e., legislation for breastfeeding protection, contraception coverage, etc.),[70] these courts may be correct.

64. *Id.*

65. 186 F.3d 759, 766 (7th Cir. 1999); *see also* Troupe v. May Dep't Stores Co., 20 F.3d 734, 738 (7th Cir. 1994) (pregnant employee fired because of excessive absences caused by morning sickness).

66. Magid, *supra* note 13, at 829.

67. 719 P.2d 376, 378 (Colo. Ct. App. 1986) (reversed by *Colorado Civil Rights Commission v. Travelers Insurance Co.*, 759 P.2d 1358 (Colo. 1988), as inconsistent with the PDA).

68. 117 F. Supp. 2d 318, 327–28 (S.D.N.Y. 2000). On appeal the reasoning of the district court was rejected, but the court upheld the decision that infertility treatments were not protected by Title VII because they applied equally to both sexes. Saks v. Franklin Covey Co., 316 F.3d 337, 343 (2d Cir. 2003).

69. 49 F. Supp. 2d 305, 309 (S.D.N.Y. 1999) (quoting Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 139 (1976)). It is interesting that this is the same court that relied on *Gilbert* in *Saks v. Franklin Covey*, only to have its reasoning, at least, rejected on appeal. *See also* Derungs v. Wal-Mart Stores, Inc., 141 F. Supp. 2d 884, 889–90 (S.D. Ohio 2000) (relying on *Gilbert* to find that breastfeeding is not protected); Wallace v. Pyro Mining Co., 789 F. Supp. 867, 869 (W.D. Ky. 1990) (same).

70. See *infra* Section V.D.

IV. BIOLOGICAL IMPERATIVES—WHEN UNIQUELY FEMALE CHARACTERISTICS ARE NOT PROTECTED

In many courts, the current approach to gender discrimination claims protects "women" in the abstract while ignoring their biological realities. For example, in sex-plus discrimination claims and cases using the *McDonnell Douglas* test, the requirement of a similarly situated class for comparison is often fatal to claims when no such class can exist. Biology can make a comparison class not only unlikely but also physically impossible.

In the racial discrimination context, there are no biological differences affecting people of color alone that could impact their ability to perform in the workplace. Skin color alone does not create differences in the ability to work or the need for accommodations. Thus, the legal system can approach racial discrimination with a color-blind view—race, or any supposed characteristics associated with race, can never justify an adverse employment decision.[71] By contrast, biological characteristics unique to women do not allow for such a "gender-blind" approach if Title VII's goal of "assur[ing] equality of employment opportunities and . . . eliminat[ing] . . . discriminatory practices and devices . . ." is to be met.[72] Biological differences can impact a woman's capacity to work. In the negative, this provides a business justification for not hiring a woman or denying her certain benefits. To counteract this effect and prevent a gender-stratified workplace, a broader concept of what constitutes "discrimination" is necessary.

A. Varied Protection Depending on the Issue

Congress, in enacting the PDA, recognized that characteristics unique to women could result in discrimination based on sex, and in fact, were inherent in the definition of discrimination based on sex. Recently, claims that failure to include prescription birth control in an otherwise comprehensive prescription drug benefit plan constitutes gender discrimination have succeeded far more often and on more sweeping grounds than claims based

71. Affirmative action programs are clearly not color-blind. However, these programs are intended to equalize the position of people of color in the workplace. According to the Supreme Court, such programs are not intended to last forever, because theoretically, discrimination based on race will cease to exist when we all become "color-blind." *See* Grutter v. Bollinger, 539 U.S. 306, 343 (2003) (racial preferences will not be necessary in twenty-five years). By contrast, the biological needs of women bearing children will always be noticeable and can have real impacts on a woman's ability to participate in the workforce.

72. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 800 (1973).

on breastfeeding or infertility treatments.[73] In breastfeeding cases, courts have held that discrimination based on biological differences is legitimate.[74] Moreover, the successful cases involving discrimination based on infertility are decided on narrow grounds, holding that infertility is within the scope of the PDA, while maintaining that the PDA essentially demands neutrality towards the genders.[75] These dramatically different outcomes are hard to justify when breastfeeding and infertility treatments are, like birth control, unique to only one gender.

1. Prescription Contraception

America has one of the highest rates of unintended pregnancies in the western world—approximately 50% of all pregnancies are accidental.[76] Without contraception, a woman could theoretically have twelve to fifteen pregnancies in her lifetime.[77] Women with unwanted pregnancies are less likely to seek prenatal care and more likely to deliver a low birth weight or ill baby.[78] Financial burdens from a distressed newborn dramatically increase the already high costs associated with a healthy baby.[79] Of the available types of birth control, only the condom functions exclusively on men. All of the other forms function exclusively on women.[80] Despite the obvious impacts pregnancy has on the labor force, half of large health insurance plans do not cover any type of contraception.[81] Others will cover much

73. Prior to the cases discussed in this section, no court had found that excluding prescription contraceptives was sex discrimination. Erickson v. Bartell Drug Co., 141 F. Supp. 2d 1266, 1272 (W.D. Wash. 2001).

74. *See Derungs*, 141 F. Supp. 2d at 890 (drawing lines based on characteristics held by only one gender is not impermissible); *Martinez*, 49 F. Supp. 2d at 309 (Title VII does not apply to failure to ensure additional risks women alone face); *Wallace*, 789 F. Supp. at 869 (it is not impermissible to discriminate based on uniquely female attributes).

75. *See, e.g.*, Pacourek v. Inland Steel Co., 858 F. Supp. 1393, 1401 (N.D. Ill. 1994) (viewing the PDA as requiring strict neutrality towards the genders, that is, ignoring pregnancy but not mandating any leniency towards the physical manifestations of pregnancy).

76. Christine Vargas, *The EPICC Quest for Prescription Contraceptive Insurance Coverage*, 28 AM. J.L. & MED. 455, 457 (2002) (citing *Improving Women's Health: Why Contraceptive Insurance Coverage Matters: Hearing of the Comm. on Health, Educ., Labor and Pensions*, 107th Cong. 53 (2001)).

77. *Id.*

78. *Erickson*, 141 F. Supp. 2d at 1273 (citing Sylvia A. Law, *Sex Discrimination and Insurance for Contraception*, 73 WASH. L. REV. 363, 365–67 (1998)).

79. *Id.* (citing U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, HEALTHY CHILDREN: INVESTING IN THE FUTURE 85 (1988), *available at* http://www.wws.princeton.edu/cgi-bin/byteserv.prl/~ota/disk2/1988/8819/881906.PDF).

80. The five FDA-approved forms of birth control are: contraceptive pill, IUDs, Depo-Provera injections, Norplant subdermal inserts, and diaphragms. *See* Lisa A. Hayden, *Gender Discrimination Within the Reproductive Health Care System: Viagra v. Birth Control*, 13 J.L. & HEALTH 171, 174 (1998–99).

81. Vargas, *supra* note 76, at 455.

more complicated and costly procedures, such as tubal ligation and abortion, but will not provide basic contraception coverage.[82]

In *Erickson v. The Bartell Drug Co.*, the court stated that "the intent of Congress in enacting the PDA . . . shows that mere facial parity of coverage does not excuse or justify an exclusion which carves out benefits that are uniquely designed for women."[83] The court noted that Congress embraced the dissent from *Gilbert*, requiring employers to "provide women-only benefits or otherwise incur additional expenses on behalf of women in order to treat the sexes the same."[84] In requiring the employer to cover prescription birth control to the same extent as other prescription drug benefits, the *Erickson* court recognized that women have different health care needs than men, which must be met to the same extent as other health care needs.[85] The court held that it was immaterial whether contraception was within the scope of the PDA, because "Congress' decisive overruling of . . . [*Gilbert*]" shows that it intended Title VII to be interpreted to include unique characteristics of women.[86] Thus, the court *did not* hold that contraception was covered because it was within the PDA. Rather, it emphatically rejected this stance and embraced the broader view that Congress overruled the reasoning behind *Gilbert*. Under this broader view, discrimination exists whenever women's unique biological differences are implicated, whether or not those differences are related to pregnancy.

By contrast, the court in *Cooley v. DaimlerChrysler Corp.* concluded that prescription contraception coverage was included within the scope of the PDA because a woman's potential for pregnancy is a protected status.[87] Denying women a medicine that "allows women to control their reproductive capacity is necessarily a sex-based exclusion."[88] Furthermore, the court stated that Title VII, as amended by the PDA, "recognizes that women have different sex-specific needs for which provisions must be made to the same extent as other health care requirements."[89] Although it did not go quite as far as the *Erickson* court, the *Cooley* court seemed to recognize that different treatment based on unique characteristics of women could give rise to a discrimination claim.

82. *Id.* at 456.

83. *Erickson*, 141 F. Supp. 2d at 1271.

84. *Id.* at 1270. This stands in stark contrast to the court in *Pacourek v. Inland Steel Co.*, an infertility treatment case, which interpreted the PDA to require that employers treat the sexes exactly the same. 858 F. Supp. 1393, 1400 (N.D. Ill. 1994).

85. *Erickson*, 141 F. Supp. 2d at 1271.

86. *Id.* at 1274.

87. 281 F. Supp. 2d 979, 984 (E.D. Mo. 2003).

88. *Id.*

89. *Id.* at 985.

In *Equal Employment Opportunity Commission v. United Parcel Service, Inc.*, the court held that the EEOC alleged sufficient facts to survive a motion to dismiss on both a disparate treatment and a disparate impact claim when the employer failed to cover prescription contraception in an otherwise comprehensive health benefit plan.[90] With little discussion, the court determined that because the exclusion burdened only females, it was not gender neutral.[91] Also, because the exclusion fell more harshly on women than men, the EEOC had sufficiently stated a claim for disparate impact.[92]

2. Breastfeeding

The American Academy of Pediatrics ("AAP") recommends that infants be exclusively fed breast milk for the first six months of life, and for optimal benefits, recommends breastfeeding for at least twelve months.[93] The AAP documents research on the significant benefits of breastfeeding, including decreased infant illness and enhanced cognitive development.[94] Benefits also flow to the mother, including decreased risk of postmenopausal hip fractures, reduced risk of ovarian cancer, and reduced risk of breast cancer.[95] The AAP also reports that economic benefits from breastfeeding include reduced health care costs and reduced employee absenteeism for care of childhood illness. Despite all the reported benefits of breastfeeding, breastfeeding rates remain low in the United States.[96] A significant barrier to breastfeeding is women's employment. One study showed that only 10% of women working full-time continued breastfeeding for six months, as compared to 24% of unemployed women.[97] The ability to continue breastfeeding has class implications, as professional women

90. 141 F. Supp. 2d 1216, 1219–20 (D. Minn. 2001).

91. *Id.* at 1219.

92. *Id.* at 1220.

93. American Academy of Pediatrics Work Group on Breastfeeding, *Breastfeeding and the Use of Human Milk*, 100 PEDIATRICS 1035, 1037 (1997), *available at* http://aappolicy.aappublications.org/cgi/content/full/pediatrics%3b100/6/1035.

94. *Id.* at 1035. The AAP reports decreases in such illnesses as diarrhea, lower respiratory infections, otitis media (ear infection), bacterial meningitis, diabetes, Crohn's disease, lymphoma, and other chronic digestive diseases.

95. *Id.*

96. Shana M. Christrup, *Breastfeeding in the American Workplace*, 9 AM. U. J. GENDER SOC. POL'Y & L. 471, 473 (2001). Christrup reports that during 1990 to 1993, only 55.2% of infants were breastfed at birth and only 28.4% were breastfed for five or more months.

97. *Id.* at 480 (citing Alan S. Ryan, PhD & Gilbert A. Martinez, *Breast-Feeding and the Working Mother: A Profile*, 83 PEDIATRICS 524, 527 (1989)).

have greater success maintaining breastfeeding after returning to work, presumably because of their ability to negotiate more favorable policies.[98]

In discrimination cases involving breastfeeding, courts have uniformly rejected the inclusion of breastfeeding within the scope of the PDA or as discrimination deserving protection under Title VII. In *Martinez v. N.B.C. Inc.*, the court denied the plaintiff's sex-plus claim because "men are physiologically incapable of pumping breast milk, so plaintiff cannot show that she was treated less favorably than similarly situated men." [99] The court, apparently ignoring the fact that breastfeeding is inextricably related to pregnancy, refused to "elevate breast milk pumping . . . to a protected status."[100] Similarly, in *Derungs v. Wal-Mart Stores, Inc.*, the court determined that a store policy prohibiting public breastfeeding differentiated between women who breastfeed and women who do not, rather than between breastfeeding women and an (impossible) class of similarly situated (breastfeeding) men.[101] The court determined that the comparative group was nonbreastfeeding women. Without the requisite comparison to the *opposite* gender, the claim failed.

Claims of discrimination based on breastfeeding have also failed under the PDA. In *Wallace v. Pyro Mining Co.*, the court determined that failing to grant leave for breastfeeding was not gender discrimination "under the principles set forth in *Gilbert*."[102] The court determined that breastfeeding is not a medical condition relating to pregnancy because it is not an illness or disability.[103] The court in *Fejes v. Gilpin Ventures, Inc.* also determined that the PDA did not include breastfeeding, concluding that "the PDA only provides protection based on the condition of the mother—not the condition of the child."[104] The obvious connection between breastfeeding and pregnancy seems to be lost on these courts.

As one commentator stated eloquently, "[t]he courts' failure to recognize this discrimination [against breastfeeding women] is apparently grounded in their belief that any genuine difference between men and women can be a valid and legal basis for discrimination."[105] It is precisely this approach that Congress rejected when it passed the PDA, vindicating

98. *Id.*

99. 49 F. Supp. 2d 305, 310 (S.D.N.Y. 1999). The court also quoted language from *Gilbert* regarding the fact that "additional risk[s]" faced by women are not protected under Title VII. *Id.* at 309.

100. *Id.* at 311.

101. 141 F. Supp. 2d 884, 889, 893 (S.D. Ohio 2000). This court also relied on *Gilbert*. *Id.* at 889.

102. 789 F. Supp. 867, 869 (W.D. Ky. 1990).

103. *Id.*

104. 960 F. Supp. 1487, 1492 (D. Colo. 1997). The court apparently has not read the AAP information about the benefits accruing to the mother by breastfeeding.

105. Christrup, *supra* note 96, at 485.

the dissent in *Gilbert*. If employers can discriminate based on real biological differences, the goals of Title VII to "'assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [sexually] stratified job environments to the disadvantage of [women]'" will never be met.[106]

3. Infertility Treatments

Infertility affects approximately 6.1 million people in the U.S.[107] Depending on which statistics are used, about one-third of infertility is caused by female factors, one-third by male, and one-third by some combination of factors.[108] However, regardless of the cause of infertility, the treatments for it are primarily performed on women.[109] Attempting to conceive a child through artificial means can be extremely expensive, as each in vitro attempt costs at least $10,000.[110] Courts rejecting the argument that the exclusion of infertility treatments from benefit packages is sex discrimination generally rely on two arguments. Either they conclude that infertility is not within the definition of "pregnancy" in the PDA or they determine that infertility also affects men, and thus it is not gender-based discrimination at all. The combination of these two approaches traps women between Scylla and Charybdis. Either infertility is not enough "about women" to be covered or it is too much "about women" under the *Gilbert* logic to be covered.[111]

In *Saks v. Franklin Covey Co.*, the court concluded that "for a condition to fall within the PDA's inclusion of 'pregnancy . . . and related medical conditions' as sex-based characteristics, that condition must be unique

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

107. Suzy Evans, *Counterpunch: Infertility Feels Like a Punch, Not a Punchline*, L.A. TIMES, May 19, 2003, at E3 (citing the American Society for Reproductive Medicine).

108. *Id.* However, other sources link infertility to male factors in about 20%, or one-fifth of couples, with male factors *contributing* to infertility an additional 30–40% of couples. Richard Sadovsky, *Evaluation and Management of Male Infertility*, 66 AM. FAMILY PHYSICIAN 1299, 1299 (2002).

109. Such treatments include ovulation-boosting drugs (e.g., Clomid), Gamete Intrafallopian Transfer ("GIFT"), and In Vitro Fertilization. Apart from surgical procedures to clear blocked seminal vesicles or treatments to correct impotence, all other infertility treatments require the woman to, at a minimum, take a series of fertility drug treatments. More aggressive treatments require regular monitoring and surgical treatments performed on women only. *See* AM. SOC'Y FOR REPRODUCTIVE MED., ASSISTED REPRODUCTION TECHNOLOGY: A GUIDE FOR PATIENTS (2003), *available at* www.asrm.org/Patients/patientbooklets/ART.pdf.

110. Stacey Range, *Expensive Medical Costs Burden Infertile Couples*, LANSING ST. J., Sept. 15, 2003, at A1.

111. The *Gilbert* logic is that if a condition is really unique and special to women, than if an employer covers everything but that, that is acceptable because that condition is an *additional* risk faced by women. As long as a plan covers the same risks for men and women, it is not discriminatory.

to women."[112] The court determined that because infertility afflicts men and women equally, exclusion of surgical impregnation procedures from the employer's benefit plan disadvantaged male and female employees equally.[113] The court recognized that surgical procedures are performed on women alone, but concluded that because the need for such procedures was traceable to men and women, it was not discrimination to exclude them.[114] This logic is irrational. Pregnancy, too, is "traceable" to both men and women, yet the PDA does not assume that because the *cause* is 50% traceable to men, there is no discrimination. Furthermore, the plan in question did cover penile prosthetic implants and surgical procedures for men to correct blockages of the vas deferens.[115]

In *Krauel v. Iowa Methodist Medical Center*, the court determined that the term "related medical conditions" in the PDA did not include infertility, because infertility, which prevents conception, was "strikingly different" from pregnancy and childbirth, which occur after conception.[116] The court based its decision on the lack of reference to infertility in the legislative history of the PDA and the determination that because infertility affects men and women, it is gender neutral.[117] The court ignored the fact that infertility treatments are primarily performed on women alone. *Laporta v. Wal-Mart Stores, Inc.*, following *Krauel*, also denied Title VII coverage to infertility treatments, noting the difficulties in determining who the protected class would be under the PDA.[118] The court went on to compare infertile women to fertile women, rather than considering whether, as compared to men, women's unique health care needs were met.[119] The court correctly stated that to claim the protected class was "infertile women" would result in the absurdity that hiring a pregnant woman to replace an infertile one would be a Title VII/PDA violation.[120] However, the PDA was passed to protect women precisely because the unique biological situation they faced resulted in the inability to create a similarly situated class of men. In the same way, because most infertility treatments are performed on women alone, a similarly situated class of men does not exist.

112. 316 F.3d 337, 346 (2d Cir. 2003).
113. *Id.*
114. *Id.* at 347.
115. *Id.* at 341.
116. 95 F.3d 674, 679 (8th Cir. 1996).
117. *Id.* at 679–80.
118. 163 F. Supp. 2d 758, 770–71 (W.D. Mich. 2001).
119. *Id.* at 770.
120. *Id.*

Some courts have accepted that infertility is within the scope of the PDA when it comes to adverse employment decisions. In *Pacourek v. Inland Steel Co.*, the plaintiff was denied use of her sick leave for infertility treatments and subsequently terminated.[121] The court emphasized that in passing the PDA, Congress repudiated both the holding and the *theory* of *Gilbert*.[122] Determining that the PDA prohibited discrimination based on the *capacity* to become pregnant, the court stated, "[d]iscrimination against an employee because she intends to, is trying to, or simply has the potential to become pregnant is therefore illegal discrimination."[123] Reading the statute, the court found the ordinary meaning of the words "related medical conditions" in reference to pregnancy included the ability or inability to get pregnant.[124] The court viewed the coverage of the PDA as "concentric circles," with discrimination based on the fact of being pregnant as the core, and abortion and infertility as the next circle.[125] The court rejected the argument that infertility was gender neutral because it affects both men and women, stating that Congress made it clear in the PDA that "neutral" discrimination based on pregnancy or related medical conditions was not neutral at all.[126]

Unfortunately, despite being more expansive in its understanding of the scope of the PDA than many, the court determined that the PDA required strict neutrality towards the genders; that is, pregnancy must be ignored but leniency towards the physical manifestations of pregnancy is not required.[127] Citing *Troupe v. May Department Stores*, the court indicated that an employer was not required to ignore an employee's absences, even if those absences were caused by pregnancy.[128] This approach leaves women in the position that their condition of infertility, in the abstract, is protected, but the real manifestations of their problem (i.e., the need for absences timed to stages of the menstrual cycle, etc.) are not.

In a related case before the same court, a plaintiff was fired for excessive absences due to infertility treatments even though she used sick leave to cover those absences.[129] The court again discussed legislative history

121. 858 F. Supp. 1393, 1401 (N.D. Ill. 1994).

122. *Id.*

123. *Id.*; *see also* Int'l Union v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991) (classifications based on potential for pregnancy are illegal).

124. *Pacourek*, 858 F. Supp. at 1402–03.

125. *Id.* at 1403.

126. *Id.*

127. *Id.* at 1400.

128. *Id.* (citing 20 F.3d 734, 738 (7th Cir. 1994)).

129. Erickson v. Bd. of Governors of State Colls. & Univs. for Northeastern Ill. Univs., 911 F. Supp. 316, 318 (N.D. Ill. 1995).

and the plain language of the statute, determining that the scope of the PDA encompassed potential pregnancy.[130] The court, quoting the plaintiff's brief, pointed out that the entire goal of infertility treatments is to achieve pregnancy.[131] It further dismissed the repeated argument that infertility afflicts men and women and is thus gender neutral, stating that "[a] male employee's infertility treatment does not seek to achieve his pregnancy; in other words, a male's infertility does not relate to his capacity to become pregnant."[132]

Both of these cases relate to adverse employment decisions linked to use of sick leave for infertility treatments. It is unclear if either court would approach a question of insurance coverage for infertility in the same manner. Clearly, if an employer provided medical benefits to deal with male infertility alone it would be discriminatory. But could an employer provide only benefits up to a certain level, and exclude infertility treatments, as in *Saks v. Franklin Covey*, that involve more complicated surgery done on women alone? By assuming the PDA commands neutrality towards pregnancy (or the capacity to become pregnant), requirements for additional benefits would probably be rejected.

B. Possible Justifications for Different Treatment of Certain Biological Differences

The approach and understanding of Title VII and PDA claims vary widely depending on the subject in question. As seen above, recent cases involving coverage of prescription contraception were treated much more favorably than cases involving breastfeeding. From a strictly intellectual perspective, it is unclear why this would be so. The same uniquely female health needs that lead courts to support discrimination claims for birth control coverage also exist for breastfeeding or infertility treatments. It is possible that an emotional and stereotypical response is obscuring the law. It may be a residual opposition to mothers in the workplace, or a message that women with children or women trying to have children should stay home. It could be a general uneasiness about breastfeeding in a puritanical society.[133] It may also be possible that male judges can empathize with the fear that their partner might accidentally become pregnant, as such an event can

130. *Id.* at 319.

131. *Id.* at 320.

132. *Id.*

133. *See* Christrup, *supra* note 96, at 472. Christrup argues that Puritanical views of motherhood and breastfeeding result in societal norms that require women to breastfeed in bathrooms rather than public spaces.

significantly impact a man's life as well. By contrast, the reality of pregnancy itself, and any postpartum needs, falls more squarely on the woman.

Economic concerns may also play a role. This seems particularly true with regard to expensive infertility treatments, yet there are at least a few cases in which infertility was a basis for a successful gender discrimination claim. There are no similar successful cases for breastfeeding, yet flexibility for breastfeeding would impose costs no more significant than those imposed by the pregnancy itself.

It is also odd that courts do not recognize that breastfeeding is intimately linked with pregnancy and thus included within the scope of the PDA. Some courts consider infertility and contraception to be within the scope of the PDA; if that is the case, certainly an event like breastfeeding, so closely linked to pregnancy itself, should be covered.

Some argue that breastfeeding, infertility treatments, or even contraception are a woman's "choice," and therefore that protection for these activities should not exist. To frame breastfeeding as a choice, and to require women to choose between breastfeeding and work, is no different than requiring women to choose between pregnancy and work—a choice Congress and the courts have clearly rejected. The purpose of the PDA was to affirm the right of women to make choices to have children, choices that society values, yet continue to be part of the workforce. In the area of insurance coverage, employers can and do provide coverage for other voluntary choices. If you break your leg while mountain biking, your insurance does not deny payment for treatment because biking was "your choice." Choice seems to be a red herring, raised whenever the courts or the legislature are uncomfortable with the choices women want to make.

V. POSSIBLE SOLUTIONS

A. Disparate Impact Claims

A successful approach to birth control, breastfeeding, and infertility treatment claims may be to bring disparate impact claims rather than disparate treatment claims. For example, a woman might argue that failure to allow breaks for pumping breast milk will unfairly impact women alone and disproportionately cause women to leave the workforce. Statistics for making such a case, however, might be difficult to obtain as the number of women breastfeeding at any given time is likely to be small. However, such a case would certainly be easier to make than finding a similarly situated lactating man.

In *Nashville Gas Co. v. Satty*, a case immediately following *Gilbert*, the Supreme Court decided that a policy denying women seniority when they took leave for childbirth did have a disparate impact and violated Title VII.[134] The Court distinguished *Satty* from *Gilbert* on the grounds that the employer had not denied a benefit but imposed a burden.[135] Denying women accumulated seniority on their return from maternity leave deprived them of employment opportunities, unlike the request in *Gilbert* for the employer to pay additional benefits.[136]

The burden/benefit distinction is arguably open to manipulation. For example, being forced to pay out of pocket for living expenses while on pregnancy disability could be characterized as a burden, while retaining seniority status could be classified as a benefit.[137] However, the *Satty* case signals one litigation approach that may meet with more success than disparate treatment claims.

Case law provides some guidance in how to frame a disparate impact case in terms of burdens. In *Roberts v. United States Postmaster General*, the court acknowledged that men and women were provided with the same benefit—use of sick leave for their personal, not family, illness only.[138] The court noted that the *burden* was disparate—"women are forced to resign more often than men because of their more frequent role as child-rearers . . . . It is exactly this type of harm that Title VII seeks to redress."[139] In a similar leave issue, the court in *Abraham v. Graphic Arts International Union* found that a ten-day maximum leave policy "doomed" any employee facing childbirth to "almost certain termination."[140] This policy affected women much more severely than men and thus was discriminatory "unless demonstrably it was required by the exigencies of the project."[141] Similarly, in *Harper v. Thiokol Chemical Corp.*, the employer's policy requiring women who had been on pregnancy leave to have had at least one menstrual cycle before returning to work imposed a burden on women that men need not face.[142] Although it appears that *Harper* was a disparate treatment case, it highlights the strength of framing the policy as creating a burden to avoid facing the requirement for a similarly situated

134. Nashville Gas Co. v. Satty, 434 U.S. 136, 142 (1977).
135. *Id.* at 141–42.
136. *Id.*
137. *See* H.R. REP. 95-948, at 3 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4749, 4751.
138. 947 F. Supp. 282, 289 (E.D. Tex. 1996).
139. *Id.*
140. 660 F.2d 811, 819 (D.C. Cir. 1981).
141. *Id.*
142. 619 F.2d 489, 491–92 (5th Cir. 1980).

male subclass, which obviously would have been impossible to find here. Plaintiffs bringing disparate impact cases would be wise to frame the complaint in terms of burdens imposed, rather than benefits sought.

Disparate impact claims still may face a narrow reading of the PDA that assumes, for example, that an employer is only obligated to treat pregnant women no worse than any others.[143] One commentator correctly points out that this view is puzzling in light of the availability of disparate impact claims generally, as women clearly will face disproportionate harm from restrictive leave policies that are facially neutral.[144]

B. A More Comprehensive View of the PDA and Title VII

The narrow view of the scope of the PDA and Title VII necessitates drawing biological lines that defy scientific reasoning. If lactation is not a "medical condition related to pregnancy," it is hard to imagine what is. Women do not spontaneously begin to lactate without having been pregnant. Moreover, a woman is not required to be pregnant at the time that the discrimination occurs in order to find the employer liable under the PDA.[145] At a minimum, the argument that the PDA includes biological events closely linked to pregnancy should be accepted. Given some courts persistent attachment to *Gilbert*, however, congressional action may be required to achieve such a goal.

Even outside of the context of pregnancy, the interpretation of Title VII to exclude protection for characteristics that are unique to women seems out of step with the intent of Congress. Congress enacted the PDA to overrule the decision in *Gilbert*. There is debate about whether Congress intended only to correct the situation in *Gilbert*, in which pregnancy was not covered under disability insurance, or whether Congress had a broader goal in mind,[146] and it may be that Congress merely intended to create a special category for pregnancy. However, Congress' inclusion of pregnancy in Title VII rather than in disability legislation, as well as the strong Congressional support for the dissent in *Gilbert*, speaks otherwise. Congress chose to incorporate the PDA into Title VII, where it would clarify the regime of rights available to women. The PDA changed the definition

143. *See* Jolls, *supra* note 11, at 662.

144. *Id.*

145. Bond v. Sterling, Inc., 997 F. Supp. 306, 309 (N.D.N.Y. 1998) (finding that discrimination can occur after the pregnancy); Donaldson v. Am. Banco Corp., 945 F. Supp. 1456, 1464 (D. Colo. 1996) (stating that to accept a rule that discrimination must occur during pregnancy to be actionable "would emasculate Title VII").

146. Magid, *supra* note 13, at 824.

of gender discrimination; it did not just add pregnancy to a list of disabilities. As Justice Brennan stated in *Gilbert*, the ultimate objective of Title VII is "'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [sexually] stratified job environments to the disadvantage of [women].'"[147]

A view that begrudgingly accepts a narrow scope of protection for pregnancy only, while strictly applying a facially neutral *Gilbert* rule to all other biological characteristics unique to women, ignores both the goal of Title VII and the intention of Congress when it overruled *Gilbert*. The message of the PDA was not only that Congress intended to protect pregnant women, but also that it sought to ensure women's rights in the workplace, writ large.

C. *Claims Under the Americans with Disabilities Act*

Some plaintiffs have sued successfully under the Americans with Disabilities Act ("ADA") in cases involving infertility treatments, but, in breastfeeding cases, most plaintiffs using this theory have not been successful. Title I of the ADA prohibits discrimination on the basis of disability, including discrimination in the provision of benefits.[148] Disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual."[149]

Reproduction has been found to be a "major life activity" by the Supreme Court.[150] In *Pacourek v. Inland Steel Co.*, the court held that reproduction was a major life activity that was impaired by infertility.[151] Furthermore, infertility substantially limited this activity; thus, a claim could be made under the ADA.[152] Similarly, in *Laporta v. Wal-Mart Stores, Inc.*, the court denied the defendant's motion for summary judgment because the plaintiff's infertility substantially limited the major life activity of reproduction within the meaning of the ADA.[153] Her request for one day of leave was an objectively reasonable accommodation under the act.[154] The court did not allow her claim to proceed under the PDA.[155] However,

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

148. 29 C.F.R. § 1630.4(f) (2003).

149. 42 U.S.C. § 12102(2)(A) (2000).

150. Bragdon v. Abbott, 524 U.S. 624, 638–39 (1998).

151. 858 F. Supp. 1393, 1404 (N.D. Ill. 1994).

152. *Id.* at 1405.

153. 163 F. Supp. 2d 758, 763–66 (W.D. Mich. 2001).

154. *Id.* at 767.

155. *Id.* at 771.

plaintiffs suing under the ADA may be less successful in cases seeking insurance coverage of infertility treatments. In *Saks v. Franklin Covey Co.*, the district court ruled that the insurance plan did not discriminate under the ADA because the plan offered the same insurance to all employees, those suffering infertility and those not.[156]

By contrast, courts have consistently ruled against including breastfeeding as a disability within the ADA,[157] and there are problems with associating a normal biological function with a disability. In a classic catch-22, because the EEOC has explicitly stated that conditions like pregnancy are not the result of a physiological disorder, and breastfeeding is related to pregnancy, it cannot be covered by the ADA.[158] However, plaintiffs have also been unsuccessful in arguing that breastfeeding should be included within the PDA in these same courts.[159] An additional problem with suing under the ADA is that for most women, breastfeeding is a normal biological function. It may be offensive to classify breastfeeding as a disability. Claiming breastfeeding is a disability also runs counter to public health messages that encourage breastfeeding.[160]

Despite the limitations of suing under the ADA in a breastfeeding scenario, an ADA theory of the case does highlight an interesting paradox in our society's approach to so-called "women's issues," such as pregnancy and breastfeeding, as compared to disabilities. The ADA is premised in part upon the idea that disabled people can be valuable employees and accommodations should be made for them. The same concept of accommodation for the needs of women creates serious debate and controversy.[161]

It does not seem likely that a claim for coverage of prescription contraception could be framed as an ADA claim. Although reproduction is a major life activity, fertility, as opposed to infertility, is not generally considered a disability or impairment.

D. State or Federal Legislative Solutions

Discrimination could be addressed by additional state or federal legislation. On the plus side, this is the true function of a democratic government—to represent the changing views of the populace. However, current

156. 117 F. Supp. 2d 318, 326 (S.D.N.Y. 2000).

157. Christrup, *supra* note 96, at 487.

158. *Id.*

159. *See* Bond v. Sterling, Inc., 997 F. Supp. 306, 308–11 (N.D.N.Y. 1998) (denying ADA claim and refusing to rule on "novel contention" that disparate treatment based on breastfeeding was discrimination).

160. Christrup, *supra* note 96, at 487–88.

161. *See, e.g.*, Jolls, *supra* note 11.

efforts at federal legislation have taken a piecemeal approach, dealing with one bodily function at a time. There do not appear to be any efforts to pass a more general statute that prohibits discrimination based on biological differences. At the state level, legislation can result in uneven protection for women depending on the state in which they live.

At the state and federal level, there have been attempts to address discrimination based on breastfeeding, infertility insurance coverage, and contraception coverage. In 2001, the Breastfeeding Promotion Act was introduced by Representative Carolyn Maloney in Congress as an amendment to the PDA.[162] The bill would prohibit discrimination against women because they are lactating or because they need to pump milk. In New York a mother's right to breastfeed is a public civil right.[163] Connecticut and Texas also have laws supporting a mother's right to breastfeed.[164] Georgia law authorizes employers to provide breaks and facilities for nursing mothers but does not require them to do so.[165] Only Minnesota requires employers to provide unpaid break time to pump milk and make "reasonable efforts" to provide a place to do so.[166]

In 2001, the Senate introduced the Equity in Prescription Insurance and Contraceptive Coverage Act. The bill would prohibit health plans from excluding benefits for prescription contraception or devices if the plans provide benefits for other prescription drugs.[167] By 2002, twenty states had passed legislation mandating contraceptive coverage.[168] Most of the state laws have so-called "conscience" clauses, which allow religious employers to exclude coverage for contraception under certain circumstances.[169]

Some states have reacted to the failure to cover infertility treatments by mandating health plan coverage of some or all treatments.[170] Fifteen states currently have such a mandate.[171] In Massachusetts, which has the

162. H.R. 285, 107th Cong. (2001).

163. 13A SHARON P. STILLER, EMPLOYMENT LAW IN NEW YORK § 3:37 (Supp. 2003).

164. CONN. GEN. STAT. ANN. § 46a-64(a)(3) (West 2004); TEX. HEALTH & SAFETY CODE ANN. § 165.002 (Vernon 2001).

165. JAMES W. WIMBERLY, JR., GEORGIA EMPLOYMENT LAW § 5-23 (3d ed. 2000).

166. MINN. STAT. ANN. § 181.939 (West Supp. 2004).

167. S.104, 107th Cong. (2001).

168. *See* Vargas, *supra* note 76, at 461. States with such legislation include Arizona, California, Connecticut, Delaware, Georgia, Hawaii, Iowa, Maine, Massachusetts, Maryland, Missouri, Nevada, New Hampshire, New Mexico, New York, North Carolina, Rhode Island, Texas, Vermont, and Washington.

169. *Id.* For example, California exempts religious organizations if the purpose of the entity is to "inculcate" religious values. A church-run hospital likely would not qualify. Other states exemptions are more liberal, allowing exemption for organizations substantially owned by a religious organization. *Id.*

170. Range, *supra* note 110.

171. *Id.*

nation's most comprehensive mandate, one study concluded that infertility coverage comprised only 0.4% of a total family health insurance premium.[172] Another study determined coverage cost to be about $2.50 per year.[173] Despite these statistics, the widespread assumption that covering infertility treatments would be far too costly for employers means that eventual passage of legislative mandates in all fifty states is unlikely.

A more ideal solution may be a federal law that, similar to the PDA, equates discrimination with differential treatment of women for any biologically unique characteristic. This would eliminate the need to have a breastfeeding law, a birth control law, etc., and draw into sharper focus the fact that Title VII is intended to ensure equal opportunity for all genders.

E. Public Pressure and Policy

There is a perception, at least among professional level women, that egregious actions with regards to pregnancy and motherhood no longer occur. Businesses tout their family friendly policies[174] and women expect equitable treatment in the workplace. This expectation of "rights" may explain "bad" plaintiffs,[175] as professional level women may be shocked to encounter discrimination and determined to fight it even if their case is weak. As Williams and Segal point out, prior to *Meritor Savings Bank v. Vinson*, people generally did not have a sense of their rights with regards to sexual harassment in the workplace, and indeed those rights may have expanded as a result of sexual harassment litigation.[176]

Cases of discrimination based on pregnancy and motherhood continue. In *Bond v. Sterling, Inc.*, an employee of a jewelry company was fired after she refused to leave her five-week-old baby in New York while she attended a "managers seminar" in Disneyland.[177] In addition, during her pregnancy her supervisor told her "we are not a family oriented company, we are a business."[178] The plaintiff survived a motion to dismiss on her discrimination claim, and one speculates that such publicity was hardly

172. *Id.*

173. *Id.*

174. WORKING MOTHER, Oct. 2003, at 38 (listing 100 most family friendly companies, with accompanying advertisements by those companies).

175. *See* Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77, 103–06 (2003) (describing failed Title VII cases as the result of poor lawyering or weak facts).

176. *Id.* at 111 (citing 477 U.S. 57 (1986)). *Meritor* involved a case in which the female employee was repeatedly raped by her superior.

177. 997 F. Supp. 306, 308 (N.D.N.Y. 1998). Kay Jewelers was also a defendant. *Id.* at 306.

178. *Id.* at 309.

beneficial to Kay Jewelers.[179] As the pressure to attract and retain professional level women continues, workplace policies may evolve, not just to remain within the law, but to retain talented employees.

The existence of a sense of "rights," which may not actually exist in the workplace, could be a valuable tool for improving the opportunities available to women. A problem with relying on this approach is that it does little to help working-class women, who may be viewed as largely fungible and also may see themselves that way. As such they may not feel entitled to fair treatment, and employers may not feel any pressure to ensure fair workplace policies.

CONCLUSION

Failure to recognize the unique biological needs of women will perpetuate a system that can always find some supposedly rational business reason for excluding women from the workforce or excluding coverage for medical needs specific to women. An overly narrow view of the intent and purpose of the PDA and Title VII leads to a continuation of discrimination against women based on their biology alone. A combination of litigation, legislation, and public pressure is needed to achieve the ultimate goal of Title VII: "'to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered [sexually] stratified job environments to the disadvantage of [women].'"[180]

179. *Id.* at 308. The plaintiff was allowed to bring a claim under New York's Human Rights Law ("HRL"). The court analogized to the PDA and ruled that neither the PDA nor the HRL required the discrimination to occur *during* the pregnancy. Because of this, the court did not respond to her "novel contention" that her need to breastfeed the baby placed her in a protected class. *Id.*

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